Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2003/A/441 Kryza v/PZLA

ARBITRAL AWARD

Pronounced by the

COURT OF ARTIBRATION FOR SPORT

Sitting in the following composition:

President : Mr Sharad **Rao**, Barrister, Nairobi, Kenya

Arbitrators : Mr Peter **Leaver**, Barrister, London, United Kingdom
Mrs Maria **Zuchowicz**, Attorney-at-law, Warsaw, Poland

IN THE ARBITRATION

Between

Ms Violetta KRYZA ("the Appellant")
represented by Mr J.G. Kabalt, Attorney-at-law, Breukelen, The Netherlands

and

NATIONAL POLISH ATHLETIC FEDERATION (PZLA) ("the Respondent")
Warsaw, Poland
represented by its Secretary General, Mr Bartlomiej Glawacki

1. This appeal has been filed by Ms Violetta Kryza against a decision of the National Polish Athletic Federation (PZLA) of 11 December, 2002.

2. Ms Kryza participated in a marathon in Pittsburgh (USA) on 5 May, 2002. A drug test carried out on 5 May, 2002 showed – as per report dated 23 May, 2002, 19 – norandrosterone at a concentration greater than 5 nanograms per milliliter of urine and 19– noretiocholanolone, about three times the IOC cut off of 5 nanograms per milliliter of urine for females. As a result Ms Kryza was provisionally suspended from 20 June, 2002.

3. The "B" sample tested on 30 July, 2002 confirmed the result. According to the IAAF rules, the penalty in case of a first offence is a mandatory suspension of two years.

4. The PZLA Disciplinary Committee, - perhaps unaware of the IAAF minimum penalty, after hearing Ms Kryza and largely as a consequence of her previous unblemished record imposed a reprimand. It is contended on her behalf that the PZLA Disciplinary Committee was entitled to take that course. The decision to reprimand was made on 26 September, 2002. Ms Kryza had 14 days i.e., until 11 October, 2002 to appeal against that decision, but obviously satisfied of that ruling did not appeal.

5. A copy of the PZLA Disciplinary Board decision was faxed to the IAAF on 4 October, 2002. By telefax dated 23 October, 2002 the IAAF informed PZLA that according to the IAAF rules the correct penalty should have been a mandatory suspension of two years.

6. Ms Kryza contends that if the IAAF was dissatisfied with the PZLA decision, PZLA rules would have entitled the IAAF to appeal against it within 14 days of the decision having been communicated to them. They only did so on 23 October, 2002 – 5 days after, and that, therefore, Ms Kryza was entitled after 11 October, 2002 – namely 14 days after the decision taken on 26 November, 2002, to assume 'that the matter was finally closed and settled'.

7. Invited to comment the IAAF says it never becomes a party to disciplinary proceedings at the national level. What the IAAF does is either:

   (i) to enter into correspondence (usually in "sanctions" cases) to persuade its Member to apply the appropriate mandatory IAAF Rules; or

   (ii) to refer to decision of the relevant National Federation to CAS pursuant to IAAF Rule 21.3(ii).

8. Furthermore, as such a reference cannot be made until all remedies have been exhausted under the Member's Constitution, the existence of a domestic right of appeal is of no relevance to the IAAF. It can only act once such domestic remedies have been exhausted.

9. They submit, therefore, that it is wrong for Ms Kryza to suggest that the IAAF had 14 days to launch a domestic appeal against the PZLA Disciplinary Committee's decision. The IAAF's option was either to commence an immediate reference of the PZLA's decision to CAS, or to enter into correspondence with PZLA in an attempt to correct what, under IAAF rules, was clearly an erroneous decision. On the basis of its prior practice, and consistent with the CAS decision in the *Zubek case* (CAS

2002/A/262, IAAF v/Czech Athletic Federation & Zubek), it chose to do the latter. The PZLA then informed the IAAF that the erroneous decision had been corrected. In these circumstances, there was no dispute left for the IAAF to refer to CAS.

10. Ms Kryza also submits that the IAAF was under IAAF Rule 21.3 obliged to submit this doping related dispute with its member to the CAS and not to any other Arbitrator or institute. In response the IAAF states that under IAAF Rule 21.4, a reference cannot be made to CAS until all remedies have been exhausted under the PZLA's constitution. In the IAAF's view, this includes the ability for representations to be made to the PZLA Board concerning what it describes as the clearly erroneous decision reached by its Disciplinary Committee. Once the PZLA Board had imposed the appropriate sanction, there was no need for the IAAF to make any reference to CAS. There was no longer a dispute.

11. The IAAF did not appeal against the PZLA decision of 26 September, 2002 under IAAF Rules 21.2 or 3. Instead the IAAF responded on 23 October, 2002 by drawing the attention of PZLA to IAAF Rules 55.2 and 60.2 and asked PZLA to reconsider the matter.

12. PZLA wrote to Ms Kryza on 21 November2002 informing her that the decision of the PZLA Disciplinary Commission was contrary to the IAAF rules, but the Disciplinary Board declined to challenge it. Therefore, the PZLA Council decided to bring the case before the PAA Board. They did not invite Ms Kryza to the further hearing nor did they advise her of the hearing date. A hearing was held on 11 December, 2002 without Ms Kryza being present, and the decision communicated to her on 12 December, 2002.

13. The IAAF Rule 21.1 specifically provides that all member associations incorporate in their respective constitutions a provision that all disputes, however arising, whether doping or non-doping related, shall be submitted to a hearing. The fact that Ms Kryza had not been invited to appear on that occasion and in her absence to have imposed the two year suspension in place of the reprimand is what lies at the heart of this appeal.

14. In response to this, the IAAF made the following points :

First, the question of whether or not a hearing was an essential procedural requirement in this case is to a large extent a matter of Polish law. We could envisage that in circumstances where no consideration of the facts took place, but merely consideration was given to the proper interpretation of a relevant IAAF Rule which is clear on its face, such law may not require the athlete to be present.

15. Secondly, the IAAF questions whether the attendance, or non-attendance, of Ms Kryza at the meeting did or would have made any difference and hence whether it caused any substantial injustice. The IAAF submits that its Rules are clear. Whether or not she had attended and whether or not she had made any difference and hence whether it caused any substantial injustice, the IAAF submits the result would have been the same. The IAAF's system of fixed sanctions must be applied. In this regard, the IAAF drew the Panel's attention to the decision of CAS in IAAF -v- Confederacao Brasileira de Atletismo and Ms dos Santos (CAS 2003/A/383) where a CAS Panel chaired by Mr. Fortier Q.C. held:

"As a mater of principle, the Panel considers that the CAS is bound to apply the sanctions provided for in the applicable doping control rules. Accordingly, in the event of a fixed sanction, CAS Panels must automatically apply the sanction stipulated by the sporting federation".

16. Therefore, no choice as to sanction was available either to the Disciplinary Committee of PZLA or to its Board (or, indeed, to CAS). A two-year period of ineligibility had to be imposed. The only relevant decision they could have made was whether or not to support an application by the athlete to the IAAF Council for early reinstatement brought on grounds of exceptional circumstances under IAAF Rule 60.9.

17. Thirdly, under IAAF Rules, all appeals before CAS take the form of a rehearing de novo of the issues raised by the case (IAAF Rule 21.9). The clear jurisprudence of CAS is that, where the Rules of the International Federation provide for a hearing de novo, this hearing cures any procedural defects at first instance, See *USA Shooting & Quigley v/UIT*, in Digest of CAS Awards 1986-1998, Staempfli Ed., Berne, pp. 187ss. and, in particular, *de Bruin v/FINA* , in Digest of CAS Awards II 1998-2000, Staempfli Ed., Berne, pp. 255ss. at paragraphs 7 to 9 where the Tribunal state:

"7 The Appellant's second point that was the Chairman of the FINA Doping Panel exhibited substantial bias against the Appellant.

8 We did not find it necessary to consider the factual basis for this submission, given that the hearing was a hearing de novo. The virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance fade to the periphery (Pierre Moor: Droit Administratif : Berne 1991 Vol: II p. 19 citing Swiss Supreme Court Cases ATF 114, Ia 307; ATF 110 [a 81]); see by analogy Calvin -v-Carr 1980 AC 574 at pp. 592-5930. The Appellant's entitlement, which she fully received, was to a system which allowed any defects in the hearing before the Doping Panel to be cured by the hearing before CAS. (see CAS award 98/208).

9 The Panel therefore finds it unnecessary to consider the charges made by the Appellant as to the alleged violation of due process and bias on the part of the FINA Doping Panel and/ or its Chairman".

18. The IAAF submits that no substantial injustice was done to Ms Kryza by her absence at the deliberations of the Board of the PZLA, as the Board could only reach one conclusion – that a two-year period of ineligibility must be imposed. If, however, there were any procedural defects, those procedural defects are fully rectified by the hearing de novo afforded to the athlete in the present case before CAS.

19. We agree. The failure to afford Ms Kryza a hearing on the 11 December, 2002, or even to notify her that a hearing was to take place, was a serious lapse on the part of the PZLA. In addition, it was a breach of the IAAF Rules and of the principle of "audi alteram partem". However, in the particular circumstances of this case, and bearing in mind that Ms Kryza did not challenge the test results, which showed the

presence of norandrosterone in the concentration alleged, but has, on this appeal, relied simply on the procedural lapses by the IAAF to protest timeously and PZLA's failure to notify her of the 11 December, 2002 hearing, the Panel concludes, albeit with considerable regret, that had Ms Kryza been afforded a hearing, it would have been inevitable that the mandatory minimum 2 year suspension would be imposed. The Panel has been assisted in this regard by the advice received from its Polish member, that the procedural defects to which reference has been made would not, in Polish Law have assisted Ms Kryza.

20. The Panel further acknowledges the assistance that it has received from the decisions of the CAS Panels in USA Shooting and Quigley v UIT and in de Bruin v FINA (to which it has referred above) and adopts the reasoning of the Panels in those cases. The Panel, therefore, concludes that no substantial injustice has been done to Ms Kryza as a result of the failure to afford her a hearing.

21. It is open to Ms Kryza, if so advised and if the facts merit an application, to apply to the IAAF, under IAAF Rule 60.9, for early reinstatement on the ground of exceptional circumstances.

22. For these reasons, the appeal is dismissed.

23. Pursuant to art. R65.3 of the Code of Sports-related Arbitration, the costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall beat them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

24. In the present case, the Panel considers that it is reasonable to order the parties to bear their own costs, considering that, even if PZLA is successful in this procedure, this appeal was not groundless in view of the failure of PZLA to hold a hearing in the presence of Violetta Kryza.

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FOR THOSE REASONS

The Court of Arbitration for Sports hereby rules :

1. The appeal filed by Violetta Kryza on 9 February 2003 is dismissed.

2. The Court Office fee of CHF 500 (five hundred Swiss Francs) already paid by the Appellant shall be retained by the CAS.

3. Each party shall beat its own costs.

Done in Lausanne, 13 August 2003

THE COURT OF ARBITRATION FOR SPORT

President of the Panel

Sharad Rao