Arbitration CAS 2018/A/5913 Sabina Ashirbayeva v. International Gymnastics Federation (FIG), award of 6 March 2019

Panel: The Hon. Michael Beloff QC (United Kingdom), Sole Arbitrator

Gymnastics (rhythmic)
Doping (furosemide, hydrochlorothiazide, chlorothiazide)
Athletes' duty of care to avoid ingestion of prohibited substances
Communication of an athlete's admission to the competent sanctioning body
Difference between a plea for mercy and a plea in mitigation

1. **An athlete's duty to take care to avoid an ingestion of prohibited substances axiomatically arises before ingestion, not after it. A breach of that duty cannot be cured by a prompt repentance and avoidance of repetition to which an appellant testifies.**

2. **While the applicable anti-doping rules do not expressly read that an athlete's admission, to have any legal relevance, must be communicated to the relevant governing body as opposed to some unrelated third party, no contrary conclusion can be reached. It is an athlete's duty to ensure that any such admission is communicated to it.**

3. **A plea for mercy invites a decision outside the relevant rules whereas a plea in mitigation invites a decision within them.**

I. INTRODUCTION

1. This is an appeal by the Appellant against the decision of the Respondent's Disciplinary Committee ("the FIG DC") dated 6th August 2018 ("the Decision") finding her guilty of an anti-doping rule violation ("ADRV") for breach of the FIG Anti-Doping Rules("ADR") and imposing a sanction of ineligibility for two years ("the Sanction").

2. The Appellant appeals against the Sanction only.

II. PARTIES

3. Mrs Sabina Ashirbayeva ("the Appellant"), born on 5 November 1998, is an international rhythmic gymnast from the Republic of Kazakhstan.

4. The International Gymnastics Federation ("FIG" or "the Respondent"), the governing body of world gymnastics, is a Swiss private association whose headquarters is in Lausanne, Switzerland.

III. FACTUAL BACKGROUND

A. Background facts

5. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

6. Four different WADA-accredited laboratories identified various prohibited substances in four different samples ("the Four Samples") provided by the Appellant, namely:

   - Sample no 3587130, taken In Competition ("IC") on 9th April 2017, analysed by the Laboratorio Antidoping FMSI of Rome: AAF of Furosemide;

   - Sample no 4071529, taken IC on 23rd April 2017, analysed by the Anti-Doping Laboratory LSI Medisence Corporation of Tokyo: AAF of Hydrochlorothiazide and Chlorothiazide;

   - Sample no 2035593 taken IC on 4th June 2017, analysed by the Madrid Anti-Doping Authority: AAF of Hydrochlorothiazide;

   - Sample no 4069546, taken IC on 27th June 2017: AAF of Furosemide.

   - The first three competitions were World Cup events, the fourth the Asian Championships.

7. Furosemide, Hydrochlorothiazide and Chlorothiazide are all related Specified Substances prohibited under the WADA 2017 Prohibited List (S5 Diuretics and Masking Agents).

B. Proceedings at first instance

8. By letter dated 7th June 2018 (the "Charge Letter") sent care of the Gymnastic Federation of Kazakhstan ("the National Federation"), the Respondent informed the Appellant that it had received notification of four Adverse Analytical Findings ("AAF") based on identification of the Four Samples (The latest of the four notifications was on 26th July 2017).

9. In its 7th June 2018 letter, the Respondent also informed the Appellant that she was provisionally suspended with immediate effect from national and international competitions pending completion of the procedure or until the B Sample Analysis proved negative and requested that the Appellant inform it by 14th June 2018 whether she wished to have the B Sample Analysis on any of the Four Samples carried out.

10. On 12th June 2018, the Appellant acknowledged receipt of the Charge Letter but in that response waived her right to the B Sample Analysis.

11. On 22nd June 2018, the FIG DC wrote to the Appellant and informed her that she had until 24th June 2018 -being the period indicated in the Charge letter to request a hearing in respect of the matters set out in it. In that letter the FIG DC also requested that the Appellant provide her written comments on the Charge Letter by Friday 6th July 2018.

12. The Appellant did not respond to the FIG DC's letter dated 22nd June 2018 by 24th June 2018. Accordingly, she was deemed, pursuant to Article 7.10.2 of the FIG Anti-Doping Rules ("FIG ADR") to have waived her right to a hearing.

13. Further the Appellant failed to respond in any way at all to the Charge Letter.

14. On 6th August 2018, the FIG DC considered the Charge in the absence of the Appellant.

15. The FIG DC applied Article 10 of the FIG ADR which sets out the sanctions to be imposed on an individual for a violation of Article 2.1 of the FIG ADR.

16. Noting that the Respondent had not sought to establish that the ADRV was intentional the FIG DC held that the starting point for the period of Ineligibility to be applied to the Appellant is two years pursuant to Article 10.2.2 of the FIG ADR.

17. The FIG DC also considered whether the period of Ineligibility must be extended pursuant to Article 10.7 of the FIG ADR due to the fact that the Appellant had committed multiple violations of the FIG ADR within a short period of time *i.e.* 9th April to 27th June 2017. The Appellant received notice of the first ADRV (arising from the 9th April 2017 test) on 7th June 2018; in consequence the second, third and fourth violations were committed prior to the Appellant receiving notice of the first violation. Accordingly, the FIG DC held that the violations had to be considered together, pursuant to Article 10.7.4.1 of the FIG ADR as one single first violation and the sanction imposed based on the violation that carries the more severe sanction.

18. The FIG DC accordingly ruled as follows:

- The Appellant breached Article 2.1 of the FIG ADR by the presence of Furosemide, Hydrochlorothiazide and Chlorothiazide, each a Prohibited Substance, in the Samples provided by her at 4 rhythmic gymnastics events, including the Asian Championships, between April and June 2017;

- The Appellant was ineligible for a period of two years commencing on 7th June 2018 (on which date it found she had been provisionally suspended);

- The Appellant must return the prize money and/or other awards, including medals that she received during the Rhythmic Gymnastics World Cup events in Pesaro, Italy, Tashkent, Uzbekhistan, Guadalajara, Spain and the Asian Championships in Almaty,

Kazakhstan and from any other competitions from 1st April 2017 to 30th June 2017, the results of which would be disqualified.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. On 14th August 2018, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code"), which may be considered as the Appeal Brief.

20. On 22nd August 2018, the Appellant provided completed some information required by the CAS Court Office and nominated Mr Bandar Alhamidani as an arbitrator.

21. On 28th September 2018, the Respondent nominated Mr Denis Oswald as an arbitrator.

22. On 26th October 2018, the Appellant submitted a further submission.

23. On 2nd November 2018, the Respondent suggested a simplification of the further proceedings before the CAS by (i) nominating a Sole Arbitrator, (ii) asking the Panel to decide the case based on the written submissions and (iii) suggesting that the Appellant may respond to the Answer filed by the Respondent.

24. On 7th November 2018, the Appellant sent a letter, whereby she did not object to the simplification of the proceedings and to the nomination of a Sole Arbitrator.

25. On 13th November 2018, the Respondent filed its Answer to the Appeal, pursuant to Article R55 of the Code.

26. On 5th December 2018, by Agreement between the Parties, evidenced by Dr Netzle's letter of 2nd November 2018 and the Appellant's email of 7th November 2018, the Sole Arbitrator was appointed in lieu of the three-person panel originally appointed.

27. On 12th December 2018, again by Agreement between the Parties, evidenced by the same letter from Dr Netzle and an email from the Appellant dated 12th December 2018, the Sole Arbitrator was to adjudicate on the basis of the written submissions only; the Sole Arbitrator acquiesced in that course. The Appellant also submitted certain further documents to whose admissibility the Respondent did not object.

28. On 13th December 2018, the Appellant submitted a Reply to the Respondent's Answer.

29. On 17th December 2018, the Respondent sent a letter by way of comment on the Reply.

30. On 4th February 2019, the CAS Court Office issued on behalf of the Sole Arbitrator an order of procedure ("Order of Procedure"), which was accepted and signed by the Parties, respectively on 11th and 1st March 2019.

31. The Sole Arbitrator has duly considered the written material before him contained in the Parties' pleadings, exhibits, and letters.

V. SUBMISSIONS OF THE PARTIES

32. The Appellant's submissions, in essence, may be summarized as follows:

- Her purpose in taking the substances (which she did on medical advice and which she believed to be medical products) was to relieve swelling in connection with a disease and urgent need after continuous training;

- When she read the associated instructions, which she did, only after taking those medical products, she ascertained that they contained the prohibited substances identified in the Decision;

- She immediately informed those in charge of the team as to what she had taken;

- On 19th December 2017, in the presence of director of the South Kazakhstan Area Gymnastics Federation and her own coach ("the two officials") she made a declaration certified by a notary on 31st July 2018 that she had taken a prohibited substance and was assured that her coach would forward this admission to the National Federation ("the admission");

- To the extent that the two officials did not, in breach of duty, and to retain funding for the national team's participation in international competition and training, inform the Respondent or WADA about her ADRV and her admission, she is not responsible;

- She should receive a discount of the period of ineligibility for this voluntary admission;

- She was forthwith suspended by the regional Federation from active competition and training, having already voluntarily withdrawn from such participation;

- She rejects any imputation of untruth in respect of the above matters contained in the Answer;

- She accepts that she committed an ADRV and that she had no justification for use of prohibited substances and (which she did not) she should have obtained therapeutic use exemptions ("TUEs") to enable her lawfully to take the prohibited substances;

- Gymnastics has been since she was four years old her *"whole life"*;

- She has learned her lesson and wishes to be able to bring the best results for her country and to transfer her skills to younger gymnasts;

- She has been deprived of the chance to develop her gymnastics talents and win prizes since 19th December 2017.

33. The Appellant asks CAS for *"indulgence"* and requests it *"to lighten the punishment, prescribed for (her) in the form of disqualification up to 1 (one) year"*.

34. The Respondent's submissions may in essence be summarised as follows:

- The FIG DC has held that the four AAF constitute one single ADRV since the Athlete committed all four ADRVs before she was notified of the first ADRV on 7th June 2018. Therefore, it is accepted, pursuant to Article 10.7.4.1 FIG ADR, the violations must be considered together as one single first ADRV and the sanction imposed must be based on the violation that carries the most severe sanction;

- All four ADRVs involve Specified Substances. The Respondent has not sought to establish that the ADRV was intentional. Therefore, it is accepted that the starting point of ineligibility to be applied on the Appellant is two years pursuant to Article 10.2.2 of the FIG ADR;

- The FIG DC also considered that the Appellant had been provisionally suspended on 7th June 2018 and decided that the period of ineligibility should start on that date, (which leads to the same result as if the period of ineligibility were to have started start on the date of the Decision from which the already served period of ineligibility would be deducted);

- As to the Appellant's defence of voluntary or prompt admission. According to Article 10.6.2 FIG ADR, a reduction of the otherwise applicable sanction may be considered if the athlete *"voluntarily admits the commission of an anti-doping rule violation before having received notice of a Sample collection which could establish an anti-doping rule violation"* and *"that admission is the only reliable evidence of the violation at the time of admission"*. This provision does not apply because the ADRV is based on the four AAFs and not on the Appellant's alleged admission. Additionally, the FIG was notified of the admission only in the course of the appeals proceedings before the CAS;

- Furthermore, according to Article 10.6.3 of the FIG ADR, prompt admission may lead to a reduction of the period of ineligibility. However, this provision applies only to the reduction of bans of four years. Here the FIG DC imposed a ban of two years which excludes a further reduction based on Article 10.6.3;

- According to Article 10.11.2 FIG ADR, *"where an athlete promptly admits the anti-doping rule violation after being confronted with the anti-doping rule violation by FIG, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred"*. This provision does not apply either, since the Appellant admitted the ADRV only after the FIG DC issued its decision on 6th August 2018. The assertion that she *"admitted"* the ADRV in front of a notary public on 19th December 2017 as notarized on

31st July 2018 is of no avail to her as admission is only relevant when the competent sanctioning body receives the relevant information;

- The early admission defence must also fail because of the factual circumstances and inconsistencies: the Appellant alleges that she took a medication to cure her health problems and found out, before she was notified of the four AAFs, that this medication contained the three prohibited substances which were identified later in her samples. She then says that she admitted the ADRV already on 19th December 2017, *i.e.* well before having received the notice of the AAF from the FIG. After this admission, she was suspended by her national federation from training and competition. It was only on 31st July 2018 *i.e.* more than seven months later that a notary public confirmed that the Appellant had deposited a confession of her ADRV already on 19th December 2017;

- The Appellant was repeatedly invited by the FIG DC to provide an explanation of the AAFs. She failed to submit the *"admission"* of 19th December 2017 and/or medical documents confirming her medical condition and the respective treatment to the FIG DC, although such would obviously have been the sensible course;

- The Appellant has not established grounds for a reduction of the otherwise applicable period of ineligibility based on the Appellant's explanations of taking the prohibited substances.

- There are serious doubts on whether the medical report provided by the Appellant and which was issued on 10th August 2018 accurately reflects the Appellant's health condition between April and July 2017 (*i.e.* the period during which the prohibited substances were taken);

- The *"recommended treatment"* for her diagnosed health condition in 2018 as described in the Medical Report of 10th August 2018 does not refer to any medication or supplement containing the three prohibited substances at issue;

- The products whose consumption she has disclosed in that document *i.e.* Ceftriaxone, Vitamines B6 and B1-2, Cystone, Phytoison, Clucose 55 and Indian Kidney tea do not contain any of the three prohibited substances;

- The Appellant has provided no corroborative evidence that she was suspended by her federation (local or national) on 19th December 2017;

- The sanction imposed by the FIG DC must be described as extremely lenient under the circumstances. Indeed, a period of ineligibility of four years would therefore not have been disproportionate or excessive because:

  (i) The ADRV included no less than four AAFs over a period of four months;

  (ii) An intentional use of diuretics by the Appellant, as an ambitious rhythmic gymnast, seems to be a more likely scenario than the negligent application of a medication

recommended by an unnamed team doctor which contained three different prohibited substances.

35. The Respondent accordingly requests that:

- The Appellant shall be declared ineligible as defined in Article 10.12.1 of the FIG ADR for a period of two years starting from 7th June 2018 for having committed an ADRV contrary to article 2.1 of the FIG ADR.

- The Appellant shall return the prize money and/or other awards, including medals that she received during the Rhythmic Gymnastics World Cup events in Pesaro, Italy, Tashkent, Uzbekhistan, Guadalajara, Spain and the Asia Championships in Almaty, Kazakhstan and from any other competitions from 1st April 2017 to 30th June 2017, the results of which shall be disqualified.

- The Appellant shall contribute to the FIG's costs and expenses related to these proceedings.

VI. JURISDICTION

36. Article R47 of the Code provides as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".*

37. An appeal to CAS against the decision is provided for by Article 13.7 of the FIG ADR is not disputed by the Respondent, and is confirmed by the Parties' signatures of the Order of Procedure.

VII. ADMISSIBILITY

38. Article R49 of the Code provides as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".*

39. FIG ADR Article 13.7.1 provides that any appeal must be filed within 21 days of the Decision. The Appellant brought her appeal within that time limit and (as is not disputed by the Respondent) the appeal is admissible.

VIII. APPLICABLE LAW

40. Article R58 of the Code provides as follows:

> *"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

41. The applicable regulations are the FIG ADR. In the light of the domicile of the Respondent Swiss law applies subsidiarily.

IX. MERITS

42. Article 10 of the FIG ADR sets out the sanctions to be imposed on an individual for a violation of Article 2.1.

43. Where the ADRV involves a Specified Substance the starting point is a period of Ineligibility of four years if FIG can establish that the ADRV was intentional (ditto Article 10.2.1). If Article 10.2.1 of the FIG ADR does not apply, the period of Ineligibility is two years (ditto Article 10.2.2).

44. Furosemide, Hydrochlorothiazide and Chlorothiazide are all Specified Substances.

45. The FIG has not sought to establish that the ADRV was intentional, the starting point for the period of Ineligibility to be applied to the Appellant is therefore two years.

46. That period can only be eliminated if the Appellant establishes no fault or negligence (Article 10.4 of the FIG ADR) or reduced if the Appellant establishes No Significant Fault or Negligence (Article 10.5 of the FIG ADR).

47. None of the propositions in paragraphs 38-43 above are either controversial or controverted.

48. Manifestly, the Appellant has not established that her Fault or Negligence was not significant, still less that she bore no fault or negligence. Even accepting her version of events at face value, she concedes that she took whatever product she took without previously exploring what it contained. The duty to take care to avoid the ingestion of prohibited substances axiomatically arises before not after ingestion; and a breach of that duty cannot be cured by the prompt repentance and avoidance of repetition to which the Appellant testifies in her written submissions.

49. The Sole Arbitrator further endorses the Respondent's argument set out above, as to why the Appellant has not established a prompt admission of the kind which would *per se* justify a reduction in the two-year period of ineligibility. He would himself emphasise comment that while the ADR does not say expressly that an admission, to have any legal relevance, must be

made to the Respondent itself, not to some unrelated third party: any contrary conclusion would be, for obvious reasons, absurd. It was therefore the Appellant's duty to ensure that any such admission was communicated to the Respondent.

50. The Appellant suggested in her e-mail of 12th December 2018, her coach and other officials privy to that admission failed, despite their promise to her and for motives of their own, to notify the Respondent about it. It follows that while she may have tried to communicate it to the appropriate recipient, but she did not succeed in so doing.

51. Finally, the Sole Arbitrator notes that a plea for mercy and a plea in mitigation are distinct creatures. The former invites a decision outside the relevant rules, the latter one within them. The Appellant's submissions as to her contrition, commitment and cognate factors as well as to the destructive impact of the FIG DC Decision on her career are not the point. None of those factors are ones which entitle the Appellant to any reduction to the minimum sanction for her offence as laid down in the ADR. It is not the function of the Sole Arbitrator (or the CAS) to grant an 'indulgence'.

52. The Sole Arbitrator draws attention to the fact that he has reached his decision on the basis of the Appellant's version of events. For that reason, in the view of the Sole Arbitrator, it is unnecessary for him further to seek to resolve or reconcile the inconsistencies or *lacunae* perceived by the Respondent to exist in the Appellant's version -though he recognizes that *prima facie* they have force.

53. The Sole Arbitrator must additionally ignore the Respondent's implied submission (albeit expressly disavowed), that the Appellant's use of the prohibited substances on multiple occasions over a short period of time was in fact intentional. On such a critical issue the Respondent cannot blow hot and cold.

54. The Sole Arbitrator also notes that, given all the Appellant's evidence, notably the certified declaration of 30th July 2018 as to her earlier admission, were available to her before the Decision, he could have exercised his discretion under Article R57.3 of the CAS Code to exclude it. However, since the Appellant has apparently not had the benefit of legal advice at any stage of proceedings both below or before the CAS, he has declined to take such a draconian course. But it remains unexplained why the Appellant did not engage with the FIG DC.

55. Finally, the Sole Arbitrator has considered the provisions of FIG ADR 10.11.1 (Delays Not Attributable to the Gymnast or other Person) which provide so far as material:

> *"Where there have been substantial delays in the hearing process (…) not attributable to the* Gymnast *or other* Person*, FIG may start the period of* Ineligibility *at an earlier date commencing as early as the date of* Sample *collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of* Ineligibility*, including retroactive* Ineligibility*, shall be* Disqualified*".*

The delay between notification of the ADRVs to the Respondent and the Charge Letter seems on the face of it somewhat excessive. But the reasons for it are not before the Sole Arbitrator

and the Appellant has taken no point on it. In consequence the Sole Arbitrator cannot adjust the period of ineligibility by reference to that factor.

56. For the above reasons, the Decision must be upheld and the Appeal dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mrs Sabina Ashirbayeva ("the Appellant") on 14th August 2018 against the decision rendered by Disciplinary Committee of the International Gymnastics Federation on 6th August 2018 is dismissed.

2. The decision rendered by Disciplinary Committee of the International Gymnastics Federation on 6th August 2018 in the case related to Mrs Sabina Ashirbayeva is confirmed and upheld.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.