



Arbitration CAS 2022/ADD/43 (OG) International Olympic Committee (IOC) & Fédération Internationale de Ski (FIS) v. Hossein Saveh Shemshaki, partial award of 15 February 2022

Panel: Judge Martina Spreitzer-Kropiunik (Austria), Sole Arbitrator

Skiing (alpine skiing)

Doping (dehydrochloromethyltestosterone)

Proof of the anti-doping rule violation

Sufficient proof of an anti-doping rule violation under Article 2.1.2 of the IOC Anti-doping Regulations is notably established by the presence of a Prohibited Substance or its metabolites in an athlete's A-Sample when the athlete's B-Sample analysis confirms the presence of the Prohibited Substance found in the A-Sample.

I. PARTIES

1. The International Olympic Committee (the "IOC" or the "Claimant") is the world governing body for Olympic sport having its registered offices in Lausanne, Switzerland. The IOC is incorporated as an association pursuant to articles 60 et seq. of the Swiss Civil Code. As a signatory of the World Anti-Doping Code ("the Code"), the IOC has enacted the IOC Anti-Doping Rules applicable to the Games of the XXIV Olympiad Beijing 2022 (the "IOC ADR"). The IOC has delegated some of its responsibilities related to the implementation of the Doping Control in relation to the Games of the XXIV Olympiad Beijing 2022 (the "Beijing 2022") to the International Testing Agency (the "ITA"), this includes the results management and subsequent prosecution of potential Anti-Doping Rule Violations ("ADRV") to the ITA.
2. The Fédération Internationale de Ski ("FIS") is the International Federation governing the sport of Skiing, having its registered offices in Oberhofen, Switzerland.
3. Mr Hossein Saveh Shemshaki (the "Athlete" or "Respondent") is a national of the Islamic Republic of Iran and a team member of the National Olympic Committee of Islamic Republic of Iran who was due to participate in the Men's Slalom and Giant Slalom during the Olympic Winter Games Beijing 2022.

II. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced in this procedure. 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 only refers to the submissions and evidence he considers necessary to explain the reasoning.

5. Mr Hossein Saveh Shemshaki, born on 5 August 1985, is a 36-year-old Alpine Skier from the Islamic Republic of Iran and was contemplating registering and participating in the Men's Giant Slalom and Slalom events of the Beijing 2022 Olympic Games scheduled to take place on 13 and 16 February 2022 respectively.
6. On 7 February 2022, the Athlete underwent an Out-Of-Competition ("OOC") doping control under the Testing Authority (the "TA") and Results Management Authority (the "RMA") of the IOC (urine – sample no. A and B-7048493).
7. The Athlete declared on his Doping Control Form ("DCF") that he had used "*Booster shot, Beta alanine, HMB, L arginine, Amino bcaa, Ashwagandha, Ginseng, Co q 10, Vitamin d, Magnesium, Zinc*" in the seven days prior to his Doping Control. Mr Shemshaki also confirmed on his DCF that the sample collection was undertaken in accordance with the relevant WADA International Standards.
8. On 9 February 2022, the WADA-accredited laboratory in Beijing, China (the "Beijing Laboratory") reported an Adverse Analytical Finding ("AAF") for the prohibited substance dehydrochlormethyl-testosterone metabolite 4 α -chloro-18-nor-17 β -hydroxymethyl,17 α -methyl-5 α -androst-13-en-3 α -ol (LTM M3). Such substance is prohibited by WADA at all times and is classified as a non-specified substance under S1.1 Anabolic Androgenic Steroids of the 2022 WADA Prohibited List, known as "oral turinabol".
9. Upon inquiry by the ITA, the Laboratory confirmed the estimated concentration of the prohibited substance to be 0.006 ng/mL for the A-sample.
10. On 9 February 2022 at 09:00 pm Beijing time, the ITA (on behalf of IOC) notified the Athlete of the AAF and imposed a mandatory Provisional Suspension pursuant to Article 7.6.1 of the IOC ADR with immediate effect (the "AAF Notification").
11. Through the AAF Notification, the Athlete was informed of the potential consequences of the AAF and his procedural rights, including the right to request the B-sample counter-analysis, a provisional hearing, or an expedited final hearing. The Athlete was requested to confirm to the ITA on or before 11:00 am Beijing time on 10 February 2022 whether he requested a provisional hearing to challenge the imposition of the Provisional Suspension.
12. In a communication to ITA, NOC immediately confirmed that the Athlete had been notified of the AAF.
13. On 9 February 2022 at 11:19 pm Beijing time, the Athlete confirmed to the ITA that he requested the opening and analysis of the B-sample and that he would stay in the village until results.

14. On 10 February 2022 at around 00:30 am Beijing time, the Athlete provided his explanations stating *“I didn't use any prohibited thing drug or food. I have gave doping test first of January during qualification race in Iran and that test sent to wada and results was negative. If you check my skill and point it is clearly visible that I have no chance to be in top results as I participated in 2010 and 2014 Olympic winter games and my goal is just participating in Olympic and there is no reason for me to use any illegal drug and food”*.
15. The Athlete did not request a Provisional Hearing on the limited issue of the Provisional Suspension within the set deadline and was deemed to have waived his right to challenge the Provisional Suspension as per Article 7.6.3 IOC ADR.
16. On 11 February 2022, the B-Sample was opened in the presence of the Athlete and was analysed by the Laboratory. On the same day, the Laboratory reported that the sample B-7048493 had also returned an AAF for the prohibited steroid dehydrochlormethyl-testosterone metabolite 4 α -chloro-18-nor-17 β -hydroxymethyl,17 α -methyl-5 α -androst-13-en-3 α -ol (LTM M3).
17. Upon inquiry by the ITA, the Laboratory confirmed the estimated concentration of the prohibited substance to be 0.01 ng/mL for the B-sample.
18. On 12 February 2022, the ITA asserted an Anti-Doping Rule Violation against the Athlete under Article 2.1 of the IOC Anti-Doping Rules.
19. On the same day, the Athlete informed the ITA that he requested the case to be referred to the CAS Anti-Doping Division Olympic Games Beijing 2022 to rule on the present matter.

III. PROCEEDINGS BEFORE THE CAS ADD

20. On 12 February 2022 at 06:50 pm Beijing time, based on the request of the Athlete, the ITA requested to the CAS ADD to initiate arbitral proceedings in order to determine whether the Athlete committed a violation of the IOC ADR.
21. On 13 February 2022, at 11:04 am Beijing time, pursuant to Article 11 of the CAS Anti- Doping Division Arbitration Rules for the Olympic Winter Games Beijing 2022, the President of the Anti-Doping Division confirmed the appointment of Ms Martina Spreitzer-Kropiunik, Judge in Vienna, Austria, as the Sole Arbitrator to resolve the matter.
22. On 13 February 2022 at 03:16 pm Beijing time, the CAS ADD informed the Parties that the hearing will be held, as requested, on 14 February 2022 at 05:00 pm Beijing time by videoconference and invited FIS and the Athlete to file their positions by 14 February 2022 at 09:00 am Beijing time.
23. Neither FIS, nor the Athlete, filed written submissions in relation with this matter, within the prescribed time limit.

24. A hearing was held on 14 February 2022 at 05:00 pm Beijing time. In addition to the Sole Arbitrator and Mr Fabien Cagneux (on remote basis), Managing Counsel, the following persons attended the hearing:
- For the IOC: Ms Dominique Leroux-Lacroix, ITA Head of Legal; Mr Damien Clivaz, ITA Legal Counsel; and Prof. Christiane Ayotte, expert.
 - For FIS: Ms Sarah Fussek, FIS Integrity Manager; and Mr Stephan Netzle, Attorney-at-Law and Legal Counsel for FIS.
 - For the Athlete: Mr Hossein Saveh Shemshaki, Athlete; Mr Liu Chi and Ms Helen Shi, *pro bono* Counsels; and Mr Bahram Saveh Shemshaki, Deputy Chef de Mission.

In addition, Mr Stephen Bock, WADA Independent Observer, and Ms Vida Amirmokri, Interpreter, also attended the hearing.

25. On 14 February 2022 at 06:57 pm Beijing time, the Athlete submitted a written statement via email during the hearing.
26. At the conclusion of the hearing, the Athlete agreed that he had received a full and fair opportunity to be heard in this proceeding despite the limited time available for him to prepare for such hearing.

IV. THE PARTIES' REQUESTED RELIEF AND SUBMISSIONS

A. International Olympic Committee

27. The Claimant requests the following relief:
- a. *The Application is admissible;*
 - b. *Mr Hossein Saveh Shemshaki is found to have committed an anti-doping rule violation pursuant to Article 2.1 of the IOC Anti-Doping Rules applicable to the Games of the XXIV Olympic Winter Games Beijing 2022;*
 - c. *Mr Hossein Saveh Shemshaki is declared Ineligible from all competition in which he has not yet participated at the Olympic Games Beijing 2022;*
 - d. *Mr Hossein Saveh Shemshaki is excluded from the Olympic Games Beijing 2022 and his accreditation for the Olympic Games Beijing 2022 is revoked;*
 - e. *The Fédération Internationale de Ski is requested to consider any further action within its own competence.*
28. The Applicant's submissions, in essence, may be summarised as follows:

- a. On 9 February 2022, the Beijing Laboratory reported that the A sample of the Athlete's urine provided during a 7 February 2022 OOC doping control tested positive for the Prohibited Substance dehydrochlormethyl-testosterone metabolite 4 α -chloro-18-nor-17 β -hydroxymethyl,17 α -methyl-5 α -androst-13-en-3 α -ol (LTM M3). Such substance is prohibited by WADA at all times and is classified as a non-specified substance under S1.1 Anabolic Androgenic Steroids of the 2022 WADA Prohibited List.
- b. The analysis of the B Sample performed at the request of the Athlete confirmed the results of the A Sample.
- c. Article 2.1 of the IOC ADR provides that the presence of a Prohibited Substance or its metabolites or markers in an athlete's sample constitutes an ADRV. In particular, sufficient proof of an ADRV under Article 2.1.2 is established by the presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample "*where the Athlete waives analysis of the B Sample and the B Sample is not analysed; or, where the Athlete's B Sample is analysed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its metabolites or Markers found in the Athlete's A Sample*".
- d. Conducted the Initial Review of the result under Article 7.2 of the IOC ADR and Article 5.1.1 of the International Standards for Results Management ("ISRM") it is found that, [a] no applicable Therapeutic Use Exemption ("TUE") had been or was in the process of being granted to the Athlete either by the IOC, FIS or the National Anti-Doping Agency [b] there was no apparent departure from the International Standard for Testing and Investigations ("ISTP") or International Standard for Laboratories that could undermine the validity of the AAF, and [c] the AAF is not caused by the ingestion of the Prohibited Substance through a permitted route insofar Anabolic Steroids are banned irrespective of the route of ingestion.
- e. The Athlete has committed an ADRV pursuant to Article 2.1 of the IOC ADR. The IOC has discharged its burden of proof, pursuant to Article 3.1 of the IOC ADR, of establishing the Article 2.1 ADRV for Presence of a Prohibited Substance.

B. The Athlete

29. The Athlete requests the following prayers for relief:
 - a. *CAS ADD dismisses the suit;*
 - b. *CAS ADD rules that the Athlete is declared eligible for Slalom events of the Beijing 2022 Olympic Games scheduled to take place on 16 February 2022.*
30. The Athlete position, in essence, may be summarised as follows:
 - a. The Athlete does not contend the results of the AAFs of his urine samples collected;

- b. The Athlete has not knowingly or intentionally doped.

V. JURISDICTION

31. The Introduction to the IOC ADR, specifically regarding its Scope, expressly states that the IOC ADR apply “*in relation to the Olympic Games Beijing 2022*” and “*to all Anti-Doping Activities and Doping Controls over which IOC has jurisdiction in relation to the Olympic Games Beijing 2022*”. Among other, the IOC ADR apply to “*all Athletes entered in the Olympic Games Beijing 2022*” and “*Athletes entered in the Olympic Games Beijing 2022 ... are bound by these Rules as a condition of eligibility to participate*”.
32. Article 8.1.1 of the IOC ADR provides that “[*w*]here the ITA decides to assert an anti-doping rule violation [...], the ITA shall promptly file an application with the CAS Anti-Doping Division, acting as first-instance authority to conduct proceedings and to issue decisions, as per the CAS Anti-Doping Division Arbitration Rules [...]”.
33. Article 1 of the Arbitration Rules applicable to the CAS Anti-Doping Division Olympic Games Beijing 2022 provides that “[*t*]he CAS ADD shall be the first-instance authority to conduct proceedings and to issue decisions when an alleged anti-doping rule violation has been asserted and referred to it under the IOC ADR, and for imposition of any sanctions therefrom whether applied at the Games or thereafter. Accordingly, the CAS ADD has jurisdiction to rule as a first-instance authority in place of the IOC and/or the International Federation concerned”.
34. Article 16 (“The Panel’s Power to Review”) of the CAS ADD Beijing 2022 Rules states:
“The Panel shall have full power to establish the facts relevant to any decisions to be taken in the proceedings”.
35. Based on the foregoing provisions of the IOC ADR, the CAS ADD General Rules and the CAS ADD Beijing Rules and due to the fact that the Athlete was entered as a participating athlete in the Beijing Olympic Games Men’s Giant Slalom and Slalom events, the CAS ADD has jurisdiction to conduct the first-instance anti-doping proceedings, including the Athlete’s alleged anti-doping rule violation.
36. Furthermore, none of the Parties has disputed CAS ADD jurisdiction and the jurisdiction of the CAS ADD has been further confirmed by the Parties during the hearing.
37. It therefore follows that the CAS ADD has jurisdiction to entertain the IOC’s Application.

VI. APPLICABLE LAW

38. Pursuant to Article 17 (“Law Applicable”) of the CAS ADD Beijing 2022 Rules, “[*t*]he Panel shall rule on the dispute pursuant to the IOC ADR, the WADC, the rules of the IF concerned, the applicable regulations, Swiss law, and general principles of law”.

39. The IOC ADR applies, without limitation, to all doping controls conducted during the Olympic Games Beijing 2022. More specifically, the Preamble to the IOC ADR provides as follows:

“Athletes entered in the Olympic Games Beijing 2022 ... are bound by these Rules as a condition of eligibility to participate in the Olympic Games Tokyo 2020”.

40. No party has objected to the application of the IOC ADR.
41. The Sole Arbitrator, therefore, confirms that the IOC ADR, in conjunction with the Code as provided for in the IOC ADR, applies to this procedure and that the IOC ADR governs the merits of these proceedings.

VII. MERITS

A. The Anti-Doping Rule Violation

42. The issue to be considered and resolved in this proceeding is whether the Athlete’s committed a violation of the IOC ADR.

43. Article 2.1, particularly Article 2.1.1, of the IOC ADR provides that:

“It is the Athletes’ personal duty to ensure that no Prohibited Substance enters their bodies. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping rule violation under Article 2.1”

44. Comment 7 of the Code specifically clarifies the Article 2.1.1 of the Code as follows:

“An anti-doping rule violation is committed under this Article without regard to an Athlete’s Fault. This rule has been referred to in various CAS decisions as “Strict Liability”. An Athlete’s Fault is taken into consideration in determining the Consequences of the anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS”.

45. The onus is on the IOC to prove that the Athlete committed an ADRV. IOC has demonstrated by the submission of documentary evidence, especially the testing results of the Athlete’s A and B sample, that the Athlete’s urine A and B sample Number 7048493, which were collected out-of-competition and analysed by the Beijing Laboratory on 9 February 2022 and 11 February 2022, were positive for the presence of dehydrochlormethyl-testosterone metabolite 4 α -chloro-18-nor-17 β -hydroxymethyl,17 α -methyl-5 α -androst-13-en-3 α -ol (LTM M3). Such substance is prohibited by WADA at all times and is classified as a non-specified substance under S1.1 Anabolic Androgenic Steroids of the 2022 WADA Prohibited List.
46. ITA conducted the initial review of the AAF results on behalf of IOC required by Articles 7.1 and 7.2 of the IOC ADR. Compliance with the International Standard for Testing and Investigations was confirmed by the ITA’s review.

47. The Athlete did not challenge the Beijing laboratory compliance with the International Standard for Laboratories' standards in connection with its analysis of his A and B sample as required by Articles 3.2.1 and 3.2.2 of the IOC ADR.
48. The Sole Arbitrator is only requested to determine whether the Athlete committed an ADRV further to the AAF of dehydrochlormethyl-testosterone metabolite 4α -chloro-18-nor-17 β -hydroxymethyl,17 α -methyl-5 α -androst-13-en-3 α -ol (LTM M3), a non-specified Prohibited Substance banned at all times by the WADA 2022 List.
49. The Sole Arbitrator has reviewed the sequence of events and facts, including the actions of the ITA on behalf of the IOC after it was notified of the Athlete's AAF by the Beijing-accredited laboratory on 9 February 2022 (and 11 February 2022) and concludes to her comfortable satisfaction that the Athlete committed a violation of the IOC ADR for the reasons explained below.
50. Sufficient proof of an anti-doping rule violation under Article 2.1.2 of the IOC ADR is notably established by the presence of a Prohibited Substance or its metabolites in the Athlete's A-Sample when the Athlete's B-Sample analysis confirms the presence of the Prohibited Substance found in the A-Sample.
51. According to Article 2.1.3 of the IOC ADR and considering that the Prohibited Substance found in the Athlete's test samples belongs to Class S1.1 of the WADA 2022 Prohibited List, the presence of any reported quantity of a Prohibited Substance in the Athlete's Samples constitutes an ADRV.
52. The Sole Arbitrator determines that the Athlete did not satisfy his burden of proving by a balance of probability that the AAF was likely to have involved a contaminated product as provided by Article 7.6.4 of the IOC ADR. The Athlete has not provided evidence that neither the supplements nor food or beverage he consumed during a stay in a training camp prior to the OG would have contained the prohibited substance found by the laboratory. On the contrary, the expert Prof. Christiane Ayotte, who as expert for the IOC, reviewed the A and B Sample findings in the present case and demonstrated clearly, that the products listed by the Athlete on the Doping Control Form or any other food or beverage he consumed, could not explain the tested substance in his A and B Sample. For the Athlete's statement, he tested negative in January 2022, the witness explained clearly and unequivocally that due to the degradation process of the substance in the body (on the one hand due to the biological conditions of the individual and on the other hand due to the fact that the laboratory in Beijing delivers particularly high-quality test results) this shows precisely, that the substance was in the final phase of the degradation process. Experience has shown a so-called ping pong effect, i.e. meaning that there are different measurement results, as in the present case: one test is negative, one test is positive. When asked about the different concentration of the substance found in A and B sample, Prof. Ayotte explained that the difference is so small that it is mathematically negligible. The Sole Arbitrator also dealt with the presented and translated video, in which two competitors from the Athlete's sporting environment reproduced their personal assessment of the Athlete's physical constitution and his training results. Even if the Sole Arbitrator is willing to give the Athlete credit for having a clear record so far since he also participated in 2010 and

2014 Olympic Winter Games, such facts neither eliminate nor diminish the Athlete's duty under the IOC ADR to ensure that no Prohibited Substance enters his body, and in case of an Adverse Analytical Finding, his duty to explain the source of the Prohibited Substance.

53. The Sole arbitrator has taken into consideration the explanation provided by the Athlete and in particular, that he did not use any prohibited thing drug or food, that he has underwent a doping test first of January during qualification race in Iran and the result was negative. The Athlete further claims that, according to his skill it is clearly visible that he has no chance to be in top results as he participated in 2010 and 2014 Olympic Winter Games and his goal is just participating in OG and there is no reason for him to use any illegal drug and food, just like the video shown. He also heard from a third person that people are trying to make his doping test positive. However, the Sole Arbitrator does not consider that it is more probable than not that the AAF resulted from a contamination consuming the products listed by the Athlete on the Doping Control Form or any other food or beverage.
54. However, the Athlete's argument regarding the alleged ingestion of a contaminated product was and still is without any concreteness or evidence. Yet, the Sole Arbitrator reminds that the purpose of the present Partial Arbitral Award is to determine whether the Athlete actually breached the IOC ADR but not to determine the Athlete's degree of fault and applicable sanction.
55. As stated in Article 2.1 of the IOC ADR, the presence of a Prohibited Substance in the Athlete's A- and B-Samples is a sufficient proof of an ADRV without regard to the Athlete's Fault. Athletes have a strict liability to ensure that no Prohibited Substances enter their bodies. Athletes' degree of fault, e.g. possible contamination, is taken into consideration when determining the consequences of an ADRV under Article 10 of the Code or, regarding Beijing, under Article 10 of the IOC ADR. In the Athlete's case, consequences beyond Beijing shall be determined in a second procedural phase, as will be explained at §§60 and 61 of the present Partial Arbitral Award.
56. Based on these facts, the Sole Arbitrator finds that the Athlete committed an anti-doping rule violation under IOC ADR Article 2.1.

B. The Applicable Sanction

57. Article 9 of the IOC ADR rules about automatic disqualification of individual results and Article 10.2.1 of the IOC ADR deals with the sanctions on individuals, e.g. disqualification of all of the athlete's results or ineligibility, exclusion or loss of accreditation.
58. According to Article 10.3 of the IOC ADR, a mandatory part of each sanction shall include automatic publication, as provided in Article 13.3.
59. As the Athlete did not get to compete in Beijing 2022 before the provisional suspension was imposed, there are no results to be disqualified. As the Sole Arbitrator is comfortably satisfied that the Athlete committed an ADRV pursuant to Article 2.1 of the IOC ADR, the Athlete shall be declared ineligible to compete in all competitions in which he has not yet participated

at the Olympic Games Beijing 2022. Furthermore, Mr Hossein Saveh Shemshaki shall be excluded from the Olympic Games Beijing 2022 and his accreditation for the Olympic Games Beijing 2022 is withdrawn.

VIII. CO-APPLICANT FIS

60. Further to the FIS request to participate as a Co-Applicant in this procedure, the Sole Arbitrator notes the FIS' delegation of power to the CAS ADD in accordance with Articles 7.1.2 and 10.2.2 of the IOC ADR and the Recognition of the CAS ADD and Delegation of Powers" signed by FIS on 7 May 2019. In this regard, FIS' request is granted.
61. These proceedings shall continue by and between FIS, who joined these proceedings as Co-Applicant, and the Athlete, in regard to the consequences of the ADRV which may be imposed on the Athlete. The Sole Arbitrator, after consultation with the Parties, shall determine the procedural directions applicable to the remaining part of the arbitration and shall issue, at the conclusion of these proceedings following the Olympic Games, a final award, all in accordance with Article 20 of the CAS ADD Rules.

IX. COSTS

62. (...).
63. (...).

X. ENFORCEABILITY AND APPEAL OF AWARD

64. Pursuant to Article 21 of the CAS ADD Beijing 2022 Rules:

"Once notified, the award (partial or final) is enforceable immediately. Any partial or final award may be appealed to the CAS ad hoc Division according to the Arbitration Rules for the OG or, if the CAS ad hoc Division is no longer in operation, to the permanent CAS in Lausanne/Switzerland pursuant to Articles R47ff of the Code of Sports-related Arbitration, no later than 21 days from the notification of the award by email".

ON THESE GROUNDS

The Sole Arbitrator issues the following decision:

1. Mr Hossein Saveh Shemshaki is found to have committed an anti-doping rule violation pursuant to Article 2.1 of the IOC Anti-Doping Rules applicable to the Games of the XXIV Olympiad Beijing 2022.
2. Mr Hossein Saveh Shemshaki is declared ineligible to compete in all competitions in which he has not yet participated at the Olympic Games Beijing 2022.
3. Mr Hossein Saveh Shemshaki is excluded from the Olympic Games Beijing 2022 and his accreditation for the Olympic Games Beijing is withdrawn.
4. Mr Hossein Saveh Shemshaki is ordered to leave the Olympic Village within the next 24 hours from the notification of the present Partial Arbitral Award.
5. With the issuance of this Partial Arbitral Award, the IOC's participation in this proceeding is hereby terminated.
6. All other prayers or motions for relief are dismissed.