

DECISION OF THE APPEALS COMMITTEE

Section : **Doping Section**
 Members of the section :
 (chair) : *mr.* J.D. Loorbach
 (member) : *mr.* dr. M. Olfers
 (member) : dr. R.C.R. Siekmann
 Case number : B 2009004/2009-14-01

In the case of:

1. Defendant

Name : [Athlete]
 Address : [...]
 [...]
 Represented by : [...]
 Member of the
 Sports Association : Royal Dutch Billiards Federation ("the KNBB")
 Registration number : [...]

2. Complainant

Name : L.A. Vervoort
 Name of the
 Sports Association : Royal Dutch Billiards Federation ("the KNBB")
 with registered
 offices at : 3438 MR Nieuwegein, Iepenhoeve 37

3. The procedure

- On 29 May 2009, the charge form dated 27 May 2009 was submitted citing the defendant for a violation of article 3 of the Doping Regulations of the Institute for Sports Law ("the ISR").
- The doping section of the disciplinary committee of the ISR heard the charge, making a decision on 25 August 2009 and forwarding that decision to the defendant on 2 September 2009.
- The defendant lodged an appeal in time against this decision in an appeal form that was received on 8 September 2009.
- The KNBB was given the opportunity to respond in writing to the appeal form from the defendant but did not avail itself of this right.
- The defendant submitted, at the same time as the aforesaid appeal form, a request for the suspension of the imposed penalty pending the appeal.
- The appeals committee rejected that request. This decision, dated 15 September 2009, was sent to the defendant on 24 September 2009.
- The appeals committee heard the appeal at a hearing on 20 October 2009 in the presence of the defendant, of Mr. [...] (the father of the defendant, and also his representative) and of Mr. [...] (advisor to the defendant). Mr. Santos Chocron (the chairman of the Three-Cushions Section) was present on behalf of the KNBB.

4. **Grounds for the appeal**

The defendant does not dispute the violation but he is appealing against the duration of the imposed penalty.

5. **In view of:**

- the decision of the doping section of the disciplinary committee of the ISR dated 25 August 2009 and the written documents referred to in paragraph 5 of that decision;
- the contents of the appeal form submitted by the defendant on 8 September 2009;
- the contents of the request submitted by the defendant on 8 September 2009 for the suspension of the penalty imposed in the aforesaid decision for the duration of the appeal proceedings;
- the decision of the appeals committee dated 15 September 2009 with respect to the aforesaid request;
- the discussions during the hearing, as set out in the notes accompanying this decision;

6. **Decision**

The appeals committee:

- states that it is competent to examine the appeal;
- confirms the decision of the disciplinary committee dated 25 August 2009 that the violation was proven but reduces the ineligibility period imposed in the decision of the disciplinary committee to a period that will start on the date of the decision made by the disciplinary committee: 25 August 2009 and end one year later, in other words on 25 August 2010;
- orders the defendant to pay part of the costs of the proceedings in this disciplinary case, which include the costs of support for the permanent and legal secretary, amounting to € 250.00. This amount should be paid to the KNBB within one month after this decision. Any failure to do so will constitute an infringement of the Disciplinary Regulations of the Institute for Sports Law.

7. **The appeals committee states the following grounds for its decision:**

With respect to competence, the appeals committee states the following grounds:

7.1 The defendant lodged an appeal within three weeks after the decision of the disciplinary committee was sent and the appeal of the defendant also complies with the requirements stated in the Doping Regulations and Disciplinary Regulations. The appeals committee therefore considers itself to be competent to consider this appeal.

With respect to the appeal, the appeals committee states the following grounds:

7.2 For the facts that play a role in this appeal, the appeals committee refers to the contents of paragraph 8 of the decision of 15 September 2009 in response to the request submitted by the defendant for the suspension of his penalty¹. At the hearing, the advisor of the defendant provided further details with respect to the appeal form submitted by the defendant. A record was made of those comments. It has been attached to this decision and is a part of it.

¹ t.n. That paragraph reads: The Doping Regulations do not contain any clear arrangements with respect to the option of a request for a suspension of a penalty when appealing against a decision. Availing itself of the competence granted to it in article 66 of the Doping Regulations, the appeals committee decides that appeal against the present decision is not possible other than at the same time as the final decision.

At the hearing, the defendant stated that he did not wish to persist with his appeal on the basis of the absence of the seal on the transportation bag. Acting in its official capacity, the appeals committee will therefore not address this defence in greater detail.

At the hearing, the defendant stated that he had not been aware of the initial proceedings relating to the disciplinary case. This defence does not stand up. The documents in the file of the disciplinary committee listed in the decision show that they were sent to the address that was confirmed by the defendant at the hearing as being correct. The defendant was registered as a member of the KNBB at this address. It is the responsibility of the defendant to inform the association of any change of address. The disciplinary committee did everything that was reasonably possible to inform the defendant when it emerged that the registered letters had not been received. In addition, the defence is not credible in view of the fact that the decision of the disciplinary committee, which was sent to the same address, did apparently arrive, and without any delay. In the judgment of the appeals committee, the disciplinary committee was correct to make entry of the defendant's default.

7.3 In the appeal, the defendant admitted using cocaine. The violation of article 3 of the Doping Regulations has therefore been established.

The substantive grounds for the appeal by the defendant relate exclusively to the penalty, which he considers to be excessively long.

7.4 Article 38 of the Doping Regulations stipulates a period of ineligibility of two years for a first violation of article 3 unless the conditions in articles 39, 40 and/or 41 for the reduction of the penalty have been met.

The appeals committee notes, on the basis of the 2009 Prohibited List, that cocaine is not a specific substance. The reduction of the ineligibility period on the grounds of article 39 of the Doping Regulations is therefore inappropriate.

Article 40(1) of the Doping Regulations stipulates as a condition for the non-imposition of the ineligibility period that the defendant did not know or suspect, and could not reasonably have known or suspected, even after exercising the greatest possible care, that he had used the prohibited substance. The defendant stated in his appeal form and at the hearing that he deliberately used the prohibited substance, in this case cocaine. The fact that he did not realise at that time the consequences to which this use could lead does not detract from the fact that the condition stated in article 40(1) has not been fulfilled. There are therefore no factual grounds based on article 40 of the Doping Regulations for the non-imposition of the eligibility period.

Article 41(1) of the Doping Regulations stipulates as a condition that there should be no question of a plausible level of fault or negligence. This is the case if the athlete can demonstrate that his fault or negligence was not significant in relation to the violation of the regulations given the circumstances of the case.

It has been established that the defendant deliberately used the cocaine. This excludes the possibility of the absence of any significant fault or negligence in the sense of article 41 of the Doping Regulations.

7.5 During the hearing, the defendant argued that the penalty imposed upon him was excessive and therefore disproportional. The appeals committee considers this to be an explicit appeal to the principle of proportionality. In this case: the disproportionality of the penalty in relation to the prohibited behaviour being punished. It must therefore examine the penalty in the light of this principle.

7.6 The principle of proportionality is a fundamental principle of proper justice (or *due process*). Although it is not, in principle, an explicit statutory component of Dutch criminal or procedural law, it is generally recognised and accepted. Disciplinary law is less formal than criminal law; the principle of proportionality should therefore be applied more widely in disciplinary law than in criminal law.

- 7.7. Disciplinary law is a component of the provisions regulating the membership relationship. This is a relationship in private law that is subject to statutory provisions relating to associations, as set out in book 2 of the Netherlands Civil Code. The statutory standard for the argument of proportionality is found in section 8(2) of the Netherlands Civil Code.
- 7.8 In the opinion of the appeals committee, doping regulations to which athletes who engage in their sports as members of an association are necessarily subject must, firstly, meet the standards that government regulations in general and their application with respect to criminal law in particular are required to meet. In addition, there are also the standards of a fair trial – in part against the background of European law – and of section 2.8(2) of the Netherlands Civil Code (see below).
- 7.9 The WADA Code and therefore the Doping Regulations have a very strict and rigid and – by comparison with normal criminal law, a very severe – system of penalties. Certainly in cases like the present one, in which the performance-enhancing effects of the prohibited substance found are at best disputed, the implications of the application of this rigid system of penalties must therefore be examined at all times in the light of the standards that prevail in normal criminal law, including the principle of proportionality. As it will emerge below, the appeals committee knows that it is supported in this respect by the CAS and the EC Court of Justice, without it being necessary to make clear whether the CAS or the Court were guided by this principle of criminal law.
- 7.10 The principle of proportionality implies that the application of anti-doping regulations must not go further than is strictly necessary to effectively combat doping. See, for example, Soek, *The Strict Liability Principle and the Human Rights of Athletes in Doping Cases*, T.M.C. Asser Press, The Hague 2006, p. 381 ff.). In his thesis, Soek sums up the principle as follows (p. 389):
“The proportionality principle is widely recognized and accepted. It prohibits the taking of any measure which in view of its objective must be considered to go beyond what is appropriate and necessary. The application of the principle involves the balancing of the interests of the person or persons affected by the measure and the possibly wider social aim which it is intended to achieve. The CAS has regularly considered whether the doctrine of proportionality could be applied in reduction of a penalty. The application of fixed penalties for doping offences made it difficult to weigh the severity of the offence against the severity of the penalty. Nevertheless, as the CAS at one occasion concluded, when the circumstances of the case so allowed the appellant’s sentence could properly be reduced by reference to proportionality considerations.”
- 7.11 The CAS has applied the proportionality principle – with the reduction of fixed penalties – in a number of cases, including in particular CAS 2000/A/270, *Meca-Medina and Majcen v. FINA*, to which Soek refers, and later in: CAS 2006/A/1025, *Puerta/v. ITF* and CAS 2007/A/ 1252, *FINA v. Mellouli* and *TSF* (cf. David, *A Guide to the world Anti-Doping Code – A Fight for the Spirit of Sport*, Cambridge University Press, 2008, p. 168 ff.).
- 7.12 In an Advisory Opinion about the implementation of the WADA Code in the FIFA Disciplinary Code (CAS 2005/C/976 and 986, FIFA and WADA; paragraph 139, pp. 52-53) the CAS has the following to say with particular reference to the proportionality principle (section 1.4.3):
“A long series of CAS decisions have developed the principle of proportionality in sport cases. This principle provides that the severity of a sanction must be proportionate to the offense committed. To be proportionate, the sanction must not exceed that which is reasonable required in the search of the justifiable aim. Both the Swiss Federal Supreme Court and a significant part of Swiss legal doctrine have upheld the principle of proportionality. [...] The panel is of the view that the principle of proportionality is guaranteed under the WADC; moreover, proportional sanctions facilitate compliance with the principle of fault. Consequently, each body must consider the proportionality of imposed sanctions for doping cases”.
 It adds, in section 1.5 (Conclusion; paragraph 143, pp. 54-55):
“The right to impose a sanction is limited by the mandatory prohibition of excessive penalties, which

is embodied in several provisions of Swiss law. To find out whether a sanction is excessive, a judge must review the type and scope of the proved rule violation, the individual circumstances of the case, and the overall effect of the sanction on the offender. However, only if the sanction is evidently and grossly disproportionate in comparison to the proved rule violation and if it is considered as a violation of fundamental justice and fairness, would the panel regard such a sanction as abusive and, thus, contrary to mandatory Swiss law."

7.13 With respect to the significance of Advisory Opinions McLaren states (CAS Advisory Opinions, in: Blackshaw/Siekmann/Soek (Eds.), *The Court of Arbitration for Sport 1984-2004*, T.M.C. Asser Press, The Hague, pp. 180-181): *"Through the Advisory procedure, the CAS is able to give opinions on legal questions concerning any activity related to sport in general. Under Rule 60 of the Code (of Sports-related Arbitration) any questions of law or general interpretation related to sport may be submitted to the CAS for resolution. [...] For the Advisory procedure, the questions do not have to be fact specific; and thus, can raise and deal with general principles of law and how they may apply to sport. For instance, there have been Advisory Opinions on the application of lex mitior, jurisdiction to establish rules, and proportionality in determining sporting sanctions."*

7.14 Turning to European law, the application of the proportionality principle is also recognised by the Court of Justice. See, for example, the Meca-Medina case and Majcen v. European Commission, C-519/04. Ground 48 is as follows:

"Regulations of this kind [in this case, anti-doping regulations] would be excessive, in the first place with respect to the conditions for drawing a distinction between situations that can be classified as punishable doping and situations that do not come into that category, and secondly in terms of the strictness of the penalties."

Dutch Association Law

7.15 As stated above, the issue of proportionality should also be considered on the basis of the standard of reasonableness and fairness relating to the membership relationship stated in section 2:8 of the Netherlands Civil Code. The text of the section is as follows:

"A rule governing the relationship between them by law, custom, statutes, regulations or decision shall not be applicable in so far as it is unacceptable according to standards of reasonableness and fairness in the given circumstances."

The provision is an imperative rule of law and, furthermore, the relevant statutory provision is not excluded in the KNBB regulations. The Committee must therefore apply this rule of law.

7.16 The KNBB is an association residing in the Netherlands and it is therefore subject to Dutch association law. The defendant is a Dutch citizen residing in the Netherlands and, when the sample was taken, he was participating in a competition in the Netherlands. The membership relationship and the relevant conduct are entirely within the domain of Dutch law. Dutch law therefore applies exclusively.

7.17 The doping regulations are a component of the regulations of the KNBB. These regulations are a component of the membership relationship between the defendant and the KNBB. The application of those regulations implies that the appeals committee must base its considerations on the principle of reasonableness of section 2: 8 of the Netherlands Civil Code, which also governs that membership relationship, and all the more because an explicit appeal has been made to that principle (by reference to proportionality).

7.18 The provision that requires a minimum penalty of an ineligibility period of two years must guide the considerations of the appeals committee unless that rule "is unacceptable according to standards of

reasonableness and fairness in the given circumstances". In that case, the rule in question must, by law, not be applied.

The appeals committee, in a limited examination, is of the opinion that this unacceptability is a factor in this case, taking all the circumstances of the case into consideration. The reader is referred to section 8 ("Grounds for Consideration").

8. Grounds for Consideration

8.1 After the application of the proportionality principle, the appeals committee comes to the conclusion that the ineligibility period of two years imposed by the disciplinary committee is excessive. In so doing, the appeals committee takes the following facts and circumstances into consideration:

- a) The defendant has not been found positive previously.
- b) Cocaine is not a performance-enhancing substance in billiards. The sports doctor and doping expert Harm Kuipers has stated (Dagblad de Stentor, 6 September 2006) that the use of cocaine has no performance-enhancing effect for an athlete whatsoever. *"Certainly not for a billiards player. This is a sport requiring coordination and cocaine is of no use in that respect. Alertness is enhanced, but only for a very short time. Indeed, coordination is rapidly adversely affected, as is the capacity to take decisions quickly. Athletes who use cocaine may have a problem, but it's not a doping problem."*
- c) The presence of cocaine in the urine of an athlete in an out-of-competition control does not constitute a violation of the Doping Regulations. The appeals committee concludes from this that the WADA also accepts that the use of cocaine does not provide athletes with any advantage other than immediately after use. In this case, there were three days between the use of the cocaine and the competition in which the defendant participated.
- d) On the basis of the account of the defendant, which the committee considers to be credible, the appeals committee finds in this procedure that it is a fact that the cocaine was taken unthinkingly in the context of the defendant's nightlife and that there was no question of any link to sports performance.
- e) There is no intention to enhance performance and so there was also no intention to acquire an unfair and irregular advantage with respect to competitors.
- f) Although it is the case that the defendant did not admit the violation in good time, or at least not in accordance with the Doping Regulations in the correct way prior to the results of the analysis and the charge, the defendant did not make any secret of the recreational use. He has frankly admitted using the substance and did so again during the hearing, seated alongside his father with a contrite expression. The KNBB also was also visibly uncomfortable with its own draconic and implacable regulations. Its representative at the hearing was clearly embarrassed about the situation, but he had no choice.
There has been a case recently in another sport of a "spontaneous" admission of cocaine use which was evidently inspired by a sample being taken shortly after cocaine had been used. That strategic honesty – in the light of the prospect of discovery – was found to be grounds for halving the penalty. The defendant has not had routine experience with doping controls targeting cocaine use, by contrast with the reluctant repentant who was clearly motivated by strategic considerations. In all reasonableness, the defendant should not suffer a worse fate than that fellow-user.
- g) The defendant has also admitted his cocaine use in public. This can be seen from publications in the press and on various billiards websites. In this respect, the defendant contrasts favourably

with numerous other athletes who, when confronted with a positive result, deny using prohibited substances regardless of the facts. With his public admission, and his expressions of regret about what has happened, the defendant has made a contribution to the discussion about this problem for, in particular, younger billiards players.

The publicity relating to this case has inflicted considerable damage on the defendant's good name, fame and reputation, and what is even worse in a matter that should have remained private (also from the point of view of the WADA ideology) if use had been established out of competition.

h) The defendant has stated that he did not know that the traces of cocaine would still be apparent in his urine after three days. Particularly when elite sports are involved, it is of course the responsibility of the athlete to be informed about the effect of the substances on the prohibited list. However, this does not absolve the sports associations from their responsibility in this respect. Article 22 of the Doping Regulations is very clear in this respect. Without wishing to suggest that there has been any significant shortcoming in the information provided by the KNBB, the appeals committee does believe it is justifiable to conclude that this information may have left something to be desired, at least in terms of the punishability and traceability of this forbidden substance. In the view of the appeals committee, the defendant is a serious athlete who, if he had been able to oversee the consequences of his cocaine use, would have been in a better position to resist the temptation.

i) The general goal of doping regulations in the field of sports is to combat doping in order to ensure fair competition and it includes the need to ensure that all athletes have the same chances and to safeguard their health. The KNBB's aim – following in the footsteps of WADA – of setting punishments for the presence in the body of a series of substances is based on this general objective.

Banning cocaine, a substance which does not enhance sporting, or at least billiards, performance is therefore, in the opinion of the appeals committee, difficult to describe as conducive to that aim. At the same time, the detection and prosecution of the presence of this substance leads in this case to a serious infringement of the privacy of the defendant which is therefore not justified by the core aim of the fight against doping in sports. The infringement of privacy is all the more disproportional in consequence and the ineligibility period coming on top of that should be all the shorter in order to attain a reasonable proportionality.

9. In summary, the appeals committee, in a limited examination, considers the outcome of a rule that requires a penalty of an ineligibility period of two years to be imposed for this violation to be disproportional and the result to be unacceptable in the sense of section 2:8 of the Netherlands Civil Code. This is supported by the grounds stated with respect to CAS decisions and European law. In this case, therefore, the rule and its result must not be applied. Instead, the appeals committee, after having taken all the circumstances into consideration and given the fact that the defendant has already received a substantial punishment, considers an ineligibility period of one year after the date of the initial decision to be reasonable.

With respect to the costs, the appeals committee states the following grounds:

10. Taking into account the outcome of this appeals procedure and the defendant's limited financial resources – given his young age – the appeals committee is of the opinion that the defendant should make only a limited contribution to the costs of this appeal procedure.

11. **Appeal against the decision of the appeals committee**

This decision of the appeals committee exhausts the possibilities for appeal within the sports association. The parties referred to in article 53 of the Doping Regulations can submit an appeal

against this decision to the Council of Arbitration for Sport (CAS). Such an appeal shall be subject to the conditions of the CAS.

Rotterdam, 26 November 2009

mr. J.D. Loorbach
(chair)

mr. A.M. Bleeker-van Velzen
(legal secretary)

Copy sent on:
Initials of permanent secretary