

JUDICIAL AWARD BY THE FISA DOPING HEARING PANEL

sitting in the following composition

Members: **John Boulton**
 Mikio Hiura, M.D.
 Mike Williams

In the case of Kissya Cataldo Da Costa

The Facts

FISA conducted anti-doping testing in Rio de Janeiro, Brazil on 28 May 2015. A urine sample was collected from Kissya Cataldo Da Costa ("the Athlete"). The Autoridade Brasileira de Controle de Dopagem (ABCD) conducted the testing on behalf of FISA.

The urine Sample collected from the Athlete was numbered 2858972 and recorded on the Doping Control Form. The Athlete signed this form and received a copy. Ms. Cataldo Da Costa declared on the doping control form that she had taken several products during the seven days before the test, including whey protein, creatine, multivitamins, Tribulus T, caffeine, omega, ferro, HBB and two others which are unreadable. She made no comments on the doping control procedure on the form. The WADA accredited laboratory in Rio received the "A and B" urine samples on 29 May 2015.

The Results from the Rio Laboratory dated 12 June 2015 indicate that Sample A showed the presence of furosemide. Furosemide is included in the 2015 Prohibited Substances/Methods List of the World Anti-Doping Code and is classified in class S5 Diuretics and Masking Agents.

Some departures from the International Standard for Testing (ISL) have been established as having occurred during the testing procedure. These are listed below. The Athlete does not have a valid TUE.

The Athlete was notified of the positive test result by the Executive Director of FISA in a letter dated 29 June 2015. She confirmed through her national federation in a statement dated 1 July 2015 that she wished to have the B sample analysed.

On 14 July 2015, the control analysis began with the Athlete present at the Laboratory. The "B" analysis confirmed that of the "A" sample.

The hearing took place on 7 August in Rio de Janeiro. The Athlete attended the hearing and was assisted by her husband Dominik Grzyb and a lawyer Marcelo Franklin. The ABCD was present through an observer Kristiane Calvas.

Daniela Gomes da Costa, an employee of FISA, acted as Portuguese/English interpreter.

Evidence Provided for the Hearing

The material provided to the Panel was as follows:

1. Doping control form of 28 May 2015
2. A sample laboratory analysis dated 12 June 2015
3. B sample laboratory analysis dated 14 July 2015
4. Letter from the FISA Executive Director to the Brazil federation dated 29 June 2015
5. Statement with contestation of Result/Request of B Sample analysis from the Athlete dated 1 July 2015
6. Copies of various emails between the Athlete's husband and FISA dated 24 May 2015 and 28 May 2015
7. Various copies of website and other articles provided by the Athlete's husband which the panel did not consider to be relevant evidence in the case
8. A laboratory analysis relating to another doping test (presumably of the Athlete) dated 16 July 2014 (written in Polish)
9. Laboratory reports of blood tests of the Athlete dated 15 June 2015 from the Laboratorio Endocrimeta in Porto Alegre Brazil (written in Portuguese)
10. A report from Dr Rosemary Petkowicz, Sports Doctor for the Gremio Nautico Uniao, Porto Alegre dated 5 August 2015 (written in Portuguese).

Witnesses

1. The Athlete Kissya Cataldo da Costa
2. Dr Jocanta Chwalbinska, doctor of the Polish team with whom the Athlete has been training over recent years.
3. Natalia Barboza, another Brazilian rowing athlete who attended the doping testing on 28 May.
4. Marcos Amorin, a coach of the Flamengo Rowing Club (Rio) who attended the testing on 28 May, and acted as observer/chaperone of the male athletes.
5. Marcelo Varriale, Coach of the Athlete in the Porto Alegre club.
6. Sandra Soldan, Doping Control Officer, who carried out the doping tests on 28 May 2015 at the request of ABCD, including the testing of the Athlete.

Applicable law

The applicable rules

The applicable rules are the FISA Anti-Doping Rules in force at the time of the test (28 May 2015). These rules are consistent with the World Anti-Doping Code.

The relevant rules

The FISA Anti-Doping Bye-Laws (2015 edition) are the relevant rules. The Panel considered in particular but was not limited to the following FISA anti-doping rules in this case:

- Article 2.1.1 which states it is each Rower's personal duty to ensure no Prohibited Substance enters his body;
- Article 3 - Proof of Doping; especially Article 3.2.3 – Departures from International Standards

- Article 5 – Testing and Investigations; especially Article 5.1 which specifies that testing is to be conducted in conformity with the provisions of the International Standard for Testing and Investigations.
- Article 10.2.2 – Sanctions where Article 10.2.1 does not apply.
- Article 10.5.1.1 – Reductions of Sanctions for Specified Substances.
- Article 10.7.1 – Period of ineligibility for a Rower’s second anti-doping rule violation.

The Panel also considered:

The WADA Prohibited List (2015)

The WADA International Standard for Testing and Investigation (January 2015) and in particular:

Article 5.4: Requirements for Notification of Athletes

Article 7.4: Requirements for Sample Collection

Article 8.3: Requirements for security/post-test administration

Annex D: Collection of Urine Samples

Evidence heard at the hearing

The Athlete Kissya Cataldo Da Costa

She gave the following evidence:

- She was tested before the London Olympics in 2012 and tested positive for EPO. She was withdrawn from the Olympics, and served a period of ineligibility for 2 years. She admitted she had taken the banned substance on that occasion, having been told by her doctor that the medicine was doping, but that the quantity she was taking would not be detected.
- Since then she has changed. She has been training in Poland where there is better support, better education about doping, and therefore had no motivation to do anything wrong. She learned from her previous mistake.
- She cannot prove how the furesomide came to be in her urine, but suggested that someone “did this to me”.
- When she came to Brazil for national selection in February/March she observed things which led her to believe things were wrong, and asked her husband to ask FISA to send anti-doping testing to Brazil. One athlete had improved her ergometer time by 25 seconds, and her voice was different; that was what made her think things were wrong.
- On 24 May her husband asked FISA to conduct doping tests at the Selection Regatta in Rio on 28 May. She suggests possibly someone from ABCD spoke to people about the testing (people who were not happy with her).
- She was tested in Poland and was negative, and had blood tests done in Poland and Brazil which showed nothing suspicious.
- On the day of the testing, the DCO Sandra Soltan arrived about 7.30 with a list of athletes to be tested. The coaches informed the athletes including her. Racing was in fact cancelled because of the weather and the DCO started testing the athletes. She was tested at about 10:30 hrs.

- She complains that the testing procedure was not totally correct:
 - There was no male chaperone for the male athletes.
 - There was only one DCO, which meant that the room where the testing kits and samples were placed was left empty and open when the DCO accompanied female athletes to the bathroom to provide the sample.
 - The DCO did not inform her she could have a representative in the room.
- She emailed her husband and asked him to notify FISA of these irregularities. (His email mentions that there was only one person, and no male chaperone; not the other matters).
- In the testing process she was given a choice of plastic containers into which to urinate out of about 4 containers. She was also given a choice of sample kits. The box with the kits was closed with tape, and the bottles were in plastic bags. She poured the urine from the plastic container into the bottles and then sealed them in front of the DCO.
- She took 5-10 minutes to provide the urine sample.
- She noted a number of medications/supplements on the Doping Control Form.
- The DCO told her she could put something on the form if she considered something was wrong, but she said there was nothing. She said it was maybe a mistake to have said this. Her evidence was confusing about this point.

Natalia Barboza

She gave evidence that she was a rower and was tested on 28 May. She said there was only one person testing, and the samples room was left unattended when the DCO went to the bathroom with the female athletes. She was tested about 9 a.m. and took no more than 5 minutes in the bathroom. She was given a choice of plastic containers to urinate into, and a choice of sample kits. She was not advised that she could have someone accompany her to the testing room.

Marcos Amorin

He said he is a coach at the Flamengo Club and was asked to help with the doping testing at the Selection Regatta. He has had no doping training. He was asked to accompany the male athletes to the toilet.

Marcelo Varriale

He has known the athlete for 10 years and is her personal coach when she is in Porte Alegre. She came to him two weeks before the selection trials. He knew about her doping issue in 2012, but it is clear that she has changed her mind. Her behaviour is perfect and she is determined to show that she can succeed doing it the right way. She is more concerned about doping than other athletes, and very particular about meeting the whereabouts requirements.

Dr Jolanta Chwalbinska

She is the Polish Team Doctor and met the Athlete training in Poland. She organized blood tests for her to check her training progress e.g. iron levels. She did not need any supplementation. She has discussed supplements with her. Rowing athletes do not use furesomide as it diminishes endurance because of dehydration. If the urine is concentrated, that means there is no masking as that dilutes the urine. Here the urine was normal, not diluted.

Sandra Soldan

- She has been a DCO since 2007, working mostly with Brazilian swimming.
- On 28 May she did testing on rowers on behalf of ABCD. She had a list of 18 athletes. She did not have a male chaperone, having been asked to do the testing with just a short time to organize it, and asked Marcos Amorin to assist as chaperone. He also was the one who notified the athletes to be tested.
- She agreed that she did not advise athletes that they could have a representative accompany them to the testing.
- Each athlete was given a choice to select from 3 collection vessels to urinate into and then 3 kits to select for the sample bottles.
- The collection vessels have a sealed bag which the athlete takes the vessel out of to go to the bathroom.
- The athlete chooses 1 kit out of 3 sample kits and checks to see that it is well sealed. The athlete is asked to check the numbers on the box, and bottles stickers. The athlete takes the bottles out of the sealed plastic bag and opens the sealed bottles – they have a red ring seal. Afterwards they put a new seal on the bottles.
- She agreed that sometimes the athletes were unaccompanied whilst waiting to be tested on that day, as Marcos was looking for other athletes.
- The Athlete in question was tested between 10.28 and 10.40 a.m.

Submissions from the Athlete

Mr. Franklin submitted as follows:

1. The International Standards were not fully respected:
 - Article 7.4.4 of the Standards – The DCO did not provide the Athlete with the opportunity to document any concerns he/she may have had about how the Sample Collection Session was conducted
 - Article 5.4.1 (d) (i) – the DCO did not ensure that the Athlete was informed of her right to have a representative accompany her in accordance with Article 6.3.3 (a)
 - Article 8.1 and 8.3.1 – All samples collected at the Doping Control Station are securely stored prior to their dispatch from the Doping Control Station, each sample collected should be stored in a manner that protects its integrity, identity and security prior to transport from the Doping Control Station – here they were not, as they were left unattended in the room when the DCO was absent with a female athlete in the bathroom.
2. In considering the question of the credibility of the Athlete, and also the question of no significant fault of negligence, the Panel should take into account that the Athlete was the person who asked for these tests to be conducted, and on the balance of probabilities, it was therefore unlikely that she would be cheating.

The Panel's Decision on the Merits

1. An anti-doping rule violation has been established by the presence of a prohibited substance (furesomide) in the sample provided by the Athlete, in accordance with Article 2.1 of the FISA Anti-Doping Bye-Laws.
2. The Athlete cannot say how the substance came to be in her urine, or at least in the sample that was tested. She denies taking such a substance. Her explanation is that someone may have somehow tampered with the sample. She

refers to departures from the International Standard for Testing to show that there was opportunity for tampering – in particular that the collection vessels, sample kits, and presumably samples were left unattended in an unlocked room when the DCO was accompanying female athletes to the bathroom during that morning.

3. The Panel is of the opinion that the evidence of the Athlete, of Natalia Barboza and of the DCO herself establishes that there were significant departures from the International Standard for testing. In particular, the failure to notify the athlete of the right to be accompanied to the doping control station, and the apparent lack of security of the doping control station when the DCO was out of the room. (There were other possible departures which are not relevant to this Athlete's case, for example, the absence of a properly authorised chaperone for the male athletes).
4. Under Article 3.2.3 of the FISA Anti-Doping Bye-Laws, "*Departures from any International Standard which did not cause an Adverse Analytical Finding shall not invalidate such evidence or results. If the Rower..... establishes a departure from an..... International Standard..... which could reasonably have caused an anti-doping rule variation based on an Adverse Analytical Finding, then FISA shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.....*"
5. This requires the Panel to decide whether the departures which it has accepted to have occurred, could reasonably have caused the Athlete's sample to contain furesomide.
6. The Panel is satisfied that the requirements relating to the sealing of the samples etc have been met, and there is no allegation to the contrary. But the Panel also considers that the evidence establishes that there were times when the sample kits, and possibly the samples were unattended in the doping control and the possibility of tampering is theoretically open. However, the Panel is not satisfied that there is any direct evidence in this case of anyone having entered the room and does not consider that the Athlete has established that the departures from the International Standard could reasonably have caused the positive test, even if there is a theoretical possibility of interference with the samples.
7. The Panel relies on the reasoning to be found in the case CAS 2013/A/3112 *World Anti-Doping Agency v Lada Chernova & Russian Anti-Doping Agency*, paragraphs 85 and 86:
"the Panel emphasizes that the current wording of Article 3.2.1 of the WADC refers to the standard of reasonableness when establishing a correlation between the departure from the rules of the ISL and an adverse analytical finding..... This should be contrasted with the previous wording of the Article 3.2.1 contained in the WADC 2003, which preceded the adoption of the WADC in 2009 "The Athlete may rebut this presumption by establishing that a departure from the International Standard occurred" Therefore, the Panel deems that a mere reference to a departure from the ISL insufficient, in the absence of a credible link of such departure to a resulting Adverse Analytical Finding. In other words, in order for an athlete to meet his/her burden and thus effectively shift the burden to an anti-doping organization, the athlete must establish, on the balance of probabilities, (i) that there is a specific (not hypothetical) departure from the ISL; and (ii) that such departure could have reasonably, and thus credibly, caused a misreading of the analysis."

Whilst the case cited is referring to the International Standard for Laboratories, and to the suggestion of a departure causing a misreading of an analysis in that case, the same principle of the departure reasonably and thus credibly causing

the adverse analytical finding should be applied in the present case; that is the need for there to be a credible link between the departure and the positive test.

The Panel has also considered the case of CAS 2014/A/3487 *Veronica Campbell-Brown v JAAA and IAAF* where departures from the International Standard for Testing were relied upon to challenge an adverse analytical finding. In that case the athlete raised the possibility of the sample having been tampered with or having been subject to environmental contamination, due to the departures from the International Standard for Testing. In that case the panel there, in considering the equivalent regulation to Article 3.2.3 in this case concluded in paragraph 155 that the Article “requires a shift of the burden of proof whenever an athlete establishes that it could be reasonable to conclude that the International Standard Testing departure could have caused the adverse analytical finding. In other words, the athlete must establish facts from which a reviewing panel could rationally infer a possible causative link between the International Standard Testing departure and the presence of a prohibited substance in the athlete’s sample. For those purposes, the suggested causative link must be more than merely hypothetical, but need not be likely, as long as it is plausible.” and in paragraph 157 that “this interpretation – which does not set the bar for a shift in the burden of proof to an unduly high threshold – strikes an appropriate balance between the rights of the athletes to have their samples collected and tested in accordance with mandatory testing standards, and the legitimate interest in preventing athletes from escaping punishment for doping violations on the basis of inconsequential or minor technical infractions of the International Standard for Testing.”

The panel in that case went on to consider the question of possible tampering, and found that there was no evidence to establish tampering. The findings it made are equally apt in this case. The panel concluded at paragraph 168 “any attempt to spike the Athlete’s sample in the doping control room would have required exceptional skill, planning and opportunity, and would have been fraught with risk.” The panel concluded: “there is no evidence before it to suggest any individual (either identified or unidentified) was behaving suspiciously in the doping control area. Nor is there evidence that any individual (either identified or unidentified) may have had the skill, equipment, opportunity or indeed the motive to spike the Athlete’s sample during the short window of time between the collection of her first and second urine samples” in that case.

It is even more the case here that tampering is not plausible, because of the fact that the sample was never un-sealed and unattended at any relevant time.

8. In our view, given that the samples were appropriately sealed, on the evidence, when the Athlete left the room, and there is no suggestion they were not sealed or appeared to have been tampered with when they reached the laboratory for analysis, given that both the A sample and the B sample tested positive, and given that there is no evidence that anyone actually entered the doping control station when it was unattended, the Panel is comfortably satisfied that there is no credible link between the departures from the International Standard that have been established and the adverse analytical finding.

9. The Panel notes that the Athlete did initiate the testing, which is unusual, but this fact does not alter the fact that there was an adverse analytical finding in the sample that she provided.
10. In the circumstances, the Panel is comfortably satisfied that the anti-doping rule violation is established, and the period of ineligibility of two years, set out in Article 10.2.2 should apply. The Athlete's lawyer raised Article 10.5, relating to "no significant fault or negligence" and related this somehow to the fact that the Athlete initiated the testing by her husband contacting FISA. However, the Panel is of the view that this Article cannot apply where an athlete has not established any credible or innocent explanation of how the prohibited substance entered his or her body. The case is therefore quite different from that of *Cielo v FINA CAS 2011/A/2495*, which Mr. Franklin referred us to. In that case there was clear evidence of exactly how the furesomide entered the athlete's body, namely by means of a contaminated supplement, which the panel in that case found to be credible. Here there is no evidence of contamination of any supplement, and nor did the Athlete contend that a contaminated supplement could be the cause of the prohibited substance in her sample.
11. The evidence provided by the Athlete of her previous anti-doping rule violation brings Article 10.7 into play, as this is the second violation. Under that article the Panel finds that the period of ineligibility must be "*twice the period of ineligibility otherwise applicable for the second anti-doping rule violation treated as if it were a first violation.*"

FOR THESE REASONS

The FISA Doping Hearing Panel finds:

1. The period of ineligibility is four years, to commence from the date of the testing, 28 May 2015.
2. This award is rendered without costs.

Rio de Janeiro, 7 August 2015

For the FISA Doping Hearing Panel:

John Boulton

Mikio Hiura

Mike Williams