



Arbitration CAS 2003/A/448 International Association of Athletics Federations (IAAF) / Fédération Camerounaise d'Athlétisme (CMR), award of 2 October 2003

Panel : Mr Yves Fortier, President (Canada); Judge James Michael Murphy (USA); Mr Allen Perry Rosenberg (USA)

Athletics

Doping (nandrolone)

Hearing de novo

Consumption of wild boar meat

Exceptional circumstances

1. **By virtue of IAAF Rule 21.9, all appeals before the CAS constitute a re-hearing *de novo* of the issues raised by the case, and that in doping cases before the CAS the IAAF shall have the burden of proving, beyond reasonable doubt, that a doping offence has been committed. However, the only issue raised by the present case concerns the sanction applicable in the circumstances, the athlete having apparently decided not to appeal the decision of the national federation acknowledging the doping offence. In that context, there is simply no need for the IAAF to revisit in its appeal materials the factual and scientific evidence of a doping offence.**
2. **The unintended consumption of foodstuffs or supplements responsible for the presence of a prohibited substance in an athlete's body is hardly an unusual occurrence, let alone a "truly exceptional circumstance". It is, rather, one of the very "mischiefs" at which the anti-doping provisions of the IAAF Rules, as indeed the rules of other sports federations, are aimed. Even if the athlete were able to demonstrate that the meat she consumed could, and did, cause the elevated levels of norandrosterone detected in her samples, indeed even if the entirety of the athlete's evidence were taken as true, the wholly "unexceptional" nature of her explanation would preclude the Panel from making the recommendation to the IAAF Council that the period of ineligibility be reduced.**

On 30 April 2002, M. a native of Cameroon and a Cameroonian citizen which is a world class sprinter, provided an out-of-competition urine sample at her home in Virginia Beach, Virginia. The sample was subsequently analyzed by the IOC-accredited laboratory in Montréal, Canada (the "Montréal laboratory").

On 14 May 2002, the Montréal laboratory provided a Certificate of Analysis to the IAAF, in which it was reported that M.'s "A" sample had tested positive for norandrosterone in the amount of $7.7 \pm$

0.06 ng/ml (0.8%). Norandrosterone is a metabolite of nandrolone and/or its precursor, and as such is a prohibited substance under IAAF Rules notwithstanding that it is also produced in small amounts by the body endogenously.

On 17 May 2002, the IAAF notified the CMR of the result of the analysis of M.'s "A" sample and advised that in the absence of a satisfactory explanation for this result M. would be provisionally suspended pending a hearing of her case. By letter dated 26 May 2002, addressed to the IAAF, M. denied having knowingly ingested any prohibited substance; in a letter of the same date, her coach declared that the only possible explanation for the athlete's positive test was "vitamin contamination".

On 3 June 2002, the IAAF informed the CMR and M's coach that it considered M.'s explanation unacceptable and that in accordance with Article 2.54 of the IAAF Procedural Guidelines for Doping Control the analysis must be regarded as positive and the athlete immediately suspended (provisionally) pending a hearing. The IAAF further stated that M.'s "B" sample would be submitted for analysis by the Montréal laboratory.

By letter dated 10 June 2002, M.'s attorneys advised the IAAF that the athlete had only recently stopped using a particular birth control pill, and requested that this fact be taken into account in the analysis of her "B" sample.

On 13 June 2002, the Montréal laboratory reported that M.'s "B" sample had tested positive for norandrosterone in a concentration of 7.3 ± 0.07 ng/ml (0.9%).

It is important to note that the facts described above are, for all relevant purposes, not disputed by the parties. In particular, there is no dispute that the out-of-competition sample provided by M. on 30 April 2002 was the same sample analysed by the Montréal laboratory and that the "chain of custody" was intact. Similarly, there is no dispute that the analyses by the Montréal laboratory of M.'s "A" and "B" samples were properly conducted; and further, there is no dispute as to the results of those analyses, to wit: that M.'s "A" and "B" samples were found to contain norandrosterone, a metabolite of the prohibited substance nandrolone and/or its prohibited precursors, in concentrations well in excess of 5 ng/ml, the threshold beyond which the presence of norandrosterone is deemed by the IOC and international sport federations such as the IAAF to "[exceed] the range of values normally found in humans so as not to be consistent with normal endogenous production" (see IAAF Procedural Guidelines for Doping Control, Schedule 1).

Subsequent to the foregoing events, the CMR informed the IAAF, on 6 August 2002, that it was persuaded of "*l'innocence de l'athlète*" (translation: "the innocence of the athlete"), in part on the ground that her positive tests could be explained by her use of oral contraceptives. The CMR specifically requested that M.'s suspension be lifted. It appears that this was understood by M. to constitute an effective annulment of her suspension, as a result of which she entered and competed in a number of meets in August and September 2002, including the IAAF World Cup on 20 September 2002. She competed again on 8 May 2003.

The CMR's letter of 6 August 2002 was acknowledged by the IAAF in a letter dated 6 September 2002 though faxed to the CMR and M.'s attorneys only on 24 September 2002. In that letter, the IAAF rejected the arguments proffered on M.'s behalf, requested that the CMR "conclude the hearing for Ms Mani as soon as possible" and confirmed that "the athlete remains suspended from competition".

On 12 December 2002, the CMR forwarded to the IAAF further submissions received from M.'s attorneys, which, it said, "*semble nous convaincre*" (translation: "which we find convincing"). In brief, it was submitted that M.'s consumption of meat from an uncastrated male wild boar constituted, in the circumstances, a reasonable and plausible explanation for the elevated level of norandrosterone in her urine at the time of the testing in question. Nonetheless, the CMR stated that "*nous nous référons à votre compétence et à votre avis avant de nous prononcer sur notre position au sujet de cette affaire*" (translation: "we would like to know your views prior to making our own decision on the matter").

By letter dated 23 December 2002, the IAAF replied that it "does not accept the athlete's latest claims [concerning her ingestion of wild boar meat] any more than it did the first two [concerning contaminated vitamins and the effect of her oral contraceptive]". The IAAF required that the CMR "conclude its hearing of the athlete's case ... no later than 15 January 2003".

The CMR responded to the IAAF in a letter dated 15 January 2003 that evidences, and in effect constitutes, the decision from which the IAAF appeals in this arbitration (the "decision"). In its letter, the CMR explained, first, that M.'s participation in competition between 6 August and 20 September 2002 was the result of a misunderstanding: the IAAF's silence in the face of the CMR's 6 August letter requesting the athlete's reinstatement, combined with the international federation's failure to deny her participation in the meets in question, was interpreted by the CMR as a lifting of the suspension by the IAAF.

In what might be referred to as the dispositive section of the CMR's 15 January 2003 decision, the following is stated:

[Translation:] The Federation organised the latest hearing on 3 January 2003. The only conclusion is that there was a positive test result. The explanation remains completely unknown.

Acknowledging the results of the tests undergone on 17 June and 21 September 2002, both of which were negative, given that the athlete has never tested positive in competition, out of competition and has never even had a warning.

Bearing in mind the level of the test and the facts that indicate that the athlete has never deliberately consumed an illegal substance,

Given the length of the suspension already served by the athlete (this being approximately 10 months in February 2003, not including the period in which she took part in competitions),

The Cameroon Athletics Federation requests your understanding and proposes the athlete [M.] be issued a warning. She is, however, prepared to go before the Court of Arbitration for Sport in Lausanne, if necessary.

The arbitration was commenced by the filing of the IAAF's Statement of Appeal on 17 March 2003. In its Statement of Appeal, the IAAF declared that its Appeal was lodged pursuant to IAAF Rule 21.2 " ...in respect of the Decision of the CMR not to declare M. ineligible for competition for 2 years in accordance with IAAF Rules".

The hearing took place at the decentralised office of CAS in New York on 25 July 2003.

A procedural issue was heard and determined by the Panel as a preliminary matter at the outset of the hearing. This issue consisted of a claim by M. that the evidence concerning the alleged commission by her of a doping offence submitted by the IAAF *after* the filing of its Appeal Brief, was inadmissible. In the athlete's submission, by virtue of IAAF Rule 21.9 and Article R56 of the CAS Code, the IAAF's election to restrict its grounds for appeal to the issue of the CMR's decision concerning the *sanction* to be imposed on M., without addressing the *merits* of the decision, namely, the question whether or not M. committed a doping offence, is fatal to the IAAF's appeal: evidence filed subsequent to the Appeal Brief is inadmissible, with the result that the IAAF is unable to prove that M. committed a doping offence.

In response, the IAAF argued that it originally prepared its Appeal Brief on the basis that the CMR had correctly found M. guilty of a doping offence but had applied the incorrect sanction; as such, *the sole issue to be decided in the arbitration* was the correct sanction to be imposed on the athlete. It is the IAAF's position that M. herself effectively "reopened the merits of the case" in her Answer, by claiming that because her positive test results were caused by the consumption of wild boar meat she is not guilty of a doping offence. In the circumstances, the IAAF contended, neither the IAAF Rules nor the CAS Code bar the subsequent submission of evidence related to the commission of a doping offence. In any event, it asserts, the issue was effectively decided by the President of the Panel when he granted the IAAF leave to file a Reply to M.'s Answer.

As mentioned, the parties' arguments were heard and decided by the Panel at the outset of the hearing. The Panel dismissed the athlete's objection to the production of evidence by the IAAF concerning the commission of a doping offence. Its decision in this regard is explained below.

The parties' submissions on the merits of the case can be summarised briefly.

The IAAF contends that, on the basis of the (uncontested) facts described at paragraphs [4 to 10] above, and in view of the un-contradicted expert evidence of Professor Ayotte concerning the normal range of values for endogenous production of norandrosterone in humans and the degree to which the concentration of norandrosterone found in M.'s "A" and "B" samples exceeded those values, the Appellant has fully met its burden of proof. Each of the elements required to prove a doping offence is present, with the result that M. is manifestly guilty of having committed such an offence. As to the athlete's explanation that the level of norandrosterone detected in her samples resulted from her consumption of wild boar meat, this, says the IAAF, has no bearing on the question of M.'s guilt or innocence. Rather, such a "defence" can go only to whether the Panel should recommend to the IAAF Council that it reinstate M. early on the basis of so-called

"exceptional circumstances", which is not warranted in the present case given the implausibility of her explanation. The IAAF submits that M. should be suspended from competition for the full two-year period required by the IAAF Rules, commencing as of 8 May 2003, the date on which she last competed.

M.'s position is best summed up by the athlete herself in the following passages from her 14 July 2003 Response:

[IAAF Rule 55.2] clearly makes an athlete liable for any prohibited substance in his or her body. There is no exception for the presence of banned substances. However, Rule 60.9 of the IAAF Constitution permits the athlete to apply to the IAAF Council for reinstatement before the IAAF's period of ineligibility has expired. The approach under the "exceptional circumstance" rule would have the Panel make a recommendation to the IAAF Council that M.'s inadvertent consumption of un-castrated wild boar probably caused a spiked increase in her nandrolone –19 level are not unusual when one is admittedly not using any illegal substances; has never used any illegal substances; and has never been challenged for the use of any illegal substances. There is no suspicion on the part of M. for attempting to explain this aberration.

In conclusion, M. submits that:

- (i) (...)
- (ii) M. has exhibited exceptional circumstances [within the meaning of IAAF Rule 60.9] that explain her ingestion and increased nandrolone –19 levels. For this reason, she should not be suspended from competition.
- (iii) The Panel should recommend that M. be reinstated early as it is shown that the spiked result of the urinalysis was most likely the result of un-castrated wild boar meat.

(emphasis in original)

LAW

1. From the foregoing, two issues arise for determination by the Panel: M.'s preliminary objection to the IAAF's production of evidence after the submission of its grounds for appeal; and the merits of the dispute, namely, whether the athlete is guilty of a doping offence and, if so, the sanction applicable in the circumstances.
2. As indicated above, the athlete's preliminary objection concerning the IAAF's right to file evidence concerning the alleged commission by her of a doping offence was dismissed by the

Panel at the hearing, after deliberation. As explained by the President at that time, the members of the Panel are unanimously of the view that, as submitted by the IAAF, *the issues in the present appeal proceeding* (and hence the nature of the evidence required to be filed by the parties) "*evolved*" *substantially over time*. Initially, it appeared as though the athlete would appeal the CMR's 15 January 2003 finding of a doping offence. Subsequent correspondence then suggested that that finding was not disputed by the athlete. Certainly, the IAAF had neither the desire nor the interest to disturb that aspect of the CMR's decision, with which it agreed; it took issue, however, with the CMR's decision as to the appropriate sanction, as reflected in its Statement of Appeal and Appeal Brief.

3. It is true, as the athlete emphasizes, that by virtue of IAAF Rule 21.9, all appeals before the CAS constitute "a re-hearing *de novo* of the issues raised by the case", and that in doping cases before the CAS "the IAAF shall have the burden of proving, beyond reasonable doubt, that a doping offence has been committed". However, it is clear that at the time the IAAF filed its grounds for appeal, the only "issue raised by the case" concerned the sanction applicable in the circumstances, M. having apparently decided not to appeal the CMR's decision. In that context, there was simply no need for the IAAF to revisit in its appeal materials the factual and scientific evidence of a doping offence. In the Panel's view, neither IAAF Rule 21.9 nor Article R57 of the CAS Code, whether read separately or together, required otherwise.
4. That said, once the athlete herself, in her defence to the IAAF's grounds for appeal, elected to challenge the CMR's finding that she was guilty of a doping offence, it would have been manifestly unreasonable to preclude the IAAF from responding, including by adducing evidence of the commission of a doping offence. This was, in fact, the basis of the President's decision granting the IAAF the right to respond to the issues raised by M.
5. It is abundantly clear from the facts that had the IAAF understood that the CMR's finding of a doping offence would be challenged by the athlete, as initially appeared to be the case, its grounds for appeal would have included the very same submissions and evidence subsequently filed with its Response, none of which could have come as any surprise to the athlete. Having herself raised the issue whether or not she is guilty of a doping offence, M.'s rights are in no way prejudiced by the Panel's decision to admit the IAAF's evidence and to consider the positions of *both* parties on the issue.
6. Notwithstanding that both parties did, eventually, file submissions and evidence concerning the question whether M. is or is not guilty of a doping offence, at the end of the day that question was not actually disputed by the athlete. In fact, M. has raised *no substantive defence* to the IAAF's allegations or to the CMR's decision. On the contrary, the entire thrust of her submissions and evidence in this arbitration, both written and oral, is that the presence of a prohibited substance in her "A" and "B" samples is the unintentional result of her consumption of wild boar meat; and the relief sought by her consists solely of a request that the Panel recommend to the IAAF Council that it reduce her period of ineligibility to something less than the two-year minimum provided in the IAAF Rules. This is evident in her Response (excerpted above):

[IAAF Rule 55.2] clearly makes an athlete liable for any prohibited substance in his or her body. **There is no exception for the presence of banned substances** (...)

There is no doubt that M. ate the non-castrated boar meat on 29 April 2002 (...)

M. was not negligent in the consumption of wild boar. Obviously, she was not aware of the potential risks of ingesting wild boar (...)

M. has exhibited exceptional circumstances that **explain her ingestion and increased nandrolone –19 levels. For this reason**, she should not be suspended from competition.

The Panel should recommend that M. be reinstated early as it is shown that **the spiked result of the urinalysis was most likely the result of un-castrated wild boar meat.**

(emphasis added)

7. Indeed, in his closing argument at the hearing, M.'s able counsel reiterated that the relevant IAAF Rules are "plain in black and white"; where a prohibited substance is detected in an athlete's samples her only defence is to show that this is the result of a pathological or physiological condition, "otherwise you're guilty". In the circumstances, the Panel considers that counsel's description of the applicable rules is clear, complete and conclusive.
8. This case is not concerned with the proper interpretation of the relevant doping rules or the appropriateness of the doping control procedures applied. It is not concerned with the chain of custody of the athlete's samples or the reliability of the analyses conducted by the IOC-accredited laboratory or the correctness of the findings of a prohibited substance reported by that laboratory or whether the presence of that substance is due to a pathological or physiological condition. As regards these matters there exists no difference of opinion between the parties and no doubt whatsoever insofar as the Panel is concerned. M.'s "A" and "B" samples contained a prohibited substance in unacceptably high concentrations; no pathological or physiological cause has been suggested; the IAAF Rules regard this as a doping offence; M. is thus guilty of a doping offence. Lest there be any doubt, the Panel finds that all of the elements of a doping offence are present and that the IAAF has carried its burden of demonstrating that the athlete committed a doping offence within the meaning of the IAAF Rules and the CAS Code.
9. What this case does concern – the sole issue that arises – is the appropriate sanction in the circumstances; specifically, whether the Panel should recommend to the IAAF Council that the athlete's period of ineligibility be reduced, as requested by her, or whether it should refrain from making such a recommendation, as the IAAF argues. Here too the parties are in substantial agreement. Both parties accept that the IAAF Rules mandate a minimum two-year suspension, which suspension shall commence to run from the later of the date of the hearing

at which it is decided that a doping offence has been committed (IAAF Rule 60.2) or, where the athlete has competed while under suspension, the date on which she last competed (IAAF Rule 53.3). They both also accept that it is open to the Panel to recommend that the IAAF Council reduce this suspension, in accordance with IAAF Rule 60.9.

10. The parties further agree that whether or not the Panel should make such a recommendation turns largely on the evidence of the athlete's conduct and state of mind. M. submits that the evidence warrants a recommendation that the IAAF Council reduce her period of ineligibility; at the hearing her counsel suggested that any suspension longer than 90 days (in addition to any period already served) would be unduly "punitive". The IAAF, for its part, views matters differently. It argues that the factual evidence presented by M. concerning her alleged consumption of wild boar is unclear; even if she did consume wild boar when and as she claims to have done, the type and quantity of meat consumed by her remains uncertain; the uncontroverted expert evidence of Professor Ayotte indicates strongly, if not conclusively, that such consumption could not in any event have caused the athlete's positive test results; and the athlete has, moreover, repeatedly competed while suspended.
11. It is unnecessary for the Panel to consider the parties' contentions at length, or to sift through the detailed factual and scientific evidence before it. Suffice it to say that the Panel finds that the athlete's evidence concerning her consumption of wild boar meat is credible – as far as it goes. Specifically, the Panel accepts that M. ate a traditional Beti tribal dish composed of wild boar meat the day before she was subject to doping control. The Panel also accepts that she was at the time unaware of the possibility that consuming wild boar meat could cause elevated levels of norandrosterone in her system. The Panel further accepts that, in her own words at the hearing, M. ate "a lot" of wild boar meat, but that she cannot say precisely how much of the dish she consumed or specify the relative amounts of the various organs (kidneys, liver, heart, etc.) which it contained and which are the principal ingredients of the Beti delicacy in question. Finally, the Panel accepts that the athlete has never before or after the present incident tested positive for prohibited substances and the evidence does not suggest that the athlete possessed what might be called a "guilty mind" on the day when she was subject to doping control. However, and be this as it may, the question still remains whether the circumstances alleged by her are so exceptional as to persuade the Panel that a recommendation to the IAAF Council is called for. On balance, and with the greatest respect for the IAAF Council should it determine otherwise in the event that the athlete applies for a reduction of her suspension, the Panel is not so persuaded.
12. IAAF Rule 60.9 on its face is concerned with "only truly exceptional circumstances". The unintended consumption of foodstuffs or supplements responsible for the presence of a prohibited substance in an athlete's body is hardly an unusual occurrence, let alone a "truly exceptional circumstance". It is, rather, one of the very "mischiefs" at which the anti-doping provisions of the IAAF Rules, as indeed the rules of other sports federations, are aimed.
13. Thus far we have considered only the factual evidence. To this must be added the consideration that, in the opinion of the Panel, the athlete has not adduced evidence sufficient

either to establish a scientific basis for her theory regarding the cause of her elevated norandrosterone levels or to undermine the expert evidence of Professor Ayotte concerning the implausibility of that theory. However, even if this were not so – that is, even if M. were able to demonstrate that the meat she consumed could, and did, cause the elevated levels of norandrosterone detected in her samples, indeed *even if the entirety of the athlete's evidence were taken as true* – the wholly "unexceptional" nature of her explanation would preclude the Panel from making the recommendation requested by her.

14. In sum, the Panel unanimously finds that all of the elements of a doping offence are proven and that the IAAF has carried its burden of demonstrating that the athlete committed a doping offence within the meaning of the CAS Code and the IAAF Rules, which impose a two-year minimum suspension. Given that the athlete competed several times while she knew that she was suspended and that the last date on which she competed was 8 May 2003, her period of ineligibility should run as of that date. M.'s explanation regarding the cause of her elevated norandrosterone levels does not, in the opinion of the Panel, reveal circumstances of a truly exceptional nature such as to persuade it to recommend to the IAAF Council that that period of ineligibility be reduced in accordance with IAAF Rules; and her request that the Panel recommend that the IAAF Council reduce such period of ineligibility is therefore denied, without prejudice to the athlete's right to apply directly to the IAAF Council for such a reduction.

The Court of Arbitration for Sport hereby rules:

1. The jurisdiction of CAS is affirmed.
2. The appeal filed by the IAAF on 17 March 2003 is upheld.
3. The decision issued by the Cameroon Athletics Federation on 15 January 2003 is annulled.
4. M. shall be declared ineligible for competition for two years commencing on 8 May 2003.
5. (...)