



Arbitration CAS 2004/A/628 International Association of Athletics Federations (IAAF) v. USA Track & Field (USATF) & Y., award of 28 June 2004

Panel: Mr Peter Leaver QC (United Kingdom), President; Mr Loh Lin Kok (Singapore); Prof. Martin Hunter (United Kingdom)

Athletics

Doping (nandrolone)

Jurisdiction of the IAAF Arbitration Panel to review a decision made by a national body

Sanction

- 1. Pursuant to its own confidentiality rules then in effect, USATF did not notify the IAAF of the positive doping test so as to enable the IAAF to bring the matter before its Arbitration Panel. In those special circumstances, it is fair and reasonable for the CAS to accept the jurisdiction of the IAAF Arbitration Panel to review a decision made by a national body outside the time limit defined by the International Federation Rule (IAAF Rule 21.1 applicable in 2000-2001), given the fact that the IAAF was effectively disabled from reviewing the Appellant's case until it had seen a copy of the decision challenged and also considering that the IAAF acted prudently in seeking disclosure of that decision before referring the Appellant's case to arbitration.**
- 2. It would be appropriate to apply the 1999-2000 Rules to the question of the sanction to be applied to the athlete. The consequence of this finding is that the athlete should not have been eligible to compete in any competition during that period, including the Olympic Summer Games in Sydney in 2000 and that the other members of the United States relay team would inevitably lose their Gold Medals. However, it is a matter for the IOC and/or the IAAF to consider, and not for the CAS.**

On 26 June 1999 Y. was competing at the USATF Outdoor National Championships in Eugene, Oregon, where he was required to provide a urine sample ("the Eugene sample") as part of the USATF's doping control programme. Six days later, on 2 July 1999, Y. was again required to provide a urine sample ("the Lausanne sample") whilst competing in Lausanne, Switzerland. Prior to giving the Eugene sample, on 12 June 1999 Y. had given a sample while competing at Raleigh, North Carolina ("the Raleigh sample").

Analysis of the Eugene sample at the IOC accredited laboratory in Indianapolis, showed that it was positive for Nandrolone Metabolites. The Raleigh and Lausanne samples tested negative. Testing of the B sample confirmed the positive results of the Eugene A sample. As was his right, Y. requested a hearing.

On 11 March 2000 the USATF Doping Hearing Panel found that a doping violation had been committed. Y. was suspended from competition on 3 April 2000, but appealed the decision and was exonerated by the USATF Doping Appeals Board (“DAB”) on 10 July 2000. The DAB found that the fact of the negative test results produced in Lausanne six days after the Eugene sample was taken raised a reasonable doubt as to whether a violation had been committed (the “DAB Decision”). The DAB relied upon expert evidence from Y.’s expert, preferring that evidence to that of the USATF’s expert, Professor Larry Bowers.

In August 2000 the Olympic Summer Games took place in Sydney. Shortly beforehand, the Indianapolis laboratory provided the IAAF with records which indicated that there were 17 cases, identified only by numbers, of which the IAAF had not been notified, in which samples taken from anonymous US athletes had tested positive. This fact appeared in the press during the Games.

The IAAF was concerned that none of the 17 athletes, whose cases had not been considered for review by the IAAF, should compete in the Games. The IAAF sought the assurance of the USATF to this effect. Y. was in fact among the 17 athletes. He competed in the Olympic Games in Sydney, and won a Gold Medal.

In September 2000, and thereafter, the IAAF requested, in writing on several occasions, from the USATF the identity of the athletes, a copy of the doping control form and copies of documents relating to the disciplinary conclusion in each of the 17 cases, including that of Y. The USATF refused to disclose any such information or documents, and contended that it was prevented from doing so by its own confidentiality regulations:

“Confidentiality and publication of drug test results: The names of athletes who have tested negative or who have provided valid excuses for failure to appear for testing shall be made available to the public. The names of athletes testing positive shall not be made publicly available until an athlete has been deemed ineligible by a DHB (Doping Hearing Board), or when the findings of the DHB have been reaffirmed by the DAB (DAB), when appropriate. Any other information will be made available only with prior consent of the athlete ...”

On 29 September 2000 the USATF appointed an Independent International Review Commission on Doping Control chaired by Professor Richard McLaren (the “McLaren Commission”).

The McLaren published its findings on 11 July 2001 (the “McLaren Report”). The McLaren Report reviewed the extent to which the USATF had complied with the IAAF Rules which required national bodies to disclose to it all positive results.

The McLaren Report found that: first, the IAAF had not reported all positive results, in particular those in which the athlete had ultimately been exonerated; secondly, the USATF had interpreted its own confidentiality regulations so restrictively as to prevent the IAAF from enforcing its doping controls; thirdly, there was no US law impediment to the disclosure of information relating to positive results; fourthly, the IAAF was the ultimate arbiter of its own rules and the USATF was on notice that it regarded the USATF refusal to disclose to be contrary to the IAAF regime; fifthly, the duty to disclose was inherent in the Rules; sixthly, the USATF had failed to impose immediate

provisional suspensions following positive results. The fourth of those findings is particularly relevant in the light of later events, and, in particular, the First CAS Decision.

In August 2001 a meeting between representatives of the USATF and IAAF took place in Edmonton, Alberta, followed by correspondence between those organizations during the autumn, with a view to the IAAF obtaining disclosure of material in relation to the 17 cases.

No disclosure was forthcoming from the USATFT. The Presidents of the International Olympic Committee (IOC) and WADA made public statements condemning the USATF's refusal to disclose the required information.

On 10 July 2002 the IAAF and USATF signed an Arbitration Agreement, to submit to arbitration at the Court of Arbitration for Sport (CAS) the following questions:

- (1) *Properly construed, at all material times did IAAF Rules provide that USATF was obliged:*
 - (a) *to furnish the results of positive tests to the IAAF;*
 - (b) *to provide the IAAF with copies of decisions of USATF Hearing Panels exonerating athletes of Doping Offences, and*
 - (c) *to provide the IAAF with the material it needs to decide whether or not to seek to have a Hearing Panel's decision reviewed by its own Arbitration Panel or CAS?*
- (2) *If IAAF Rules did so provide, is there any valid reason why USATF should not be required to comply with these Rules?*

The first CAS hearing took place in November 2002 and the Arbitral Award was published on 10 January 2003 (the "First CAS Decision"), in which both questions were answered in the affirmative. The First CAS Decision held that although the IAAF Rules did oblige the USATF to disclose the relevant information, there was a valid reason why the USATF should not be *required* to disclose such information.

In summary, the reasoning was that the IAAF had been asked by the USATF to substantiate its requests for information by reference to the relevant IAAF Rule(s) and to reply to USATF's interpretation of the rules, and that the IAAF had failed or refused to do so. By such failure or refusal the IAAF had led the USATF to understand that whilst it would like disclosure, the Rules did not explicitly require it and it could not be compelled. In the circumstances, this failure or refusal created an estoppel. The circumstances included the "dramatic and undoubtedly painful consequences" for the athletes in question if disclosure were made obligatory so long after the events in issue and so long after they were led to believe that their cases were closed.

No specific reference was made by the First CAS Panel to the fourth finding by the McLaren Commission that the IAAF was the ultimate arbiter of its own rules and the USATF was on notice that it regarded the USATF refusal to disclose to be contrary to the IAAF regime.

It appears to this Panel that in this regard, at least, there is an inconsistency between the reasoning in the First CAS Decision and that of the McLaren Commission.

On 27 August 2003 the Los Angeles Times revealed that Y. was the athlete who had competed in Sydney following a positive test. Shortly afterwards, on 29 August 2003, Y. himself confirmed in the media that he had tested positive in June 1999 but that he had subsequently been exonerated of a doping violation. This was the first time that Y. had been identified.

On 28 August 2003, the IOC wrote to the IAAF, USOC and WADA requesting information on Y.'s case. On 29 August 2003 WADA wrote to the IAAF demanding that it take action in the light of the new information. In its response to the IOC, dated 11 September 2003, the IAAF stated that it was bound by the First CAS Decision. The IAAF made a similar response to WADA.

On 19 September 2003, the Joint Commission wrote to the IAAF expressing the view that disclosure of the athlete's name removed the reason why disclosure could not be required, and asking the IAAF to exercise its authority over the USATF and demand full and unrestricted cooperation.

On 30 September 2003 the IOC Executive Board decided to establish a Disciplinary Commission into the entry and participation of Y. in the Sydney Olympic Summer Games.

However, largely because the version of the DAB Decision that it had received from the Disciplinary Commission was redacted, so that Y.'s name did not appear, the IAAF still did not believe that it had sufficient material on which to proceed to review Y.'s case. The IAAF's decision not to institute proceedings against Y. in October 2003 is criticised in the present case by both the USATF and Y.

After international efforts to obtain the unredacted DAB Decision, on 1 February 2004 USATF replied to USOC, confirming Y.'s identity, and enclosing the unredacted DAB Decision.

The USATF's letter of 1 February 2004 and its enclosure were forwarded to the IAAF through the IOC. Thereafter, the IAAF produced a Notice of Referral to Arbitration on 18 February 2004.

The Panel has received voluminous pleadings from the parties. In this Section of the Award it will do no more than attempt to summarise the parties' respective submissions on the two issues that it has to decide.

Issue (1)

"Pursuant to IAAF Rule 21.1 in IAAF Handbook 2000-2001, would it be fair and reasonable for a Panel in the position of the IAAF Arbitration Panel to accept jurisdiction in this case outside the six month deadline?"

IAAF submits that it would be fair and reasonable for a Panel in the position of the IAAF Arbitration Panel to accept jurisdiction outside the six month deadline. It points out that both the McLaren Commission and the First CAS Panel decided that USATF was obliged to pass on positive results to it so as to enable it to decide whether to take proceedings against an athlete who had been found to have a prohibited substance in his or her body.

It had been prevented from making that decision in Y.'s case by the USATF's failure to satisfy that obligation.

For the most part, USATF is content to adopt the submissions made on behalf of Y. It does so because it contends that it has a "limited role in the present arbitration".

Y.'s submissions are, first, that it would not be fair and reasonable to consider his case as more than six months have elapsed since the disputed decision; and, secondly, that, in the circumstances, he would suffer unfair prejudice and irreparable harm if the IAAF were permitted to "re-open" his case. He submits that it was the IAAF that substantially caused the delay, and that it should not be able to avoid that responsibility.

In addition, Y. submits that the IAAF is bound by the First CAS Decision, and that "fairness, legitimate expectations and estoppel" should preclude the re-opening of the case.

Issue (2)

"Did the USATF Doping Appeals Board misdirect itself or otherwise reach an erroneous conclusion on 10 July 2000 when it exonerated Y. of a Doping Offence?"

IAAF submits that it is clear that the DAB misdirected itself, and reached an erroneous conclusion, when it exonerated Y.

USATF rejects any suggestion that it failed to follow proper procedures, or that it misdirected itself.

Although he does not seek to present a defence on the merits of the Doping Appeals Board Decision, Y. submits that that Decision should not be reconsidered on its merits.

If, contrary to his primary submission, the Panel does reconsider the DAB's Decision, and find that Y. committed a doping violation, no penalty should be imposed beyond the period of suspension already served from April to July 2000. Y. has not committed any doping offence since July 2000, and should be treated leniently.

LAW

The Arbitration Agreement and Jurisdiction

1. The Arbitration Agreement is dated 13 May 2004, and is in the following terms:

“(…)

NOW IT IS AGREED as follows:

1. Agreement to Arbitrate

- 1.1 *The IAAF, USATF and Y. agree to submit to arbitration the following issues:*

- (i) *Pursuant to IAAF Rule 21.1 in IAAF Handbook 2000-2001, would it be fair and reasonable for a Panel in the position of the IAAF Arbitration Panel to accept jurisdiction in this case outside the six month deadline?; and*
- (ii) *Did the USATF Doping Appeals Board misdirect itself or otherwise reach an erroneous conclusion on 10 July 2000 when it exonerated Y. of a Doping Offence?”*

2. Constitution of the Arbitration Panel

- 2.1 *The arbitration will take place before the Appeals Division of the Court of Arbitration for Sport.*

(…)

6. Applicable Rules and Applicable Law

- 6.1 *The Applicable Rules to be applied by the Arbitration Panel are those published in IAAF Handbook 2000-2001.*
- 6.2 *This Agreement shall be governed by and construed in accordance with Swiss law.*
- 6.3 *The arbitration shall be subject to the procedural law of the Swiss courts. If the Panel find it necessary to select a substantive law governing the proceedings, it shall do so in accordance with Article 187 of the Swiss Federal Code on Private International Law”.*

2. It was common ground between the parties that, pursuant to the Arbitration Agreement, the CAS has jurisdiction to determine the two issues referred to it.

Issue (1)

3. The Panel is asked to decide whether it would be fair and reasonable for a Panel in the position of the IAAF Arbitration Panel to accept jurisdiction in this case outside the six month deadline. That decision involves, as all parties accepted, an exercise by the Panel of its discretion. In their written and oral submissions on this issue, considerable reference was

made by the Respondents to the First CAS Decision. It is, therefore, necessary, as a preliminary matter, for the Panel to determine precisely what the First CAS Panel decided.

4. The First CAS Panel determined that the IAAF Rules obliged the USATF to notify the IAAF of any results of laboratory tests on urine samples in which prohibited substances were found (“positive tests”). It also determined that the IAAF Rules obliged the USATF to provide copies of any decisions exonerating athletes of doping offences, together with any material necessary for the IAAF to decide whether to seek a review of decisions that exonerated the athletes concerned. Thus, the First CAS Panel upheld the IAAF’s interpretation of its own Rules. In the circumstances, it found that the USATF had acted in flagrant breach of its obligations over a significant period of time. However, the First CAS Panel also determined that, when the USATF requested an explanation as to where its obligations were to be found, the IAAF had failed to identify the relevant rules, or to explain their interpretation to the USATF. In the First CAS Panel’s opinion, those failures by the IAAF constituted a valid reason why the USATF should not be required to comply with its obligations under the IAAF Rules in relation to the 13 anonymous athletes whose cases were primarily the subject of the arbitration¹.
5. The First CAS Panel was not asked to consider, and did not in fact consider, whether the IAAF would be entitled to review the cases of the 13 anonymous athletes in the event that their identities and decisions exonerating them were made available to the IAAF by means other than compulsory disclosure by the USATF. Such a question would have been entirely academic at the time, and was not one of the questions that that Panel was asked to answer. In the case of athlete USOC13, now known to have been Y., two and a half years had passed since the DAB Decision, during which period his anonymity had been maintained, and there was no reason to suppose that, absent USATF being required to disclose the information, the position would change.
6. The First CAS Panel’s underlying assumption that its decision would, in all probability, render it impossible for the IAAF to review the 13 cases is reflected in the First CAS Decision. That assumption does not fetter this Panel’s ability to consider Y.’s case as it stands today. The circumstances which have arisen since 27 August 2003, or any such circumstances, were obviously not known to or anticipated by the First CAS Panel. It was not, and could not have been, the First CAS Panel’s Decision that the case of Y. and the other 12 athletes should remain closed in all circumstances.
7. IAAF Rule 21.1 in IAAF Handbook 2000-2001, to which the Panel is referred in the first question, is unambiguous in stating that the time limit for review by the IAAF of decisions by national bodies is six months from the date on which the decision was made. The DAB Decision was published on 10 July 2000. The six month time limit therefore expired on 9 January 2001. Three years elapsed between the expiry of that time limit and the IAAF’s referral of Y.’s case to arbitration. IAAF Rule 21.1 provides that the IAAF Panel has a discretion to review cases outside the time limit if it is “fair and reasonable” to do so. The

¹ The original 17 cases had, for various reasons which it is unnecessary to state in this Award, by this time become 13.

“fair and reasonable” test is therefore that to be applied by this Panel, standing as it does in the shoes of an IAAF Arbitration Panel in this arbitration.

8. The Panel takes into account a number of factors in deciding whether it would be fair and reasonable to exercise its discretion to extend the time limit. One of the relevant factors is the issue of why the IAAF is referring Y.’s case to arbitration three years out of time. In considering the cause of the delay, the Panel analyses the total period of delay in three phases: first, from the date of the DAB Decision on 10 July 2000 to the date of the First CAS Decision on 10 January 2003 (the “First Period”); secondly, from 11 January 2003 to 27 August 2003, that is, up to the date of the disclosure of Y.’s name in the Los Angeles Times (the “Second Period”); thirdly, from 28 August 2003 until 2 February 2004, when USATF finally confirmed to the IAAF Y.’s identity and disclosed an unredacted copy of the DAB Decision (the “Third Period”).
9. During the First Period, as soon as the IAAF became aware of the positive results and exonerations in the 17 cases then at issue, it took action to obtain the information it required to decide whether to review the exonerating decisions. The IAAF pursued this line of enquiry vigorously over an extended period, in spite of adamant refusals by the USATF to co-operate. It was found in both the McLaren Report and the First CAS Decision that the USATF was in breach of the IAAF Rules in its refusal. The USATF and Y. submit that it follows from the First CAS Panel’s finding that, during this period, and prior to it, the IAAF’s failure to identify the Rule upon which it relied (which eventually, as the First CAS Panel held, estopped it from relying upon the Rules to require disclosure from the USATF of the identity of the athletes involved) means that the IAAF was to blame for the delay in the First Period. The Panel does not accept this view. The answer given by the First CAS Panel to the second question it had to decide does not lead to this inevitable conclusion.
10. The USATF had an entrenched view on the interpretation of the IAAF Rules, and defended that view throughout the First Period. It advanced that view to the First CAS Panel. There is nothing in the evidence to suggest that, if the IAAF had identified the relevant Rule, the USATF would have conceded that its construction was wrong, and immediately given disclosure. What prevented the IAAF from reviewing Y.’s case during the First Period was the USATF’s refusal to comply with their disclosure obligations, which refusal was found to have been in breach of the Rules.
11. Therefore, the Panel concludes that, whilst it may be true that the IAAF failed to take adequate steps to dissuade the USATF from its erroneous interpretation, it cannot be said that the blame for the delay lies wholly with the IAAF. In fact, the Panel considers that the USATF was at least equally to blame for the delay in the First Period.
12. During the Second Period, the IAAF abided loyally by the First CAS Decision, and did not take any steps to *require* the USATF to disclose material relating to Y.’s case. Likewise, the USATF did not take any steps to disclose such material, since it had been released from complying with the IAAF Rules by the First CAS Decision. In the Panel’s opinion, no blame for the inaction during the Second Period can be ascribed to any party.

13. The Third Period commenced with the disclosure of the identity of athlete USOC 13 in the Los Angeles Times on 27 August 2003, and the reported confirmation in the media by Y. on 29 August 2003 that he had tested positive, but had been exonerated. The Third Period is interrupted by the disclosure of a redacted copy of the DAB Decision to the IAAF on 8 October 2003.
14. The Panel finds that the IAAF was effectively disabled from reviewing Y.'s case until it had seen an unredacted copy of the DAB Decision. Whether the redacted version should have been sufficient for the IAAF to proceed was a matter on which the Panel heard submissions. The Panel notes that, even if the IAAF ought to have been able to proceed on the basis of the redacted version, the maximum delay, after receipt of the redacted copy, for which the IAAF might be culpable is limited to 4 months, that is, between 8 October 2003 and the date of the Notice of Application by the IAAF. Even assuming that this period was a period in which the IAAF could have acted faster than it did, the Panel considers that such a period of delay does not mean that it would not be "fair and reasonable" for the IAAF to be permitted to bring these proceedings out of time.
15. However, the Panel is not prepared to make even that assumption. The Panel accepts that the IAAF was effectively unable to consider whether to review Y.'s case until it had all of the materials with which to do so. These materials necessarily included, as a basic minimum, an unredacted copy of the exonerating decision identifying Y. The Panel finds that the IAAF acted prudently in seeking disclosure of that decision before referring Y.'s case to arbitration. Therefore, the IAAF acted as soon as it reasonably could, and no blame should attach to it for any delay during the Third Period.
16. Y. has argued before this Panel that, because of the means by which the IAAF obtained disclosure of his identity and the DAB Decision, the IAAF should be precluded from relying upon that material. The argument was based on the legal principle that a party should not be allowed to benefit from evidence obtained by unlawful means, or to benefit from the fruits of a "poisoned tree". Y. argues that his confidentiality rights were violated by the wrongful publication of his name in the Los Angeles Times, and that the IAAF took a leading role in a concerted campaign which brought wrongful pressure to bear in order to obtain the disclosure forbidden by the First CAS Decision.
17. The Panel finds that this argument fails in law and in fact. As to the law, no authority was cited to the Panel, whether in United States Federal or State Law or Swiss Law or English or Commonwealth Law or of "general law", that, absent some criminal activity, which is not alleged in this case, the alleged legal principle exists. The Panel is not aware of, and heard no submissions to the effect that there is, a general principle of law that requires evidence to be excluded simply on the basis that it was obtained in violation of a person's civil rights.
18. As to the facts, the correspondence between the IAAF, USATF, IOC, USOC and WADA during the autumn 2003 does not demonstrate any wrongful pressure on the part of IAAF. On the contrary, the IAAF took a restrained and careful position for much of the Third

Period, mindful of the implications of the First CAS Decision. The disclosure of the DAB Decision was eventually obtained by third parties, who had legitimate reasons of their own for wishing to see Y.'s case examined. Furthermore, this argument on behalf of Y. can be seen to be, at best, technical, and, at worst, entirely without merit, in the light of Y.'s reported (never denied) acceptance, 2 days after the report in the Los Angeles Times, that he had given a positive test in June 1999, and had competed at the Olympic Summer Games 2000 in Sydney.

19. As has been demonstrated, much of the debate before the Panel concerned the effect of the First CAS Decision. The Panel has had to consider in detail both the issues before the First CAS Panel, and the terms of the First CAS Decision. In CAS jurisprudence there is no principle of binding precedent, or *stare decisis*. However, a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel. Whether that is considered a matter of comity, or an attempt to build a coherent corpus of law, matters not.
20. In the present case, the Panel has concluded, without difficulty, that the First CAS Decision did not determine either of the issues that arise in the present arbitration. This is not an appeal against the First CAS Decision. It is a review of the DAB Decision, following its publication together with the identity of the athlete concerned. Further, the Panel takes the view that the First CAS Decision does not even impinge directly upon the issues which it has to decide.
21. It would be difficult to conceive of a CAS Panel which contained more distinguished and experienced international arbitrators than the First CAS Panel. This Panel has no doubt that the First CAS Panel limited itself, as this Panel limits itself, to a determination of the particular issues before it. The First CAS Panel had to make its decision on issues referred to it in an ad hoc arbitration agreement. It did not purport to decide, and could not have decided, issues which were not referred to it in that agreement, and if it had done so, a later CAS Panel, such as the present Panel, would have been entitled to disregard a decision on such issues.
22. For the reasons set out above, the Panel concludes that, in the exercise of its discretion, it is "fair and reasonable" to accept jurisdiction outside the six month deadline.

Issue (2)

23. Having decided that it would be fair and reasonable to accept jurisdiction in Y.'s case, the Panel proceeds to consider the question of whether the DAB misdirected itself or otherwise reached an erroneous conclusion on 10 July 2000 when it exonerated Y. of a Doping Offence.
24. In relation to Issue (2), the Panel is required to decide whether the DAB "*misdirect[ed] itself or otherwise reach[ed] an erroneous conclusion*". No submissions were made to the Panel as to the meaning of "*misdirect*". The Panel infers that the distinction sought to be made by the parties in agreeing this formulation was between, on the one hand, a misdirection of law, such as, for example, taking into account material which should not have been taken into account, and on the other hand, an erroneous conclusion of fact.

25. As was his right, Y. elected not to respond in detail to the IAAF's challenge to the DAB Decision. His position was, simply, that the DAB Decision correctly exonerated him for the reasons given in the Decision. In the circumstances, the Panel is required to assess the weight to be given to the written evidence of the IAAF's expert witnesses in the present arbitration, without the benefit of seeing them cross-examined by either of the Respondents' counsel.
26. Through his Counsel, Y. asked that his absence from the hearing and his failure to challenge the DAB Decision on its merits should not be construed as an admission of guilt. In particular, the Panel was asked not to draw an adverse inference from Y.'s failure to make himself available to answer questions about his statement.
27. The USATF and Y. have declined to disclose in these proceedings the material which was before the DAB when it made its Decision, in particular the record of the testimony of Y.'s expert. Therefore, the only material which is available to the Panel on the second issue is the DAB Decision itself, the Expert Report of Professor Hemmersbach and the Witness Statement of Professor Bowers, both dated 12 February 2004 and submitted by the IAAF, and Y.'s statement dated 7 May 2004.
28. The basis upon which the DAB exonerated Y. was that it found that a reasonable doubt existed as to whether he had committed a Doping Offence. The DAB's reasoning appears to have been that the fact that the positive Eugene sample was preceded by the negative Raleigh sample and succeeded by the negative Lausanne sample created a reasonable doubt about the positive Eugene sample. Although there appears to have been no criticism of the taking of the sample, or the chain of custody or the analysis results of the Eugene sample, the DAB found that there had been "insufficient explanation" of how a positive sample could have been preceded and succeeded by negative samples over so short a time.
29. The DAB Decision referred to the "theories raised by the athlete's expert" and that expert's "testimony regarding the time period for elimination of the drugs from the system of the tested athlete".
30. The DAB had before it the evidence of two experts: that of the expert called on behalf of Y. and that of Professor Bowers for the USATF. The DAB found that the record of the Doping Hearing Panel described a "difficult and confusing examination" of Y.'s expert, whose testimony was referred to by the DAB as "not altogether a smooth and clear read". Nevertheless, the DAB found that Y.'s expert's testimony could be followed better on paper than it was at the time of the hearing, and preferred it to the expert evidence of Professor Bowers.
31. Although the Panel does not have a copy of the evidence of Y.'s expert, it appears that the "theory" raised by him was on the following lines: that nandrolone metabolites pass through a person's body relatively slowly, such that detection of high levels of the substance in an athlete's body on day one and detection of none of the substance in the athlete's body on day six would be an impossible, or highly unlikely, scenario.

32. In his witness statement Professor Bowers recalls giving evidence at the Doping Hearing Panel, a record of which evidence appears to have been in front of the DAB. Professor Bowers states:

"I testified that the excretion pattern of the oral precursors of nandrolone is very short and that studies published in the scientific literature showed that an athlete could have orally administered one of these precursors and been positive on 26 June 1999, but negative 6 days later on 2 July 1999".

Professor Bowers comments that Y.'s expert was an engineer with no pharmacological training or experience who relied upon:

"... basic pharmacokinetic equations relating to blood concentrations, which were clearly irrelevant to the issue of the urinary excretion pattern or oral precursors of nandrolone".

33. In his Expert Report, Professor Hemmersbach was asked a number of questions, including the following:

"Is the fact that sample 058096 (provided on 2 July 1999) was negative and sample 109176 (provided on 26 June 1999) was positive for norandrosterone consistent with the known excretion pattern of nandrolone and/or its precursors?"

Professor Hemmersbach answered that question in the affirmative. He said:

"The excretion of oral preparations containing nandrolone precursors is characterised by a rapid metabolism and consequently rapid urinary excretion compared to injected preparations. The main amount of the substance is excreted during the first 24 h. ... In most of the cases the urinary concentrations will drop from 60/80 to 2 ng/ml in less than 6 days".

34. In the light of this very clear, and uncontradicted, evidence that the negative Raleigh and Lausanne samples were not inconsistent with the positive Eugene sample, the Panel finds that the basis on which the DAB made its finding and the decision to exonerate Y. was erroneous. The Panel rejects the theory apparently put forward by Mr. Y.'s expert, which seems to have no scientific basis.
35. Accordingly, the Panel finds that on 26 June 1999 Y. committed a Doping Offence.
36. Further, the Panel finds that the DAB had before it material on which it could, and should, have made the correct decision, that is, to dismiss Y.'s appeal. The only evidence before the Panel indicates that Y.'s expert was inadequately qualified, and put forward a misguided and irrelevant theory. Indeed, on the basis of Professor Bowers' uncontradicted evidence as to the area of expertise of Y.'s expert witness, it seems to the Panel very doubtful that his evidence should have been admitted as expert evidence at all, far less that any weight should have been attached to it. The Panel has seen no evidence to indicate why the DAB rejected the evidence of Professor Bowers.
37. For the reasons stated above, the Panel finds that the DAB misdirected itself in law in accepting, as expert evidence, the evidence of Y.'s expert and rejecting that of Professor

Bowers. On the basis of its understanding of the evidence before the DAB, which is set out in Professor Bowers' uncontradicted evidence, the DAB's Decision was capricious and one which no tribunal, properly directing itself, could have reached.

Sanction

38. In addition to the submissions on sanction which appeared in the parties' written pleadings, the Panel heard oral submissions on the issue of the appropriate sanction to be imposed on Y. in the event that the Panel answered both of the issues in the affirmative. Clause 6.1 of the Arbitration Agreement states that *"The Applicable Rules to be applied by the Arbitration Panel are those published in IAAF Handbook 2000-2001"*. It was common ground that this provision was included because of Note 2 of the Transitional Provisions to the 2002/3 Edition of the IAAF Rules, which was in the following terms:

"Where a dispute has arisen prior to 1 November 2001, or where a Member has made a decision concerning a doping matter before this date, then such dispute or doping matter shall be resolved in accordance with the IAAF Rules and Regulations in force immediately prior to 1 November 2001".

39. As the dispute arose before 1 November 2001, the transitional provisions apply.
40. All parties were in agreement that it had not been their intention in signing the Arbitration Agreement to agree that the 2000-2001 Rules should necessarily apply to the question of any penalty to be imposed. The Rules in place at the time the Doping Offence was committed were the 1999-2000 Rules. Rule 60 of the 1999-2000 Rules provided, in Rule 60.2. (a) (i), for a minimum period of ineligibility for the "doping offence" of finding in an athlete's body tissues or fluids a prohibited substance, two years from the date of the provision of the sample or of the sanctionable offence and any additional period necessary to include a subsequent equivalent competition to that in which the athlete was disqualified.
41. Rule 60.4 of the 1999-2000 Rules provided that where an athlete had been declared ineligible, that athlete should not be entitled to any award or addition to the trust fund to which he would have been entitled by virtue of his appearance and/or performance at the athletics meeting at which the doping offence took place, or at any subsequent meetings.
42. It is clear to the Panel, and the IAAF was prepared to accept that, when the Statement in support of the Reference to Arbitration was prepared, it had Rule 60.2 (a) (i) in mind. Thus, it sought an order that Y. should be *"deemed to have been ineligible from competition for the two year period from the date of his sample on 26 June 1999 until 26 June 2001"*. It is accepted by the IAAF that the end date of the period of ineligibility should have been stated as 25 June 2001.
43. The Panel agrees with the IAAF's position, as stated in the Statement in support of the Reference to Arbitration, and finds that it would be appropriate to apply the 1999-2000 Rules to the question of the sanction to be applied to Y. Accordingly, the Panel finds that Y.'s period of ineligibility should have been from 26 June 1999 to 25 June 2001.

44. The consequence of this finding is that Y. should not have been eligible to compete in any competition during that period, including the Olympic Summer Games in Sydney in 2000.
45. It was urged upon the Panel that the consequence of finding that Y. had been guilty of a doping offence, and that he should have been ineligible to compete in the Olympic Summer Games in Sydney, would be that the other members of the United States relay team would inevitably lose their Gold Medals. The Panel could not take that possibility into account in deciding Issue (2). It is, however, sufficient to say that the Panel does not necessarily accept that, in the unusual circumstances of the present case, this consequence must follow. Whether it does or not is, however, a matter for the IOC and/or the IAAF to consider, and not for this Panel.

The Court of Arbitration for Sport rules that:

1. In respect of Issue 1, the answer is that it is fair and reasonable for it to accept jurisdiction outside the six month time limit.
 2. In respect of Issue 2, the answer is that the Doping Appeals Board did misdirect itself and reach an erroneous conclusion when it exonerated Y.
- (...)