

CAS 2011/A/2499 Albert Subirats v. FINA

AWARD

Issued by

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Michele **Bernasconi**, Attorney-at-law, Zurich, Switzerland

Ad hoc clerk: Ms Olivia **Pelli**, Attorney-at-law, Zurich, Switzerland

in the arbitration between

Albert Subirats, Venezuela

Represented by Mr Howard L. Jacobs, Attorney-at-law, Westlake Village, California, USA

Appellant

and

Fédération Internationale de Natation, Lausanne, Switzerland

Represented by Mr Jean-Pierre Morand, Attorney-at-law, Lausanne, Switzerland

Respondent

A THE PARTIES

- 1 Mr Albert Subirats (hereinafter "Appellant"), born on 25 September 1986, is a professional swimmer from Venezuela. He has been part of the Venezuelan national swimming team since 1999. He is a two times Olympic swimmer and won, inter alia, medals on 100 m butterfly at the 2006 Shanghai World Championships, 100 m butterfly at the 2007 World Aquatic Championships, Melbourne Australia, and 50 m and 100 m butterfly at the 2010 Dubai World Championships.
- 2 The Fédération Internationale de Natation (hereinafter "FINA" or "Respondent") is the international federation which promotes the development of five disciplines of aquatic sports throughout the world. Founded in 1908, FINA has today more than 200 members and is located in Lausanne, Switzerland. FINA has established and is carrying out, inter alia, a doping control program, both for in-competition as well as out-of-competition testing.

B BACKGROUND

- 3 This section of the award sets out a brief summary of the main relevant facts, as established on the basis of the parties' written submissions. Additional facts ascertained by the Sole Arbitrator, where material, are set out within other sections of this award. Factual elements that are not addressed in this award have been considered by the Sole Arbitrator as being irrelevant.
- 4 According to the rules regulating the doping control program of the FINA, i.e. the Doping Control Rules (hereinafter "DC"), FINA shall establish a FINA Registered Testing Pool of Competitors (hereinafter "FINA RTP"). Each swimmer in the FINA RTP has the obligation to keep FINA informed about where he or she can be met for unannounced testing.
- 5 The Appellant belongs to the FINA RTP and, since 2006, he has always submitted his whereabouts forms to the Venezuelan Swimming Federation (hereinafter "VSF"), i.e. the Appellant's national federation, which is a member of the FINA. Until 2010, the VSF has always forwarded the Appellant's whereabouts forms to FINA on time. However, VSF

did not forward the Appellant's whereabouts information to FINA for the first quarter of 2010, the fourth quarter of 2010 and the first quarter of 2011, so committing 3 filing failures.

6 FINA notified the Appellant's filing failures to VSF by letters of 25 February 2010, 11 November 2010 and 2 February 2011, requesting VSF to inform the Appellant about the failures. However, VSF failed to forward the three FINA communications to the Appellant on time. In fact, all three letters were forwarded from VSF to the Appellant for the first time on 2 February 2011, i.e. only after the third violation had already occurred. No failure notification was ever sent directly by FINA to the Appellant.

7 Thereinafter, FINA initiated a proceeding against the Appellant for the violation of the DC. On 7 May 2011, the FINA Doping Panel held a hearing in Lausanne and on 21 June 2011 the FINA Doping Panel issued a decision (hereinafter "FINA Decision") whereby it was determined that the Appellant had committed an anti-doping rule violation and it was ordered a one year period of ineligibility commencing on 7 May 2011 and ending on 6 May 2012. In addition, all results obtained by the Appellant after 3 January 2011 have been disqualified and any medals, points and prizes achieved during that period have been forfeited.

C THE PROCEEDINGS IN FRONT OF THE CAS

8 On 9 July 2011, the Appellant filed with the Court of Arbitration for Sport (hereinafter "CAS") his Statement of Appeal against the FINA Decision. The Appeal Brief was filed on 24 July 2011, i.e. within the deadline as extended by the CAS with letter dated 14 July 2011.

9 On 3 August 2011, the Parties informed the CAS that they agreed that this matter can be submitted to a sole arbitrator and they nominated Mr Michele Bernasconi. Such nomination was confirmed by the CAS with letter of 8 August 2011.

10 On 9 August 2011, the Respondent filed its Appeal Answer within the deadline fixed by the CAS with letter dated 26 July 2011.

11 Upon the Parties request, no hearing was held on this matter and the present decision was taken on the basis of the written submissions, following the expedited proceedings.

D PRAYERS FOR RELIEFS AND POSITION OF THE PARTIES

I The Appellant

12 In his Appeal Brief the Appellant requests the Sole Arbitrator to:

- declare that the second and third filing failures are cancelled;
- declare that the Appellant has not committed any anti-doping rule violation;
- reinstate the Appellant's results; and
- award the Appellant a contribution toward his costs in this appeal.

13 The Appellant essentially argues that he has always and consistently sent his whereabouts information to VSF on a timely basis and that VSF simply did not forward this information to FINA. However, FINA never notified the Appellant of any of the filing failures. Instead, it only notified the VSF, which never forwarded such communication to the Appellant on time. The Appellant became aware of all three filing failures only on 2 February 2011, i.e. after the third violation, when it was too late for him to repair such failures. According to the World-Anti-Doping Code International Standard for Testing (hereinafter "ISF"), FINA has to notify directly the athlete of the filing failures, and not merely notify his national federation. As FINA never notified the filing failures to the Appellant, the Appellant was deprived of his right to repair the failures. For this reason, the second and the third filing failure may not be designated as a second and third filing failure and the FINA Decision has to be annulled.

II The Respondent

14 The Respondent requests the Panel to dismiss the appeal of the Appellant.

- 15 The Respondent essentially argues that the FINA Doping Panel correctly applied the definition of filing failures. The Appellant decided to delegate his filing obligations to a third party, i.e. to VSF. However, he remained personally responsible to ensure proper filing. As a consequence, the fact that the third party, i.e. VSF, failed to properly relay the information to FINA is not an excuse.
- 16 It is correct that according to art. 11.3.5(c) IST the athlete must be notified of the filing failure prior to being sanctioned. It is undisputed that the filing failures were duly notified to the VSF, but that no notification was directly sent to the Appellant. However, the delegation made by the Appellant covers not only the filing of information, but also the receipt of notifications regarding failures. As the Appellant chose to act through a representative, this representative is the only point of contact between the anti-doping organization and the athlete. As a matter of practicality and good faith, such representative shall also be deemed as authorized to receive notifications of failure in respect of the whereabouts filings he has been entrusted by the athlete to manage. Otherwise, a two level communication channel would have to be established and this would be unmanageable. As a consequence, the filing failures have been duly notified to the Appellant and the FINA Decision must be upheld.

E ADMISSIBILITY OF THE APPEAL

- 17 According to § 13.2. and § 13.2.1 DC, in cases arising from a participation in an International Competition or in cases involving International-Level Competitors, a decision that an anti-doping rule violation was committed and/or a decision imposing consequences for an anti-doping rule violation may be appealed exclusively to the CAS in accordance with the provisions applicable before such court. According to § 13.6 DC, the deadline to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party and FINA.
- 18 The Appellant is an International-Level Competitor in accordance with the DC. The FINA Decision recognizes the existence of a violation of the anti-doping rules and imposes consequences to the Appellant. The Appellant received the FINA Decision on 21 June 2011 and filed his appeal on 9 July 2011. The present appeal is therefore admissible.

F APPLICABLE LAW AND APPLICABLE REGULATIONS

- 19 The DC in their version of January 2009 apply to the present proceedings in accordance with § 1 DC.
- 20 According to § 5.4.3 DC, FINA shall establish a FINA Registered Testing Pool of Competitors. It shall be the obligation of each swimmer, i.e. each "Competitor" in the Registered Testing Pool as well as that Competitor's Member Federation, to keep FINA informed about where the Competitor can be met for unannounced Testing. It is the responsibility of each Competitor in the Registered Testing Pool to report the required whereabouts information to the FINA office no later than the first Monday of the months of January, April, July and October, respectively (§ 5.4.4 DC). According to § 2.4 DC, the athlete has to comply with the requirements regarding Competitor availability for Out-of-Competition Testing, including the filing of the required whereabouts information as well as the participation to the tests. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the Competitor shall constitute an anti-doping rule violation. For violations of § 2.4 DC (i.e. Whereabouts Filing Failures and/or Missed Tests), the period of Ineligibility shall be at a minimum one (1) year and at a maximum two (2) years, based on the Competitor's degree of fault (§ 10.3.3 DC).
- 21 The ISF is a mandatory International Standard developed as part of the World Anti-Doping Program. The ISF January 2009 are applicable in accordance with Clause 1 ISF.
- 22 According to Clause 11.3.5 ISF, an athlete may only be declared to have committed a filing failure where the responsible anti-doping organization can establish each of the following:
- a) that the athlete was duly notified (i) that he/she was designated for inclusion in a Registered Testing Pool, (ii) of the consequent requirement to make whereabouts filings; and (iii) of the consequences of any failure to comply with that requirement;
 - b) that the athlete failed to comply with that requirement by the applicable deadline;

- c) (in the case of a second or third filing failure in the same quarter) that he/she was given notice of the previous filing failure in accordance with Clause 11.6.2(a) and failed to rectify that filing failure by the deadline specified in that notice; and
- d) that the athlete's failure to comply was at least negligent. For these purposes, the athlete will be presumed to have committed the failure negligently upon proof that he/she was notified of the requirement yet failed to comply with it. That presumption may only be rebutted by the athlete establishing that no negligent behavior on his/her part caused or contributed to the failure.

23 An athlete in a Registered Testing Pool may choose to delegate the making of some or all of his/her whereabouts filings required under Clauses 11.3.1 and 11.3.2 (and/or any updates to his/her whereabouts filings required under Clause 11.4.3) to a third party, such as (for example, and depending on the rules of the responsible anti-doping organization) a coach, a manager or a national federation, provided that the third party agrees to such delegation (Clause 11.3.6 ISF). In all cases, however, each athlete in a Registered Testing Pool remains ultimately responsible at all times for making accurate and complete whereabouts filings as required by Clause 11.3, whether he/she makes each filing personally or delegates this to a third party (or a mixture of the two). It shall not be a defense to an allegation of a filing failure under Clause 2.4 that the athlete delegated such responsibility to a third party and that third party failed to comply with the applicable requirements (Clause 11.3.7(a) ISF).

G SCOPE OF THE PANEL'S REVIEW

24 According to R57 of the Code of Sports-related Arbitration and Mediation Rules (hereinafter "CAS Code"), the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.

H DISCUSSION

25 Uncontested is the fact that the Appellant always sent the whereabouts information on time to VSF, but that VSF did not forward such information to the Respondent, neither

for the first quarter of 2010, nor for the fourth quarter of 2010, nor for the first quarter of 2011. In addition, uncontested and supported by the documents in the file is the fact that the Respondent notified all three filing failures by letters of 25 February 2010, 11 November 2010 and 2 February 2011 to VSF, only. No failure notices were ever sent by Respondent to the Appellant directly. Also uncontested is the fact that VSF forwarded these communications to the Appellant for the first time on 2 February 2011, i.e. after the third violation had already occurred.

- 26 It is correct that it is the responsibility of each swimmer registered in the FINA RTP to report the required whereabouts information to the FINA office (§ 5.4.4 and § 2.4 DC). Even when the athlete chooses to delegate whereabouts filings to a third party, he or she remains ultimately responsible at all times for making accurate and complete whereabouts filings (Clause 11.3.6 and Clause 11.3.7(a) ISF). In particular, it is important that the athlete that delegates such assignments to a third party makes sure that such third party effectively forward the whereabouts information to the anti-doping organization on time. The rationale of such rule is quite obvious: no athlete shall be in position to somehow "hide" behind a third party, chosen by the athlete himself as a kind of personal "courier". As the rule itself states: it shall not be a defense to an allegation of a filing failure under Clause 2.4 that the athlete delegated such responsibility to a third party and that third party failed to comply with the applicable requirements (Clause 11.3.7(a) ISF).
- 27 It is also correct that an athlete may only be declared to have committed a filing failure when the responsible anti-doping organization duly notified to the athlete that he or she failed to comply with that requirement by the applicable deadline and, in the case of a second or third filing failure in the same quarter, that he/she was given notice of the previous filing failure and failed to rectify that filing failure by the deadline specified in that notice (Clause 11.3.5 ISF). In particular, the anti-doping organization is responsible for making an accurate notification to the athlete. If it decides to notify the filing failure communication to the athlete's national federation instead of directly to the athlete, it has to make sure that the athlete receives such communication from the national federation. If the athlete does not receive the filing failure communication from the national federation, he or she may not be declared to have committed any filing failure. Again, the rationale

of this is also quite obvious: the athlete must be informed adequately so that he or she has a true opportunity to correct the filing deficiencies that have emerged.

- 28 In the case under consideration, the Appellant chose to delegate whereabouts filings to VSF. Despite this choice, he remained ultimately responsible at all times for making accurate and complete whereabouts filings to the FINA. For this reason, as mentioned above, the Appellant should have ensured that the VSF was acting correctly, for example by asking the VSF to confirm the fact that the whereabouts information was filed on time.
- 29 On the other side, FINA never notified a filing failure communication to the Appellant. In particular, FINA did not send the letters concerning the filing failures directly to the Appellant, but only to the VSF, and the Appellant did not receive any such communications from the VSF before his third failure. As a consequence, the Appellant was unaware of all filing failures until the third filing failure occurred and was not in a position to repair on that.
- 30 In accordance with the ISF rules, a similar restriction shall apply when the anti doping organization chooses as recipient of the failure notices a third party, even if such third party is the one chosen by the athlete to make his or her filing. In other words, it shall not be a defense to an allegation of non-receipt of one or more failure notices that the anti-doping organization delegated such responsibility to a third party and that third party failed to comply with the applicable requirements.
- 31 Thus, since it is undisputed that Appellant did not receive any failure notice before the third whereabouts filing failure, the existence of a second and a third violation cannot be reproached to the Appellant.
- 32 For these reasons, no anti-doping rule violation in the sense of § 2.4 DC (Whereabouts Filing Failures and/or Missed Tests) exists and, as a consequence, the Appeal is upheld, the FINA Decision overturned, the second and third filing failure for the fourth quarter of 2010 and the first quarter of 2011 are cancelled and the Appellant's results reinstated.

33 The above conclusion, finally, makes it unnecessary for the Sole Arbitrator to consider the other requests submitted by the parties. Accordingly, all other prayers for relief are rejected.

34 (...)

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal filed by Mr Albert Subirats is upheld.
2. The decision rendered on 21 June 2011 by the FINA Doping Panel is overturned.
3. The second and the third filing failure for the fourth quarter of 2010 and the first quarter of 2011 are cancelled.
4. Mr Albert Subirats' results are fully reinstated.
5. (...)

Done in Lausanne, 24 August 2011

THE COURT OF ARBITRATION FOR SPORT

Michele Bernasconi

Sole Arbitrator

Olivia Pelli

Ad hoc clerk