Arbitration CAS/A/718 A. v. International Olympic Committee (IOC), award of 31 March 2005

Panel: Mr Hans Nater (Switzerland), President; Mr Peter Leaver QC (England); Mr Michael Geistlinger (Austria)

Athletics
Olympic Games
Failure to submit to doping control
Doping offence
Sanction

1. **The failure by an athlete to appear to a scheduled doping control, despite the knowledge of the requirement to do so through the international media as well as the national media without any justification constitutes a violation of the doping rules. The "no show" and the general behavior lead to conclude that the athlete evaded sample collection and, thereby, committed a doping offence under the applicable Anti-Doping Rules.**

2. **The consequence of a "no show" is the disqualification of all of the Athlete's individual results obtained in the Olympic Games with all consequences, including forfeiture of all medals, points and prizes is adequate.**

On *22 August 2004*, the Appellant, a member of the Hungarian Athletics Association, competed in the Athens 2004 Olympic Games (OG) men's hammer throw finals event, in which he came first. The Appellant was awarded the gold medal. Immediately after his last throw, he provided a urine sample for doping control. There was no adverse analytical finding.

The Appellant was scheduled to fly back to Hungary on 25 August 2004 with the Hungarian Olympic Team. However, on *24 August 2004,* at about 08:00, the Appellant left the Olympic Village to drive home to Hungary by car.

On the same day at 12:50, the Athens Olympic Games Organizing Committee (ATHOC) attempted to serve a Doping Control Notification upon the Appellant for targeted testing. As the Appellant had already left the Olympic Village and was on his way home by car, he could not be located.

The following day, *25 August 2005*, the IOC requested the Hungarian Olympic Committee (HOC) to provide by 21:00 detailed and accurate "Whereabouts Information" for the Appellant. Some

information was provided, such as the addresses and mobile telephone numbers of the Appellant, his trainer and his manager.

At around 23:00 on 26 August 2005, two Doping Control Officers drove to the Appellant's home to collect a urine sample from him. They found themselves confronted by a number of journalists and fans, some of them with motorcycles, who had gathered outside the Appellant's house. They felt threatened by the crowd and decided not to contact the Appellant. Accordingly, they left.

When the Doping Control Officers returned in the morning of *27 August 2005*, this time accompanied by two local police officers, the Appellant had already left his home.

On the same day, the IOC delivered an official notification for testing to Mr M., Chef de Mission of the HOC, on behalf of the Appellant. The notification required the Appellant *"to make himself available for doping control not later than 4pm (16:00) today, August 27th. The location for testing will be the police station at the BUCSU border control (Austrian side), where the DCOs will be waiting"*. The Appellant did not report to the identified doping control station.

On 29 August 2004, the IOC Executive Board decided to (i) disqualify the Appellant from the men's hammer throw event, in which he had placed first pursuant to Articles 2.3 and 9.1 of the Rules, to (ii) exclude him from the Games of the XXVIII Olympiad in 2004; (iii) to withdraw his Olympic identity and accreditation; and (iv) requested the International Association of Athletics Federations to modify the results of the above-mentioned event accordingly.

(…)

The Appellant claims that his rights were infringed in the IOC-proceedings since (1) he had not been duly represented at the disciplinary hearing, (2) the IOC failed to notify its decision to him and (3) the decision had not been translated into Hungarian.

With respect to the merits of the case, the Appellant takes the position that the decision of the IOC Executive Board does not state with sufficient clarity when and where he had refused a doping test. He contends that he had not refused to submit to sample collection and, accordingly, had not committed any doping offence.

In conclusion, the Appellant requests

> *"that the decision taken by the Executive Board of the International Olympic Committee on 29.8.2004 be annulled in all counts and to award the gold medal to A. for placing first".*

The IOC claims that the Appellant had been specifically targeted for testing because there had been reports that he had used a method to provide false urine samples at previous controls. Thus, the Appellant deliberately avoided submitting to a urine test on *four* separate occasions. The Appellant's explanation for how he had managed to avoid being tested by the IOC on all these occasions was farcical and incredible.

The IOC requests that:

> *"1. The Appellant's appeal be dismissed, and*
>
> *2. The Appellant pay all the costs and expenses arising out of the arbitration on an indemnity basis".*

On 16 September 2004, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (CAS) against the decision of the Executive Board of the International Olympic Committee (IOC) of 29 August 2004.

The Appellant's Appeal Brief is dated 14 October 2004 and the Respondent's Answer is dated 30 December 2004.

On 8 and 9 February 2005, a hearing was held in Lausanne.

LAW

CAS Jurisdiction

1. The jurisdiction of the CAS derives from Article 12.2 of the Anti-Doping Rules applicable to the Games of the XXVIII Olympiad in Athens in 2004, which reads as follows:

> *"12.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences and Provisional Suspensions*
>
> *A decision that an anti-doping rule violation was committed, a decision imposing Consequences of an anti-doping rule violation […] may be appealed exclusively as provided in this Article 12.2. […].*
>
> *12.2.1 In all cases arising from the Olympic Games, the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court".*

2. Neither party raised any objection to the jurisdiction of the CAS before or during the hearing.

3. Accordingly, the jurisdiction of the CAS is established.

Applicable Law

4. Article R58 of the Code of Sports-related Arbitration (the "Code") provides that the Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sport-related body which has issued the challenged decision is domiciled.

5. In the present case, the Appellant, as a condition of entry into the Games, had to sign an Entry Form. He thereby accepted that he was bound to comply with the IOC Anti-Doping Rules applicable to the Games of the XXVIII Olympiad in Athens in 2004. Therefore, the Panel is required to decide the dispute according to these Rules and, since the IOC has its seat in Switzerland and the parties did not choose a different governing law, according to Swiss law. The proceedings are subject to Articles R47 et seq. of the Code, and to the provisions of Chapter 12 of the Swiss Private International Law Act.

Procedural Objections

6. The Appellant claims that there was a violation of his right to be heard since he had not been duly represented at the hearing before the Disciplinary Commission of the IOC on 29 August 2004: As the Appellant had not been medically fit to attend the hearing, Mr Pal Schmitt, President of the HOC, represented him, claiming that he had full authority to do so. The Appellant submits that he never gave any such authority to Mr Pal Schmitt.

7. Article R57 of the Code provides that the CAS hears the case de novo. The complete investigation by the CAS remedies any flaws that there might have been in the procedure at first instance. This means that, even if a violation of the right to be heard occurred in the first instance, any such violation is cured by a full hearing on an appeal to the CAS (CAS 94/129, CAS Digest I, p 187, 203). Therefore, the Panel does not need to decide whether Mr Pal Schmitt was duly authorized to represent the Appellant at the disciplinary hearing.

8. The Appellant's objections that the IOC failed to notify its decision to him and did not translate the decision into Hungarian, would only be relevant if he had thereby suffered a disadvantage, e.g. if he had missed the date by which to file his appeal. As this is not the case, these objections do not have to be considered further.

Merits

A. Has a doping offence been committed?

9. Article 2.3 of the applicable Anti-Doping Rules provides that, inter alia, the following conduct constitutes an anti-doping rule violation:

> *"2.3 Refusing, or failing without compelling justification, to submit to Sample collection after notification as authorised in these Rules or otherwise evading Sample collection".*

10. Consequently, the Panel has to consider

- whether the Appellant, after notification, refused or failed to submit to sample collection, or
- whether the Appellant otherwise evaded sample collection.

11. The IOC Executive Board relied on the conduct of the Appellant during the period between the end of the competition until and including 27 August 2004 and concluded that the behavior of the Appellant was to be characterized as a refusal or failure to submit to sample collection.

12. In the present proceedings, the Appellant explains his behavior and, inter alia, submits that he was never notified that he had to attend a doping test at the Hungarian border in Bucsu on 27 August 2004. Thus, he contends that his conduct did not amount to a failure or refusal to submit to sample collection.

a) The Notification of the Bucsu-Doping-Test

13. It seems appropriate to take a closer look at the issue of the notification of the Bucsu-doping-test:

14. By hand delivered letter of 27 August 2004, the IOC (Dr Schamasch) and WADA (Mr Andersen) informed Mr M. for the attention of the HOC that the Appellant had to make himself available for doping control no later than 16:00 that day at the police station at Buscu, a border town on the Austrian side.

15. Thereupon, Mr L., Team Leader of the Hungarian Olympic Athletics Team, wrote a letter to the Head of the Appellant's Sporting Club Haladas VSE, which (in the English translation provided for the Panel) included the following passage:

"In the name of the Hungarian Athletic Association I demand and oblige the competitor to cooperate [with] the officers presented by WADA and subject himself [to] the dope test. According to the enclosed official letter dated for today, sent by WADA, I ask your concrete steps. A. A. must appear at the police station on the Austrian side of Bucsu until 4 p.m. so that to give sample to the WADA officers. I demand your immediate steps. Inform us in connection with the procedure".

16. Apparently, upon receipt of this letter at 13:30 on 27 August 2004, Katalin Görfi from Haladas VSE contacted P., the Appellant's Personal Secretary. She read out the letter to P., and forwarded it to him by e-mail.

17. Up to this point, the transmittal of the notification of the scheduled doping test can be stated with certainty. However, the question is whether the Appellant was informed of the scheduled doping test. While the IOC claims that this was the case, the Appellant denies it.

18. In order to answer this question, the following evidence has to be considered:

19. The IOC relied upon the translation of an interview with P. in the program "Good Morning Hungary!" on TV2 Channel, which took place in the morning of 27 August 2004 between 06:00 and 07:00. As this interview was given before the IOC sent its letter of notification to Mr M., the Panel finds this evidence to be of no relevance.

20. Furthermore, the IOC submitted a number of excerpts of news reports from 27 August 2004: These excerpts show that, on that very day, the details of the time and place for the Appellant to provide a urine sample were reported in the Hungarian media throughout the day. This is also supported by the fact that a number of journalists and TV stations waited outside the police station in Bucsu for the Appellant to appear.

21. And, Mr M. wrote to Dr Schamasch on 27 August 2004, 19:25, in the following terms:

"In accordance with the IOC and WADA rules I dully informed A. about his requirements to undergo doping control upon the demand of IOC and WADA. Regardless of my personal verbal and written contact with the athletes and his Team Leader, Mr. L., I was unable to convince Mr. A. to accept the relevant rules and undergo the required doping control. The athlete had been acting on his own; his reluctant behavior was beyond our control. I made it very clear to Mr. A. and his Team Leader as well that by not complying with the IOC rules Mr. A. would violate the doping control regulations and must bear all the consequences".

22. Mr P. gave evidence as follows: He said that he had not passed on the notification concerning the Bucsu-doping-test to the Appellant. There had been three reasons for this: First, he had been aware of the Appellant's bad health. Secondly, he knew that the Hungarian Athletic Association had collected a sample from the Appellant, and, thirdly, he took into consideration that the doping inspectors could have found the Appellant at his home. Upon questioning by the Panel, P. admitted that he knew that it was a serious matter. But the letter had not been addressed to him, P., personally and he was not directly responsible to Mr L., the author of the letter. When he was asked how he had been informed about the Appellant's bad health, the witness stated that he had not seen the Appellant on 27 August 2004, but had talked to him on the phone around noon, albeit only for a *"very very short time"*.

23. Mr M. said that, when he wrote his 27 August 2004, 19:25, letter to Dr Schamasch, he had been convinced that the notification of the Bucsu-doping-test had been delivered to the Appellant. He said that he was convinced of this fact because of (1) Mr L.'s e-mail message confirming the receipt of the notification and (2) the e-mail message from the Appellant's Hungarian sports club, in which it advised that it had communicated the information of the scheduled Bucsu-doping-test to the Appellant's Personal Secretary by telephone as well as by e-mail. He said that, albeit he did not receive any confirmation of the fact that the notification has been passed to the Appellant, he was quite certain that it had been.

24. The Appellant said that he had only learnt from the 27 August 2004 evening news that he should have appeared at the police station at Bucsu for a doping control; he had not received this information during the day. In regard to his health condition, he said that at midday on 27 August 1994, he did not feel too well. He had been tired, since he had been waiting for the Doping Control Officers until 01:00. He had also been excited, nervous and worried about what was going to happen. In response to the question of when on 27 August 2004 he began to feel ill, the Appellant answered that this was in the late afternoon, early evening. His condition had deteriorated step by step. When he was asked if the reason of his deteriorating condition had been the bad press, he answered: *"Yes, I heard this and had no idea why all this was happening to me"*. Subsequently, he said that it was difficult to say which factors had what impact upon his health condition, but he felt that the media were unfair and he feared that he

would lose his gold medal. The Hungarian media, however, were partly positive and supportive. Although he did not want to go so far as to deny that there had been reports in the media about the Buscu-doping-test-deadline, he insisted he had not seen them.

25. Article 3.1 of the applicable Anti-Doping Rules provides, in relation to the burden and the standard of proof, as follows:

> *"3.1 The IOC shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the IOC has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond reasonable doubt. (…)"*

26. The witnesses and the Appellant testified after they had been reminded that they were required to tell the truth, and were subject to the sanctions of perjury.

27. The Panel finds that Mr M. has no personal interest in the outcome of these proceedings. He stated that he did not personally communicate to the Appellant that he had to appear to a doping test in Bucsu. The Panel has no reason to believe that this statement is incorrect, and accepts it.

28. However, P. falls into a different category. The Appellant said that P. was one of his best friends. P. confirmed that he was a close friend of the Appellant. The Panel has no hesitation in concluding that, due to his close and personal relationship with the Appellant, P.'s evidence must be treated with caution. The Panel applies the same caution to the statements made to it by the Appellant himself.

29. P.'s statement that he did not pass on the notification about the Bucsu-doping-test to the Appellant does not seem to the Panel to be plausible. It does not conform to the behavior to be expected of a responsible person in the position of a Personal Secretary and Public Relations-expert. As an explanation for his behavior, P. said that he was conscious of the Appellant's bad health on 27 August 2004.

30. In this regard, the statements of Mr P. and the Appellant differ from each other: P. claims he learnt about the Appellant's bad health when having a (very) short telephone conversation with him, *at around noon* on 27 August 2004, while the Appellant told the Panel that he began to feel ill during the *late afternoon, early evening*. The statements of Mr P. and the Appellant on this important issue are inconsistent. The Panel concludes that it cannot accept P.'s evidence.

31. Furthermore, the Appellant himself ascribes the deterioration of his health condition during the afternoon of 27 August 2004 to the "bad press", the ongoing media interest in "his case" and his fear of losing his gold medal. It is implicit in this statement that, during the afternoon of 27 August 2004, the Appellant kept himself informed through the international media as well as the Hungarian media about what was going on in "his case". By doing so, he could not have possibly avoided discovering that he was supposed to appear in Bucsu to give a urine

sample to the WADA Doping Control Officers. The Panel finds that the Appellant was fully aware of the fact that he was expected at Buscu to provide a sample.

32. Additionally, the Panel takes into consideration that various people from the Appellant's entourage are reported in the media on 27 August 2004 as having made statements. They include Dr Karoly Piko (the Hungarian Olympic Team doctor), Karoly Köpf (Vice-President of the Hungarian Olympic Team), and V. (the Appellant's coach). Each of those persons is reported as stating that the Appellant was not willing to give a sample and that he could not be convinced otherwise. The Panel is of the opinion that there is a high probability that at least one of these persons talked with the Appellant about the Buscu-doping-test. However, the Panel does not consider it necessary to make a specific finding on this issue.

33. Finally, it also has to be mentioned that Mr Schmitt, Mr M. and Mr L. each testified that they had been convinced that the Appellant had received the notification of the Bucsu-doping-test.

34. To sum up, the Panel feels comfortably satisfied that the Appellant in fact *had been* informed about the scheduled Bucsu-doping-test.

b) The Appellant's General Behavior

35. Apart from the question whether the Appellant was informed about the Bucsu-doping-test, one matter is clear and uncontested: The Appellant was well aware of the fact that the Doping Control Officers were looking for him. He had been aware of this since at least the late afternoon of 24 August 2004: The Appellant told the Panel that he was contacted by Mr L. by telephone at between 17:00 and 18:00 on 24 August 2004. Mr L. informed him that a Doping Control Officer had been looking for him in the Olympic Village. The Appellant admitted that he knew that this meant he was required to give another sample. Despite this knowledge and the tireless efforts of the IOC to collect a sample, the Appellant managed to make himself unreachable by the Doping Control Officers for three days in a row. And, as has already been shown, during this period of time various persons from his entourage made statements in the media, to the effect that the Appellant was not willing to submit to sample collection.

c) The Appellant's Submissions

36. The Appellant contends that Article 2.3 of the applicable Anti-Doping Rules, when read together with Article 3.1 of Appendix 2 of the Doping Control Guide, requires a personal notification and that, as such a personal notification had never taken place, he did not commit a doping offence.

37. Article 3.1 of Appendix 2 of the Doping Control Guide reads as follows:

"3.1 Notification of Athletes

(…)

The Athlete shall be the first person notified that he/she has been selected for Sample collection (…)".

38. In this context, the Panel refers to the wording of Article 2.3 of the applicable Anti-Doping Rules, which has been set out earlier in this Award. The second part of the sentence provides that an anti-doping rule violation can be committed by *"otherwise evading Sample collection"*. This version of committing an anti-doping rule violation, that is, evading a doping control, does not require a notification. Therefore, there is no need for the Panel to express any conclusion on whether the notification of the Bucsu-doping-test was correctly performed by the IOC.

39. Finally, the Appellant raised the objection that the WADA had not been competent to perform doping tests during the Olympic Games by referring to Article 5.2.1 of the applicable Anti-Doping Rules. In this regard, the Panel refers to the wording of Article 5.2.2 of the applicable Anti-Doping Rules, according to which *"The IOC has the authority to appoint any other Anti-Doping Organization [than the ATHOC] to carry out Doping Control on its behalf"*. On these grounds, the Panel rejects the Appellant's objection.

d) Conclusion

40. The Appellant failed to appear to the scheduled doping control in Bucsu, although he knew that he was required to do so. There was no justification for his failure. His "no show" and his general behavior as described above lead the Panel to conclude that the Appellant evaded sample collection and, thereby, committed a doping offence under Article 2.3 of the applicable Anti-Doping Rules.

B. Sanctions

41. With regard to sanctions, Article 9.1 of the applicable Anti-Doping Rules provides as follows:

"9.1 Disqualification of Olympic Games Results

An Anti-Doping Rule violation occurring during or in connection with the Olympic Games may lead to Disqualification of all of the Athlete's individual results obtained in the Olympic Games with all consequences, including forfeiture of all medals, points and prizes, except as provided in Article 9.1.1".

42. Thus, the Panel concludes that the sanctions imposed by the Executive Board of the IOC are adequate.

The Court of Arbitration for Sport rules:

1. The appeal filed by A. on 16 September 2004 is dismissed.

2. The decision issued by the Executive Board of the International Olympic Committee on 29 August 2004 is confirmed.

3. (…).