Arbitration CAS 2022/A/8700 Anna Harkowska v. Polish Anti-Doping Agency (POLADA), award of 24 April 2023

Panel: Prof. Stefano Bastianon (Italy), Sole Arbitrator

Cycling
Doping (meldonium)
CAS Jurisdiction
Interpretation of a NADO's arbitration clause for national level athletes
Compliance of a NADO's arbitration clause for national level athletes with article 6.1 ECHR

1. **According to Article 186 para. 1 of the Swiss Private International Law Act, the arbitral tribunal shall rule on its own jurisdiction. The objection of a lack of jurisdiction must be raised prior to any defence on the merits. In order for the CAS to have jurisdiction to hear an appeal, there must exist either a specific arbitration agreement between the parties, or the jurisdiction of the CAS must be expressly recognized in the statutes or regulations of the sports-related body that issued the decision appealed against.**

2. **The National Anti-Doping Organisation's Anti-Doping Rules (NADO ADR) adopted pursuant to the applicable provisions of the World Anti-Doping Code (WADC) and the International Standard shall be interpreted in a manner that is consistent with said provisions and standard. With respect to national level athletes not involved in international events, a NADO can provide either that the appellate body be an independent and impartial national-level appeal body provided the principles of a fair hearing are respected or provide that a national-level athlete not involved in international events has a right to appeal directly to CAS. Where the NADO ADR has clearly opted for a right to appeal to a national appellate body, there is therefore no CAS arbitration clause entitling a national-level athlete to file an appeal to CAS.**

3. **As a matter of principle, according to the case law of the European Court of Human Rights, a violation of Article 6.1 of the European Convention on Human Rights (ECHR) cannot be grounded on the lack of independence or impartiality of a decision-making tribunal or on the breach of an essential procedural guarantee by that tribunal, if the decision taken is subject to subsequent control by a judicial body that has "full jurisdiction" and ensures respect for the relevant guarantees by curing the failing in question. Accordingly, in cases where a final appeal to CAS is possible, the requirements of independence and impartiality are always met, since the CAS has been found to be a true and independent arbitral tribunal. If the appellate body established by the rules of a NADO is competent to finally decide the case i.e. in a case involving a national-level athlete (not involved in international events), Article 13.2.2 WADC ensures that the same standards of independence and impartiality are met at the local appellate level. If not, the national-level athlete has a right to appeal the first instance**

decision directly to CAS. From the perspective of the principle of equal treatment, the purported asymmetric nature of the adjudicatory system established by a NADO ADR in so far as it entitles only WADA, to file an appeal to CAS against decisions of the national federation's appellate body does not amount to a violation of Article 6.1 ECHR. Indeed, the positions of a national-level athlete (not involved in international events) and WADA are not comparable. The athlete's rights are fully respected by a national two-instance adjudicatory mechanism provided that the national appellate body respects the principles of independence and impartiality as well as the right to be heard stemming from Article 6.1 ECHR. Conversely, WADA's right to appeal to CAS against decisions issued by a national appellate body is consistent with the role of WADA, which is charged, i) to ensure the uniform application of anti-doping rules worldwide and the respect of the principle of equal treatment of athletes at transnational level; ii) to correct potential mistakes in the interpretation and/or application of anti-doping rules by the anti-doping national sports bodies; iii) to avoid the risk of unredressable "home-town" decisions.

I. PARTIES

1. Ms Anna Harkowska (the "Appellant" or "Ms Harkowska") is a Polish cyclist from Slubice, Poland.

2. The Polish Anti-Doping Agency (the "Respondent" or "POLADA") is the National Anti-Doping organisation in Poland and a signatory to the World Anti-Doping Code ("WADC"). Its registered office is in Warszawa, Poland.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the Parties' written submissions and the evidence produced. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 15 January 2021, the Appellant underwent an out-of-competition doping control. The analysis of her sample returned an adverse analytical finding ("AAF") for Meldonium, a Prohibited Substance under Section S4.4 (*Hormone and metabolism mudulators*) of the 2021 World Anti-Doping Agency ("WADA") Prohibited List.

5. On 28 January 2021, POLADA suspended provisionally the Appellant.

6. On 13 May 2021, the Appellant was charged with an Anti-Doping Rule Violation ("ADRV") pursuant to POLADA Anti-Doping Rules ("POLADA ADR").

7. On 27 May 2021, a preliminary hearing was held before the POLADA Disciplinary Panel of First Instance. Further hearings were held in the following days.

III. THE FIRST INSTANCE DECISION

8. On 16 August 2021, the POLADA Disciplinary Panel of First Instance ruled that the Appellant had violated Articles 2.1 and 2.2 POLADA ADR and imposed a four-year period of ineligibility:

"I. Ms Anna Harkowska is considered guilty of the aforementioned violation of the Anti-Doping Rules of the polish Anti-Doping Agency.

II. A disciplinary sanction of 4 (four) years of ineligibility is imposed on the respondent.

III. The starting date of the sanction set out in point 11 is 28 January 2021.

IV. The present decision will be made public".

9. In its decision, the Disciplinary Panel of First Instance held that:

- *"[i]n the light of the collected evidence, there existed no grounds for finding that the panel was not competent to examine the case. The key fact in this regard was that on the day of the doping control, the respondent was a member of the OKS warnia I Mazury Olsztyn club and the club was a member of the Polish Cycling Association. This fact, in the light of the Polish Anti-Doping Rules, constitutes a basis for concluding that the Disciplinary Panel is a body competent to conduct the proceedings".*

- *"The presence of the prohibited substance in the athlete's body was not questioned by the parties to the proceedings, as it had been confirmed by the results of tests of the A and B samples".*

- *"In the course of the evidentiary proceedings, the respondent and her attorney mentioned two alternative reasons for the detection of the prohibited substance: unconscious ingestion and sabotage".*

- *"The evidence-related proceedings gave a picture of the conflict between the respondent and her coach on the one side, and the other members of sports community on the other side (…). This, however, does not confirm any act of sabotage against the respondent. Such act has not been proven or made highly probable as a result of these proceedings".*

- *"Given the above findings, the First Instance Panel has concluded that the use of the substance by the respondent has been most probable. Firstly, there exists no evidence of the sabotage. Secondly (…), there have been circumstances which, in the opinion of the First Instance Panel, point to the use of the prohibited substance by the respondent".*

IV. THE SECOND INSTANCE DECISION

10. On 22 October 2021 the Appellant filed an appeal against the decision of the POLADA Disciplinary Panel of First Instance.

11. A hearing was held before the Disciplinary Panel of Second Instance on 21 December 2021.

12. On 21 December 2021, the Disciplinary Panel of Second Instance issued the operative part of its decision and dismissed the appeal in its entirety.

13. On 9 February 2022 the Disciplinary Panel of Second Instance issued its reasoned decision (the "Appealed Decision"). *Inter alia*, in its finding against the Appellant, the Disciplinary Panel of Second Instance held that:

- *"The content of the agreement of 2 January 2021 between the respondent and the PZSN Start sports club was of key importance for resolving the question of the Disciplinary Panel's competence to hear the case in question. In Article 3 of the agreement, in addition to the athlete's obligation to undergo doping test, there is a provision regarding the need for the respondent to comply with generally applicable laws and regulations and good practices in the field of physical culture. In the opinion of the Second Instance Panel this also means the necessity to comply with POLADA ADR whose point (c) (iv) of the section 'Scope of these Anti-Doping Rules' provides that 'all Athletes and Athlete Support Personnel who participate in any capacity in any activity organized, held, convened or authorized by the organizer of a National Event or of a national league that is not affiliated with a National Federation".*

- *"The respondent had never questioned being subject to the above-mentioned provision before".*

- *"In the opinion of the Second Instance Panel, based on the collected evidence, it cannot be established that the presence of the prohibited Substance had been caused by an act of sabotage".*

- *"The Second Instance Panel is of the opinion that the explanations and testimonies of the respondent and the witnesses regarding the alleged act of sabotage have been only circumstantial and insufficient to conclude that sabotage has actually taken place".*

V. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

14. On 2 March 2022, pursuant to Article R47 of the Code of Sports-related Arbitration (the "CAS Code"), the Appellant filed a Statement of Appeal against the POLADA with respect to the decision rendered by the Disciplinary Panel of Second Instance on 21 December 2021, with its reasons notified to the Parties on 9 February 2022. In accordance with Article R48 and Article R50 of the CAS Code, the Appellant proposed that the Appeal be submitted to a Sole Arbitrator. The Appellant also requested that the time limit to file the Appeal Brief be suspended until the approval of his Legal Aid Application.

15. On 29 March 2022, the Respondent agreed with the appointment of a Sole Arbitrator. In the same correspondence, the Respondent further raised an objection to the CAS jurisdiction.

16. On 4 April 2022, in view of the Respondent's objection to CAS jurisdiction, the Appellant requested for bifurcation of the proceedings in order to decide in a preliminary award, in accordance with R49 of the CAS Code, the issue of CAS jurisdiction.

17. On 5 April 2022, the CAS Court Office informed the Appellant that the time limit to file the Appeal Brief remained suspended until further notice and invited the Respondent to state whether it agreed with the Appellant's request for bifurcation.

18. On 7 April 2022, the Respondent agreed with the Appellant's request for bifurcation and repeated its objection to CAS jurisdiction.

19. On 4 May 2022, the CAS Court Office informed the Parties that the ICAS Legal Aid Commission has issued its Order on Request for Legal Aid and accordingly the Appellant's deadline to file her Appeal brief resumed as from the same date.

20. On 12 May 2022, the Appellant requested a deadline for the Parties to file their final position in respect of CAS jurisdiction. At the same time, the Appellant also requested that the deadline to file her Appeal Brief be suspended until the request for bifurcation was adjudicated.

21. On 13 May 2022, the CAS Court Office suspended the Appellant's deadline to file her Appeal Brief until further notice from the CAS Court Office. On 9 June 2022, pursuant to Article R54 of the CAS Code, the CAS Court Office, on behalf of the President of CAS Appeals Arbitration Division, informed the Parties about the constitution of the Panel in this procedure as follows:

    Sole Arbitrator: Prof. Stefano Bastianon, Law Professor and Attorney-at-Law, Busto Arsizio, Italy.

22. On 15 June 2022, upon review of the file case by the Sole Arbitrator and the fact that the Parties have agreed on bifurcation, pursuant to Article R55.5 of the CAS Code the parties were invited to file their final and comprehensive position in respect of CAS jurisdiction and to state whether they preferred a hearing to be held on the issue of CAS jurisdiction or the issuance of a preliminary Award on CAS jurisdiction based on the Parties' written submission.

23. On 22 June 2022, the Appellant and the Respondent filed their final position on CAS jurisdiction and requested the issuance of a preliminary Award on CAS jurisdiction based on the Parties' written submission.

24. On 5 July 2022, on behalf of the Sole Arbitrator, the CAS Court Office advised the Parties that the Sole Arbitrator would render a preliminary Award on CAS jurisdiction based on the Parties' written submissions in accordance with Article R55.5 of the CAS Code, without the need of holding a hearing.

VI. SUBMISSION OF THE PARTIES

A. The Appellant

25. The Appellant requested the following reliefs:

"(i) In principal:

(…)

1) the Appeal is admissible;

2) that the challenged decisions are set aside (annulled);

3) that the POLADA Disciplinary Panels has no jurisdiction to bring the case against the Appellant;

4) that the respondent shall bear the costs of the arbitral proceedings and contribute an amount to the legal costs and other expenses of the Appellant incurred in connection with the proceedings of the Appellant regarding to Rule R64.5 of the Code;

5) that the Respondent shall bear the additional costs of the proceedings which occur due to the proceedings before the POLADA Disciplinary Panels.

(ii) In alternative:

(…)

1) the Appeal of Appellant is admissible;

2) that the challenged decisions are set aside (annulled) and Sole Arbitrator rules on merits of the case by finding that:

a) the sanction imposed on the Athlete was excessive;

b) the 4 (four) year period of ineligibility for a first violation is rescinded;

c) the Athlete established that she did not know or suspect and could not reasonably have known or suspected, even with the exercise of utmost caution, that she used or been administered the prohibited substance or otherwise violated an anti-doping rule;

d) the Athlete acted: (i) without 'fault or negligence' pursuant to the Article 10.5 of the POLADA ADR or (ii) without intent and significant 'fault or negligence' pursuant to the Article 10.2.1.1 and Article 10.6.2 of POLADA ADR;

e) there are grounds to (i) eliminate the period of ineligibility imposed on the Athlete on the basis that the Athlete acted without 'fault or negligence' or alternatively that there are grounds for (ii)

reduction the period of ineligibility imposed on the Athlete, on the basis that she acted without 'intent' and 'significant fault or negligence';

3) that the respondent shall bear the costs of the arbitral proceedings and contribute an amount to the legal costs and other expenses of the Appellant incurred in connection with the proceedings of the Appellant regarding ro Rule R64.5 of the Code;

4) that the Respondent shall bear the additional costs of the proceedings which occur due to the proceedings before the POLADA Disciplinary Panels".

26. In support of her position on CAS jurisdiction, the Appellant relied on the following main arguments:

(a) pursuant to Article 13.2.2.3 and Article 13.2.2.3.4 POLADA ADR the decisions of the Second Instance Disciplinary Panel may be appealed as provided in Article 13.2.3.

(b) Article 13.2.3.2 POLADA ADR, concerning appeals involving other athletes (i.e. non-international athletes), provides that

"in cases under Article 13.2.2, the following parties shall have the right to appeal: (a) the Athlete or other Person who is the subject of the decision being appealed; (…)

For cases under Article 13.2.2, WADA, the International Olympic Committee, the International Paralympic Committee, and the relevant International Federation shall also have the right to appeal to CAS with respect to the decision of the Second Instance Disciplinary Panel.

(…)".

(c) The Appellant argued that it is evident from Article 13.2.3.2 (a) POLADA ADR that also a national-level athlete has the right to appeal to CAS a decision issued by the Disciplinary Panel of Second Instance. Indeed, assuming that a national level athlete is not entitled to appeal to CAS, then Article 13.2.3.2 POLADA ADR would have not mentioned the athlete in the category of persons entitled to appeal the decision issued by the Disciplinary Panel of Second Instance.

(d) Moreover, pursuant to POLADA ADR prior to 1 January 2021, a national level athlete had the right to appeal a decision of the Disciplinary Panel of Second Instance to the Court of Arbitration for Sport at the Polish Olympic Committee. In contrast, POLADA ADR in force from 1 January 2021 do not provide for such a possibility and do not allow a national level athlete to file an appeal to the CAS.

(e) The Appellant also referred to the 14 January 2022 Resolution of the Council of the Court of Arbitration for Sport at the Polish Olympic Committee, according to which

"(…) we cannot agree with the current interpretation of POLADA that by changing the internal disciplinary rues established (currently) by POLADA, national athletes lost the right to appeal against

the disciplinary decision to any external – non connected in any way with POLADA – arbitration organization (Court of Arbitration for Sport at the Polish Olympic Committee or CAS). Furthermore, Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms should be noted, according to which everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, to decide on his civil right and obligations or on the merits of any criminal charge against him. The exclusion of the possibility to appeal the decisions of the Disciplinary Panel – in the case of national athletes – to the TAS at the Polish Olympic Committee or to the CAS would be a violation of the principle stemming from the above-mentioned Article 6 of the Convention".

B. The Respondent

27. In its written submission to CAS jurisdiction, the Respondent requested the following reliefs:

"1. to reject an appeal formulated by Anna Harkowska cause of the lack of admissibility of CAS in this case;

2. the Appellant to cover all proceedings costs related to the recognition of CAS admissibility;

3. alternatively, in case of positive recognition of admissibility of CAS, POLADA reserves a right to formulate its position about merits of the case in a later stage of the proceedings".

28. In support of its objection to CAS jurisdiction, the Respondent relied on the following main arguments:

(a) there is no doubt that the Appellant is a national level athlete pursuant to POLADA ADR definitions;

(b) pursuant to Article 13.2.2 and Article 13.2.3.2 POLADA ADR concerning appeals involving national level athletes:

(i) the decisions issued by the Disciplinary Panel of First Instance may be appealed to the Second Instance Disciplinary Panel;

(ii) the following persons and entities are entitled to file an appeal to the Disciplinary Panel of Second Instance: *"(a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) POLADA and (if different) the National Anti-Doping Organization of the Person's country of residence or countries where the Person is a national or license holder; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; Polish Sport Federation and (f) WADA"*;

(iii) WADA, the International Olympic Committee, the International Paralympic Committee, and the relevant International Federation also have the right to appeal to CAS with respect to the decision of the Second Instance Disciplinary Panel;

(c) accordingly, the Respondent argued that the only entities entitled to file an appeal to CAS against a decision issued by the Disciplinary Panel of Second Instance are WADA, the International Olympic Committee, the International Paralympic Committee, and the relevant International Federation;

(d) therefore, pursuant to POLADA ADR, national level athletes benefit of a two-national instances mechanism at national level, whereas only a limited number of entities are entitled to file an appeal to CAS against the decision issued by the Disciplinary Panel of Second Instance.

29. While the Respondent put forward a "lack of admissibility of CAS" in this matter, the Sole Arbitrator notes from the Respondent's written submission that it actually challenges the jurisdiction of CAS to review the present dispute since it alleges that the decision issued by the POLADA Disciplinary Panel of the Second Instance was final, considering that the Appellant would not be entitled to appeal such decision, which could only be appealed by WADA, IOC, IPC and the relevant international federation.

30. As announced in the CAS letter of 5 July 2022 and as agreed by the Parties, the present Award is dedicated to the issue of CAS jurisdiction.

VIII. CAS JURISDICTION

31. Article 176 para. 1 of Switzerland's Federal on Private International Law Act (the "PILA") provides that Article 176 et seq. PILA apply if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland. The seat of the present arbitration is Lausanne, Switzerland (Article R28 of the CAS Code). None of the parties are domiciled in Switzerland. Articles 176 et seq. PILA therefore apply to the present case.

32. According to Article 186 para. 1 PILA, the arbitral tribunal shall rule on its own jurisdiction. The objection of a lack of jurisdiction must be raised prior to any defence on the merits. The Respondent has contested CAS jurisdiction in its letter of 29 March 2022 in a timely manner.

33. The Sole Arbitrator can therefore rule on his own jurisdiction in the present matter.

A. Specific Arbitration Agreement

34. The Sole Arbitrator notes that, according to Article R47 of the CAS Code, an *"appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body"*.

35. According to settled CAS jurisprudence, in order for the CAS to have jurisdiction to hear an appeal, there must exist either a specific arbitration agreement between the Parties, or the

jurisdiction of the CAS must be expressly recognized in the statutes or regulations of the sports-related body that issued the decision appealed against (CAS 2008/A/1602; CAS 2009/A/1910; CAS 2008/A/1708; CAS 2005/A/952).

36. Likewise, legal scholars have observed that *"it is now well-established CAS case law that a direct reference to CAS must be contained in the statutes or regulations of the body whose decision is being appealed"* (See MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials*, Wolter Kluwer, p. 289, para. 29).

37. In the present case, no specific arbitration agreement was concluded between the Parties.

B. Arbitration Clause in POLADA ADR

38. POLADA ADR provides the context in which the Appellant and the Respondent's rival arguments must be evaluated. POLADA ADR *"shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes"* (Article 24.2 POLADA ADR). Moreover, POLADA ADR *"have been adopted pursuant to the applicable provisions of the [WADC] and the International Standards and shall be interpreted in a manner that is consistent with applicable provisions of the [WADC] and the International Standards. The [WADC] and the International Standards shall be considered integral parts of these Anti-Doping Rules and shall prevail in case of conflict"* (Article 24.3 POLADA ADR).

39. Preliminarily, the Sole Arbitrator notes that the present case is governed by the POLADA ADR in force on 10 January 2021 (i.e., POLADA ADR 2021 September 2020, version 1.0 and version 1.3). Consequently, the Appellant's reference to POLADA ADR in force prior to 1 January 2021 is not relevant. Similarly, the position of the Council of the Court of Arbitration for Sport at the Polish Olympic Committee expressed in the resolution dated 14 January 2022 is irrelevant and cannot as such create a CAS jurisdiction.

40. Article 13.2 POLADA ADR (*Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences […]*) reads as follows:

"A decision that an anti-doping rule violation was committed, a decision imposing Consequences (…) may be appealed exclusively as provided in this Article 13.2".

41. Article 13.2.1 POLADA ADR (*Appeals Involving International-Level Athletes or International Events*) further provides:

"In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS".

42. It appears to be common ground that the Athlete is not an international-level athlete and POLADA does not claim that the ADRV arose from participation in an international event. Therefore, the Sole Arbitrator concludes that Article 13.2.1 POLADA ADR does not apply to the Appellant. Nor for the same reason does Article 13.2.3.1 POLADA ADR (*Persons entitled*

to Appeal – Appeals Involving International-Level Athletes or International Events) in so far as it provides:

"In cases under 13.2.1, the following parties shall have the right to appeal to CAS: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) POLADA and (if different) the National Anti-Doping Organization of the Person's country of residence or countries where the Person is a national or license holder; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; and (f) WADA".

43. Article 13 POLADA ADR continues:

"13.2.2 Appeals Involving Other Athletes or Other Persons

In cases where Article 13.2.1 is not applicable, the decision may be appealed to the Second Instance Disciplinary Panel. The appeal process shall be carried out in accordance with the International Standard for Results Management.

(…)

13.2.2.3 Decisions of the Second Instance Disciplinary Panel

(…)

13.2.2.3.4 The decision may be appealed as provided in Article 13.2.3 and Publicly Disclosed as provided in Article 14.3".

44. Article 13.2.3.2 POLADA ADR (*Persons Entitled to Appeal*) also provides:

"In cases under Article 13.2.2, the following parties shall have the right to appeal: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) POLADA and (if different) the National Anti-Doping Organization of the Person's country of residence or countries where the Person is a national or license holder; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; Polish Sport Federation and (f) WADA.

For cases under Article 13.2.2, WADA, the International Olympic Committee, the International Paralympic Committee, and the relevant International Federation shall also have the right to appeal to CAS with respect to the decision of the Second Instance Disciplinary Panel".

45. The two key issues of interpretation which arise at this juncture are:

(i) Does Article 13.2.3.2 POLADA ADR entitles a national-level athlete to file an appeal to CAS against the decisions of the Second Instance Disciplinary Panel?;

(ii) If the answer to (i) is no, must Article 13.2.3.2 POLADA ADR be deemed in violation of the right to a fair trial stemming from Art. 6.1 of the European Convention of Human Rights and Fundamental freedoms ("ECHR")?

46. The Sole Arbitrator notes that Article 13.2 of POLADA ADR refers to the appellate body competent to hear appeals against decisions regarding ADRV and provides two venues:

a) in cases involving international athletes or international events, *"the decision may be appealed exclusively to CAS"* (Article 13.2.1 POLADA ADR);

b) in cases involving other athletes or other persons, *"the decision may be appealed to the Second Instance Disciplinary Panel"* (Article 13.2.2 POLADA ADR).

47. Article 13.2.3 of POLADA ADR refers to persons entitled to appeal.

48. In cases under Article 13.2. POLADA ADR (i.e, involving international athletes or international events)

"the following parties shall have the right ***to file an appeal to CAS****: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) POLADA and (if different) the National Anti-Doping Organization of the Person's country of residence or countries where the Person is a national or license holder; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; and (f) WADA"* (emphasis added).

49. In cases under Article 13.2.2 POLADA ADR (i.e., involving other athletes or other persons)

"the following parties shall have the right to file an appeal: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) POLADA and (if different) the National Anti-Doping Organization of the Person's country of residence or countries where the Person is a national or license holder; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; Polish Sport Federation and (f) WADA.

For cases under Article 13.2.2, WADA, the International Olympic Committee, the International Paralympic Committee, and the relevant International Federation ***shall also have the right to appeal to CAS*** *with respect to the decision of the Second Instance Disciplinary Panel"* (emphasis added).

50. The Sole Arbitrator notes that Article 13.2.3.1 POLADA ADR expressly mentions the international-level athlete's right to appeal to CAS, whereas Article 13.2.3.2 POLADA ADR simply states that *"other athletes on other persons"* have the right to appeal. Moreover, the second para of Article 13.2.3.2 POLADA ADR clearly entitles a limited number of entities (i.e., WADA, the International Olympic Committee, the International Paralympic Committee, and the relevant International Federation) to file an appeal to CAS. In the Sole Arbitrator's view, it can be inferred from the foregoing that international-level athletes have a right to appeal to

CAS against decisions of the First Instance Disciplinary Panel, whereas national-level athletes have a right to appeal to the Second Instance Disciplinary Panel only against decisions of the First Instance Disciplinary Panel.

51. The Sole Arbitrator also notes that the provisions of POLADA ADR concerning the appeals are fully consistent with the WADC.

52. According to Article 13.2.1 WADC, in cases involving international-level athletes or international events

"the decision may be appealed exclusively to CAS".

53. According to Article 13.2.2 WADC, in cases involving other athletes or other persons,

"the decision may be appealed to an appellate body in accordance with the rules established by the National Anti-Doping Organization. The rules for such appeal shall respect the following principles:

- *a timely hearing;*
- *a fair, impartial and operational independent and institutionally independent hearing panel;*
- *the right to be represented by counsel at the Person's own expenses; and*
- *timely, written, reasoned decision.*

If no such body as described above is in place and available at the time of the appeal, the Athlete or the other Person shall have a right to appeal to CAS".

54. In other words, in establishing its own procedural rules a National Anti-Doping Organization ("NADO") can provide either that the appellate body for cases not involving international-level athletes or international events be an independent and impartial national-level appeal body provided the principles of a fair hearing is respected or provide that a national-level athlete (not involved in international events) has a right to appeal directly to CAS (See DAVID P., *A Guide to the World Anti-Doping Code. The Fight for the Spirit of Sport*, 2018, 477).

55. Against this, the Sole Arbitrator notes that, in cases not involving international level athletes or international events, POLADA ADR have clearly opted for a right to appeal to a national appellate body (i.e. the Second Instance Disciplinary Panel).

56. The Appellant argued that, if a national-level athlete (not involved in international events) is not entitled to appeal to CAS against the decisions of the Second Instance Disciplinary Panel, Article 13.2.3.2 POLADA ADR would have not mentioned the athlete in the category of persons entitled to appeal.

57. However, the Sole Arbitrator notes that the Appellant's argument does not consider that Article 13.2.3.2 POLADA ADR does not refer specifically to appeals against the decisions of

the Second Instance Disciplinary Panel, but, more generally, refers to persons entitled to file an appeal. Consequently, the reference to the (national level) athlete in Article 13.2.3.2 POLADA ADR simply indicates that such athlete is entitled to file an appeal against a decision of the First Instance Disciplinary Panel.

58. Moreover, assuming that Article 13.2.3.2 POLADA ADR refers both to appeals against decisions of the First Instance Disciplinary Panel and to appeals against decisions of the Second Instance Disciplinary Panel, the second paragraph of this provision would be meaningless, as WADA, the International Olympic Committee, the International Paralympic Committee and the relevant International Federation are already mentioned in Article 13.2.3.2, para. 1 POLADA ADR.

59. Therefore, in order to construe para. 2 of Article 13.2.3.2 POLADA ADR in a sense that it may have some effect rather than none (in application of the fundamental interpretive principle *"ut res magis valeat quam pereat"*), in the Sole Arbitrator's view the broad reference to Article 13.2.3 POLADA ADR contained in Article 13.2.2.3.4 POLADA ADR must be read as a specific reference to Article 13.2.3.2, para. 2 POLADA ADR.

60. For all those reasons, the Sole Arbitrator concludes that in POLADA ADR there is no CAS arbitration clause entitling a national-level athlete (not involved in international events) to file an appeal to CAS against decisions of the Second Instance Disciplinary Panel.

61. The second argument put forward by the Appellant relates to the alleged violation of Article 6.1 ECHR in the event that Article 13.2.3.2 POLADA ADR is interpreted to preclude a national-level athlete (not involved in international event) to appeal to CAS against decisions of the Second Instance Disciplinary Panel.

62. The need to protect the fundamental rights of the parties has been consistently emphasized in the CAS case law. In particular, in CAS 2012/A/3031, the panel stressed that *"the CAS jurisdiction cannot be imposed to the detriment of an athlete's fundamental rights. In other words, an athlete basically cannot be precluded from obtaining in CAS arbitration at least the same level of protection of his/her substantive rights that he or she could obtain before a State court. As an author put it* (HAAS U., *Role and Application of the European Convention on Human Rights in CAS Procedures*, in *Int'l Sports Law Review* 3, 42, at 53-54), *'arbitration may be accepted, in the eyes of the European Convention on Human Rights, as a valid alternative to access to a State court, only if arbitration proceedings constitute a true equivalent of State court proceedings'"* (para 68).

63. Moreover, CAS panels have always sought to guarantee the parties' respect for the fundamental principles of procedure, in accordance with the notion of procedural public policy (*"ordre public"*) as defined by the case law of the Swiss Federal Tribunal ("SFT").

64. In CAS 2011/A/2426 (paras 66-67), the CAS panel stressed that *"[w]ith specific regard to the European Convention on Human Rights ("ECHR"), which was invoked by the Appellant, the Panel remarks that international treaties on human rights are meant to protect the individuals' fundamental rights vis-à-vis governmental authorities and, in principle, they are inapplicable per se in disciplinary matters carried out by sports governing bodies, which are legally characterized as purely private entities (…). However, the*

Panel is mindful that some guarantees afforded in relation to civil law proceedings by article 6.1 of the ECHR are indirectly applicable even before an arbitral tribunal – all the more so in disciplinary matters – because the Swiss Confederation, as a contracting party to the ECHR, must ensure that its judges, when checking arbitral awards (at the enforcement stage or on the occasion of an appeal to set aside the award), verify that parties to an arbitration are guaranteed a fair proceeding within a reasonable time by an independent and impartial arbitral tribunal. These procedural principles thus form part of the Swiss procedural public policy".

65. The Sole Arbitrator notes that, as a matter of principle, according to the case law of the European Court of Human Rights ("ECtHR"), a violation of Article 6.1 ECHR cannot be grounded on the lack of independence or impartiality of a decision-making tribunal or the breach of an essential procedural guarantee by that tribunal, if the decision taken is subject to subsequent control by a judicial body that has "full jurisdiction" and ensures respect for the relevant guarantees by curing the failing in question (*Denisov v. Ukraine* [GC], 2018, paras 65, 67 and 72, in a disciplinary context; *De Haan v. the Netherlands*, 1997, paras 52-55; *Helle v. Finland*, 1997, para 46; *Crompton v. the United Kingdom*, 2009, para 79).

66. In line with the abovementioned case law, the adjudication process in the WADC provides, in principles, for two instances, although different standards of independence and impartiality apply to the first instance and the second instance. Accordingly, in cases where a final appeal to CAS is possible, the requirements of independence and impartiality are always met, since the CAS has been found to be a true and independent arbitral tribunal (See EctHR, *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, 2.10.2018). On the contrary, if the appellate body established by the rules of a NADO is competent to finally decide the case, Article 13.2.2 WADC ensures that the same standards of independence and impartiality are met at the local appellate level. If not, the national-level athlete (not involved in international events) has a right to appeal the first instance decision directly to CAS (See HAAS U., *The revision of the World Anti-Doping Code 2021*, CAS Bulletin March 2020; DE LA ROCHEFOUCAULD/REEB, *Sport and human rights. Overview from a CAS perspective* (as at 31 March 2021), p. 4, footnote 2).

67. Against this, the Sole Arbitrator notes that Article 13.2.2.1 POLADA ADR concerning hearings before the Second Instance Disciplinary Panel reads as follows:

"13.2.2.1.1 The Second Instance Disciplinary Panel shall consist of an independent Chair and two other independent members.

(…)

13.2.2.1.3 The appointed members shall be Operationally and Institutionally Independent. Board members, staff members, commission members, consultants and officials of POLADA or its affiliates (such as a Delegated Third Party), as well as any Person involved in the investigation, pre-adjudication or Results Management of the matter, cannot be appointed as members and/or clerks of the Second Instance Disciplinary Panel. In particular, no member shall have previously considered any TUE application, Results Management decision, first instance, or appeal involving the same Athlete in a given case.

13.2.2.1.4 The Second Instance Disciplinary Panel shall be in a position to conduct the hearing and decision-making process without interference from POLADA or any third party".

68. Article 13.2.2.2 POLADA ADR concerning proceedings before the Second Instance Disciplinary Panel provides, *inter alia*, as follows:

"13.2.2.2.1 The proceedings of the Second Instance Disciplinary Panel shall respect the principles described in Articles 8, 9, and 10 of the International Standard for Results Management.

(…)

13.2.2.2.6 Each party shall have the right to be represented by counsel at a hearing at that party's own expense".

69. Article 13.2.2.3 concerning decisions of the Second Instance Disciplinary Panel provides, *inter alia*, as follows:

"13.2.2.3.1 At the end of the hearing, or promptly thereafter, the Second Instance Disciplinary Panel shall issue a written, dated and signed decision that respects the principles of Article 9 of the International Standard for Results Management.

13.2.2.3.2 The decision shall notably include the full reasons for the decision and for any period of Ineligibility imposed, including (if applicable) a justification for why the maximum potential sanction was not imposed".

70. More generally, according to *Introduction* of POLADA ADR, which constitute integral part of POLADA ADR (see Article 24.4 POLADA ADR):

"POLADA was established Polish Anti-Doping Act in 2017 with the objective of acting as the National Anti-Doping Organization for Poland. As such, and in accordance with Article 20.5.1 of the Code, POLADA notably has the necessary authority and responsibility to be independent in its operational decisions and activities from sport and government. Without limitation, this includes the prohibition of any involvement in its operational decisions or activities by any Person who is at the same time involved in the management or operations of any International Federation, National Federation, Major Event Organization, National Olympic Committee, National Paralympic Committee, or government department with responsibility for sport or anti-doping".

71. Therefore, in the Sole Arbitrator's view, the two-instance adjudicatory system established by POLADA ADR is fully consistent with both WADC and Art. 6.1 ECHR. In any case, the Sole Arbitrator notes that:

i) the Appellant has never contested either the impartial and independent nature of the Second Instance Disciplinary Panel or the violation of her right to the heard during the proceedings before the Second Instance Disciplinary Panel;

ii) the last paragraph of Article 13.2.2 WADC (providing a national-level athlete with the right of appeal to the CAS if an impartial and independent second instance body is not available) may not be applied here as there is no evidence on file which could prove the

lack of independence and impartiality of the Second Instance Disciplinary Panel or the violation of the Appellant's right to be heard.

72. For the sake of clarity and completeness, the Sole Arbitrator considers also the alleged violation of Article 6.1 ECHR raised by the Appellant from the perspective of the principle of equal treatment.

73. In adversarial proceedings, the principle of a fair trial established by Article 6.1 ECHR is closely linked to the principle of equality of arms (*Regner v. The Czech Republic* [GC], 2017, para 146). However, such a principle is not absolute, and its scope may vary depending on the specific features of the case in question (*Haudákavá and Others v. Slovakia*, 2010, paras 26-27).

74. In the Sole Arbitrator's view, the purported asymmetric nature of Article 13.2.3.2 POLDADA ADR in so far as it entitles only WADA, the International Olympic Committee, the International Paralympic Committee and the relevant International Federations to file an appeal to CAS against decisions of the Second Instance Disciplinary Panel does not amount to a violation of Article 6.1 ECHR.

75. Indeed, in CAS 2019/A/6226 the panel found that *"there is a clear justification for granting WADA a right to appeal decisions of a national-level appellate body – to give WADA the avenue to ensure that WADC signatories are properly and uniformly enforcing the WADC, particularly in order to avoid that NADOs and national judging bodies adopt a protectionist attitude and give preferential treatment to their own athletes when it comes to the assessment of anti-doping offences"* (para 89).

76. The Sole Arbitrator also notes that the positions of a national-level athlete (not involved in international events) and WADA are not comparable. The athlete's rights are fully respected by a national two-instance adjudicatory mechanism provided that the national appellate body respects the principles of independence and impartiality as well as the right to be heard stemming from Article 6.1 ECHR. Conversely, WADA's right to appeal to CAS against decisions issued by a national appellate body is consistent with the role of WADA, which is charged with the following tasks:

i) to ensure the uniform application of anti-doping rules worldwide and the respect of the principle of equal treatment of athletes at transnational level;

ii) to correct potential mistakes in the interpretation and/or application of anti-doping rules by the anti-doping national sports bodies;

iii) to avoid the risk of unredressable "home-town" decisions.

77. For all those reasons, the Sole Arbitrator concludes that Article 13.2.3.2 POLADA ADR is not in contrast with Article 6.1 ECHR in so far it does not entitle national-level athletes to file an appeal to CAS against decisions of the Second Instance Disciplinary Panel.

78. As a result, the Sole Arbitrator concludes that the CAS has no jurisdiction to proceed on the present dispute between the Parties. Consequently, all other issues raised by the Parties are moot.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. CAS has no jurisdiction to decide on the appeal filed on 29 March 2022 by Ms. Anna Harkowska against the decision rendered by the Disciplinary Panel of Second Instance on 21 December 2021 with reasons notified on 9 February 2022.

2. The appeal filed by Ms. Anna Harkowska against the decision rendered by the Disciplinary Panel of Second Instance on 21 December 2021 with reasons notified on 9 February 2022 is not entertained.

3. (…).

4. (…).