

# Around the World

## Switzerland

### SWITZERLAND: DOPING OFFENCES IN THE PAST /ELIGIBILITY TO PARTICIPATE IN OLYMPIC GAMES

*Discussion of Decision Nos 2011/O/2422 (USOC v IOC) dated October 4, 2011 and 2011/A/2658 (BOA v WADA) dated April 30, 2012 by the Court of Arbitration for Sports (CAS)*

⚖ Disciplinary procedures; Eligibility; Misuse of drugs; Olympic Games; Sportspersons; United States

#### 1. Decision No.2011/O/2422 (USOC v IOC) dated October 4, 2011

##### 1.1 Facts

In 2008, at its meeting in Osaka, the International Olympic Committee (IOC) enacted the following rule which has since been known as the “Osaka Rule”:

“Any person who has been sanctioned with a suspension of more than six months by any anti-doping organization for any violation of any anti-doping regulations may not participate, in any capacity, in the next edition of the Games of the Olympiad and of the Olympic Winter Games following the date of expiry of such suspension.”

In 2010, LaShawn Merrit, an American track and field athlete who specialised in the 400 metres and was a gold medallist at the 2008 Olympic Games, had been suspended until 2011 for a doping offence. In legal proceedings before the AAA/North American Court of Arbitration for Sports on this matter, it was decided that the Osaka Rule could not be used to prevent LaShawn Merrit from competing in the 2012 Olympic Trials or from having his name submitted from entry to the Olympic Games. However, the IOC who was not a party to the said proceedings would not accept his nomination for the Olympic Games based on the Osaka Rule. Therefore, the US Olympic Committee (USOC) and the IOC voluntarily entered into an arbitration agreement and requested a CAS award regarding the applicability/validity of the Osaka Rule. Many stakeholders in the fight against doping filed amicus curiae briefs, outlining their view on the matter.

##### 1.2 Held

CAS followed the USOC’s arguments and held that the Osaka Rule was not—as the IOC had argued—simply a condition of eligibility to compete in the Olympic Games but rather an additional disciplinary sanction for an anti-doping rule violation after the ineligibility sanction under the World Anti-Doping Code (WADA Code) has been served.

However, as a signatory of the WADA Code, the IOC is bound by contract to comply with its terms. Article 23.2.2 of the WADA Code provides that

“The following Articles ... must be implemented by Signatories without substantive change ...

Article 10 (Sanctions on Individuals) ...

No additional provision may be added to a Signatory’s rules which changes the effect of the Articles enumerated in this Article.”

CAS qualified the Osaka Rule as a prohibited substantive change to the WADA Code and found the Osaka Rule, for lack of its compliance with the IOC’s own statutes (which had incorporated the WADA Code), to be invalid and unenforceable. The IOC was requested not to enforce the said Rule against any athlete pending its formal abrogation by the IOC Executive Board.

Nevertheless, CAS hastened to stress that it was not stating that the spirit or the rationale of the Osaka Rule was wrong. However, if such rule could be validly enacted, this would have to take place within the WADA Code which was the only set of rules with any sanctions for violation of anti-doping rules, which signatories to the Code could apply.

## **2. Decision No.2011/A/2658 (BOA v WADA) dated April 30, 2012**

### **2.1 Facts**

Rule 7.4 of the Bye-Law relating to Anti-Doping (the Bye-Law) of the British Olympic Association (BOA) provides that any British athlete

“who has been found guilty of a doping offence ... shall not ... thereafter be eligible for consideration as a member of a Team GB or be considered eligible by the BOA to receive or to continue to benefit from any accreditation as a member of the Team GB delegation for or in relation to any Olympic Games.”

Until the *USOC v IOC* award (see above) was issued, both BOA and WADA acted under the presumption that the Bye-Law was not contrary to the WADA Code. WADA had even explicitly confirmed this to the BOA in 2008. The day after the publication of the *USOC v IOC* award, however, WADA informed the BOA that, in light of the said award, it might have to change its views on the Bye-Law. In November 2011, after the WADA Foundation Board had discussed its annual report on the compliance of its members with the WADA Code, it advised the BOA in a letter that it had found the Bye-Law not to be Code-compliant.

The BOA appealed this decision with the CAS. The same panel as the one selected in the *USOC v IOC* case conducted the proceedings.

In its briefs, the BOA outlined the differences between the Bye-Law and the Osaka Rule (namely, the Bye-Law admits of exception). It took the position that the Bye-Law was an overall team selection policy aimed at choosing the most appropriate athletes to be representatives of Team GB, neither constituting a rule of ineligibility nor a sanction, and that it therefore did not fall within the scope of the WADA Code.

### **2.2 Held**

CAS again referred to art.23.2.2 of the WADA Code, which requires that its signatories do not insert any additional provisions in their rules which would change the substantive effect of any enumerated provisions of the WADA Code, including its sanctions for doping. This article was introduced into the WADA Code in order to be a guarantor of worldwide harmony in the fight against doping.

As in the *USOC v IOC* case, CAS determined that the Bye-Law operates within the sphere of activity governed by the WADA Code. By imposing an additional sanction of a much lengthier duration than those provided in the WADA Code, the Bye-Law was qualified not to be compliant with the WADA Code. The view of the WADA Foundation Board as indicated in its decision is confirmed. Therefore, the appeal of BOA is rejected.

## **Discussion of both decisions**

The first award reflects an unusual dispute situation as the arbitration was not held in the form of an appeal against a previous decision. Rather, two parties who could not agree on the prerequisites to be met by athletes to be admitted to participate in the Olympic Games, decided to submit an abstract legal question to CAS for decision outside of the context of a previously pending dispute between them. CAS confirmed its jurisdiction for such

proceedings to be held pursuant to the procedural rules for Ordinary Arbitration Procedures (arts R38 et seq. of the then applicable Procedural Rules, 2004 edition, including the General Provisions as stated in arts R27 et seq.) based on the fact that the parties had agreed, in an Arbitration Agreement as well as by signing the Order of Procedure, to proceedings before CAS.

Had the parties not agreed on such proceedings, any of the two parties would still have been able to initiate a so-called Consultation Procedure pursuant to arts R60 et seq. of the then applicable Procedural Rules of CAS (2004 edn) on its own. However, the opinion to be rendered by CAS within the framework of such procedure would not have, as specified in art.R62 of the CAS Procedural Rules (2004 edn), constituted a binding arbitral award. For lack of frequent use, the Consultation Procedure has, in the latest revision of the CAS Procedural Rules, entered into force at the beginning of 2012, been abolished.

Substantively, CAS did not compare two sets of independent rules (the WADA Code and the IOC Osaka Rule) and value one of them more highly than the other. Rather, it held that the IOC itself had made the WADA Code a set of its own rules by formally incorporating it into the IOC statutes. This set of rules was assessed against the Osaka Rule. As the incorporation of the WADA Code took place in the IOC statutes and as the Osaka Rule was qualified as a rule of lower hierarchy within the framework of IOC rules, the Osaka Rule was declared invalid for incompatibility with higher-ranking rules.

The second award was to be expected in the light of the first. After CAS had, in its first award, accepted that the WADA Code was the one and only set of rules allowed to determine any sanctions for violations of the anti-doping rules, any other incompatibilities with this principle had to be identified. The BOA Bye-Law, which was declared invalid in the second procedure was a good subject for such review for two reasons. First, the life-long ban it imposed on British athletes who had been suspended for an anti-doping violation constituted the strictest sanction one could imagine. Secondly, two famous sportsmen (sprinter Dwain Chambers and cyclist David Millar) were vigorously disputing this Bye-Law as they were hoping to be selected for Team GB for the London 2012 Olympic Games despite having served a suspension previously. Whether there will be more comparable decisions is yet undetermined. Rumour has it that, since the two awards were issued, many other sports organisations have secretly reviewed their rules to verify whether they are in conformity with the WADA Code and its requirements.

After these awards were issued, many stakeholders in sports raised their voices, criticising the awards as being doping-friendly and counterproductive in the fight against doping. However, CAS itself had remarked in the first award that the legal situation was clear and that its award should not be mistaken for a political decision. If the Osaka Rule or any related sanctions should stay in force, they would have to be incorporated into the WADA Code. British stakeholders have since announced their support of any intention to add such sanctions in the next revision. At the time this article was submitted for publishing, however, no such new wording of the WADA Code had been decided upon (yet?).

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