

DRUGS IN SPORT

RECENT DEVELOPMENTS IN A FAST CHANGING AREA

OUTLINE FOR 19TH ANNUAL ANZSLA CONFERENCE:

"THE PRICE OF SPORT"

*CANBERRA, AUSTRALIA
7 – 9 OCTOBER 2009*

Paul David

BA (Hons), LL.M (Cantab)
Barrister, Eldon Chambers
Level 3, The Annex, 41 Shortland Street
Auckland, New Zealand

www.pauldavid.co.nz

OUTLINE FOR PRESENTATION – RECENT DEVELOPMENTS IN A FAST CHANGING AREA

A long way in a short time

Anti-doping has come a long way in a short period of time - the WADC 2003 contractual scheme (supported by UNESCO Convention against Doping in Sport at State level, currently 120 ratifications) has created harmony and consistency.

WADC 2009 is now in force – Code will continue to evolve. Before looking at recent developments, worth remembering what current system has replaced – previous general lack of harmony between sports in anti-doping matters uncertainty and unfairness – example of the *Bray* case in New Zealand.

Areas of development

Several significant changes in the measures taken to combat doping are producing new case law before CAS and domestic tribunals – development likely to continue apace.

- The changes in WADC 2009 – particularly greater flexibility as to sanctions.
- Increasing investigation of non-analytical anti-doping rule violations under Code by anti-doping organisations.
- Changing approaches (whereabouts requirements under WADA Program, biological passport regimes, further eligibility rules).

Access to decisions of CAS and sporting tribunal remains an issue, but efforts are being made. Greater problem may become, perhaps, the ever-increasing volume of decisions being produced worldwide – important for tribunals which hear allegations and those who advise and appear to focus on applicable principles.

Areas covered

Complex, developing area but will refer to changes to Code and some decisions in particular areas:

- Changes in the WADC 2009 and initial decisions under provisions giving greater flexibility as to sanctions.
- Athlete's B sample rights.
- Violation of "refusing" under Article 2.3 Code.
- Proof of the elements of non-analytical anti-doping rule violations – "use", "possession", "attempt".
- Substantial assistance and prompt admission.
- Future challenges for the Code.
- Some concluding comment.

Changes to the Code – the 2009 Code

- Consultation process on possible changes required by Code, produced 2009 Code, - process of evolution will continue.
- Signatories agree to 2009 Code – new rules at National level as a result - example in New Zealand – Sports Anti-Doping Rules (2009) adopt 2009 Code - adopted automatically by NSOs, if adopted SADR (2007) as "amended from time to time" as most NSOs did.

Key change in 2009 Code – more flexible sanctions regime

- Broadening category of "specified substances" – Article 4.2.2, 10.4 – "softening" of strict liability by this method if pre-conditions proved by athlete as required – important pre-conditions – how substance entered athlete's system and no intention to enhance sport performance.
- No fault and no significant fault remains – Article 10.5.1 and 10.5.2 – no significant fault expressed to apply (potentially at least) to all violations (see notes to Article).

- Provisions for reduction for prompt admission and assistance – Article 10.5.3 – 10.5.5, 10.6.2 – prompt admission also reason to start ineligibility earlier – Article 10.9.2.
- Aggravating circumstances can be established by ADO to increase 2 year sanction – Article 10.6.
- Multiple violations– Article 10.7 table.

More complex process in arriving at sanction to be imposed.

Other changes:

- Atypical findings – International Standard Prohibited List – Article 7.3 Code.
- Violation for breach of ineligibility provisions – Article 10.10.2.
- Whereabouts information – requirements in International Standard for Testing – Article 2.4 violation.
- Provisional Suspension – Article 7.5 – mandatory where A sample for non-specified substance.
- Transitional provisions – Article 25 – *lex mitior* principle.

Remember Code part of WADA Program which includes International Standards which have also changed.

Beginning to see decisions by CAS and national tribunals applying the 2009 Code provisions for specified substances – at this stage under operation of transitional provisions and *lex mitior*:

- *DSFNZ v Boswell*, Sports Tribunal 01/09
- *DSFNZ v Wallace*, Sports Tribunal 15/08
- *ITF v Vollandri*, ITF Anti-Doping Tribunal
- *USADA v Brunemann*, AAA 77 190 E 00447 08 JENF

Important for athlete to prove pre-conditions as required by Article 10.4 before more flexible approach possible.

Athlete B sample rights

Athletes right to attend B sample and requirements for B sample analysis – 2 different matters – *David: A Guide to the World Anti-Doping Code*, p 106, 107.

Earlier decisions on B sample analysis – *Landaluze*, TAS 2006/A/1119; *FINA v Oliva*, FINA Doping Panel 1/07; referred to in *USADA v Jenkins*, AAA No. 30 190 00199 07. Change to 2009 ISL.

Varis v IBU, CAS 2008/A/1607 - B sample analysis went ahead in absence of athlete after no attempts to accommodate athlete's attendance but before neutral party appointed by NADO. B sample confirmed A sample but sport Rules and IS not followed. B sample confirmed A sample. Tribunal set aside positive result because B sample rights not adhered to – agreed procedural error invalidates testing process relying on earlier pre-Code authority – no consideration whether AAF caused by breach.

Non-analytical anti-doping rule violations – importance of definitions in Code and analysis of facts

- *ASADA v Marinov*, CAS A1/2007 – failure to prove possession on facts, appeal allowed.
- *ASADA v van Tienen*, CAS A3/2007 – proof of “use” to the required standard by interviews and analysis of A sample only.
- *ASADA v Wyper*, CAS A4/2007 – “constructive” possession not made out but attempted use established where athlete ordered prohibited substances over the internet.
- *IRB v Troy & ARU*, CAS 2008/A/1664 – possession – actual or constructive – not established - attempted use made out – no analytical testing – “impossibility”.
- *Gibilisco v CONI*, CAS 2007/A/1426 – successful appeal to CAS – requirements for attempted use under Code definition not satisfied where athlete linked to suspicious

doctor and had been subject to criminal investigation, but evidence not satisfying burden and standard of proof under Code.

Substantial assistance under 2003 Code

- *Rasmussen v FMC & UCI*, CAS 2008/A/1612 – Article 2.4 violation – no reduction for substantial assistance.
- *UCI v Scarponi*, CAS 2007/A/1368 – use or attempted use – *Puerta* investigation – admitted transfusion to have retransfused later – did not finish process – attempted use established – 3 months reduction for naming others (reduced from 6 months before CONI).
- *Riccardo Ricco v CONI*, TAS 2008/A/1698 also reduction to 20 months for assistance.

Prompt admission

- *DFSNZ v Hunter-Galvan*, ST 07/09 – requirements of Code 2009 for “prompt admission” under Article 10.9.2 for period of ineligibility to start earlier than hearing date. Note clearer provision on reasons for period of ineligibility to start earlier.

Refusals

- *WADA v CONI, FIGC, Mannini and Possanzini*, CAS 2008/A/1557 – “no compelling justification” to refuse but no significant fault or negligence – illogical?

Outside the Code – Claim by athlete for wrongful termination of contract

- *Gusev v Olympus SARL*, TAS 2008/O/1643 – professional cyclist successfully claims for damages (about 600,000 Euro) - where contract was summarily terminated as a result of “suspicious” blood values – no chance to answer. Emphasises need for proper approach to employment contract (and generally).

Challenges and issues ahead

- Challenges before Belgian courts in relation to whereabouts regime – proceedings ongoing.

- Eligibility by-laws from IOC under Olympic Charter rule 45. See *USADA v Hardy*, AAA 77 190 00288 09 – nutritional supplement case but Panel asserting jurisdiction to make orders effectively putting in issue IOC eligibility by-law, notwithstanding IOC not a party.
- Greater flexibility under 2009 Code – more difficult to maintain harmony? – Great need for principled decision making bad decisions have ripple effect.

As this complex area develops at real pace, challenge is to keep the focus on the applicable principles and Code – lawyers have a significant role in ensuring understanding of the key principles so that tribunals can give decisions which are consistent with the Code.

**Paul David
Barrister
Eldon Chambers
Auckland, New Zealand
23 September 2009**