Arbitration CAS 2005/A/831 International Association of Athletics Federation (IAAF) v. Eddy Hellebuyck, award of 5 May 2006

Panel: Prof. Ulrich Haas (Germany), President; Prof. Richard McLaren (Canada); Ms Maidie Oliveau (USA)

Athletics
Doping (recombinant EPO)
Reliability of the testing procedure used for detecting r-EPO
Beginning of the period of ineligibility

1. **A mere hypothetical possibility of false positives, i.e. pure speculation about the unreliability of the testing procedure, is, on its own, not sufficient for calling into question the reliability of the testing procedure. Rather evidence must be shown that the test procedure results are unreliable and that false positives occur. The threshold for this is high; for it must be taken into account that 1) the various WADA accredited laboratories already have extensive experience with the testing procedure; 2) there is a long jurisprudential basis for the acceptance of the testing procedure within the CAS and other dispute resolution Institutions in sport; 3) the validity of the testing procedure has been the subject of a number of studies that have been published in peer-reviewed journals and was also the subject of scrutiny at various scientific meetings.**

2. **If the athlete was able to continue to participate in competitions in the period between the taking of the sample and the hearing of his/her case, if it was within the athlete's control to determine the commencement of the two-year suspension by accepting a "provisional suspension", and if the athlete himself/herself contributed very significantly to the delay in the proceedings, then it cannot be said that he/she has suffered any legal disadvantages through the excessively long duration of the proceedings. Therefore, there are no compelling reasons of fairness which would justify an (unwritten) exception stating that the two-year sanction shall begin to run on the day on which the sample was taken, contrary to the clear and unambiguous wording of the applicable rule according to which the suspension shall start from the date of the hearing at which it is decided that the Doping Offence has been committed.**

The Appellant, International Association of Athletics Federation ("IAAF" or "the Appellant"), is the international sports federation governing the sport of athletics and has its seat in Monaco.

Mr Eddy Hellebuyck ("the Respondent" or "Mr Hellebuyck") is an elite-level distance runner in the sport of track and field. He was born on 22 January 1961. He is a member of USA Track and Field ("USATF") the national governing body of the sport of athletics in the United States of America.

On 31 January 2004 the Respondent provided a urine sample as part of the United States Anti-Doping Agency ("USADA") out-of-competition testing program. On 25 February 2004 the World Anti-Doping Agency ("WADA") accredited laboratory at the University of California in Los Angeles ("the Laboratory") reported a positive A sample for recombinant human erythropoietin ("r-EPO"). On 15 April 2004 the Laboratory reported that the Respondent's B sample also proved positive for r-EPO. The latter is a banned substance according to the Appellant's rules.

USADA submitted the case to a panel of the USADA Anti-Doping Review Board. Following the Review Board's review, USADA recommended a two-year suspension. This was communicated to the Respondent by letter dated 14 June 2004. In addition the letter also included the following passage:

> *"… in accordance with IAAF Rule 59(2), you have the right, at this time, to accept a 'provisional suspension.' This means that you will be immediately suspended from competing in all competitions under the jurisdiction of the IAAF, USATF and USOC, until your tests are deemed not to be a doping offence or until you accept a sanction or a hearing has been held in this matter beginning on the date you accept the 'provisional suspension' and notify USADA of such acceptance. If you choose to accept the 'provisional suspension', in accordance with IAAF Rule 60 (2)(a)(i), the period of the 'provisional suspension' will be deducted from any period of ineligibility you might receive. If you do not choose this 'provisional suspension' any period of ineligibility you might receive will begin on the date of your acceptance of the sanction or the hearing panel's decision. …".*

The Respondent did not accept the "provisional suspension" by USADA. He was therefore able to participate in competitions during the entire period between the taking of the sample and the hearing on 30 November 2004. The Respondent made use of this possibility on at least two occasions, one of which was also after having received the above-mentioned letter from USADA of 14 June 2004.

The Respondent exercised his right to a hearing before a three-member Panel of arbitrators from the American Arbitration Association/North American Court of Arbitration for Sport ("the NACAS"). The hearing was held on 30 November 2004.

On 9 December 2004 the NACAS issued a written decision which stated *inter alia* that, *"a doping violation occurred on the part of the Respondent … [and that the] minimum suspension … of two (2) years is imposed on the Respondent to take effect from January 31, 2004"*. The decision was communicated to USADA and to the Respondent on 9 December 2004.

By fax dated 10 December 2004 USADA forwarded the decision of the NACAS to the Appellant.

By letter dated 21 December 2004 the NACAS provided an explanatory letter from the chairman of the panel regarding the start date of the sanction. This letter reads *inter alia* as follows: *"… The extraordinary delay between the collection and hearing would make mechanistic application of the IAAF's rule produce a penalty of 33 months in this case, (well beyond the minimum in IAAF's rules) since IAAF also requires forfeiture of results between collection and hearing. Perhaps I should have labelled this delay 'exceptional circumstances' but it seemed self-evident. …".*

By letter dated 8 February 2005 the Appellant filed an appeal against the decision by NACAS with CAS. By letter dated 17 February the Appellant submitted its Appeal Brief.

LAW

Jurisdiction

1. The Code applies whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes can arise out of the statutes and regulations of a federation containing an arbitration clause, out of a contract containing an arbitration clause, or be the subject of a later arbitration agreement. In casu the jurisdiction of CAS is based on Rule 21.2 of the 2002-2003 IAAF Rules. (hereinafter referred to as "the former IAAF-Rules"). According to this provision *"all appeals … between the IAAF and an athlete… however arising, whether doping or non-doping related, shall be referred to the Court of Arbitration for Sports …"*.

2. The application of Art. 21.2 of the former IAAF Rules ensues in the present case from the transition rule in the 2004-2005 IAAF Rules (hereinafter referred to as "the revised IAAF Rules"). According to this, the relationship between the former and the revised IAAF Rules is governed in the Introduction to the revised IAAF Rules as follows:

   "[the revised IAAF Rules] … have been duly passed by the Council further to, and in accordance with the Congress mandate. They shall take effect from 1 March 2004, i.e. in relation to all samples provided, on or after that date. They shall not be applied retrospectively to doping matters pending at 1 March 2004".

3. In the Panel's opinion this transition rule is neither arbitrary nor is it unfair. Since the present case is based on a doping test from the period prior to the cut-off date of 1 March 2004, only the provisions of the former IAAF Rules apply to the case.

4. Moreover, the parties have signed the Order of Procedure dated 4 November 2005. Furthermore, in their abundant correspondence with the CAS, neither the Appellant nor the Respondent has at any time challenged the general jurisdiction of the CAS. Finally, both parties confirmed the jurisdiction of the CAS at the hearing.

The Panel's Task

5. The Panel's task follows from Article R57 of the Code. According to said Article the Panel has full power to review the facts and the law of the case. Basically, Article R57 of the Code is understood to mean that the Panel's power to review the facts and the law of the case exists only within the scope of the request filed by the Appellant (see CAS 2002/A/432 marg. no 9.4.6 *et seq*; RIGOZZI, L'arbitrage international en matière de sport, 2005, marg. no 1369). An exception to this principle exists only if the Respondent raises a counter appeal. The Respondent did this in his *"reply brief"* dated 17 February 2005, for in the latter he is no longer

requesting only that the Appellant's request be dismissed but rather he is now pursuing an independent application of his own, namely that NACAS' decision dated 9 December 2005 be set aside and that the anti-doping rule violation be dismissed. Such a counter appeal is - basically - only covered by the terms of Article R57 of the Code if it was filed in due form and in due time. It is questionable whether this is so in the present case. However, there is no need to answer this because by letter of 12 August 2005, in its *"response to the Respondent's reply brief"* of 10 October 2005 and in the oral hearing the Appellant expressly declared its agreement that the Panel's mission be extended and furthermore it entered an appearance in the matter. In the present case the Panel therefore has the power to amend NACAS' decision of 9 December 2004 in either party's favour. Furthermore, Article R57 of the Code also allows the Panel to annul the decision and refer the case back to the first instance panel.

Admissibility

6. The appeal filed by the Appellant by letter dated 8 February 2005 is admissible. The Panel determined this in its preliminary decision dated 4 July 2005.

Applicable Law

7. According to Article R58 of the Code, the Panel is required to 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 sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

8. Here the Appellant is arguing that, as regards Article R58 of the Code, the parties have reached a different agreement; for – according to the Appellant – through the membership of USATF the Respondent is obliged to abide by and submit to the IAAF Rules. However, in derogation from Article R58 of the Code the IAAF Rules provide the following:

Rule 21.8: *"The CAS appeal, including, but not limited to, the constitution of the CAS Panel, the powers of the arbitrators, the documents to be filed with CAS and the procedure of appeal, shall be in accordance with the rules of the CAS from time to time in force, provided always that the CAS Panel shall be bound to apply IAAF Rules and Regulations (in accordance with Rule 21.9 below) and, unless the Council determines otherwise, the appellant shall file his statement of appeal with CAS (in accordance with Rule 21.2 above) within sixty days of the date of communication of the decision that is to be appealed …".*

Rule 21.9: *"All appeals before CAS shall take the form of a re-hearing de novo of the issues raised by the case and the CAS Panel shall be bound by the IAAF Rules and Regulations and the Procedural Guidelines for Doping Control (as amended from time to time)".*

9. The Panel refers to the IAAF Rules and Regulations and the Procedural Guidelines For Doping Control (2002 edition) and does not need to refer to any other source of law in this case.

The Merits of the Dispute

10. The examination of the merits centres on two questions, namely whether the Respondent committed an anti-doping rule violation and – if yes – whether the NACAS calculated the period of ineligibility correctly.

11. The applicable former IAAF Rules (see marg. no. 3 above) define an anti-doping rule violation in Rule 55.2 as: *"The offence takes place when … a prohibited substance is present within an athlete's body tissues or fluids"*. It is not disputed that r-EPO is a prohibited substance within the meaning of the provision. It is also not disputed between the parties that the urine samples in question here derive from the Respondent. In particular the Respondent in his *"reply brief"* dated 3 August 2005 stated that he does not contest the chain of custody of his sample from the point of collection through to the completion of the testing by the Laboratory. It therefore remains to be examined whether the prohibited substance was actually present in the Respondent's sample.

12. It is not disputed between the parties that the human body does not normally produce r-EPO and that, therefore, its presence in the body of the athlete is an indication of administration of an external substance (see SDRCC DT-05-0028 Sheppard v. CCES [12.9.2005] marg. no 40). The testing procedure used by the Laboratory to detect r-EPO relies - inter alia - on the fact that naturally produced EPO (endogenous or natural EPO) contains molecules with different electrical charges than r-EPO. Therefore, EPO and r-EPO will respond differently when placed in an electrical field. The method applied by the Laboratory to detect r-EPO in the urine of an athlete involves five steps which can briefly be summarised as follows:

13. In a first step the sample is prepared. For this, enzymes that could destroy r-EPO in the sample are deactivated. Adding protease inhibitors to the urine does this. The urine is then filtered and centrifuged in order to retain molecules with a molecular weight that is similar to (or higher than) that of natural or r-EPO.

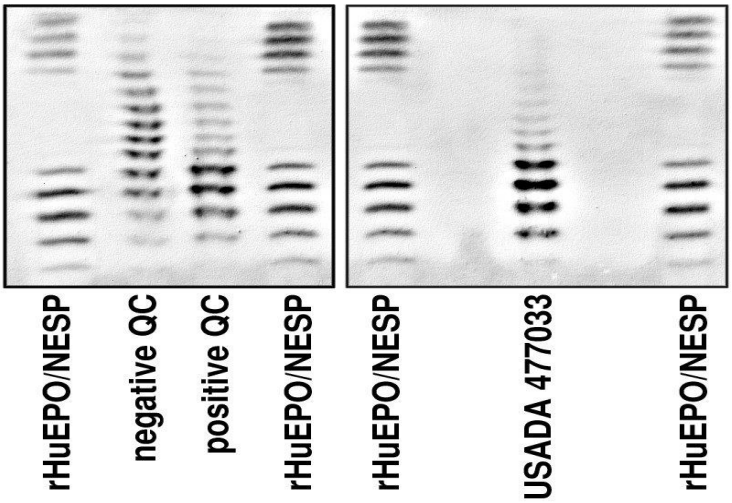
14. In a second step a portion of the centrifuged and filtered urine ("the retentate") is spotted on a gelatine-like material ("the gel"), which is then placed flat on the surface of an electrophoresis instrument. Electrodes are attached to the gel and connected to the electrophoresis instrument. When the electrophoresis unit is turned on (isolectric focusing) the molecules start to migrate either in the direction of the cathode or the anode. Since not all molecules of r-EPO or EPO have the same structure and electrical charge the electropherogram produced by the electro focusing will form a certain pattern consisting of various bands (so called isoforms).

15. In a third step the bands produced by the electro focusing have to be detached from the gel. This is done in a so-called "blotting procedure". The latter is designed for transferring proteins from one surface to another. The Laboratory uses two blotting procedures. The first blot transfers the EPO and r-EPO from the gel to a first membrane. This first membrane is a mirror image of the material that was on the gel. Then the first membrane is incubated with a primary antibody that binds to EPO and r-EPO. In the next stage referred to as the second blot, the primary antibody is transferred from the first to a second membrane. Then the second

membrane is incubated in a solution containing a second antibody that binds to the primary antibody.

16. In a fourth step the visualization of the bands of the second antibody is brought about. To this end, a marker protein, which binds to the second antibody, is used. Next a special substance is added that emits light when it comes into contact with the marker protein. The emitted light is then captured with a special digital camera and a final image (electropherogram) is produced.

17. The electopherogram in this case is set out below.



18. In a last step, the final electropherogram must be interpreted. At the time the Respondent's sample was analysed, the Laboratory considered three alternative criteria for determining whether a sample was positive. These criteria were: the two band ratio analysis, the basic area percentage analysis and the location of the most intense band analysis. Particular importance was thereby attached to the two-band ratio analysis. This is in any event what the laboratory package dated 15 April 2004 shows, namely that the two band ratio analysis is designated the primary criterion for positivity. WADA put into force a technical document designated TD2004EPO with effect from 1 January 2005 (i.e. after the test carried out by the Laboratory), which document establishes the criteria for determining whether a sample is positive for r-EPO. This standard for r-EPO positivity is similar to the criteria used by the Laboratory.

19. In the present case the Respondent is not claiming that the Laboratory derogated from the established standards or otherwise proceeded carelessly in the course of the individual steps of the testing procedure. The Respondent is also not claiming that the Laboratory did not apply the above-mentioned criteria when interpreting the final electropherogram or that it did not apply the criteria correctly. Rather it is not disputed between the parties that the Laboratory complied with the standards and procedures for the testing procedure and for interpreting the test results. The only question, which is disputed between the parties, is whether the testing procedure used by the Laboratory is suitable for detecting r-EPO in the Respondent's urine.

The Respondent is calling this into question and argues that the testing procedure cannot rule out the possibility of "false positives" with sufficient reliability.

20. In his "reply brief" dated 3 August 2005 the Respondent based his assumption that the testing procedure used by the Laboratory is unreliable on various aspects. In the oral hearing the Respondent then made it clear that he was continuing to maintain only one of the original points of criticism. This was that - according to the Respondent - the testing procedure was unreliable because the primary antibody used in the blotting procedure (see 15 above) was a primary antibody called AE7A5 from the company R & D Systems, which shows non-specific binding, i.e. binds not only to human and r-EPO but also to other EPO-unrelated proteins. According to the Respondent this cross-reactivity of the primary antibody involves the risk of "false positives". This risk existed all the more in that according to the Respondent it has been known for years that particularly intense exercise can result in a condition called exercise-induced proteinuria, which, in turn, may lead to unusually large quantities of proteins being filtered to urine. These would – due to their high molecular weight – reach the retentate and therefore influence the test result.

21. Of course it must be noted that a mere hypothetical possibility of false positives, i.e. pure speculation about the unreliability of the testing procedure, is, on its own, not sufficient for calling into question the reliability of the testing procedure. Rather the Respondent must show evidence that the test procedure results are unreliable and that false positives occur. The threshold for this is high; for it must be taken into account:

22. that the WADA accredited laboratories have been using the testing procedure in question – with modifications in the detail – since the Sydney Olympic Games. The various WADA accredited laboratories therefore already have extensive experience with the testing procedure. This is particularly so in the case of the Laboratory in question here. The Head of said Laboratory, the Appellant's witness, Professor Catlin, has been involved in drug testing since 1982 and his laboratory is one of the leading laboratories on EPO testing.

23. It must further be taken into account in favour of the testing procedure that there is a long jurisprudential basis for the acceptance of the testing procedure within the CAS and other dispute resolution Institutions in sport (see in detail and informatively SDRCC DT-05-0028 Sheppard v. CCES [12.9.2005] marg. no 47 et seq.). Examples for these rulings can for instance be found in CAS 2001/A/345 marg. no V.3.2.4, CAS 2001/A/343 marg. no V.1.2.2, the trilogy of cross-country skiing cases at the Olympic Games of Salt Lake City[1] or CAS 2003/A/452 marg. no 5.50 et seq. and CAS 2004/O/679 marg. no. 5.1.3 et seq. This international jurisprudence has analysed the testing procedure as having a reliable result with an acceptable risk of a false positive.

24. It must also be taken into account that the validity of the testing procedure has been the subject of a number of studies that have been published in peer-reviewed journals. Furthermore, the testing procedure was also the subject of scrutiny at various scientific meetings.

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1 CAS 2002/A/370 marg no 10.9 et seq; CAS 2002/A/371 marg. no 10.9 et seq; CAS 2002/A/374 marg. no. VII 3.2 et seq.

25. Finally, it must be pointed out that the criteria for interpreting the isoforms (see 17 above) when applied to the laboratory results of the Respondent do not result in a finding that is either ambiguous or borderline. Rather, the test result is a clear finding - as was plausibly explained by the witness Professor Catlin with the help of the document package and comparisons with positive and negative quality control samples. In particular the analysis results do not show any strange or deviant profiles or any otherwise ambiguous pattern.

26. The Panel concludes that the Respondent has not established doubt about the reliability of the testing procedure:

27. The starting point for the Respondent's line of argument is that the primary antibody AE7A5 used in the testing procedure not only binds with human and r-EPO but also with other EPO-unrelated proteins. As evidence of this the Respondent submitted – *inter alia* – an article by KHAN ET AL. from the peer-reviewed journal Clinica Chimica Acta 358 (2005) 119 et seq. This states, inter alia (p. 124) that *"… non-specificity of the antibody detection of EPO was always observed in the Western blot. The cross reacting urinary proteins in the pI range 3-5, were identified by peptide mass fingerprinting as Tamm Horsfall glycoprotein (THP), alpha-antichymotrypsin (AC), alpha 2-thiol proteinase inhibitor (TPI) and alpha-2-HS glycoprotein (HSGP) …"*. It is not disputed that these proteins are EPO-unrelated proteins. The witness, Dr Heid from the German Cancer Center Heidelberg (Division of Cell Biology), called by the Respondent and interrogated by the Panel, also confirmed on the basis of his own investigations that the primary antibody used in the testing procedure also binds EPO-unrelated proteins.

28. Contrary to the Respondent's expert opinion it does not follow from a potential cross-reactivity of the antibody that the testing procedure used by the Laboratory to detect r-EPO is unreliable and in particular involves a serious risk of 'false positives'. In particular, no such conclusion can be inferred from the Article by KHAN ET AL. (see 27 above) submitted by the Respondent. This Article describes a method for detecting the drug r-EPO in urine, which differs from the conventional testing procedures. The background to this "new" testing procedure advocated by the authors is, however, not that the (conventional) test used by the Laboratory is unreliable. Rather, with "their" testing procedure the authors want to overcome certain issues that were identified in a WADA-commissioned report by THORMANN AND PELTRE (Evaluation report of the urine EPO test, Paris and Bern, 11 March 2003). According to Kahn et al., these issues concern a *"time consuming urine sample preparation, low sample load capacity, irreproducible carrier ampholyte gels resulting in difficult inter-laboratory standardization, non-specific binding of the secondary antibody to urinary proteins which requires a double blotting system to overcome, sensitivity issues and high costs"* (p. 120). These "problems", which were the reason the new testing procedure by KAHN ET AL. was developed, therefore have no direct connection with the present question (namely what effects the alleged non-specificity of the primary antibody has on the outcome of the conventional testing procedure).

29. In the Panel's opinion it also does not follow indirectly from the article by KHAN ET AL. that the testing procedure used by the Laboratory is unreliable. Although it is stated on p. 125 of the article by KHAN ET AL. that it was observed on the electropherogram *"that pI ranges of these cross-reacting proteins overlap significantly with the pI of human EPO and r-EPO isoforms in the first dimension*

…", it must be noted that the testing procedure used by KHAN ET AL. differs in numerous aspects (sample preparation, electrofocussing and blotting) from the standards and procedures used by the Laboratory to detect r-EPO. The authors did not intend to and indeed did not provide any proof that the isoforms of the cross-reacting proteins also significantly overlap with the pI range of human or r-EPO when the conventional testing procedure is used. Furthermore, the isoforms depicted in the article by KHAN ET AL. (see p. 124) clearly differ from those of the Laboratory.

30. The Respondent's witness, Dr Heid, whom the Panel questioned by telephone, could also not convince the Panel of any connection between a (possible) cross-reactivity of the primary antibody and the unreliability of the entire testing procedure. Dr Heid is of the opinion that the conventional testing procedure bears a *"serious risk of false positive r-EPO results"*. However, he has not published this conclusion in a peer reviewed journal nor has he subjected it to the scrutiny of a scientific meeting of experts on doping analysis. Furthermore, according to the witness Dr Heid himself he has not made any attempt to prove the occurrence of "false positives" under the standards and procedures applicable to the conventional testing procedure. Rather, his attempts were primarily aimed at confirming the results described in the article by KHAN ET AL. However, it cannot be inferred from this – just as it cannot be inferred from the article by KHAN ET AL. – that the testing procedure used by the Laboratory is unreliable.

31. Insofar as the Respondent invokes the 2005 case of the triathlete Rutger Beke, who was found by the Flemish Disciplinary Commission not to have committed an anti-doping rule violation for r-EPO because of an (alleged) false positive result, this is not suitable for calling into question the reliability of the testing procedure used by the Laboratory. The Panel neither has the decision of the Flemish Disciplinary Commission before it nor does it have the athlete's test result or the corresponding laboratory documentation. In the end, these are mere assertions or speculations, which do not support any connection between the cross-reactivity of the primary antibody and the alleged unreliability of the testing procedure.

32. Also the article by BEULLENS ET AL. filed with the CAS Court Office after the closing of the hearing ("False Positive Detection of Recombinant Human Erythropoietin in urine Following Strenuous Exercise") is not sufficient to cast doubt on the reliability of the testing results by the Laboratory. The article, which is based on the observation conducted on urine from a single subject suggests that in cases of "effort induced urine" the cross-activity of the primary antibody causes the isoforms to migrate on the electropherogram. Even if that was true the fact remains that the isoforms shown in the electropherogram of the Respondent clearly differ from the profiles presented in the study by BEULLENS ET AL. Furthermore, the results by the Respondent do not reveal any deviant profile or bad quality image. They are "clear cases" not on the borderline. Hence, there is no reason to conclude that the Respondent's testing result might be within the science of the article and be considered a "false positive".

33. In summary it can therefore be said that the Panel finds no evidence to establish that a false positive occurred. Rather – after considering all the evidence – the Panel is satisfied beyond a reasonable doubt that the Respondent's sample contained r-EPO. Therefore, the Respondent's counter appeal to have the decision of the NACAS set aside and for him to be found not to have committed an anti-doping rule violation is dismissed.

34. The foregoing conclusion leads to the second aspect of this appeal. When should the period of ineligibility commence? First, this must be assessed according to the former IAAF Rules (see 3 above). As regards the duration and the beginning of the sanction the rules provide in Rule 60 (2)(a) (former IAAF Rules):

> *"If an athlete commits a doping offence, he will be ineligible for the following periods:*
>
> *a) for an offence under Rule 60.1 (i) or 60.1 (iii) above involving the substances listed in Part I of Schedule 1 of the 'Procedural Guidelines for Doping Control', or, for any other offences listed in Rule 60.1:*
>
> *(i) first offence – for a minimum of two years from the date of the hearing at which it is decided that the Doping Offence has been committed. When an athlete has served a period of suspension prior to a declaration of ineligibility, such a period of suspension shall be deducted from the period of ineligibility imposed by the relevant Tribunal".*

The application of the above Rule requires that the two-year sanction begins on 30 November 2004 (date of the hearing) and ends on the expiry of 29 November 2006.

35. An exception to this rule would apply if the Respondent had served a period of suspension prior to the declaration of ineligibility. The provision in Rule 60 (2)(a) of the former IAAF Rules expressly provides for a deduction of any such period. It is not disputed that neither USATF nor USADA suspended the Respondent from competition. If the athlete accepts a "provisional suspension" that is to be treated as equivalent to a suspension within the meaning of Rule 60 (2)(a) of the former IAAF Rules. The Respondent was expressly advised of this possibility in a letter from USADA dated 14 June 2004. However, the acceptance of a "provisional suspension", which can be deducted from the period of ineligibility under Rule 60 (2)(a) of the Old IAAF Rules requires that the athlete notifies USADA of such acceptance, which the Respondent did not do. According to the Respondent's own submissions in the oral hearing, he wanted to continue to compete and had no intention of being provisionally suspended. Indeed, the Respondent took part in the 2004 USA Masters 10 km Championship and finished 3rd in the category of men 40-44.

36. It is questionable whether in the present case there are other reasons which would justify deviating from the principle in Rule 60 (2)(a) of the former IAAF Rules, whereby the period of ineligibility shall commence from the date of the hearing. In this regard the explanatory letter from the chairman of the NACAS dated 21 December 2004 reads as follows:

> *"… As a chairman of the Panel, I prepared the draft and I regret that I did not make it impossible to misunderstand. The extraordinary delay between the collection and the hearing would make a mechanistic application of the IAAF's rule produce a penalty of 33 months in this case, (well beyond the minimum in IAAF's Rules) since IAAF also requires forfeiture of results between collection and hearing. Perhaps I should have labelled this delay 'exceptional circumstances' but it seemed self-evident. …".*

37. In his explanatory letter the chairman refers to compelling reasons of fairness in order to justify an exception to the beginning date of the sanction laid down in Rule 60 (2)(a) of the former IAAF Rules. The Appellant regards this as a breach of Rule 60 (9) of the former IAAF Rules, for – according to the Appellant – said provision provides that only the Appellant's Council has

the authority to find on the presence of such exceptional circumstances. Rule 60(9) of the former IAAF Rules reads as follows:

"In exceptional circumstances, an athlete may apply to the Council for re-instatement before the IAAF's period of ineligibility has expired. … A decision on exceptional circumstances shall be made only if the athlete is able to present three negative tests conducted by the Member or the IAAF, with a period of at least one month between each test. However, it is emphasised that only truly exceptional circumstances will justify any reduction…".

38. There is no question that the length of the suspension in the present case is two years. What is disputed and has to be decided is only the question of when this two-year sanction begins to run. The fact that Rule 60 (9) of the former IAAF Rules does not say anything about the question of when the suspension begins is demonstrated not least in the fact that the NACAS would, of course, have had the authority to deduct a "provisional suspension" from the two-year sanction, although this is not expressly provided for in Rule 60 (2)(a) of the former IAAF Rules.

39. NACAS's decision, whereby for compelling reasons of fairness the two-year sanction begins to run on the day on which the sample was taken, is however erroneous. There is no need to examine whether compelling reasons of fairness can at all justify an (unwritten) exception to the clear and unambiguous wording of Rule 60 (2)(a); for in this specific case there are no compelling reasons of fairness which would justify this. In the Panel's opinion the Respondent has not suffered any legal disadvantages through the excessively long duration of the proceedings. In particular, the Respondent was able to continue to participate in competitions in the period between the taking of the sample and the hearing on 30 November 2004. He therefore had an advantage over his competitors, which he should not really have had according to the Appellant's rules (see also SDRCC DT-05-0028 Sheppard v. CCES [12.9.2005] marg. no 35). Furthermore, it was within the Respondent's control to determine the commencement of the two-year suspension by accepting a "provisional suspension". The Respondent was also aware of this possibility from the letter from USADA dated 14 June 2004, or ought to have been aware of it - since he was already legally represented at the time. The Respondent therefore knowingly accepted the risk that the competition results achieved in the period between the sample collection and the hearing would later be annulled. When the Respondent knowingly exposed himself to this risk, although other reasonable alternatives were available to him, this can hardly constitute an unreasonable disadvantage. Finally, it is pointed out that the Respondent himself contributed very significantly to the delay in the proceedings by numerous requests to USADA for information, which have no basis in the USADA Protocol for Olympic Movement Testing. This fact deserves to be mentioned particularly because much of the additional information requested by the Respondent was completely irrelevant for the purposes of the present proceedings.

40. The Respondent is further also invoking the principle of *lex mitior*, in order to justify a commencement of the two-year sanction in derogation from Rule 60 (2)(a) of the former IAAF Rules.

41. According to the consistent case law of the CAS, under the principle of *lex mitior* the rules that were in force at the time when the rule violation was committed do not – by way of an exception – apply in disciplinary proceedings, rather the later established rules apply provided that these

"new" rules are more favourable to the sanctioned athlete (see CAS 2002/A/378, Digest of CAS Awards III, p 314; CAS 2001/A/318, Digest of CAS Awards III p 191; CAS 2000/A/289, Digest of CAS Awards II, p 427). The principle of *lex mitior* derives from criminal law. Its analogous application to disciplinary proceedings of sports associations is justified according to this jurisprudence with the argument that such disciplinary proceedings are akin in nature to criminal proceedings (CAS 2000/A/289, Digest of CAS Awards II, p 427).

42. Contrary to the Respondent's opinion, there is no scope in the present case for the application of the principle of *lex mitior*, as the principle requires that the sanctioning provisions in force at the time of the oral hearing are more favourable to the person affected than the provisions that were in force at the time of the sample collection. However this is not so in the present case. Rather the former and the revised IAAF Rules are largely identical. Firstly, this is so in terms of the length of the suspension. Thus, Rule 40 (1)(a) of the revised IAAF Rules just like Rule 60 (2)(a) of the former IAAF Rules provides for a minimum period of ineligibility of two years for the doping offence in question here as does Rule 60 (2)(a) of the former IAAF Rules. Rule 40 (9) of the revised IAAF Rules also provides that the commencement of the period of ineligibility *"shall start on the date of the hearing decision providing for ineligibility or, if the hearing is waived, on the date the ineligibility is accepted or otherwise imposed …"*. Insofar as the Respondent is invoking the provisions on exceptional circumstances (Rule 40 (2-4) in conjunction with Rule 38 (21) of the New IAAF Rules), said provisions are not relevant in the present case, for exceptional circumstances serve – as already ensues from the heading to Rule 40 (2) of the New IAAF Rules – *"to reduce or replace the period of ineligibility"*. However, this is not the issue in the present case. It is not the length of the sanction (two years of ineligibility) that is in question; rather it is solely the commencement date of said sanction which is in question. The latter is governed in Rule 40 (9) of the revised IAAF Rules in which is the equivalent of Rule 60 (2)(a) of the former IAAF Rules. There is, therefore, no scope for any application of the principle of *lex mitior* in the present case.

43. Finally, the Respondent is also invoking Art. 10.8 WADC in order to justify a different commencement date of the period of ineligibility from that required by Rule 60 (2)(a) of the former IAAF Rules. Art.10.8 WADC reads as follows:

"The period of ineligibility shall start on the date of the hearing decision providing for ineligibility or, if the hearing is waived, on the date ineligibility is accepted or otherwise imposed. Any period of provisional suspension (whether imposed or voluntarily accepted) shall be credited against the total period of ineligibility to be served. Where required by fairness, such as delays in the hearing process or other aspects of doping control not attributable to the athlete, the body imposing the sanction may start the period of ineligibility at an earlier date commencing as early as the date of the sample collection".

44. Contrary to the Respondent's opinion, the WADC does not apply to the present case. It does not apply directly because neither the former IAAF Rules nor the revised IAAF Rules refer to the WADC and thereby incorporate the latter as an integral part of the Appellant's rules.

45. The fact that the Appellant is a "signatory" to the WADC does not mean that the WADC applies as between the Appellant and the athletes affiliated to it. The Introduction to the WADC specifies that the WADC can apply in the relationship to the athletes only if the provisions of the WADC have been *"incorporated into the rules of the relevant Anti-Doping Organization"*. Of course,

it does not follow from this that the WADC has no relevance whatsoever in the relationship between the Appellant and the athletes affiliated to it. In certain circumstances the WADC can be used to help with interpretation where the content of the IAAF Rules is equivalent to the WADC. The limits of an explanatory or supplemental interpretation are, however, exceeded if, by having recourse to the provisions of the WADC, the content of the IAAF Rules is altered or its meaning reversed.

46. In the present case the Appellant deliberately did not adopt the exact same wording of the provision in Art. 10.8 WADC in their Rules. Whether the Appellant thereby breached an obligation in relation to WADA can be left unanswered in this case. Even if this were the case, the Panel cannot override the expressed will of the Appellant. Instead the Panel is bound by the content of the properly established IAAF Rules.

47. To summarise therefore, there is no legal basis for a point in time other than 30 November 2004 as a commencement date for the two-year sanction. The NACAS' decision must therefore be set aside and the Appellant's appeal allowed. Applying Article R57 of the Code, the Panel decision replaces the decision challenged. Therefore, the two-year period of ineligibility begins with the date of the hearing before NACAS on 30 November 2004 and ends upon the expiry of 29 November 2006. Furthermore, it follows from Rule 59 (4) that competition results achieved from the date on which the sample was provided, until the date of the hearing, shall be annulled.

The Court of Arbitration for Sport rules that:

1. Upon appeal by the IAAF, the decision of the NACAS dated 9 December 2004 is set aside.

2. The Respondent, Eddy Hellebuyck, has committed an anti-doping rule violation under Rule 60 (2)(a) of the IAAF Rules 2002-2003.

3. The Respondent is declared ineligible for a period of two years. The period of ineligibility commences on 30 November 2004 and ends upon expiry of 29 November 2006.

4. Any competition results between the 31 January 2004 and the date of the hearing on 30 November 2004 are annulled under Rule 59 (4) of the IAAF Rules 2002-2003.

5. The counter appeal by the Respondent is dismissed.

(…).