

CAS 2015/A/4233, *World Anti-Doping Agency (WADA) v. Martin Johnsrud Sundby & Fédération Internationale de Ski (FIS)*, Award of 11 July 2016

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Abstract This case commentary examines the CAS Award in *WADA v. Sundby* with particular focus on the CAS Panel’s reasoning with respect to the occurrence of an anti-doping rule violation (“ADRV”). Among interesting points are the CAS Panel’s application of the principle of legal certainty as well as the practical implications of the CAS Panel’s findings with respect to the interpretation of the rule in question—the β 2A Provision of the Prohibited List. This commentary also addresses the burden of proof, standards for appreciation of scientific evidence, assessment of fault and determination of sanctions.

Keywords Sundby • Doping • World Anti-Doping Agency • Prohibited List β 2A Provision • Adverse Analytical Finding (AAF) • Anti-doping rule violation (ADRV) • Principle of legal certainty • TUE • Nebulizer • Salbutamol
Cilic test • “Degree of fault”

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1 Introduction

This case commentary concerns a very successful Norwegian cross-country skier, Mr. Martin Johnsrud Sundby, who used a prohibited substance upon medical advice, in order to treat severe airway obstructions, which ultimately led to an adverse analytical finding (“AAF”).¹

At the outset, it is worth noting that “*it was not suggested by WADA (or by FIS) that the Athlete intentionally cheated or intentionally broke the rules and then tried to defend deliberate doping with spurious medical or other justifications*”.²

Still, Mr. Sundby was found guilty of an anti-doping rule violation and sanctioned with a two months period of ineligibility and disqualifications of results obtained on 13 December 2014 in Davos (SUI) and on 8 January 2015 in Toblach (ITA), which ultimately stripped him off his World Championship title for 2015.³

2 Factual Background and Procedure

2.1 Facts

In December 2014 and January 2015, Mr. Sundby underwent two in-competition doping controls in Davos, Switzerland, and Toblach, Italy, respectively.⁴ Both the Davos and the Toblach samples revealed the presence of salbutamol in concentrations above the 1,200 µg/mL limit⁵ that, according to the WADA’s list of prohibited substances for 2014 and 2015 (jointly “the Prohibited Lists”), must be reported as an AAF by the laboratory.⁶

Mr. Sundby has been treated for asthma since childhood.⁷ When confronted with the AAFs, Mr. Sundby explained that, in December 2014 and January 2015, he had

¹ CAS 2015/A/4233, *WADA v. Martin Johnsrud Sundby & FIS*, Award of 11 July 2016, para 5.

² *Ibid.*

³ *Ibid.*, para 128.

⁴ *Ibid.*, paras 7 and 9.

⁵ The so-called “decision limit”, as defined by the WADA International Standard for Laboratories (“ISL”). See Viret 2016, pp. 361 et seq.

⁶ CAS 2015/A/4233, *WADA v. Martin Johnsrud Sundby & FIS*, Award of 11 July 2016, paras 11–12.

⁷ *Ibid.*, para 17.

suffered from an airway obstruction which had required more medication than usual.⁸ He described the treatment he underwent, notably inhalation of salbutamol via nebulizer (Ventoline), and provided detailed information about the timing of administration and the dosage at the time of the AAFs.⁹ The information was confirmed by the team doctor of the Norwegian Ski Federation.¹⁰

The Fédération Internationale de Ski (“FIS”) submitted Mr. Sundby’s results, Mr. Sundby’s explanations and the team doctor’s explanations to Ken Fitch, Professor at the School of Sports Science, Exercise and Health at the University of Western Australia. In his report, Prof. Fitch stated that Mr. Sundby’s two AAFs were most likely due to excessive doses of salbutamol over a short period of time, notably 3 times 5 mg over 5 hours. Prof. Fitch did, however, also state that he did not consider that Mr. Sundby had sought to dope or to otherwise enhance his performance by using high doses of salbutamol.¹¹

Following FIS’ notification that a hearing would be held before the FIS Doping Panel, Mr. Sundby submitted a personal statement explaining, among other, that studies had shown that allowed doses of salbutamol could lead to AAFs in urine and that he had never been warned or otherwise alerted to the fact that the use of salbutamol in line with the regulations could place him at risk of an AAF.¹²

Mr. Sundby also submitted two expert reports in reply to Prof. Fitch’s report. These reports supported Mr. Sundby’s explanations. One report also suggested that inhalation of a labelled dose of 15 mg of salbutamol via nebulizer would be “*bioequivalent to 1500 µg salbutamol delivered by MDI with spacer*”.¹³

The method of administration of salbutamol became a major issue in Mr. Sundby’s case. At this juncture, it suffices to say that there are three main methods (or devices) for administering salbutamol by inhalation: (i) metered dose inhaler (“MDI”), (ii) dry powder inhaler (“DPI”) and (iii) nebulizer (the method used by Mr. Sundby).

The numerous expert reports submitted in this case (in all 20 expert reports from 7 different experts) examined, among other, Mr. Sundby’s contentions that (i) the use of nebulizers, as compared to MDIs and DPIs, would require much higher doses going into the device as large quantities of salbutamol remain in the device after administration and (ii) that an AAF for salbutamol in urine could be the result of allowed use of salbutamol.¹⁴

In light of the expert reports submitted by Mr. Sundby, the FIS Doping Panel decided to postpone the hearing and have Mr. Sundby undergo a pharmacokinetic study. Such study was conducted in April 2015 at the King’s College London drug

⁸ Ibid., para 16.

⁹ Ibid., para 16.

¹⁰ Ibid., para 17.

¹¹ Ibid., para 20.

¹² Ibid., para 23.

¹³ Ibid., para 25.

¹⁴ Ibid., paras 24 and 32.

control centre and showed that administration of 3 times 5 mg of salbutamol over 5 hours via nebulizer could produce peak concentrations in Mr. Sundby's urine exceeding the limits of AAFs.¹⁵

In May 2015, Mr. Sundby underwent a second pharmacokinetic study in Oslo, during which a dose 1600 µg of salbutamol was administered through an MDI. This second study showed results similar to those obtained in London using a nebulizer.¹⁶

In August 2015, a hearing took place before the FIS Doping Panel and on 4 September 2015, the latter issued a decision holding that Mr. Sundby's AAFs did not constitute an ADRV.¹⁷

In essence, the FIS Doping Panel considered that FIS had not met its burden of proof of establishing that Mr. Sundby had committed an ADRV since it had failed to demonstrate to the comfortable satisfaction of the FIS Doping Panel that Mr. Sundby, for the purposes of the relevant provision of the Prohibited List (Section S.3, the "β2A Provision"), had inhaled more than 1600 µg of salbutamol over 24 hours.¹⁸

With respect to the interpretation of the expression "inhaled" contained in the β2A Provision, the FIS Doping Panel, after careful review of the Parties' submissions, held that such provision was "*not sufficiently clear to support FIS' allegation that the Athlete has committed an Anti-Doping Rule Violation*".¹⁹ The Panel was, in particular, not convinced that the maximum dose of 1600 µg referred to in the Prohibited List referred exclusively to metered dose inhalers/dry powder inhalers and not to other inhalation methods (i.e. nebulizers).²⁰

In its concluding remarks, the FIS Doping Panel invited WADA to "*further specify how Section S.3 of the Prohibited List [the β2A Provision] must be interpreted and to clarify how to determine the maximum doses for inhalation by MDI, nebulizer and other methods of inhalation of salbutamol without a TUE [Therapeutic Use Exemption]*".²¹

2.2 *The Parties' Submissions Before the CAS*

On 12 October 2015, WADA appealed the decision of the FIS Doping Panel before the CAS.

¹⁵ Ibid., para 28.

¹⁶ Ibid. para 31.

¹⁷ Ibid., paras 33–34.

¹⁸ Ibid., para 35, (paras 59–69 in the quotation).

¹⁹ Ibid., (para 65 in the quotation).

²⁰ Ibid., (para 66 in the quotation).

²¹ Ibid.

In its appeal brief of 10 November 2015, WADA requested that the FIS Doping Panel's decision be set aside, that Mr. Sundby be sanctioned with a reprimand or a period of ineligibility of up to two years and that his competitive results from and including 13 December 2014 be disqualified. WADA's appeal brief was accompanied by three expert reports.²²

On 22 December 2015, Mr. Sundby lodged his answer accompanied by three expert reports. In his answer, Mr. Sundby requested that the FIS Doping Panel's decision be upheld.²³

The CAS hearing was held over two days in the end of May 2016. During the hearing, three witnesses (including Mr. Sundby himself) and six experts gave evidence.²⁴

The parties' submissions before the CAS Panel were mainly focused on two issues, namely (i) whether Mr. Sundby, for the purposes of the β 2A Provision, had exceeded the allowed dose of salbutamol, i.e. "*maximum 1600 micrograms over 24 hours*" and (ii) the meaning of the reference to "*inhaled salbutamol*", contained in the β 2A Provision.

In essence, WADA disputed Mr. Sundby's contentions that a metered dose of 15,000 μ g over 24 hours using a nebulizer was bioequivalent to a dose of 1,500 μ g using an MDI and that his AAFs would be the result of allowed doses of salbutamol.²⁵

WADA also argued that the administration of salbutamol by nebulization was not a standard treatment for asthma and that, by using a nebulizer and the doses as he described, Mr. Sundby "*took the risk*" of AAFs.²⁶

It was WADA's position that, in order to use a nebulizer, the Athlete should have requested a Therapeutic Use Exemption ("TUE"), "*in the same way a TUE is necessary for the administration of an amount larger than 1,600 μ g per day*".²⁷

WADA also stated that the exception (to the general rule that any use of prohibited substances requires a TUE) for salbutamol was introduced (in 2010) in order to "*avoid the need to apply for a TUE in the event of its normal therapeutic use to treat asthma: the rule was not intended to apply to the treatment of exacerbations of severe asthma by nebulisation—a mode administration not used for the day-to-day treatment of asthma in the ordinary course of events*".²⁸

With respect to the interpretation of the β 2A Provision, WADA submitted that the wording of the rule relating to salbutamol—in contrast to the rule relating to formoterol—would clearly refer to the labelled dose of salbutamol, and not the delivered dose.²⁹

²² *Ibid.*, paras 39 and 50.

²³ *Ibid.*, paras 43 and 61.

²⁴ *Ibid.*, paras 45 and 47.

²⁵ *Ibid.*, paras 52 and 57.

²⁶ *Ibid.*, paras 52 and 54.

²⁷ *Ibid.*, para 54.

²⁸ *Ibid.*, para 55ii.

²⁹ *Ibid.*, para 55i.

Although WADA accepted that Mr. Sundby had used salbutamol in a therapeutic manner and had not intended to enhance his performance,³⁰ it did consider that Mr. Sundby had committed an ADRV by taking a dose of salbutamol higher than the allowed dose and argued that Mr. Sundby's sanction "*should be toward the upper bound of the relevant category of fault*".³¹

On his side, Mr. Sundby argued that nebulization was, in fact, a standard treatment for asthma. In that regard, he pointed out that he had been granted a TUE for the use of salbutamol via nebulizer in 2009.³²

As before the FIS Doping Panel, Mr. Sundby also submitted that there was a ratio of approximately 1:10 with respect to delivery of salbutamol compared to labelled dose between an MDI and a nebulizer and that the scientific evidence on file showed that it was, at least, plausible that his AAFs were the result of therapeutic inhaled doses lower than the maximum allowed under the β 2A Provision.³³

With regard to the interpretation of the β 2A Provision, Mr. Sundby argued that "*for a substance to be inhaled, the minimum requirement would be that it enters the body through the mouth or the nose*" and that the allowed maximum dose of 1,600 μ g would necessarily refer to the dose delivered in the Athlete's body.³⁴ Mr. Sundby also stated that, since the term "*inhaled dose*" referred to "*delivered dose*" for the substance formoterol under the same provision, it could not have a different meaning for salbutamol.³⁵

Mr. Sundby stressed that "*the principles of legality and predictability of sanctions call for a narrow interpretation of the provision, and inconsistencies in the rule must be construed against the WADA*".³⁶

Finally, Mr. Sundby pointed out that if the CAS Panel was to retain WADA's interpretation, it would mean that all athletes suffering from asthma and using nebulizers would commit an ADRV, as the lowest labelled dose for nebulized salbutamol is 2,500 μ g. Hence, all those athletes would be required to submit for a TUE, as "*even the lowest dose recommended for adults is above the WADA limit*".³⁷

FIS did not file any written submissions before the CAS, but declared that it did not agree with the FIS Doping Panel's decision and that it sided with WADA with respect to the interpretation of the β 2A Provision.³⁸

³⁰ Ibid., para 58.

³¹ Ibid., para 59.

³² Ibid., para 63i.

³³ Ibid., para 63iv.

³⁴ Ibid., para 63vi.

³⁵ Ibid.

³⁶ Ibid., para 63vi.

³⁷ Ibid.

³⁸ Ibid., paras 65–67.

3 Commentary

3.1 Jurisdiction and Applicable Law

The jurisdiction of the Panel was not disputed.³⁹

With respect to the applicable law, the CAS Panel applied, with reference to the principle of “*tempus regit actum*”, the FIS ADR 2014 and the Prohibited List 2014 to the Davos sample and the FIS ADR 2015 and the Prohibited List 2015 to the Toblach sample. The Panel stressed that, for the purposes of the case at hand, no difference could be identified in the two sets of rules. The Panel also noted that the FIS ADR were based on the rules contained in the WADA Code—more specifically the FIS ADR 2014 on the WADA Code edition of 2009, and the FIS ADR 2015 on the WADA Code edition of 2015—and that it would be appropriate to consider the WADA Code for the interpretation of the corresponding provisions of the FIS ADR.⁴⁰

3.2 Did Sundby Commit an Anti-Doping Rule Violation?

The first of two questions addressed by the CAS Panel was whether the AAFs constituted an ADRV within the meaning of Article 2.1 of the FIS ADR.

It was not disputed that the Samples contained salbutamol, a specified prohibited substance falling in category S3 of the Prohibited List, in a measure exceeding the decision limit of 1,200 ng/mL.⁴¹

However, the Parties disagreed on whether this finding was the result of a therapeutic inhaled dose of salbutamol higher than the allowed maximum of 1,600 µg per day.

The applicable provision of the Prohibited List (the β2A Provision) reads as follows:

S3. BETA-2 AGONISTS

All beta-2 agonists, including all optical isomers, e.g. d- and l- where relevant, are prohibited.

Except:

- *Inhaled salbutamol (maximum 1600 micrograms over 24 hours);*
- *Inhaled formoterol (maximum delivered dose 54 micrograms over 24 hours); and*
- *Inhaled salmeterol in accordance with the manufacturers' recommended therapeutic regimen.*

³⁹ Ibid., para 70.

⁴⁰ Ibid., paras 81–84.

⁴¹ The “decision limit”, see footnote 5 *infra*.

*The presence in urine of salbutamol in excess of 1000 ng/mL or formoterol in excess of 40 ng/mL is presumed not to be an intended therapeutic use of the substance and will be considered as an Adverse Analytical Finding (AAF) unless the Athlete proves, through a controlled pharmacokinetic study, that the abnormal result was the consequence of the use of the therapeutic inhaled dose up to the maximum indicated above.*⁴²

The CAS Panel's analysis was mainly focused on the issue of whether the terms "inhaled salbutamol" and "therapeutic inhaled dose" referred to (i) the salbutamol as "delivered", i.e. the dose coming out of the device and into the Athlete's body (Mr. Sundby's position), or (ii) the "labelled" dose (also referred to as the "nominal" dose) going into the device (WADA's position).⁴³

To the CAS Panel, the term "inhaled" served to "identify the mechanics of administration" and to "distinguish 'inhalation' from 'ingestion' or 'injection'".⁴⁴ The CAS Panel did not accept that "inhaled" could have two meanings and refer to the stage of administration as well as to the mechanics of administration. According to the CAS Panel, such an interpretation would, unless expressly indicated, be "inconsistent with ordinary rules of construction, including the principle of narrow interpretation of exceptions".⁴⁵

The CAS Panel went on to conclude that "it follows that the Use Threshold (i.e. 1,600 µg over 24 hours) refers to the maximum dose that can be taken by inhalation (as distinct from ingestion or injection), i.e. the 'labelled' or 'nominal' dose".⁴⁶

3.2.1 The Principle of Legal Certainty

In his submissions, Mr. Sundby specifically argued that the β₂A Provision was ambiguous and therefore had to be construed in his favour.

Mr. Sundby invoked the principle of legal certainty ("the principles of legality and predictability of sanctions",⁴⁷ see above) pursuant to which every sanction requires an express and valid rule providing that someone may be sanctioned for the specific offence in question.

It follows from CAS jurisprudence that this requirement entails that the rules of federations and associations—including anti-doping rules⁴⁸—in order to be binding

⁴² Text of the Prohibited List 2015. CAS 2015/A/4233, *WADA v. Martin Johnsrud Sundby & FIS*, Award of 11 July 2016, para 86, footnote 6: the Panel noted that the text of the Prohibited List 2014 was "identical ... in all material respects".

⁴³ *Ibid.*, paras 91 and 102.

⁴⁴ *Ibid.*, para 96.

⁴⁵ *Ibid.*, para 97.

⁴⁶ *Ibid.*, para 98.

⁴⁷ *Ibid.*, para 63vi.

⁴⁸ See, for instance, CAS 2011/A/2612, *Liao Hui v. International Weightlifting Federation (IWF)*, Award of 23 July 2012, para 103 and CAS 94/129, *USA Shooting & Q./Union Internationale de Tir (UIT)*, Award of 23 May 1995, para 34.

on athletes, must be clear and precise.⁴⁹ Further, ambiguities in the rules must be construed against the rule-maker (here: WADA). This is also often referred to as the principle of *contra proferentem*.⁵⁰

CAS panels have, on several occasions, stated that one consequence of the above principles would be that disciplinary bodies—and CAS panels—when interpreting rules providing for sanctions must take the legal certainty and foreseeability for the athlete into account. In particular, CAS panels have noted that it is necessary to consider whether the spirit of the rule has been violated (not only its strict letter but the “*perceived intention of the rule maker*”⁵¹) and whether the athlete, when reading the rule, would have been able to clearly make the distinction between what is prohibited and what is not.⁵²

As put by one CAS panel (Sole Arbitrator):

*[...] the principle of legality and predictability of sanctions [...] requires a clear connection between the incriminated behaviour and the sanction and calls for a narrow interpretation of the respective provision.*⁵³

In the specific context of anti-doping rules, another CAS panel has stated the following:

*The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-apppliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders.*⁵⁴

This last quote is from a CAS award that was issued over 20 years ago (in 1995) and that is still referred to on a regular basis.⁵⁵

⁴⁹ See, for instance, CAS 2014/A/3832&3833, *Vanessa Vanakorn v. Fédération Internationale de Ski (FIS)*, Award of 19 June 2015, para 85; CAS 2013/A/3324&3369, *GNK Dinamo v. UEFA*, Award of 13 June 2014, para 9.11; CAS 2006/A/1164, *Luca Scassa & MV Agusta Motor Spa v/ Fédération Internationale de Motocyclisme (FIM)*, Award of 13 March 2007, para 53.

⁵⁰ See, for instance, CAS 2014/A/3832&3833, *Vanessa Vanakorn v. Fédération Internationale de Ski (FIS)*, Award of 19 June 2015, para 85; CAS 2013/A/3324&3369, *GNK Dinamo v. UEFA*, Award of 13 June 2014, para 9.11; CAS 2011/A/2612, *Liao Hui v. International Weightlifting Federation (IWF)*, Award of 23 July 2012, para 107; CAS 2009/A/1752&1753, *Vadim Devyatovskiy et al. v/IOC*, Award of 10 June 2010, para 4.28.

⁵¹ CAS 2013/A/3324&3369, *GNK Dinamo v. UEFA*, Award of 13 June 2014, para 9.11(iii).

⁵² See, for instance, CAS 2014/A/3832&3833, *Vanessa Vanakorn v. Fédération Internationale de Ski (FIS)*, Award of 19 June 2015, para 86.

⁵³ CAS 2007/A/1363, *TTF Liebherr Ochsenhausen v. ETTU*, Award of 5 October 2007, para 16.

⁵⁴ CAS 94/129, *USA Shooting & Q./Union Internationale de Tir (UIT)*, Award of 23 May 1995, para 34.

⁵⁵ One recent example would be CAS 2014/A/3832&3833, *Vanessa Vanakorn v. Fédération Internationale de Ski (FIS)*, Award

In the present case, Mr. Sundby's argument relating to the principle of legal certainty was rejected even though the CAS Panel did consider that Mr. Sundby had "*genuinely misunderstood the meaning of the β 2A Provision*" and that "*the β 2A Provision could have been drafted more clearly in certain respects*".⁵⁶

In the CAS Panel's view, the β 2A Provision was not ambiguous enough even though it did not clearly state that it ultimately would not apply to nebulizers—only MDIs and DPIs.⁵⁷

The CAS Panel acknowledged that "*on its face [the β 2A Provision] covers [the nebulizers], because it applies without restriction to any type of device for inhalation*".⁵⁸ Further, when addressing Mr. Sundby's argument that the β 2A Provision, as interpreted by WADA, would not apply to nebulizers because the smallest available labelled dose for a nebulizer is 2500 μ g of salbutamol, which exceeds the use threshold of 1600 μ g, the CAS Panel stated that "*his point is indeed correct in the sense that β 2A Provision only obviates the need for a TUE where the athlete inhales salbutamol from an MDI or DPI and that any athlete wishing to nebulize salbutamol needs to request a TUE*".⁵⁹

The CAS Panel also expressly acknowledged that the principle of legal certainty would have an "*important role to play in exercise of interpretation*" but it applied it in the disfavour of Mr. Sundby. Specifically, the Panel stated that "*the WADA/FIS position has the merit of certainty*" as the users of the β 2A Provision "*need do no more than look at a label*". In contrast, the Athlete's interpretation would require "*the introduction of and reliance on detailed scientific evidence (an exercise which may be beyond the resources available to most sportsmen or sportswomen)*".⁶⁰

With these statements, in particular by favouring an interpretation that would ensure a simple and more 'certain' application of the β 2A Provision for *other athletes* in the *future*, the CAS Panel appears to have in a way 'shifted' the focus and application of the principle of legal certainty away from the protection of the individual and towards the future benefit of the greater collective.

In the spirit of the fight against doping and in view of the potential drawback of the alternative, namely to sanction the ambiguity of the rule and excuse athletes otherwise in violation of anti-doping rules, such an approach could make sense, at least from a pragmatic standpoint.

However, the approach is unusual and appears to go against established CAS jurisprudence. Although CAS panels are not, in principle, bound by precedents, one would expect that a deviation from established jurisprudence would, at the very least, be coupled with a careful detailed reasoning. On this point it would have been preferable and useful if the CAS Panel had further developed its reasoning and explained why and how the circumstances of the case called for a different

⁵⁶ CAS 2015/A/4233, *WADA v. Martin Johnsrud Sundby & FIS*, Award of 11 July 2016, para 104.

⁵⁷ *Ibid.*, para 105.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, para 107.

application of the principles invoked. This is especially true for cases like this one where the deviation from established jurisprudence appears to have its origin in very specific facts and may not be suited to set a new standard.

Further, the principle of legal certainty—in its traditional sense protective of individual subjects of rules of law—is not one derived from or limited to sports law. Rather, it figures among the most fundamental principles of modern legal orders and would in many jurisdictions form part of public policy.⁶¹ For this reason alone, anti-doping panels, disciplinary bodies and CAS panels should be very careful in drawing parallels to Mr. Sundby’s case to the detriment of athletes ‘fallen victim’ to ambiguous rules.

3.2.2 Burden of Proof and Appreciation of Scientific Evidence

In the proceedings before the FIS Doping Panel, the burden of proof was specifically discussed. In its decision, the FIS Doping Panel summarised the applicable rule relating to the burden of proof, namely that it was the burden of FIS/WADA to establish that an anti-doping rule violation had occurred and that the burden would be shifted upon the athlete to “*rebut a presumption or establish specified facts or circumstances*”.⁶² The FIS Doping Panel specifically stated that “*FIS bears the burden of proof for all aspects of the alleged ADRV, including the meaning of the applicable rules and argues that the Prohibited List refers to inhalation to distinguish the mode of application from other methods of administration, such as injection or oral application of a powder*”.⁶³

With respect to the assessment of scientific evidence, the FIS Doping Panel cited the following passage from CAS 2014/A/3488, *WADA v. Juha Lallukka*:

*The Panel in the present case recognises that it is not its function to step into the shoes of scientific experts, or to seek to repeat the exercises carried out by those experts. It also recognises that any Tribunal faced with a conflict of expert evidence must approach the evidence with care and with an awareness as to its lack of scientific expertise in the area under examination. Bearing in mind the prescribed provisions as to burden and standard of proof, the Panel considers that its role in applying the applicable standards as an appellate body is to determine whether the experts’ evaluations (upon which WADA’s case rests) are soundly based on the facts, and whether the experts’ consequent appreciation of the conclusion be derived from those facts is equally sound (see also CAS 2010/A/2235, para 79). In carrying out this task the Panel is bound to form a view as to which of possibly competing expert views it considers to be more persuasive.*⁶⁴

⁶¹ See, for instance, Viret 2016, pp. 111–112 (part 3.2.2.1.2) and references therein.

⁶² CAS 2015/A/4233, *WADA v. Martin Johnsrud Sundby & FIS*, Award of 11 July 2016, para 35 (para 39 in the quotation) and para 86 (Article 3.1 in the quotation).

⁶³ *Ibid.*, para 35 (para 43 in the quotation).

⁶⁴ *Ibid.*, p. 26. See also *WADA v. Juha Lallukka*, CAS 2014/A/3488, Award of 20 November 2014, para 97.

The FIS Doping Panel concluded that FIS had failed to demonstrate to the comfortable satisfaction of the FIS Doping Panel that Mr. Sundby had inhaled more than 1,600 µg of salbutamol over 24 hours and that FIS thus had not met its burden of establishing that Mr. Sundby had committed an ADRV.

The FIS Doping Panel's statements with respect to the burden of proof and appreciation of scientific evidence were cited in the CAS award, but only in the summary of the procedural history of the case. In its analysis, the CAS Panel did not comment on these issues even though the Parties had submitted in all 20 expert reports from 7 different experts relating to the question of whether the Mr. Sundby's AAFs represented an ADRV.

In fact, the Panel appears to not have considered the scientific evidence at all. After having concluded on the proper construction of the β2A Provision, the Panel stated that “[i]n light of the Panel's interpretation of the 1,600 µg Use Threshold as referring to the labelled dose, there is no need to consider further any of the subjects of learned scientific debate between the Experts, as developed in numerous reports filed in the proceedings and explored at the hearing”.⁶⁵

The Panel ultimately found that Mr. Sundby “acknowledge[d] that he nebulized 15,000 µg of salbutamol within a 24-hours period on the days of the delivered Samples” and, accordingly, that he had “by virtue of that fact alone admitted the violation at issue”.⁶⁶

3.2.3 The Evolution of the β2A Provision

As mentioned above, the FIS Doping Panel invited WADA to “further specify how Section S.3 of the Prohibited List [the β2A Provision] must be interpreted and to clarify how to determine the maximum doses for inhalation by MDI, nebulizer and other methods of inhalation of salbutamol without a TUE [Therapeutic Use Exemption]”.⁶⁷

The CAS Panel's interpretation of the β2A Provision is that it only applies to MDIs and DPIs and, as a consequence, that athletes wanting to use a nebulizer must apply for a TUE.⁶⁸

Until 2010, the β2A Provision provided that the use of “formoterol, salbutamol, salmeterol and terbutaline when administered by inhalation [...] require[d] a Therapeutic Use Exemption [TUE] in accordance with the relevant section of the International Standard for Therapeutic Use Exemptions”.⁶⁹

⁶⁵ CAS 2015/A/4233, *WADA v. Martin Johnsrud Sundby & FIS*, Award of 11 July 2016, para 108.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, para 35 (para 68 in the quotation).

⁶⁸ *Ibid.*, para 105.

⁶⁹ WADA 2009 Prohibited List, https://www.wada-ama.org/sites/default/files/resources/files/WADA_Prohibited_List_2009_EN.pdf. Accessed 18 April 2017.

In 2010, the WADA changed its regulation and decided that a TUE should no longer be required for the use of inhaled salbutamol and salmeterol, provided that the use does not “*exceed the maximum therapeutic dose for inhaled salbutamol (1600 µg/day)*”.⁷⁰ The purpose of the new rule was to relieve the administrative burden on athletes suffering from airway disorders by removing the requirement of obtaining a TUE, which can be a rather long and complex procedure.⁷¹

However, in Mr. Sundby’s case, the new regime actually made it more difficult for the athlete and his medical support staff to determine and comply with the applicable requirements. The result was devastating for Mr. Sundby on a personal as well as sporting level. His case certainly raises the question of whether the new β 2A regime is fair to the athletes.

The CAS Panel’s conclusions also raise questions from a scientific standpoint. In particular and in view of the scientific evidence submitted before the CAS Panel, one may wonder why the use of nebulizers would be excluded from the exception granted by the β 2A Provision.⁷²

Further, if that was the intention of the rule makers,⁷³ it would have been easy to specify, for instance, that the exception would only concern “*Inhaled salbutamol by way of metered dose inhaler or dry powder inhaler (maximum 1600 micrograms over 24 hours)*”.

Such a wording would not only be consistent with the WADA’s and the CAS Panel’s interpretation of the β 2A Provision but would also remove any ambiguity and be easy to enforce.⁷⁴

We note, however, that the β 2A Provision remains unchanged in the 2017 Prohibited List.

3.3 The Consequences of the Anti-Doping Rule Violation

The second of the two questions addressed by the Panel was the consequences of the anti-doping rule violation.

There had technically been two AAFs issued for Mr. Sundby (and hence, in principle, two ADRVs). However, as noted by the CAS Panel, “*the adverse analytical finding regarding the Toblach sample does not produce the consequences established for a second anti-doping rule violation by Article 10.7 of the FIS ADR*”.

⁷⁰ WADA 2010 Prohibited List—Summary of Major Modifications, https://www.wada-ama.org/sites/default/files/resources/files/WADA_Summary_of_Modifications_2010_EN.pdf.

⁷¹ CAS 2015/A/4233, *WADA v. Martin Johnsrud Sundby & FIS*, Award of 11 July 2016, para 55ii.

⁷² *Ibid.*, para 105.

⁷³ See above, in particular footnote 27.

⁷⁴ It must be highlighted that the Panel did not consider the β 2A Provision not to be ambiguous at all, but only “*not sufficiently ambiguous*”, see CAS 2015/A/4233, *WADA v. Martin Johnsrud Sundby & FIS*, Award of 11 July 2016, para 104.

2015”, because Mr. Sundby, at the time of the Toblach sample, had not been notified of the AAF in the Davos sample.⁷⁵

As mentioned above, the two AAFs were, in principle, subject to different sets of anti-doping rules. This could have caused difficulties with respect to the assessment of the sanction, but the 2014 and 2015 regulations have “*identical content as far as the individual case of the Athlete is concerned*”.⁷⁶

Hence, the CAS Panel stated that the 2014 FIS ADR and the 2015 FIS ADR “*make [it] clear that the measure of the sanction depends on the assessment of the Athlete’s fault*”. The Panel also noted that “*it is a principle under the WADC [...] that the circumstances to be considered in the assessment of the Athlete’s fault must be specific and relevant to explain the athletes [...] departure from the expected standard of behaviour*”.⁷⁷

3.4 Application of the ‘Cilic Test’

With respect to the assessment of Mr. Sundby’s sanction, the CAS Panel did follow established CAS jurisprudence, namely by applying the so-called ‘Cilic-test’ relating to an athlete’s “*degree of fault*”.⁷⁸

The ‘Cilic test’ refers to the guidelines established by the CAS panel that ruled on *Marin Cilic c. ITF* case in 2013 by assessing Mr. Cilic’s “*degree of fault*” in view of the specific circumstances of the case.⁷⁹ Mr Cilic, a professional tennis player, had ingested (out-of-competition) a substance only prohibited in-competition. As an AAF was issued for said substance in the course of a tournament, it led to an ADRV for the presence (in-competition) of a prohibited substance. To his own defence, Mr. Cilic explained that his mother had bought him glucose powder containing the prohibited substance, nicethamide, and that he had only glanced at the label without noticing that it contained this substance, whose name was very similar to an ingredient contained in the glucose supplements he usually purchased, namely nikotinamid.⁸⁰

When assessing Mr. Cilic’s fault, the CAS Panel identified three degrees of fault⁸¹:

⁷⁵ Ibid., para 112i.

⁷⁶ Ibid.

⁷⁷ Ibid., para 113.

⁷⁸ Test identified by the CAS panel in CAS 2013/A/3327&3335, *Marin Cilic v. ITF*, award of 11 April 2014, in particular paras 69–76.

⁷⁹ Ibid.

⁸⁰ Ibid., paras 11–13.

⁸¹ Ibid., para 69.

- i. Significant degree of or considerable fault, for which a sanction ranging from 16 to 24 months suspension (with a “standard” sanction of 20 months) should be applied.
- ii. Normal degree of fault, for which a sanction from 8 to 16 months suspension (with a “standard” sanction of 12 months) should apply.
- iii. Light degree of fault, for which a sanction ranging from 0 to 8 months suspension (with a “standard” sanction of 4 months) should be applied.

With respect to the determination of which category Mr. Cilic would belong to, the CAS Panel in *Cilic v. ITF* stated that:

*... it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete’s situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities.*⁸²

The CAS Panel in Mr. Sundby’s case took that exact principle into account when determining Mr. Sundby’s sanction. In particular, the CAS Panel listed a number of elements in favour and against Mr. Sundby.

In essence, the Panel considered the following elements in favour of Mr. Sundby⁸³:

- his disclosure, in the doping control form, of the use of salbutamol;
- the fact that he used the substance upon prescription of his doctor;
- the fact that he used the substance as prescribed;
- the existence of a medical condition justifying the use of salbutamol;
- the fact that he had used the nebulizer openly; and
- the fact that he had used a nebulizer without incident in the past.

In addition, the CAS Panel noted the following:

- *the β 2A Provision does not expressly rule out the use of nebulizers and could sensibly have done so as to avoid any possible misunderstanding by athletes (or their advisers)*⁸⁴; and
- *questions as to the possibility to use nebulizers and the amount of salbutamol they could nebulize while remaining below the Threshold were (apparently) asked by American athletes. When asked, USADA did not respond simply that any athlete wishing to nebulize salbutamol must request a TUE. Instead, it advised athletes who wanted to nebulize to contact the manufacturer to “ask what percentage of the drug you are using is administered with each dose”. This approach, focussing on what amount of the substance actually reached the Athlete’s body by use of the nebulizer, is that adopted by Dr. Gabrielsen and, in consequence the Athlete before he used it, and was also the approach sought to be defended by his experts before the Panel.*⁸⁵

⁸² Ibid., para 71.

⁸³ CAS 2015/A/4233, *WADA v. Martin Johnsrud Sundby & FIS*, Award of 11 July 2016, para 119i.

⁸⁴ Ibid.

⁸⁵ Ibid.

These last two statements are striking when compared to the statements made by the same CAS Panel in relation to the question of whether Mr. Sundby had committed an ADRV.

The CAS Panel went on to note the following elements against Mr. Sundby⁸⁶:

- the fact that Mr. Sundby, as a professional athlete who had been subject to many anti-doping controls, was well aware of his anti-doping obligations;
- the fact that his doctor had prescribed salbutamol by way of nebulizer for use outside a hospital, which was, in the CAS Panel's view "*arguably questionable from a medical point of view*"⁸⁷;
- the fact that Mr. Sundby, in view of the former requirement of a TUE, "*should have shown ... particular caution in ascertaining the degree to which an exception had been made under the relevant revised provisions of the WADC*"⁸⁸;
- the fact that Mr. Sundby only relied upon his medical adviser and did not seek information from WADA, FIS or the manufacturer of the nebulizer.

These statements are also striking in view of the discussion relating to the occurrence of an ADRV. In particular, the CAS Panel draws conclusions "*from a medical point of view*" without having examined the relevant scientific evidence on file and fails to comment on the fact that Mr. Sundby had obtained TUEs for the use of nebulizers in the past.

After having considered all these elements, the CAS Panel found that Mr. Sundby's degree of fault was "light" and concluded that the appropriate sanction would be a two months period of ineligibility.⁸⁹

With regard to the application of the 'Cilic test', although the *Cilic v. ITF* Award was rendered under an older version of the WADA Code (2009), Mr. Sundby's case confirms that such test and the principles behind it are relevant to anti-doping cases in general, including cases brought under current and future versions of the WADA Code.⁹⁰

4 Concluding Remarks

The core issue of this case was the interpretation and application of a provision regulating the administration of a substance.

⁸⁶ *Ibid.*, para 119ii.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, para 120.

⁹⁰ See, for another recent example, CAS 2016/A/4371, *Robert Lea v. USADA*, Award of 25 February 2016, para 28.

While examining the scope of the disputed provision—the β 2A Provision of the Prohibited List, the CAS Panel appears to have ‘shifted’ the application of the principle of legal certainty by construing an ambiguous provision in favour of *future* certainty to the detriment of the Athlete. This approach is noteworthy, in particular in view of the fundamental nature and traditional application of this principle.

This case also illustrates the difficulties CAS Panels often face when dealing with scientific evidence. In this case, the Parties submitted in all 20 expert reports from 7 different experts relating to the question of whether the Athlete’s AAFs represented an ADRV. For its part, the CAS Panel circumvented the scientific issues altogether by relying on (i) the Athlete’s admissions concerning the administration of the substance in question and (ii) its own interpretation of the β 2A Provision which, conveniently, disposed of the necessity to consider whether the admitted administration, from a scientific standpoint, represented excessive use of the substance.

Other CAS Panels have taken similar approaches to scientific questions in the past. One recent example would be the Dutee Chand case, where the Panel had to decide on the validity of the International Associations of Athletics Federation’s (IAAF) Hyperandrogenism Regulations.⁹¹ Among similarities between the Dutee Chand case and Mr. Sundby’s case would be that they both deal with ambiguous regulations with potential to raise very complex scientific questions. In both cases, the CAS Panels ultimately found ways around some, if not all, of these issues and the vast amount of scientific evidence submitted by the parties.

Reference

Viret M (2016) Evidence in Anti-Doping at the Intersection of Science and Law. TMC Asser Press, The Hague

⁹¹ CAS 2014/A/3759, *Chand v. AFI & IAAF*, Award of 24 July 2015.