

CAS 2012/A/2759 Oleksandr Rybka v. UEFA

ARBITRAL AWARD

delivered by

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: The Hon. Michael J. Beloff MA QC, London, England

Arbitrators: Prof. Luigi Fumagalli, Milan, Italy
Prof. Ulrich Haas, Zurich, Switzerland

in the arbitration between

OLEKSANDR RYBKA, Ukraine

Represented by Mr Juan de Dios Crespo Perez and Mr Adam Whyte, Ruiz-Huerta & Crespo Sports of Valencia, Spain and Andrey Khavitonuck of Donetsk in the Ukraine

- Appellant -

and

UEFA, Nyon, Switzerland

Represented by Mr Antonio Rigozzi and Mr William McAuliffe of Lévy Kaufmann-Kohler in Geneva, Switzerland

- Respondent -

1. THE PARTIES

- 1.1 Oleksandr Rybka, the Appellant (“the Player”) is a professional footballer who plays for the well-known Ukrainian team Shakhtar Donetsk as a goalkeeper and has won international caps for the Ukraine.
- 1.2 The Respondent, the Union of European Football Association (“UEFA”), an association incorporated in Switzerland is the governing body of football in Europe.

2. THE NATURE OF THE APPEAL

- 2.1 The Appeal is brought against a decision of the UEFA Appeals Body dated 16 March 2012 suspending the Player for two years for a doping offence (“the Decision”).

3. FACTUAL BACKGROUND

- 3.1 Below is a summary of the main relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the discussion of law and merits that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
- 3.2 On 30 November 2011, UEFA Doping Officers conducted an out-of-competition doping control and the Player was selected to provide a urine sample. The sample was numbered 3311858 and sealed.
- 3.3 On 19 December 2011, the sample was analysed by the Seibersdorf Laboratory in Austria (hereinafter the “Laboratory”), which reported an Adverse Analytical Finding of Furosemide.
- 3.4 Furosemide is a substance “*prohibited at all times (in and out-of-competition)*” according to section S5 of the 2011 WADA Prohibited list in combination with Article 4 of the UEFA Anti-Doping Regulations, edition 2011 (“ADR”).
- 3.5 On 10 January 2012, the Player, the Ukrainian Football Association and FC Shakhtar Donetsk were informed by Mr Mike Earl, UEFA Anti-Doping and Medical Manager about the Laboratory’s findings. At the same time, the Player was informed of his right to request the analysis of his B sample. The Player was given a deadline until 12 January 2012 to provide UEFA with any explanation for the adverse analytical finding. Also on 10 January 2012, the Chairman of the Control and Disciplinary Body (“CDB”) provisionally decided to suspend the Player, pending a decision on the merits of the case.

- 3.6 On 11 January 2012, the Player informed UEFA that he waived his right to request an analysis of his B sample and provided an explanation for the findings.
- 3.7 On 17 January 2012, the Player was informed by UEFA that disciplinary proceedings had been instigated into an alleged doping offence committed by the Player and he was provided with a time limit until 24 January 2012 to submit a statement and evidence to UEFA's Disciplinary Services.
- 3.8 On 23 January 2012, the Player submitted a statement with his evidence to UEFA.
- 3.9 On 27 January 2012, the CDB decided to suspend the Player for 2 years according to Article 18.01 of the ADR.
- 3.10 On 3 February 2012, the CDB issued the grounds of the aforementioned decision and informed the Player.
- 3.11 On 6 February 2012, the Player appealed the CDB decision in conformity with the forms and within the time limits provided for by Article 52 of the UEFA Disciplinary Regulations.
- 3.12 On 8 February 2012, pursuant to a request by the Chairman of the CDB, FIFA extended the suspension as to give it a worldwide effect.
- 3.13 On 28 February 2012, the Player submitted the grounds for his appeal to the UEFA Appeals Body.
- 3.14 On 16 March 2012, a hearing took place before the UEFA Appeals Body.
- 3.15 The following persons were heard: (i) the Player (ii) the Player's wife (iii) Mr Saugy and (iv) Dr Liénard.
- 3.16 On 16 March 2012, the UEFA Appeals Body delivered the Decision whose operative part reads as follows:
1. *The appeal is rejected. Consequently, the Control and Disciplinary Body's decision of 26 January 2012 is confirmed.*
 2. *The costs of the proceedings, totalling €6,000, are to be paid by the appellant, minus the appeals fee.*
 3. *This decision is final, subject to Article 66 DR.*

[...]

- 3.17 On 20 March 2012, the reasons for the Decision were sent to the Player stating, *inter alia*, that:
1. *The Panel has been convinced neither by the appellant's explanations as to how the substance entered his body, nor by the appellant's wife's statements as to how she would have given him the Furosemide. [...]*
 2. *The appellant also did not establish to the comfortable satisfaction of the Panel the absence of an intent to mask the use of a performance-enhancing substance. [...]*
 3. *[...] there is no reason, in the specific case, to depart from the standard sanction (two years' suspension), and this is because of the extreme negligence for which the appellant has to bear responsibility.*

4. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

- 4.1 On 28 March 2012 in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration and Mediation Rules ("the Code") the Player filed his Statement of Appeal.
- 4.2 On 4 April 2012 in accordance with Article 51 of the Code the Player filed his appeal brief.
- 4.3 On 2 May 2012 in accordance with Article 55 of the Code UEFA filed its answer.
- 4.4 No further pleadings were submitted.
- 4.5 On 15 May 2012 and 17 May 2012 respectively, UEFA and the Player filed brief submissions on costs.

5. THE CONSTITUTION OF THE PANEL AND THE HEARING

- 5.1 By letter dated 2 May 2012, the CAS informed the parties that the Panel to hear the appeal had been constituted as follows: The Hon. Michael J. Beloff QC, President of the Panel, Prof. Luigi Fumagalli and Prof. Ulrich Haas, arbitrators. The parties did not raise any objection as to the constitution and composition of the Panel either before, at, or after the hearing.
- 5.2 On 11 May 2012 the hearing was held at the Court of Arbitration for Sport, Chateau de Béthusy, 2 Avenue de Beaumont, 1012, Lausanne. The Panel was assisted by Ms Louise Reilly, CAS Counsel. The Player and his wife Mrs Nataliia Rybka gave evidence in support of the appeal; the Player also filed expert reports from Dr Nalyotov Sergei Vessilyevich and Professor I. N. Bashkin but neither was called to give evidence at the hearing; Dr Martial Saugy, Swiss anti-doping laboratory director and Professor Jeremy Biolloz, director of a WADA accredited laboratory gave evidence in response to the appeal.

6. THE PARTIES' SUBMISSIONS

A. The Player's Submissions and Requests for Relief

In summary, the Player submits the following in support of his appeal:

- 6.1 He did not knowingly take any prohibited substance. He simply drank a glass of water offered to him by his wife which was colourless and odourless, and which he could not reasonably have thought to have contained such substances.
- 6.2 He had no reason to take any performance enhancing substances of any kind at the end of the football season and accordingly there was nothing to mask. He denied both the suggestions that he was overweight, and that he was using Furosemide to assist in weight loss. He emphasised that he had had a successful season playing in all but one of his team's matches.
- 6.3 In his appeal brief, the Appellant requests the Panel to:
 1. *To accept this appeal against the decision of UEFA Appeals Body dated 16 March 2012.*
 2. *To adopt an award annulling the said decision and adopt a new one declaring that the Appellant bears no fault or negligence in this dispute and should receive no sanction.*
 3. *Further and in the alternative, to adopt an award annulling the said decision and adopt a new one declaring that due to the specific circumstances of the event that the Athlete should face a minimum sanction of a reprimand and no period of suspension from future events.*
 4. *In the alternative, to adopt an award annulling the said decision and adopt a new one declaring that the Appellant has committed a minor doping violation and should receive a maximum of 6 months ban from playing.*

In his statement of appeal, the Appellant also requests the following relief:

5. *To fix the sum of 25,000 CHF to be paid by the Respondent to the Appellant to aid the Appellant in the payment of its defense fees and costs.*
6. *To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators fees.*

B. Respondent's Submissions and Requests for Relief

In summary, UEFA submits the following in defense:

- 6.4 It is undisputed that the Player committed an anti-doping rule violation within the meaning of Art. 2.01(a) of the UEFA ADR.
- 6.5 The Player could obtain the elimination/reduction of the standard period of ineligibility provided for by Article 18.01 of the UEFA ADR only if he establishes, on the balance of

probability (Art. 3 of the UEFA ADR), “how the prohibited substance entered his system” (Article 19.01 and 19.02 (a) and (b) of the UEFA ADR).

- 6.6 In the present case, the Player did not discharge his burden of demonstrating on the balance of probability how the prohibited substance entered his system.
- 6.7 Further and in any event, the Player did not discharge his burden of proving to the standard of comfortable satisfaction that his use of Furosemide was not intended to enhance his performance or mask the use of a performance-enhancing substance.
- 6.8 Even if the Player did discharge his burden to the appropriate standard on both of the above elements, the length of the ineligibility period to be imposed (if any) was to be assessed according to the Player’s “degree of fault” and given the degree of negligence on the part of the Player. (a) He does not qualify for any reduction under Article 19.01 of the ADR for no fault or negligence (b) he does not qualify for a reduction for “no significant fault or negligence” according to Article 19.02(b) of the ADR (c) *a fortiori* he does not qualify for an elimination of the sanction pursuant to Article 19.02(b) of the ADR.
- 6.9 It follows that the imposition of the standard 2 years period of ineligibility must be confirmed and the appeal dismissed.
- 6.10 In its Answer, UEFA requests that the CAS issue an award:
1. *Rejecting Mr. Rybka’s appeal against the decision of the UEFA Appeals Body of 16 March 2012.*
 2. *Ordering Mr. Rybka to (i) pay the arbitration costs in full, and (ii) pay in full, or pay a reasonable contribution towards the legal fees and other expenses incurred by UEFA in connection with these proceedings.*

7. JURISDICTION OF THE CAS

- 7.1 Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

- 7.2 The jurisdiction of CAS arises from Article 62.1 of the UEFA Statutes 2010 edition, is accepted by both parties and is confirmed by their signature of the Order of Procedure; by the Appellant on 9 May 2012 and the Respondent on 10 May 2012.

8. ADMISSIBILITY

8.1 Article 62.3 of the UEFA Statutes provides that “*The time limit for appeal to the CAS shall be ten days from the receipt of the decision in question.*” The decision was sent to the parties on 20 March 2012. The Statement of Appeal against the decision was filed on 28 March 2012, i.e. within the 10 days provided for by Article 62.3 of the UEFA Statutes.

8.2 The Appeal is accordingly admissible.

9. APPLICABLE LAW

9.1 Article R58 of the Code provides as follows:

The Panel shall 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.

9.2 The UEFA ADR are accepted to be the applicable regulations. Swiss law as the law of UEFA’s domicile applies complementarily.

10. THE LAW

10.1 The relevant provisions of the UEFA ADR are Articles 2, 18 and 19, of which the material parts are as follows.

10.2 Article 2.01(a) sets out that the following constitutes an anti-doping rule violation:

The presence of a prohibited substance or its metabolites or markers in a player’s sample.

- *It is each player’s personal duty to ensure that no prohibited substance enters his body. Players are responsible for any prohibited substance or its metabolites or markers found to be present in their samples. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the player’s part be demonstrated in order to establish an anti-doping rule violation.*
- *Sufficient proof of an anti-doping rule violation is established by either of the following: presence of a prohibited substance or its metabolites or markers in the player’s A sample where the player waives analysis of the B sample and the B sample is not analysed.*

10.3 Article 18.01 sets out the following sanction for “First violations” of the anti-doping rule:

Suspension for presence, use, attempted use, or possession of prohibited substances and prohibited methods

The period of suspension imposed for a first violation under subparagraphs 2.01a (presence of a prohibited substance) is two years, unless the conditions for lifting or reducing the period of suspension, as provided in paragraphs 19.01 and 19.02, are met.

10.4 Article 19.01 provides that if the substance at hand is a specified substance within the meaning of Article 4 ADR, the sanction can be reduced or lifted in the following circumstances:

Where a player or other person can establish how a specified substance entered his body or came into his possession and that this specified substance was not intended to enhance the player’s performance or mask the use of a performance-enhancing substance, the period of suspension found in paragraph 18.01 is replaced with the following:

At a minimum, a reprimand and no period of suspension from future events, and at a maximum, two years’ suspension. To justify any lifting or reduction of a suspension, the player or other person must produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sporting performance or mask the use of a performance-enhancing substance. The player or other person’s degree of fault is the criterion considered in assessing any reduction of the period of suspension.

10.5 Article 19.02 sets out the preconditions for “Lifting or reducing the period of suspension in exceptional circumstances”:

a) *No fault or negligence*

If a player establishes in an individual case that he bears no fault or negligence, the otherwise applicable period of suspension is lifted. When a prohibited substance or its markers or metabolites is detected in a player’s sample in violation of subparagraph 2.01a (presence of prohibited substance or its metabolites or markers), the player must also establish how the prohibited substance entered his system in order to have the suspension lifted. If this subparagraph is applied and the otherwise applicable suspension is lifted, the anti-doping rule violation is not considered a violation for the limited purpose of determining the period of suspension for multiple violations under paragraph 20.02.

b) *No significant fault or negligence*

If a player or other person establishes in an individual case that he bears no significant fault or negligence, then the otherwise applicable period of suspension may be reduced, but the reduced period of suspension may not be less than half of the period of suspension otherwise applicable. When a prohibited substance or its markers or metabolites is detected in a player's sample in violation of subparagraph 2.01a (presence of a prohibited substance or its metabolites or markers), the player must also establish how the prohibited substance entered his system in order to have the period of suspension reduced.

11. ANALYSIS – THE MERITS OF THE APPEAL

- 11.1 It is undisputed (i) that Furosemide was found in the Player's A sample and (ii) that Furosemide qualifies as a substance prohibited both in- and out-of-competition.
- 11.2 Since the Player waived his right to have the B sample analysed, there is “[s]ufficient proof of an anti-doping rule violation” under Article 2.01(a) of the ADR.
- 11.3 It is further undisputed that the Player had no valid therapeutic use exemption for the prohibited substance.
- 11.4 It follows that the violation by the Player of Article 2.01(a) of the ADR (presence of a prohibited substance or its metabolites or markers in a player's sample) is established.
- 11.5 Prima facie, the Player must in consequence be suspended for two years.
- 11.6 In order to benefit from the possibility of elimination/reduction of the 2-year ban imposed under Articles 18 and 19 of the UEFA ADR, the Player must establish how Furosemide entered his body on the balance of probabilities. See at paragraph 72 of the CAS 2011/A/2645 decision *UCI v. Alexander Kolobnev & Russian Cycling Federation*, where the Panel stated:

“The evidentiary standard applicable to the establishment of the mentioned conditions is set by Article 22 ADR, as supplemented by Article 29(3) ADR. In accordance with the rules therein provided, therefore:

i. regarding the first condition, the athlete may establish how the Specified Substance entered the body “by a balance of probability”. In other words, a panel should simply find the explanation of an athlete about the presence of a Specified Substance more probable than not”

- 11.7 The Player's claims as to how the presence of this prohibited substance occurred have varied from time to time.

11.8 On 11 January 2012, the Player stated that he took the medication on 28 November 2011 on the advice of his wife without thinking about its content.

I noticed a large swelling on my face. Taking the advice of my wife I took the drug for swelling which was in liquid form and did not think about its content.

11.9 Even assuming this was true, it would neither qualify as a defence nor mitigation in the light of the robust and consistent line of CAS's jurisprudence as to the responsibility of players to avoid the ingestion of prohibited substances and not to delegate the duty to coaches or doctors or a *fortiori* relations.

11.10 The Player provided at different times different explanations for this first version from which he sought to depart subsequently –

- That Russian statement had been mistranslated. But it was not.
- That it had not been read fairly. But it admits of only one meaning.
- That given the shortage of time in which he was offered an opportunity to give an explanation, only a broad summary was needed. But not surely an inaccurate one.
- That he was nervous and apprehensive in light of the allegation made against him. But that cannot sensibly explain such an inaccuracy in his response.

11.11 On 24 January 2012, the Player stated that it was after he drank the water that his wife told him that she had put the drug in the water:

The next day, 28.11.2011, I woke up with great puffiness of my face. My wife who lives with me in Donetsk filled a glass with pure water and added previously the cure for puffiness to it and offered me to drink the glass with water. Taking into consideration the fact that the medicine was absolutely colorless, I did not feel its taste as well.

After I drank the water glass, my wife said me that she diluted the medicine prescribed by her doctor to her as the medicine in relation to regular leg puffiness that was the result of endocrine profile change after she gave birth to our daughter in 2011. If my wife had not said me about this medicine, I should not have known that I took it. I did not try to remember this medicine name and forgot about it at once.

11.12 On 20 January 2012, this version was also confirmed by Mrs. Rybka in her statement:

On the 28th of November, 2011, my husband woke up very early after his regular football match with sodden features. Over his head, I put 1 (one) ampoule of "Furosemid" to a glass of water and gave it to him to drink. After he drank the water with drugs in it, I told Oleksandr that I added some drugs into water to remove the swelling. During the day the swelling was gone and we have totally forgotten about this fact.

11.13 On 28 February 2012, in the appeal brief submitted to the UEFA Appeal Body, the Player stated that he had asked his wife for a glass of water.

[The Player] could therefore not have had the slightest suspicion that a simple glass of water would contain something else than just water when he asked his wife to give him such a glass of water.

[...]

His wife who gives him a glass of water when he asks for a glass for water

11.14 On 16 March 2012, before the UEFA Appeal Body, the Player's wife made an oral declaration that he did not even ask her for a glass of water and that she spontaneously gave it to him to drink without telling him the content and that it was only a few minutes after drinking the liquid that the Player asked his wife what was in it.

I decided to help him ... I'm the one who took the decision. He didn't ask me anything and gave it to him to drink.... He drank and sometime after that, I think he went to brush his teeth and then he asked me what he had had to drink and I said remember it's the drug which helped me when the doctors were treating my swollen legs... there was no concrete question.. he just drank and then he asked.

11.15 On the same occasion the Player stated that:

Panel: You heard what your wife has said? Do you confirm what she has said?

Player: Yes. Of course. That is exactly how things happened.

[...]

Panel: You say you didn't know there was a drug in it. Did you ask your wife after you cleaned your teeth, or whatever, what she had given you?

Player: Yes, of course I did. A few minutes later, I don't remember how long it was exactly I asked her what she had given me and she said that she had given me a drug that the doctor had prescribed for her when her legs were swollen.

- 11.16 In the CAS Appeal Brief (paras 2 to 3) the Player indicates that he did ask his wife for a glass of water, that the substance was “impossible to detect” in the glass of water and that “he could not have known that he was taking a substance”.
- 11.17 The chain of events testified to by the Player and his wife can only be as strong as its weakest link; in this instance there was a series of links all of whose strengths were highly suspect. The variety of versions proffered as to how Furosemide entered the Player’s body itself discouraged belief that he can surmount this crucial initial hurdle
- 11.18 First, the Panel was not persuaded that at the material time the player’s wife had any Furosemide at all. The documentary evidence was in the form of her medical record No. 2382 which stated:
- “Oleksandrivska clinic of Kyiv
Excerpt from the out-patient medical record N. 2382
Patient Rybka Nataliya Valentynivna, 1985 year born, residing at the address: ap. 17, 21 Lesya Ukrayinkablvd., Kyiv.
She referred to a primary care physician for consultation on 19.05.2011. After examination she was sent to a cardiologist for consultation on 19.05.2011. After examination the following diagnosis was made:
Dysmetabolic cardiomyopathy on the background of endocrine disorders of unclear genesis. Arterial hypertension of I grade, 2 gr. CH I.
Recommended: consultations of endocrinologist, gynaecologist, observation by cardiologist. Limited consumption of liquids and salt.
Treatment: Nebivolo 15 mg once in the morning, Etap 5 mg at lunch time, Mildronat solution 5.0 ml intramuscularly 5 days, Furosemide solution 2.0 intramuscularly 3 days.
Head of the consultative polyclinic Khilko O.M.
Deputy Chief Medical Officer Bashkirtsev. O.V.”*
- 11.19 The Panel is prepared to accept that the Furosemide was designed to cure the oedema i.e. swelling in her legs which was the consequence of her heart condition. Neither Dr Saugy nor Professor Billioz actually thought it effective, but acknowledged that it was in fact used, for that purpose.
- 11.20 The Player’s wife claimed before the Panel that she was scared of injections, was rendered nauseous by tablets, and accordingly was prescribed ampoules by a physician. Given that the course of injections prescribed was for a period of 3 days only, it must be inferred that only an amount of ampoules to replicate the effect of such a short course of injections would properly have been prescribed by a responsible pharmacist; but in point of fact there was no corroborative evidence of such prescription.

- 11.21 Even, however, assuming that the Player's wife was correct in her evidence about provision of that prescription, this would not explain why she continued to have such ampoules more than half a year later.
- 11.22 When asked for an explanation of such continued possession, she stated that she had recurrent problems with swelling over the intervening months and, without further resort to the physician, purchased further Furosemide over the counter (the Panel accepts on the basis of a receipt produced, albeit of a later date and in a place other than Donetsk, that over-the-counter purchase was possible in the Ukraine).
- 11.23 There was, however, again no corroboration of this account, although, again, the Panel accepts that she would have been unlikely to retain over the counter receipts for relatively inexpensive purchases.
- 11.24 The Panel noted a medical report from Dr. Nalyotov Sergei Vessilyevich, the Head of the Department of Clinical Pharmacology, Clinical Pharmacy and Pharmacotherapy at the Donetsk National Medical University, Doctor of Medical Science that Furosemide can, in fact, be used to treat facial swelling but, absent an ability to test this evidence, the Panel cannot rely on it to outweigh the carefully expressed and cogent views of the UEFA medical experts. In any event it was not for facial swelling that it had been recommended for the Player's wife.
- 11.25 The Panel noted too the report from Professor I.N. Bashkin, MD referring to the final analysis of the Player's doping control results which he said unequivocally demonstrated that Furosemide was inadequate as a masking agent had the Player in fact been taking other performance enhancing substances. Again the Panel had no opportunity to probe his conclusions. In any event, it is not the substance's efficacy but the Player's intention which is crucial.
- 11.26 Turning to the day in question an issue arose as to whether the Player had sustained a swelling at all, and, if so, what was its cause. Dr Billioz explained to the Panel that facial swelling can occur from a range of reasons; allergy; trauma; infection; adverse reaction to substances ingested or applied.
- 11.27 The Players' explanation (as a layman) was that what was an hour's flight from Karpaty to Donetsk, and after a strenuous game, he had drunk more water than was usual. Dr Billioz said although in theory ingestion of water could be a cause of facial swelling, it would require the consumption of several litres in a very short period. The Player never suggested that he had drunk that extraordinary amount of water; and if he had made such suggestion, the Panel would have had problems in accepting it.
- 11.28 If the Player had had a swollen face (according to him for the first time) the Panel finds it difficult to accept that:

- (i) (as both player and his wife asserted) the wife expressed no surprise and made no enquiry as to how he came by it
- (ii) (as was again common ground in the evidence) the wife would have given the husband a glass of water containing a substance without any explanation as to why she was offering it to him
- (iii) the Player would have taken the drink without asking why she was giving it to him unsolicited
- (iv) the wife, who had some medical training (including in pharmacy), would sensibly have offered her husband water containing that substance without any knowledge of what the cause of the swelling was, or why (if it were the case) that the medicine that had indeed reduced her own swelling, would necessarily have the same effect for her husband when – which cannot be gainsaid – such swelling in his case could not have been the consequences of pregnancy.

11.29 Finally, on the Player's version, the swelling indeed subsided. If it did, on the medical evidence before us, that could not have been the result of the Furosemide. It would have to have been a (peculiar) coincidence. Mr Crespo said in his final submissions in effect "so be it", but that his agile advocacy cannot erase the Panel's doubts about such fortuity.

11.30 The sequence of events as so finally described may not have been impossible or contradict the laws of physics or even of psychology, but it is certainly improbable.

11.31 It was not for UEFA – the Panel emphasise – to hypothesise, still less prove, their own version of events, but for the Player to establish his version.

11.32 The Player relied for the contrary proposition on paragraph 40 the *Gasquet* CAS decision (CAS 2009/A/1926 *International Tennis Federation (ITF) v. Richard Gasquet*, CAS 2009/A/1930 *World Anti-Doping Agency (WADA) v. ITF & Richard Gasquet*, award of 17 December 2009), where the CAS Panel took note of the fact that neither the International Tennis Federation nor the World Anti-Doping Agency submitted any evidence to suggest that the athlete in that scenario had taken a prohibited substance by any other method than the one he suggested.

"Moreover, the ITF and WADA have not submitted any evidence, but only speculation, that any of these alternate causes of ingestion could have occurred." (paragraph 40)

This statement, in its context, goes in the Panel's view not to the issue as to who bears the burden of proof but whether it has been discharged by the person who bears it (i.e. the Player).

11.33 The Player's case as finally advanced before the Panel was to the effect that he was unaware that he had been given anything to drink by his wife other than a glass of water.

11.34 Had that version been correct and given (as the Panel accept), that Furosemide is odourless and colourless in liquid, his fault, if any, would lie in his not having ever advised his wife (as both he and she agreed he had not) that as a professional footballer he had to be very careful to take no prohibited substance but the Panel has noted it does not find that version credible.

11.35 Mr Crespo drew the Panel's attention to the dictum in case of *Puerta* CAS 2006/A/1025 that:

"The definition of "No Significant Fault or Negligence" requires the Panel to look at the totality of the circumstances." (paragraph 11.5.6)

11.36 In *Puerta*, the Panel further decided that:

"Proceeding from the premise that each case must demonstrate exceptional circumstances, the Panel has concluded, after examining and evaluating the facts in their totality, that the ingestion of etilefrine occurred inadvertently. Although Mr Puerta acted negligently in not ensuring, despite his brief absence, that his previous glass had not been used by another person, the degree of his negligence is so slight that a finding of "No Significant Fault or Negligence" is inevitable and necessary." (paragraph 11.5.8)

11.37 However, there are clear differences between *Puerta* and the present case, since in the present case the issue of degree of fault simply does not arise. Unless and until the Player establishes the presence of the prohibited substance, the Panel cannot consider whether, and if so, how negligent he was (*International Wheelchair Basketball Federation (IWBF) v. UK Anti-Doping & Simon Gibbs*) CAS 2010/A/2230.

11.38 There is no basis for a conclusion that Furosemide was used in this instance as a mask for other drugs – Mr Rigozzi confirmed that there was not even basis for suspicion, let alone evidence of ingestion of other prohibited substances.

11.39 It is, however, clear on the evidence that the coaches of both the player's previous and present club considered that he was, from time to time, overweight, and indeed were quoted in newspapers as saying that he used diuretics for the purpose of weight loss, which would, of course, explain the adverse analytical finding.

11.40 The Panel indeed consider that the likelihood is that Furosemide was being taken by the Player for its perceived function in assisting in a weight loss.

11.41 But whether or not if so the underlying motive was only of pride in appearance, and not performance enhancement, it was not a matter that the Panel could explore since that was not the version tendered by the Player to it.

- 11.42 The Panel, for reasons already given, was not persuaded of the truth of the version that the Player did advance.
- 11.43 The Panel's sympathies, if any, lie with his wife whose loyalty to her husband was beyond question.
- 11.44 The Panel should only add that it is not a consequence of its conclusion that no sportsman can safely take a drink when offered to him by his wife in the family home. The prudent sportsman would have reminded his wife or partner of the obligations attended upon participation in modern professional sport.
- 11.45 The Panel has no option but to uphold the sanction, and it does so.

12. COSTS

- 12.1 Article R64.4 of the CAS Code provides:

“At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties”.

- 12.2 Article R64.5 of the CAS Code provides:

“In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties”.

- 12.3 The Panel has no evidence as to who has paid for the Player's legal fees – whether he himself or the Club. But even assuming, as UEFA contends, that he may have had assistance from the Club in this regard, there is no basis to assume, in the absence of evidence, that the Club or some other third party agreed to indemnify him against any claim by UEFA. Clearly the Player has less resources than UEFA. Although the Panel has found that the Player's version of events is false, it is not persuaded that he has indeed been seeking directly to enhance his performance.

- 12.4 Having taken into consideration all these matters the Panel is of the view that the costs of the arbitration, as calculated by the CAS Court Office, shall be borne by the Player.
- 12.5 In addition, as a contribution towards UEFA legal fees and other expenses the Player shall pay to UEFA an amount of CHF 2,000 (two thousand Swiss Francs).

DECISION

The Court of Arbitration for Sport rules that:

1. The appeal filed by Oleksandr Rybka on 28 March 2012 against the decision of the UEFA Appeals Panel dated 16 March 2012 is dismissed.
2. The Court Office fee of CHF 1,000 paid by Oleksandr Rybka shall be retained by the CAS.
3. Save that Oleksandr Rybka will pay to UEFA the sum of CHF 2,000 each party shall bear its own legal and other costs incurred in connection with these arbitration proceedings.
4. All other or further claims are dismissed.

Operative part of the award issued on 18 May 2012
Lausanne, 11 July 2012

THE COURT OF ARBITRATION FOR SPORT

Michael J Beloff QC
President of the Panel

Luigi Fumagalli
Arbitrator

Ulrich Haas
Arbitrator