Chapter 14
CAS 2008/A/1480 *Pistorius v IAAF*

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Abstract The appellant in this award is Oscar Pistorius, a professional athlete from South Africa competing internationally in 100, 200 and 400 m sprints. The respondent, the International Association of Athletics Federations (the "IAAF"), governs the sport of athletics throughout the world. Broadly, the dispute concerned the eligibility of an athlete with disabilities to compete in IAAF-sanctioned events alongside able-bodied athlete. More specifically, in this arbitration, Mr Pistorius appealed Decision No. 2008/01 of the IAAF Council dated 14 January 2008 which held that the "Cheetah" prosthetic legs worn by Pistorius, who has been a double amputee since he was eleven months old, constituted a technical device and provided him with an advantage over an able-bodied athlete in violation of IAAF Competition Rule 144.2(e). At the material time, IAAF Rule 144.2(e) stated that "For the purposes of this Rule, the following shall be considered assistance, and are therefore not allowed:…(e) Use of any technical device that incorporates springs, wheels, or any other element that provides the user with an advantage over another athlete not using such a device". The appeal centred principally on whether there was sufficient evidence of any metabolic advantage in favour of a disabled athlete. The appellant argued successfully that (a) due to the fact that he used the same oxygen amounts as able-bodied runners at a sub-maximal running speed and (b) there was no evidence that the biomechanical effects of using his particular prosthetic device gave him an advantage over other athletes not using the device; he, as a disabled athlete, should not have been banned from competeing in international IAAF-sanctioned events alongside able-bodied athlete. The CAS Panel held that there were glaring due process flaws in the process that led to the decision by the IAAF Council to ban Pistorius from IAAF sanctioned events alongside able-bodies athletes. It further held that when it related to the eligibility of an athlete to participate, convincing scientific proof was required to show that the athlete gained an unfair overall net competitive advantage over other athletes.

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A secondary element to the appeal was the CAS Panel's holding that where an appeal to the Court of Arbitration for Sport does not concern any disciplinary element, it is not the "beyond reasonable doubt" standard applicable in criminal cases which is applicable nor can it be any of the possible intermediate standards that are discussed from time to time in connection with the disciplinary processes, e.g. the "comfortable satisfaction" approach. In such a case, the applicable standard is the "balance of probability".

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14.1 Introduction

On the evening of 3 September 2011, a group of athletes—twelve in all—lined up to receive medals at the thirteenth World Athletics Championships hosted by the IAAF in Daegu, South Korea. The previous night, the men's 4 × 400 m relay team from the United States of America took first place in the final, with the team from South Africa finishing second and the Jamaican team finishing third. However, the group of athletes which stepped onto the podium to receive the respective medals did not present the full picture. Under the IAAF's Competition Rules (rule 170.10 IAAF), a relay team consists of four athletes who must each run one leg of the relay race. The rule, however, also provides that up to two additional athletes may be used as substitutes in the course of the elimination and final rounds. However, regulation 108.2.1 of the *Technical Regulations for IAAF World Series* provides that, in the case of relay events, only the four athletes who competed in the final, may represent the team at the medal ceremony, and that substitutes are to receive their medals afterwards. Because of this, when the medal ceremony took place, there were athletes sitting in the crowd, who had made a major contribution during the heats to ensure that their respective teams made it to the finals. One of them was a remarkable young South African sprinter called Oscar Pistorius. At first glance, he looked like any other track athlete, smartly dressed in his South African colours and watching with pride (and probably a tinge of disappointment) as his team received their medals, knowing that he too would receive his silver medal afterwards.

But six days earlier, as he prepared to walk onto the track to participate in the individual 400 m race, there was something patently different about Pistorius. Instead of putting on his sprinter's spikes like all the other athletes around him, Pistorius promptly removed his lower limbs and fitted prosthetic blades designed for sprinting. On 28 August 2011, Pistorius became the first amputee to participate in the regular IAAF World Championships. He finished third in his heat and qualified for the semi-final where he finished last and was thus eliminated from the competition. On 1 September 2011, Pistorius ran the first leg of the 4 × 400 m relay race for the South African team which set a new national record of 2:59.21 at the World Championships. This meant that Pistorius also had become the first amputee to set a national record in an event for able-bodied athletes. The following evening Pistorius, who made way for 400 m hurdler, LJ van Zyl, on the relay team, had to watch from the sidelines as his team finished second in the final of the 4 × 400 m race. In the process, Pistorius became the first amputee to win a medal at the World Championships. The 2011 IAAF World Athletics Championships in Daegu turned out to be a historic occasion for Pistorius. But his record breaking performances did not come easily and, because of a ruling by the IAAF Council, almost did not happen at all.

Pistorius was born on 22 November 1986 in Johannesburg, South Africa. He was born without fibula bones in both his legs and at the age of eleven months, after his parents had consulted some of the leading orthopaedic surgeons across the globe, his legs were amputated below his knees. His parents were advised that if his legs were amputated before he could learn to walk, it would greatly improve his chances of mobility in later life. He soon received his first prosthetic limbs and mastered them within a few days. Pistorius was an active child and, with the aid of his prosthetic limbs, has managed to do pretty much everything that other young boys his age would do. As a result, he has never thought of himself as disabled and participated in sport like all other children of his age. He attended the prestigious Pretoria Boys' High School where he played rugby, tennis, cricket and water polo and participated in triathlons and Olympic style wrestling! In 2003, Pistorius shattered his knee during a rugby match and, on medical advice, took up track running to aid his rehabilitation. In 2004, on the insistence of a teacher, Pistorius entered the 100 m race at a school athletics meeting. He won the race in 11.72 s and only learned later that his time was markedly faster than the existing world record for the T43 (double amputees) class.

His incredible talent was immediately evident a few months later when Pistorius won the gold medal in the 200-m event and the bronze medal in the 100-m event in the T43/T44 class at the 2004 Paralympic Games in Athens and he went on to set various world records at 100, 200 and 400 m in the T43 class. For Pistorius, who had always played all kinds of sport with able-bodied athletes, it was only natural that he would also compete alongside able-bodied athletes and in 2005 he participated in the South African Athletics Championship, in which he finished sixth in the 400 m event. His exploits did not go unnoticed and Pistorius

was invited to participate in a Grand Prix meeting in Helsinki, but had to decline the invitation due to school commitments. In 2007, he finished second in the 400 m race at the South African championships.[1]

14.2 Factual Background

Oscar Pistorius was invited to participate at an athletics' meet at Glasgow in June 2007 but this invitation was subsequently withdrawn following intervention by the IAAF. In March 2007, the IAAF Council had introduced an amendment to IAAF Rule 144.2 to regulate the use of technical devices. Subsection (e) of the new rule prohibited the "Use of any technical device that incorporates springs, wheels or any other element that provides the user with an advantage over another athlete not using such a device". Pistorious eventually got his opportunity to participate in an international athletics meeting in July 2007, when he took part in the 400 m "B" race at the Golden Gala meeting in Rome. During this period, the IAAF asked Dr Elio Locatelli to evaluate whether the prostheses used by Pistorius contravened rule 144.2(e). The IAAF arranged to have the Rome race videotaped by an Italian sports laboratory using several high-definition cameras from different angles.

Analysis of the video revealed that Pistorius was slower than other runners off the starting blocks, during the acceleration phase and running around the first bend, but faster over the back straight. The split times of the race confirmed that able-bodied sprinters ran their fastest 100 m splits in the first and second 100 m, while Pistorius ran his fastest 100 m splits in the second and third 100 m. The scientific analysis of the videotapes by the Italian laboratory indicated that neither Pistorius' stride-length, nor the length of time that his prosthesis was in contact with the ground, were significantly different from those of the other runners. In short the results of the study were inconclusive.[2]

Locatelli then instructed Professor Peter Brüggemann at the Institute of Biomechanics and Orthopaedics at the German Sport University in Cologne to conduct a biomechanical study to demonstrate whether or not Pistorius' prosthetic limbs gave him an advantage over other athletes. Brüggemann prepared a testing protocol based on instructions given to him by the IAAF. The tests were mainly designed to evaluate Pistorius' sprint movement using an inverse dynamic approach and also to study Pistorius' oxygen intake and blood lactate metabolism over a 400-m race simulation. Crucially, the IAAF instructed Brüggemann to carry out the testing only when Pistorius was running in a straight line after the

[1] The sources for this introduction are taken from an interview conducted by the author with Oscar Pistorius on 11 January 2012 at the Sports Science Institute, University of Pretoria, South Africa and from www.oscarpistorius.com/about. Accessed on 31 July 2012.

[2] CAS 2008/A/1480 *Pistorius v IAAF*, p. 3.

acceleration phase. The tests were conducted in November 2007 and involved Pistorius and five control athletes of similar sprinting ability as him.[3] Dr Robert Gailey, a scientist nominated by Pistorius to participate in the Cologne testing, set out a number of questions and suggestions directly relating to the testing protocol, but this was ignored by the IAAF and not shown to Brüggemann. Gailey was allowed to attend the tests only as an observer and was allowed no input on the testing protocol or on the analysis that would be made subsequently by Brüggemann's team.[4]

Brüggemann and his colleagues issued their report in December 2007 (the "Brüggemann Report"). They concluded that, when compared to the control athletes, Pistorius displayed a lower aerobic capacity and his VO2 uptake was 25 % lower than the oxygen consumption of the control athletes. They also found that the prostheses displayed significantly different joint kinetics when compared to the ankle, knee and hip joints of the control athletes and energy return was higher in the prostheses than in the human ankle joints. They concluded that Pistorius received significant biomechanical advantages by the prosthesis in comparison to sprinting with natural human legs.[5] Pistorius indicated that it would take time to produce a considered scientific response to the Brüggemann Report, but was given less than a month to respond.[6] In January 2008, the IAAF Council was provided with a summary of the Brüggemann Report prepared by the IAAF, the report itself and the reply by Pistorius. The IAAF's brief summary of the Brüggemann Report was not approved by Brüggemann, nor was it wholly accurate.[7]

As a result of the Brüggemann Report, the IAAF Council concluded that running with prostheses required a less-important vertical movement associated with a lesser mechanical effort to raise the body, and the energy loss resulting from the use of prostheses was significantly lower than that resulting from a human ankle joint at a maximal sprint speed. In January 2008, and based on these findings, the IAAF held that the prosthetics used by Pistorius were to be considered as a technical device providing the user with an advantage over other athletes in contravention of Rule 144.2(e) IAAF—IAAF Council decision no 2008/01 of 14 January 2008 ("the IAAF Decision"). Pistorius was thus declared ineligible to compete in IAAF-sanctioned events with immediate effect.[8]

In February 2008 Pistorius commissioned his own series of tests against able-bodied athletes as controls at a laboratory in Houston, Texas (the "Houston Report"). The Houston Report measured elements which the Brüggemann Report did not measure and found that Pistorius fatigued normally: he used the same

[3] CAS 2008/A/1480 *Pistorius v IAAF*, pp. 3–4.
[4] CAS 2008/A/1480 *Pistorius v IAAF*, paras 14–15.
[5] CAS 2008/A/1480 *Pistorius v IAAF*, p. 4.
[6] CAS 2008/A/1480 *Pistorius v IAAF*, para 16.
[7] CAS 2008/A/1480 *Pistorius v IAAF*, para 17.
[8] CAS 2008/A/1480 *Pistorius v IAAF*, p. 5.

oxygen amounts as able-bodied runners at a sub-maximal running speed, and thus did not have a metabolic advantage. The Houston Report also found a greater amount of energy loss from the prosthesis against the intact human leg.[9]

On the basis of this report and other evidence, Pistorius then appealed to the Court of Arbitration for Sport ("CAS") to have the IAAF Decision quashed. Pistorius raised four basic issues in his appeal: the IAAF Council exceeded its jurisdiction in taking the IAAF Decision; the process leading to the IAAF Decision was procedurally unsound; the IAAF Decision was unlawfully discriminatory; the IAAF Decision in determining that the use of the prosthetic devices contravenes Rule 144.2(e) was wrong.[10] On hearing, Pistorius abandoned his challenge to the IAAF Council's jurisdiction and the CAS Panel was left to determine the remaining three issues.[11]

14.3 Determination at CAS

The CAS Panel determined that the IAAF Decision had first to be traced in form and context to the adoption of Rule 144.2(e) IAAF in March 2007. They rejected testimony that the introduction of this rule was aimed primarily at the use of "spring" technology in running shoes and found it more likely that the new rule was aimed specifically at Pistorius by, for example, enabling the IAAF to subject Pistorius to the various tests.[12] The CAS Panel did acknowledge that the event in Rome, where Pistorius was filmed, was a *bona fide* attempt to determine whether his stride-length was greater than that of other athletes who ran comparable times in competition.[13] However, when this proved inconclusive, the CAS Panel noted that the IAAF had made some crucial procedural and due process errors when it commissioned further tests by Brüggemann.[14] In this, the CAS Panel highlighted that the instructions to carry out the testing only when Pistorius was running in a straight line (and thus not considering the effect of the prostheses over the entire race) was probably taken after the analysis of the Rome tests and was presumably designed to create a distorted view of any advantages Pistorius may have.[15] Consequently, the CAS Panel questioned the scientific basis, validity and relevance of the Brüggemann Report. The CAS Panel further concluded that Brüggemann was briefed to determine whether or not the prostheses provided an

[9] CAS 2008/A/1480 *Pistorius v IAAF*, para 43.
[10] CAS 2008/A/1480 *Pistorius v IAAF*, para 5.
[11] CAS 2008/A/1480 *Pistorius v IAAF*, para 7.
[12] CAS 2008/A/1480 *Pistorius v IAAF*, paras 5–6.
[13] CAS 2008/A/1480 *Pistorius v IAAF*, para 10.
[14] CAS 2008/A/1480 *Pistorius v IAAF*, para 11.
[15] CAS 2008/A/1480 *Pistorius v IAAF*, paras 12–13.

advantage in certain determined respects only and the Brüggemann Report therefore did not address all the questions which had to be determined.[16]

The CAS Panel also questioned the voting procedure followed by the IAAF Council. It noted that the documents were sent to IAAF Council members on a Friday with a request that the votes should be returned by the following Monday morning, while abstentions would be counted as positive votes to declare Pistorius ineligible. As a result, the IAAF press statement to the effect that the decision was made by the IAAF Council unanimously was misleading.[17] The CAS Panel found clear evidence of "prejudgment" in that Locatelli and other IAAF officials told the press before the vote was taken that Pistorius would be banned from IAAF-sanctioned events.[18] The Panel held that the manner in which the IAAF handled the case fell short of the high standards that the international sporting community is entitled to expect from a leading federation.[19]

The CAS Panel then went on to dismiss the submission by Pistorius that the IAAF Decision was in breach of its obligation of non-discrimination. It held that disability laws only require that an athlete be permitted to compete on the same footing as others. It followed that if the CAS Panel found that Pistorius gained no advantage from using the prostheses, he would be able to compete on an equal basis with other athletes. On the other hand, if the CAS Panel concluded that Pistorius did gain an advantage, he could not claim to participate on an equal footing.[20]

Lastly, the Panel had to determine whether the IAAF Decision was wrong in determining that Pistorius' use of the prostheses contravened Rule 144.2(e)IAAF which prohibited the use of any technical device that incorporates springs, wheels, or any other element that provides the user with an advantage over another athlete not using such a device. The CAS Panel identified the critical question as relating to the meaning of the expression "an advantage … over another athlete".[21] The CAS Panel rejected the IAAF's argument that the rule referred to any advantage, however small, in any part of a competition regardless of any disadvantages.[22] The Panel held that convincing scientific proof was required to show that the prostheses provide Pistorius with an overall net advantage over other athletes. If the use of the prostheses provided more disadvantages than advantages, then it could not reasonably be said to provide an advantage over other athletes, because the user was, in scientific and sporting fact, at a competitive disadvantage.[23] Crucially, the IAAF did not brief Brüggemann to make that "net" determination and the testing

[16] CAS 2008/A/1480 *Pistorius v IAAF*, para 13.
[17] CAS 2008/A/1480 *Pistorius v IAAF*, para 19.
[18] CAS 2008/A/1480 *Pistorius v IAAF*, para 20.
[19] CAS 2008/A/1480 *Pistorius v IAAF*, para 22.
[20] CAS 2008/A/1480 *Pistorius v IAAF*, paras 24–30.
[21] CAS 2008/A/1480 *Pistorius v IAAF*, para 34.
[22] CAS 2008/A/1480 *Pistorius v IAAF*, para 34.
[23] CAS 2008/A/1480 *Pistorius v IAAF*, para 36.

protocol that Brüggemann prepared was not designed to provide an authoritative scientific opinion as to whether the prostheses provided an overall net advantage over other athletes not using such devices. The Panel also found insufficient evidence that the prostheses provided any metabolic or biomechanical advantage over other athletes not using the device.[24]

Finally, although the CAS Panel upheld Pistorius' appeal, it nevertheless found it necessary to stress that its ruling applies only to Pistorius while using the particular model of (Cheetah Flex-Foot) prosthesis that was the subject of the various tests. It did not relate to any further developments of prostheses. Furthermore, the Panel did not exclude the possibility that advances in scientific knowledge might in the future prove on the balance of probabilities[25] that the existing prostheses provide an overall net advantage. In sum, the Panel explained that its decision did not apply to any other athlete and each case must be considered by the IAAF on its own merits under Rule 144.2(e) as interpreted by the Panel.[26]

14.4 Discussion and Analysis

At first glance, this case seems to have dealt a major blow for the benefit and recognition of the fundamental rights of disabled athletes, and in particular their right to be adequately accommodated, to have genuinely equal opportunity to participate in sport and to be treated with personal dignity. And in many ways, this holds true. The misguided attempts of the IAAF to amend its rules, hide behind ill-conceived "scientific" reports and exclude Pistorius from participation against able-bodied athletes was exposed for the sham it was.[27] The CAS Panel sent a clear message to international federations that they must address the participation criteria surrounding disabled athlete in a transparent and impartial manner. In this, credit should go the IAAF, though, for the dignified way in which it accepted the CAS award and welcomed Pistorius into events sanctioned by the IAAF including the London Olympics of 2012, where, on 4 August 2012 Pistorius became the first amputee to take part in the Olympic Games.

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[24] CAS 2008/A/1480 *Pistorius v IAAF*, para 36.

[25] CAS 2008/A/1480 *Pistorius v IAAF*, paras 38–39. The IAAF accepted the burden of proof. The parties disagreed on the applicable standard of proof. The CAS Panel determined that where an appeal to it does not concern any disciplinary element (as was the case here) it is not the "beyond reasonable doubt" standard applicable in criminal cases which is applicable nor can it be any of the possible intermediate standards that are discussed from time to time in connection with the disciplinary processes, e.g. the "comfortable satisfaction" approach in doping cases. Accordingly, in this case, the applicable standard was the "balance of probabilities".

[26] CAS 2008/A/1480 *Pistorius v IAAF*, paras 53–56.

[27] See CAS 2008/A/1480 *Pistorius v IAAF*, para 12 where the Panel uses the phrase "off the rails" to describe the IAAF's testing of Pistorius.

As with all aspects of this case, all is not, however, quite what it seems. It is ironic that a case which signals a clear victory for the rights of disable athletes to participate equally with able-bodied athletes was not decided on the basis of unlawful discrimination. In fact, the arguments in this regard were clearly dismissed by the Panel.[28] But perhaps this is also fitting as Pistorius has never considered himself to be disabled. As he put it, there are "no disabilities, only hurdles".[29] Instead, the CAS Panel focussed on the question of what constitutes an unfair advantage and the scientific evidence presented in this regard. In addition, while the award was based mainly on the proper interpretation of Rule 144.2(e) IAAF, the CAS Panel's view that "advantage" referred to an overall "net" advantage is significant as it demands that both the benefits and burdens have to be taken into consideration in determining whether a device provides an advantage to an athlete who uses it.[30] In this respect, this case is also a landmark case that will undoubtedly be cited in future cases which involve other sports rules that seek to ensure fair competition and prevent a competitor from obtaining an unfair advantage over other competitors.

It must be noted that, in any event, this "net" approach is how this concept of "advantage" has been applied in some other sports. For instance, in Formula 1 motor racing, racing regulations have long provided that if a car leaves the race track, the driver may rejoin the race if it is safe and the driver does not gain an advantage. Where a driver leaves the track and rejoins the track in such a way that he passes the car in front or avoids being passed by the car behind (and thus gains an advantage), the driver is generally not penalised if he immediately relinquishes his place to the driver then behind him (and effectively gains no "net" advantage). In the end, this is a simple common sense interpretation of the expression "advantage". In application to the Pistorius affair, the CAS Panel explained, again in a commonsense manner, that if a device (or incident) provides more disadvantages than advantages, then it cannot reasonably be said to provide an advantage over other athletes, because the user is in a factual, scientific and sporting sense at a competitive disadvantage.[31]

This interpretation does however beg one final question. In determining whether an athlete gains a net advantage, should only the advantages and disadvantages that manifest themselves during actual competition be considered, or should overall advantages and disadvantages, such as those that impact on training, also be considered? For instance, one matter that was not even put before the CAS Panel relates to the impact which the use of prosthetic devices have on Pistorius' ability to train to the same extent that able-bodied athletes do. The prostheses do not always fit snugly on his legs and from time to time he suffers from such severe

[28] CAS 2008/A/1480 *Pistorius v IAAF*, para 30.

[29] Interview conducted by the author with Oscar Pistorius on 11 January 2012 at the Sports Science Institute, University of Pretoria, South Africa.

[30] CAS 2008/A/1480 *Pistorius v IAAF*, para 36.

[31] CAS 2008/A/1480 *Pistorius v IAAF*, para 36.

chafing to the skin on his legs that he has to cut back on his training.[32] Able-bodied athletes wearing running shoes may suffer some blisters, but this occurs less frequently and usually heals much quicker. In addition, even with any kind of prosthesis, Pistorius is unable to perform many of the typical weight training exercises that able-bodied sprinters take for granted, especially those exercises that strengthen the leg muscles.[33] A disadvantage during training must surely also result in a competitive disadvantage during competition.

14.5 Conclusion

Pistorius' selection to participate at the 2012 Olympic Gems in London continues to arouse controversy and even some hostility.[34] The bigger picture and the one in which Oscar Pistorius, and not his critics, will stand prominently must however be about how sport at the Olympics and elsewhere is based fundamentally around a celebration of the human body and mind and the physical and psychological prowess of the participants. It is about training and turning the human body into something capable of incredible feats of speed, strength, endurance and skill. CAS 2008/A/1480 *Pistorius v IAAF*, which allowed one of the most remarkable athletes of our time, who has had to overcome adversity from the day he was born, to exhibit his incredible talent on the world stage alongside able-bodied athletes, is a clear affirmation of the spirit of sport and, possibly more importantly still, an inspiration to millions of people across the globe who face daily struggles of their own.

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www.guardian.co.uk/sport/oscar-pistorius. Accessed 31 July 2012
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[32] Interview conducted by the author with Oscar Pistorius on 11 January 2012 at the Sports Science Institute, University of Pretoria, South Africa.

[33] Interview conducted by the author with Oscar Pistorius on 11 January 2012 at the Sports Science Institute, University of Pretoria, South Africa.

[34] An archive of material and commentary relating to Pistorius at the Olympics can be found at www.guardian.co.uk/sport/oscar-pistorius. Accessed 31 July 2012. See, in particular, the interview with Pistorius by McRae 2011.