DECISION

dated April 25, 2008

rendered by

THE FITA ANTI-DOPING PANEL

sitting in the following composition

Mr Jean-Pierre Morand, Chairman
Mr Peter Jenoure, Member
Mr John Faylor, Member

In the proceedings opened in the matter concerning

Mr Markiyan Ivashko

(hereinafter "the Athlete")

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1. PRELIMINARY OBSERVATION

1. On April 14, 2008, the Panel issued a decision in this matter together with a summary of the supporting grounds.

2. The Panel announced that it would issue a decision with full grounds.

3. This is the announced decision with full grounds.

2. SUMMARY OF THE RELEVANT FACTS

4. The Athlete is a professional athlete registered with the Ukrainian Archery Federation.

5. The Athlete is listed on the FITA Registered Testing Pool.

6. According to his whereabouts information, the Athlete was available at his domicile in Lvov for testing on Sunday, December 9, 2007. The same specified that the Athlete would be at his designated training location between 10 am and 1pm.

7. The DCO who was in charge of the collection on behalf of the Sample Collection Agency, indicated that it was rather unusual to test on Sundays. As a matter of practice, athletes often remove Sundays from the list of available days.

8. However, in this case, Sunday, December 9, 2007, was mentioned on the whereabouts form without reservation.

9. The DCO therefore travelled with his assistant by train to Lvov on the morning of December 9, 2007 in order to collect a sample from the Athlete. Both arrived at the Athlete's domicile at around 7 o'clock and waited on the street until 8 o'clock.

10. At this time, the Athlete was sleeping in his 1-room flat which he shared with his fiancée.

11. According to the Athlete, his fiancée was taking her examinations at that time and was working hard and late. She was under much stress.

12. According to the explanation of the Athlete and as shown on a floor-plan of the apartment which was entered into the evidence, there were no doors in the interior of the apartment (except for the bathroom), which separated the main rooms (kitchen-dining room left of the entrance area and the bedroom on the right) from the small entrance area. In particular, no door existed between the entrance area and the bedroom which would have allowed the Athlete’s fiancée to preserve her privacy.

13. From the entrance area, one could in particular peer directly into the bedroom.

14. The proximity of the Athlete’s sleeping fiancée to the entrance area was supported not only by the floor-plan, but also by the testimony of the DCO who stated that when he entered into the flat later that afternoon, he saw the feet of person resting on a bed or sofa in the part of the flat serving as bedroom.

15. At 8 AM, the DCO knocked at the door of the Athlete. It took some time until the Athlete came to the door (without opening it) and enquired who was knocking.

16. After the DCO explained who he was and requested entrance, the Athlete could at first not believe it was a serious request (“are you serious?”). He then refused to open the door, explaining that this would awake his fiancée who was still sleeping.

17. A rather long exchange followed, always through the door, with the Athlete, speaking in a low voice and remaining polite, but who repeatedly asked to postpone the collection. However, the DCO insisted on being allowed to enter to take the sample.

18. Both the DCO and the Athlete concurred in their testimony that the DCO stated clearly that, if the Athlete did not open the door to let him in to take the test, he would have “to report the incident”.

19. It remained less clear whether at all, to what extent and at which stage of the discussion the DCO threatened more concrete consequences, such as the penalties which might be imposed if the Athlete did not comply. The DCO stated in his testimony, however, that he did not identify the violations or the type and scope of any sanctions or penalties.

20. Eventually, it was discussed between the Athlete and the DCO at what time the DCO should come back to the flat to take the test. In this regard, the time of one o'clock (i.e. after the training) was suggested by the Athlete.

21. The DCO confirmed the above exchange, but clarified that he did not make any specific commitment to return to the flat. He wanted to first take instructions from his superiors.

22. At the door, the discussion was focused on the issue of entering the flat or not. A possible alternative for taking the sample at a different location (e.g. at the training location, the nearby train station or elsewhere) in order to avoid disturbing the Athlete’s fiancée appears to have been neither discussed, nor even considered by the Athlete or the DCO.

23. In his testimony, the DCO stated that, at the time, he felt that it was wrong of the Athlete not to let him enter the flat, but he did not perceive the situation as a being a "refusal" within the meaning of that term in the rules, especially as the Athlete always confirmed his willingness to submit to collection.

24. His perception was that the situation was so unique and unusual that he had to obtain instructions from the Sample Collection Agency on how to address it.

25. However, as it was Sunday and because he did not have a list of direct personal telephone numbers with him, he could not get in touch with the office immediately while standing in front the door of the Athlete’s flat.

26. The DCO first had to find an internet café in order to access the Sample Collection Agency internet site from which to find the mobile number of a representative whom he could consult by SMS.

27. When he accomplished the above, the instructions which he received from Sample Collection Agency by SMS over his mobile phone was to “go back” to the Athlete’s flat and to make a further attempt.

28. However, the above process had taken time (several hours) and he could not return to the Athlete's flat until well after 1 o'clock.

29. In the meantime, the Athlete, who had realised that he could not go to training and be back at one o'clock had remained in his flat waiting anxiously for the DCO to return.

30. The DCO testified that, upon his return, the Athlete seemed to be happy and relieved to see him come back and that he did not sense any sign of nervousness on the part of the Athlete which could have indicated that the Athlete feared the collection. The sample collection took place without any objections, protests or problems. The Athlete was cordial and cooperative, according to the DCO. Given the incident in the morning, the DCO indicated that the Athlete was particularly attentive in this respect.

31. The DCO also stated that in his 12 year career as a DCO, he had never been confronted with a similar situation.

3. APPLICABLE RULES

32. The rules applicable are the FITA Anti-Doping Rules. These rules are based upon, and stand in full conformity with, the World Anti-Doping Code.

33. The WADA International Standard for Testing (version 3.0) includes more detailed provisions with regard to the testing process. There are no specific provisions of FITA in this regard.

4. DISCUSSION OF THE MERITS

4.1 No Violation of art. 2.3 of the FITA ANTI-DOPING RULES

34. These proceedings were initiated on the basis that the circumstances at stake could notably constitute a violation of art. 2.3 of the FITA Anti Doping Rules which mirror the WADA Code and reads as follows:

> Refusing or failing without compelling justification, to submit to sample collection after notification as authorized in these Anti-Doping Rules or otherwise evading Sampling collection.

35. This violation is considered to be a serious one. In accordance with art. 10.4 of the FITA Anti Doping Rules in connection with art. 10.2, refusal or failure to submit to a sample collection without compelling justification carries a sanction of 2 years ineligibility.

36. The violations covered by art. 2.3 of the FITA Anti Doping Rules are so-called non-analytical violations, i.e., violations which do not rest on an analytical (laboratory) result.

37. In accordance with art. Art. 3.1, in the event of a non analytical violation, the general rules of evidence apply (with no presumption) and the burden rests on FITA to establish to the so-called “comfortable satisfaction” of the hearing body, i.e., the FITA Anti-Doping Panel, that an anti-doping violation had possibly been committed.

38. In the present case, the Panel could not conclude from the facts presented that the elements of an art. 2.3 violation were established to its comfortable satisfaction.

39. In this regard, the Panel notes the first difficulty in establishing the objective elements of the violation contemplated in art. 2.3.

40. The classical cases falling under this art. 2.3 are the ones in which the athlete, following notification of the test, expressly refuses the sample collection or the case in which, absent any express refusal, he simply fails to submit to the test, e.g. he fails to report to the doping station. In both case, the result is that the collection cannot take place.

41. In this case, the Athlete never refused the sample collection. To the contrary, he agreed to submit to it, but the time was inappropriate. His response and behaviour cannot be compared to an athlete who expressly refuses to submit to a doping control or just never shows up. In the case at hand, the Athlete confirmed orally to the DCO from behind the door that he was willing to submit to the sample collection, just not at that point in time, because this would awake his fiancée.

42. Similarly, the Athlete did not, strictly speaking, fail to submit. He did not wish to submit at that specific time. Even if delayed, the sample collection took place about 5 to 6 hours later and the Athlete eventually co-operated.

43. Finally, even if the Panel were to apply the wording "otherwise evading", it would have to consider whether the Athlete willingly and knowingly attempted to evade the test by undertaking active measures to avoid it. Again, the fact is that the Athlete emphasized repeatedly to the DCO his willingness to submit to the test. He only wanted to avoid the resultant disturbance of his fiancée who was sleeping only a few meters away from the entrance to the flat.

44. Looking at the violation from the subjective side, the Panel is unable to find the level of fault which is necessary to accuse the Athlete of a violation of art. 2.3 of the FITA Anti-Doping Rules.

45. Violations pursuant to art. 2.3 of the FITA Anti Doping Rules are, by nature, intentional. The circumstances must allow the conclusion that the Athlete, being aware of the consequences in terms of sanctions and penalties, had willingly and knowingly refused or otherwise intentionally evaded the sample collection. In the case at hand, being awakened from his Sunday morning sleep, the Athlete was thinking about the disturbance and possible embarrassment which the test would cause to his fiancée. The Panel has determined to its comfortable satisfaction that the Athlete had no intent to refuse or otherwise evade the sample collection.

46. In making the above finding, the Panel does not wish to imply that, if an Athlete wishes to delay an unannounced out-of-competition test, he need only invent a plausible excuse. The Panel finds, however, that the facts and circumstances of this case, the circumstances under which the confrontation of the Athlete with the DCO (early in the morning on Sunday) took place, the DCO being caught "off guard" and unable to communicate immediately with the Sample Collection Agency, the failure of both parties to perceive an alternative solution such as going to another location and the instructions of the Sample Collection Agency to the DCO ("go back and take the test"), all of these factors, in the view of the Panel, preclude a violation of art. 2.3 of the FITA Anti-Doping Rules in the case at hand.

47. Separate by the entry door to the Athlete's flat, the DCO confronted the Athlete without being able to engage him for a confirmation of his identity and to set the procedure in motion which enables an orderly and valid sample collection to take place. In order for a proper "refusal" or "failure" to arise under the rules, the Athlete must be placed before the clear choice of either allowing the collection procedure to proceed or to incur the sanctions and penalties which result from a "refusal" or "failure".

48. Art. A. 4 of the International Standard for Testing (Annex A – Investigating a possible failure to comply) states as follows:

> ***"A.4 Requirements***
>
> *A.4.1 Any matters with the potential to compromise the test shall be reported as soon as practicable.*
>
> *A.4.2 If the matter has potential to compromise the test, the Athlete shall be notified if possible:*
>
> *a) Of the possible consequences:*
> *b) That a possible failure to comply will be investigated by the ADO and appropriate follow-up action will be taken.*

49. In the case at hand, it is clear to the Panel that such notification of "the possible consequences", although indeed possible, did not take place. The Panel recognises that the DCO may have warned the Athlete that sanctions could be incurred, but he did not inform him that the consequences might be so far reaching as to constitute a violation of Art. 2.3 with the possible consequence of a two year period of ineligibility under Article 10.2. In fact, the DCO was himself unsure whether a doping violation had been committed at all. On the basis of his own testimony, he was never confronted with such a situation and needed instructions from the Sample Collection Agency.

50. Both the Athlete and the DCO were confused, the Athlete regarding the possibility of sanctions and the DCO over the presence of a possible doping violation.

51. Importantly, the result of the blind discussion was that the DCO left the Athlete with the impression, even if he did not give any express assurance, that he might return that day to carry out the sample collection.

52. As the DCO departed, the Athlete was aware of only one possible consequence, namely that the incident could be reported to WADA. The DCO confirmed to the Panel that he made no reference to a possible "refusal" or "failure to submit" with the consequences set forth in Articles 10.4.1 and 10.2 of the FITA Anti-Doping Rules which find their corresponding wording in Articles 10.4.1 and 10.2 of the WADA Code

53. In addition to the novelty of the situation, the Panel further observes that the DCO was confronted with another serious issue which, at first, was not so obvious and easy to address, much less to resolve. This issue focused on the privacy rights of a third party, the fiancée of the Athlete, who could not have avoided disturbance and perhaps embarrassment in light of the small quarters in which the Athlete resided and the lack of doors between the bedroom where she was sleeping and the entry area of the flat. This fact was admitted by the DCO himself, who, upon his return to the flat in the afternoon observed "legs stretched out on the sofa" in the bedroom.

54. Indeed, to the best knowledge of the Panel, this issue has never been addressed in the past case rulings of arbitral tribunals dealing with sports law. Moreover, this question is not addressed by any specific provision of the applicable anti-doping rules, including the International Standards and Guidelines.

55. Indeed, athletes must accept significant intrusions to their own privacy, such as sample collection early in the morning, late at night, on any week day, even on Sundays. This waiver of one's own right to privacy does not, however, imply that third parties in the immediate proximity of the athlete, who are not bound by the rules, must also suffer violations of their rights to privacy.

56. This does not imply that an athlete may avoid (or evade) a sample collection merely by pointing to the immediate presence of girlfriend, mother, sister or some other female person likely to be inconvenienced by the procedure. It does imply, however, that both the athlete and the DCO must cooperate with each other in finding ways and means to avoid such violations of third party privacy, for example, by finding another locality to conduct the test.

57. In the present case, however, the circumstances were such that to allow the DCO to come inside the flat would have exposed the Athlete's fiancée to an unpleasant wake-up and possible embarrassment, not only for the fiancée vis-á-vis the Athlete, but also for the Athlete vis-á-vis his fiancée.

58. Given the circumstances on the Sunday morning of December 9, 2007, the Panel deems it to be far from obvious that the DCO's request to be granted access to the flat was unreservedly justified

59. To be sure, given the circumstances, the Athlete's refusal to open the door was therefore not entirely without justification. At least, the attempt should have been made to consider alternative solutions to conduct the sample collection.

60. Of course, hindsight is always wiser than foresight, but other possibilities existed for conducting the test. Once having engaged the Athlete "eye-to-eye", the Athlete could have dressed in the quiet eyesight of the DCO and then could have moved on together to the Athlete's training location or to the lavatories of the nearby train station.

61. Alternatively, and after weighing the interests of the parties, the DCO might have suggested to the Athlete as a further alternative that he (the DCO) wait outside of the flat immediately in front of the door for the few minutes that would have been necessary for the Athlete's fiancée to wake up and dress, even if these few minutes would have meant a partial departure from art. 5.4.6 of the International Standard for Testing which require that the athlete, following notification of the test, be chaperoned until the collection of the sample.

62. Unfortunately, but understandably, the discussion of these alternative possibilities seems never to have arisen, neither in the consciousness of the Athlete nor the DCO. Had the Athlete been conscious of such alternative possibilities, and if he had chosen to reject them without consideration, the facts of this case would merit a different consideration. The alternative which was considered, namely the possible return of the DCO several hours later, represented the solution to the problem in the eyes of both parties at that time and under the given circumstances. In the meantime, the DCO sought instructions and the Athlete waited for his return, choosing not to train that morning and to drink liquids to expedite the test.

63. In summary, therefore, the Panel holds that the Athlete cannot be charged with a violation of art. 2.3 of the FITA Anti-Doping Rules.

4.2 Violation of art. 2.4 of the FITA Anti-Doping Rules

64. Athletes have a duty of making themselves available for out-of-competition testing. Art. 2.4 of the FITA Anti-Doping Rules (Violation of availability for out-of-competition testing) reads as follows:

> ***2. Anti-Doping Rule Violations***
>
> *The following constitute anti-doping rule violations:*
>
> 2.4 Violation of the requirements regarding Athlete availability for Out-of-Competition Testing including failure to provide required whereabouts information set forth in Art 5.5 (Athletes whereabouts requirements) and missed tests, which are declared based on reasonable rules.

65. While art. 2.4 of the FITA Anti-Doping Rules refers expressly to two particular situations (failure to provide whereabouts and missed tests), the Panel holds that, by proper interpretation, the said article articulates a more general duty of the Athletes to make themselves available and to cooperate in the testing procedure in a manner which allows out-of-competition testing to be conducted effectively.

66. This interpretation is supported by the title of the article ("Violation of availability for out-of-competition testing") and further by the structure of the clause which cites "whereabouts" violations and "missed tests" as non-conclusive sub-categories under the broader heading of violations of availability. By use of the word "including", it is clear that "whereabouts violations" and "missed tests" are examples of "non-availability"

67. If the Athlete has not committed a violation of art. 2.3, such a finding does not imply that the Athlete's behaviour complied with the provisions of the FITA Anti-Doping Rules. Although the Athlete cited reasonable and credible grounds for denying the DCO entry into the flat, it was wrong for the Athlete not to have opened the door and/or to have stepped out into the public area to identify himself and to establish unhindered contact with the DCO. This would not have disturbed his fiancée.

68. This would have allowed proper notification of the sample collection and freer and more open discussion of the appropriate way to proceed with the sample collection given the circumstances.

69. The Panel finds that the Athlete's decision not to open the door and not to step out of his flat into the public area, where he would not have disturbed his fiancée, constitutes a violation of his duty to make himself available for out-of-competition. In so doing, he actively prevented a notification of the test procedure which would have begun with the identification of the athlete, the legitimation of the DCO and the initiation of the testing procedure. Without proper identification and legitimation, the sample collection procedure, pursuant to the DCO's testimony, could not "be put in motion".

70. If the Athlete did not react properly, the DCO did not either. The latter continued to insist upon being allowed to enter the flat. This focused the discussion in the wrong direction, tensions mounted and alternative solutions were never considered. This is not intended to be a criticism of the DCO. He was confronted for the first time after 12 years of experience with a situation for which he had not been prepared. The situation was not easy to manage.

71. The timing of the sample collection played a role as well. Whereas many athletes strike Sundays in their whereabouts information as an available time for testing (which is

permitted), the Athlete in this case stated that he would be available on Sunday both at his training location and at his home.

72. Not only did the timing of the collection place the Athlete before a difficult situation, it did also raise a problem for the DCO. It was not possible for him to obtain immediate instructions from the Sample Collection Agency office without going to an internet café in order to search on the website for the telephone number of his contact person. This is not a satisfactory state of affairs. General confusion arose on the part of the testing organisation and the DCO.

73. The Panel notes that the Athlete never once indicated that he was unwilling to submit the sample. As confirmed by the DCO, the Athlete emphasized to the DCO during their conversation that he had no issue with the collection, only with the timing and the location. The DCO stated during his testimony that the Athlete behaved at all time politely and cooperated without objections upon his return in the afternoon.

74. After all of the above, the Panel concludes that the unwillingness to open the door to his flat and to seek, in a cooperative spirit together with the DCO, a mutually-agreeable solution to the dilemma constitutes an unacceptable, although temporary, denial of his availability within the meaning of art. 2.4. The Athlete did not refuse the sample collection; he made himself unavailable, contrary to the rules and the terms of his whereabouts information, to undergo the testing procedure within the confines of his small flat. Despite the cited problems on the side of the DCO and of the Sample Collection Agency, the Athlete unavailability cannot go unsanctioned.

4.3 The Sanction

75. The Panel concludes that a sanction of three months of ineligibility, i.e. the minimum provided in art. 10.4, is appropriate.

76. Taking into account that the Athlete's Federation has barred him from participating in important competitions since the occurrence of the violation, the Panel had determined that, in application of art. 10.8, last sentence, of the FITA Anti-Doping Rules, the sanction shall apply retroactively from the date of the violation, December 9, 2007.

77. This sanction nullifies any competitive results achieved by the Athlete between December 9, 2007 and the end of the ineligibility period on March 8, 2008 and results in the forfeiture of all points, medals, prize-money received during this period (art. 10.1 FITA Anti-Doping Rules).

78. With respect to costs, the Panel has taken note of the fact that FITA has decided not to require the imposition of costs. The Panel will therefore not issue an order for costs.

5. DECISION (ISSUED ON APRIL 14, 2008)

The FITA Anti-Doping Panel

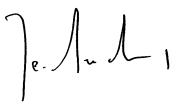
1. holds that the Athlete has committed a violation of art. 2.4 of the FITA ANTI DOPING RULES (availability for out-of-competition testing).

2. issues a sanction of three months ineligibility commencing as of December 9, 2007.

3. orders the annulment of all the results of the Athlete during the ineligibility period including forfeiture of all medals, points and prizes.

4. decides that no costs will be imposed.

Geneva, April 25, 2008



Jean-Pierre Morand
Chairman
on behalf of the Panel