

**ARBITRAL AWARD**

delivered by the

**COURT OF ARBITRATION FOR SPORT**

sitting in the following composition:

President: Prof. Luigi **Fumagalli**, Attorney-at-Law, Milan, Italy

Arbitrators: Prof. Michael **Geistlinger**, Attorney-at-law, Salzburg, Austria  
Dr Dirk-Reiner **Martens**, Attorney-at-law, Munich, Germany

between

**ROBERT FAZEKAS**, Szombathely, Hungary  
Represented by Dr. Eva Maria Barki, Attorney-at-Law, Wien, Austria

as Appellant

and

**INTERNATIONAL OLYMPIC COMMITTEE**, Lausanne, Switzerland  
Represented by Mr Jan Paulsson, and Zachard Douglas, Attorneys-at-Law, Paris, France

as Respondent

## I. BACKGROUND

### The Parties

1. Mr Robert Fazekas (hereinafter referred to as the “Athlete” or the “Appellant”) is a discus thrower of international level.
2. The International Olympic Committee (hereinafter referred to as the “IOC” or the “Respondent”) is the supreme authority of the Olympic Movement, with the primary responsibility to supervise the organization of the Summer and Winter Olympic Games.

### The Events

3. The Appellant participated in the Athens 2004 Olympic Games as a member of the Hungarian team. More exactly, on the evening of Monday 23 August 2004, the Athlete competed in the men’s discus throw event, ranking first.
4. After the competition, at 10.15 p.m., the Athlete was requested to report to the doping control station of the Olympic Stadium in order to provide a urine sample for a doping control.
5. The Athlete arrived at the doping control station at 10.19 p.m. Despite a plurality of attempts, lasting until 2.37 a.m. of Tuesday 24 August 2004, the Athlete could provide only a (partial) sample of 25 ml of urine.
6. At 2.37 a.m. of Tuesday 24 August 2004 the Doping Control Official Record was signed by the Athlete (as well as by Dr. Panagiotis Tsarouchas, head of the doping control station of the Olympic Stadium, by Dr. Gabriel Dollé, representative of the International Association of Athletics Federations (“IAAF”), and by Dr. Karoly Pikó, as the Athlete’s representative). The Doping Control Official Record contained *inter alia* the following statements:

*“This may be regarded as a failure to comply and may constitute an antidoping rule violation according to the I.O.C. Rules”.*

*“The athlete decide to finish the procedure because not feel good himself. The athlete was given the opportunity to continue the sample collection at the polyclinic where medical treatment could be given to him but the athlete did’nt accept”.*

### The Disciplinary Proceedings and the Decision of the IOC Executive Board

7. On the basis of such Doping Control Official Record, disciplinary proceedings were opened against the Athlete pursuant to Article 7.2 of the IOC Anti-Doping Rules applicable to the Games of the XXVIII Olympiad in Athens in 2004 (the “Athens Rules”):

- i. the head of the doping control station of the Olympic Stadium (Dr. Panagiotis Tsarouchas), believing that an anti-doping rule violation had been committed, informed the Chairman of the IOC Medical Commission (Dr. Patrick Schamasch) and provided him with a report, signed also by Dr. Gabriel Dollé, containing the relevant information as follows:
 

*“On Monday, 23<sup>rd</sup> August 2004, the Hungarian athlete FASEKAS Robert gold medal winner of the discus event was notified at 22:15 hours for doping control. He reported at the doping control station at 22:19 accompanied by his team doctor, Dr Karoly Piko. He went to the bathroom to provide the sample at 22:52 with Mr. Gentekos Nikos and Dr. Gabriel Dollé as witnesses. Dr. Dollé took the initiative to witness the athlete himself in order to have a personal opinion on the whole procedure.*

*The athlete showed a strange behaviour during providing the sample, always covering with his hands the collection vessel and his part of the body and pressing strongly the lower part of his belly. He managed to provide 25.0 ml that were sealed as a partial sample. He repeated the attempt to provide a further sample more than twice witnessed either by Dr. Dollé or Mr. Gentekos Nikos or Dr. Tsarouchas. Eventually, at 01:15 the athlete stated that he would not give a further sample since he was in an unstable psychological state and was not feeling well. The athlete was given the opportunity to be transferred to the polyclinic where medical treatment would be provided to him and continue the sample collection there, but he refused. It was clearly explained to the athlete and his doctor that both under the IAAF and the IOC anti-doping rules this may be regarded as a failure to comply and therefore constitute an anti-doping rule violation. The athlete in full awareness of the procedure decided not to give a further sample, seal the 25.0 ml as described in the list and sign the doping control official record, as instructed by Dr. Schamasch, at 02:37. He signed out of the doping control station at 02:41 with his doctor”;*
  - ii. the Chairman of the IOC Medical Commission determined that the anti-doping violation set forth in Article 2.3 of the Athens Rules (“refusing, or failing without compelling justification, to submit to Sample collection after notification ...”) had apparently been committed by the Athlete and therefore informed the IOC President of the apparent anti-doping rule violation;
  - iii. a Disciplinary Commission (the “Disciplinary Commission”) was set up and a hearing before the Disciplinary Commission was convened.
8. The hearing before the Disciplinary Commission was held on 24 August 2004 at 4.00 p.m. Before the Disciplinary Commission appeared a delegation composed of Mr Zsigmond Nagy, staff member of the Hungarian Olympic Committee, and Dr. Karoly Pikó, doctor of the Hungarian Olympic Committee. The Athlete was not present. During the hearing Dr. Panagiotis Tsarouchas and Dr. Gabriel Dollé were heard as witnesses.

9. At the end of the hearing, the Disciplinary Commission “*unanimously*” concluded that the Athlete “*had committed a doping offence*” pursuant to Article 2.3 of the Athens Rules, “*in that he had refused or failed to submit to sample collection*”, and therefore was of the view that the following recommendations be made to the IOC Executive Board:

“... *that Mr. Robert Fazekas be disqualified from the men’s discus throw event, where he had placed first;*

... *that Mr. Robert Fazekas not be awarded a gold medal or diploma;*

... *that Mr. Robert Fazekas be excluded from the Games of the XXVIII Olympiad in Athens in 2004;*

... *that Mr. Robert Fazekas’s Olympic identity and accreditation card be withdrawn; and*

... *that the International Association of Athletics Federations (IAAF) be requested to modify the results of the above-mentioned event accordingly and to consider any further action within its own competence”.*

10. On the same 24 August 2004 the IOC Executive Board, to which the matter had been referred upon the recommendations of the Disciplinary Commission, adopted the following decision (the “Decision”) on the basis of Articles 2.3 and 8.1 of the Athens Rules and of Rule 25.2.2.1 of the Olympic Charter:

“I. *That the athlete Mr Robert Fazekas, Hungary, men’s discus throw:*

(i) *is disqualified from the men’s discus throw event, where he had placed first;*

(ii) *is not awarded a gold medal or diploma;*

(iii) *is excluded from the Games of the XXVIII Olympiad in Athens in 2004; and*

(iv) *shall have his Olympic identity and accreditation card withdrawn.*

II. *The International Association of Athletics Federations (IAAF) is requested to modify the results of the above-noted event accordingly and to consider any further action within its own competence.*

III. *This decision shall enter into force immediately”.*

## II. THE ARBITRAL PROCEEDINGS

### The Appeal

11. On 13 September 2004, the Athlete filed a statement of appeal with the Court of Arbitration for Sport (the “CAS”), pursuant to the Code of Sports-related Arbitration (the “Code”), to challenge the Decision. The statement of appeal cited the IOC as the respondent, contained the appointment of Prof. Michael Geistlinger as arbitrator and requested that the CAS decide as follows:

*“That the decision taken by the Executive Board of the International Olympic Committee on 24.08.2004 be annulled in all counts and to award the gold medal to Robert Fazekas for placing first”.*

12. On 13 October 2004, the Appellant filed his appeal brief, together with 10 Exhibits (including the expert witness reports signed by Prof. Gerhard S. Barolin, Prof. Alexander Friedmann, Dr. Gyözö Szendrödi, and Dr. Wilhelm A. Hübner, and a “short report” signed by Dr. Karoly Pikó), confirming his request for relief in the following terms:

- *that the evidence which has been submitted and offered be heard,*
- *that the decision by the IOC Executive Board is set aside and declared null and void and that I be rewarded the Gold Medal in the discus throw”.*

13. In support of his requests for relief, the Appellant submits that the Decision “is based on defective proceedings” and that it “is substantively unlawful”.
14. As to the first argument (relating to procedural issues), the Appellant challenges the Decision by advancing criticisms both with respect to the disciplinary proceedings and to the sample collection procedure.
15. With respect to the disciplinary proceedings, the Appellant submits that he had not been notified of the hearing before the Disciplinary Commission, and that, as a result, his “right to representation” had been violated: he “was not instructed as to ... [his] ... right to obtain legal counsel”; and “the persons representing ... [him] ... were not legally qualified and ... failed to make the necessary submissions and evidentiary motions and submitted incorrect and incomplete argumentation”. In the Appellant’s view such proceedings were “defective” because they violated the “procedural regulations, as well as the Anti-Doping Rules Applicable to the Games of the XXVIII [Olympiad] in Ath[e]ns in 2004, the World Anti-Doping Code of 2003, the Doping Control Guide, Athens 2004, the International Standard for Testing, 2003, and the International Anti-Doping Convention of 1989”.
16. With respect to the sample collection procedure, the Appellant stresses that “two witnesses were present at the urine sample ... and that ... [he] ... was not allowed to bring representative”, while, pursuant to the rules that the Athlete indicates as relevant on the point (Paragraph 1.2 of Appendix 2 to the Athens 2004 Olympic

Games Doping Control Guide – the “Athens Guide”), “*the Athlete is entitled to be accompanied by an accredited representative and/or interpreter*” and “*only the designated doping control witness ... will observe the Athlete [passing] a urine sample*”.

17. As to the second argument (relating to substantive issues), the Appellant challenges the Decision as “*unlawful*” for two main reasons.
18. First, because “*the applicability*” of the Athens Rules “*was not reviewed*”. And in this connection the Appellant maintains that he had never been informed of such rules.
19. Second, because “*the element of Article 2.3 of the IOC Anti-Doping Rules [the Athens Rules] has not been met*”.
20. In this latter respect the Appellant stresses that he “*did not refuse the urine sample without justification*”: he could produce only a partial sample because of “*psychological factors caused by the conduct of the witnesses and the general mood during the doping control*”. In addition, the Appellant submits that “*it has to be taken in consideration that ... [he] ... was sweating profusely after the competition due to the high temperatures at that time and the stress in connection with the event and the urine sample*”. More specifically, the Appellant submits, based on experts opinions, that the reason for the “*non-submission*” of a full sample was “*a psychological trauma caused by the witnesses*”:

*“From the beginning, I was received in an unfriendly and dismissive fashion: instead of greeting me, the doping station staff turned away from me. After the euphoria over my victory, this was like a cold shower.*

[...]

*I was treated in hostile and demeaning fashion by the witnesses, who mocked and made fun of me because I could not produce any more urine.*

*I was made to get on all fours and was ordered to spread my buttocks apart so that the witnesses could look into my anus, also to lift my testicles and penis; unexpected, the testers pulled down my pants from behind even further. Inspecting me from all angles at a distance of about 5 cm. During this time ... I was made fun of, was laughed at and humiliated. This was repeated at each attempt to produce a urine sample: a total of seven times. The situation grew more and more aggressive. At one time Mr. Dollé even unzipped his pants, took out his penis, and said: ‘look, you have to urinate like this’”.*

21. As to his decision to interrupt the doping control procedure and not to go to the Polyclinic of the Olympic Village, the Appellant submits the following:

*“... first I agreed to this suggestion. However when it became clear that the same two witnesses would accompany me. I rescinded my consent and requested other*

*attendants. This request was not granted.*

*[...]. I asked [a staff member] whether the 25 ml I had given would suffice, which was expressly affirmed. The woman stated that even 25 ml was enough for testing. ... The other members of the committee had heard this.*

*[...]. Based on this information, I was reassured, and decided to stop the procedure. [...]*”.

22. With respect to “*the woman who was brought in the doping control station and said that 25 ml was enough for testing*” the Appellant submits that her name “*should be released by the Respondent*”.

### **The Answer to the Appeal**

23. By letter dated 23 September 2004, the IOC appointed Dr. Dirk-Reiner Martens as arbitrator.

24. On 22 December 2004, the IOC filed its answer to the appeal brief, together with 16 exhibits and the witness statement signed by Dr. Panagiotis Tsarouchas. The answer contained the following requests for relief:

*“1. The Appellant’s appeal be dismissed; and*

*2. The Appellant pay all the costs and expenses arising out of this arbitration”.*

25. In support of its requests for relief, the Respondent submits that the anti-doping rule violation described in Article 2.3 of the Athens Rules (“*refusing, or failing without compelling justification, to submit to Sample collection after notification ...*”) had been committed: in the Respondent’s opinion, the Athlete had “*deliberately*” refused to submit to a sample collection; and the Appellant’s “*subjective reasons*” for refusing to provide a full urine sample are “*irrelevant*”.

26. In this respect the Respondent, on one hand, confirms that the Appellant did not give a full urine sample; and, on the other hand, while stressing that “[*t*]he principle of strict liability for anti-doping rule violations leading to disqualification is the cornerstone of the legal framework” of any anti-doping code, submits that “*a ‘compelling justification’ in the sense of Article 2.3 of the IOC’s Anti-Doping Rules [the Athens Rules] must be confined to a justification based on objective reasons external to the athlete*”. More specifically the Respondent maintains that

*“... once the athlete is physically present at the doping control station, he cannot invoke subjective reasons personal to himself to justify a refusal or inability to provide a urine sample. [...]. no refusal by an athlete to give a sample while at the doping control station could ever be excused on the basis of a ‘compelling justification’”.*

27. As a result of the above, “*in the present case*”, in the Respondent’s opinion, the Appellant cannot rely on the reasons he is advancing: “*whether or not the Appellant suffered from ‘psychological trauma’ as a result of his childhood predisposition, his religious beliefs or something else, there has been an anti-doping rule violation*” in accordance with Article 2.3 of the Athens Rules.
28. In any case, the Respondent exposes “*the background*” to the Appellant’s refusal to provide a full urine sample, confirms that “*each and every aspect of the procedure [of the sample collection from the Athlete] conforms with the exacting specifications*” of the Athens Guide, and challenges the description of the same procedure submitted by the Appellant.
29. With respect to “*the background*” to the Appellant’s refusal to provide a full urine sample, the Respondent submits that the Appellant was suspected of using an apparatus aimed at providing a false urine sample, and that “*the Appellant’s conduct was precisely consistent with [an] attempted use of [such] apparatus*”.
30. With respect to the doping control procedure the Respondent submits, also on the basis of the witness statement signed by Dr. Panagiotis Tsarouchas, that:
  - i. contrary to the Appellant’s assertion, “*no one touched him during the procedure or came within half-a-metre of his person*”;
  - ii. contrary to his assertion, the Appellant was not “*made to get on all fours*” for anal inspection;
  - iii. the “*Appellant refused to even separate his legs to adopt the natural position for urinating*”;
  - iv. “*the Appellant’s accusations that he was ‘mocked and made fun of’ and ‘treated in a hostile and demeaning fashion’ are complete fabrications*”;
  - v. “*the Appellant never asked to take a representative with him into the toilet facility*”;
  - vi. “*the Appellant made three attempts at giving a urine sample, not seven as he suggests*”;
  - vii. “*the Appellant was not ‘sweating profusely’ during the procedure as he maintains*”;
  - viii. the Athlete decided not to go to the Polyclinic (as provided in the Athens Guide) when he realized that his plan to “*resort to his method of providing a false urine sample ... was foiled*”;
  - ix. the “*unidentified woman ... present at the doping control station ... had no competence to advise [and, according to the Respondent, did not advise] the athlete on any aspect of the doping control procedure ...*”, while, as it is

absolutely clear that, according to the applicable rules, 75 ml is necessary, “*it is inconceivable that the Appellant could have relied upon advice to the effect that he could leave the doping control station because he had provided 25 ml of urine*”.

31. With respect to the failure of the Athlete to attend the hearing before the Disciplinary Commission, the Respondent explains that this was due to the fact that the Appellant “*had fled from Athens in haste*” the morning of the 24 August 2004.
32. The Respondent, finally, challenges the witness statements and the expert reports filed by Appellant. As to the expert reports because “*some of the medical experts do not appear to have examined the Appellant in person*”, all of them “*have accepted without reservation, the version of events provided by the Appellant*”, their conclusions are “*absurd*”, they are not limited to observations based on medical expertise, they refer to circumstances for which no evidence is given. As to the witness statements because they are a “*sham*”.

### **The CAS Proceedings**

33. By letter dated 11 October 2004, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that Prof. Luigi Fumagalli had been appointed as President of the Panel.
34. On 20 December 2004, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (the “Order of Procedure”), detailing the procedure for the arbitration. The Order of Procedure was accepted and countersigned by both parties.
35. On 28 October, the IOC, upon receipt of the Appellant’s appeal brief, requested *inter alia*, certain clarifications from the Appellant in relation to the witnesses and the experts intended to be called at the hearing and to other evidentiary matters, concerning the scientific articles referred to in the expert witness reports filed by the Appellant and the “*interrogation*” of the Appellant.
36. On 29 October 2004, the Respondent made a request to the Panel in order to obtain the production of specific documents in the possession, custody or control of the Appellant deemed to be material to the dispute. More specifically, the IOC requested the production of documents evidencing difficulties experienced by the Appellant in providing a full urine sample in the doping controls undertaken by the relevant sporting bodies during the Appellant’s career.
37. On 8 November 2004, the Appellant filed with the CAS a Statement “*regarding the requests made by the IOC*” in the letter dated 28 October 2004, specifying the list of the witnesses to be heard at the hearing and his desire to be heard as well.
38. On 11 November 2004, the CAS Court Office, acting on behalf of the Panel, informed the parties that the Panel had decided, pursuant to Article R. 44.3 § 2 of

the Code, to request the Appellant to provide the documents and/or information available, concerning the difficulties experienced by the Appellant in providing a full urine sample in the doping controls under taken by the relevant sporting bodies during the Appellant's career.

39. On 12 November 2004, the IOC requested a ruling by the Panel with respect to the witnesses and experts to be called at the hearing and the evidentiary matters already mentioned in the letter dated 28 October 2004.
40. On 23 November 2003, the CAS Court Office informed the parties, on behalf of the Panel, of the Panel's decision concerning the outstanding procedural issues, as follows:

“1. Witnesses and Experts

- a. Mr. Robert Fazekas: *the Panel considers that the Appellant Mr. Robert Fazekas is a party. The Panel wishes that the Appellant attends the hearing in person to answer any questions from the Respondent or the Panel.*
- b. Appellant's list of witnesses and experts: *Pursuant to art. R51 of the Code ..., the Appellant is invited to file his final list of witnesses and experts on or before 3 December 2004. By the same deadline, the Appellant shall file witness statements for each witness, failing which the persons mentioned in the witness list will not be authorized to testify before the Panel. It shall be noted that the production of new evidence (exhibits, witnesses) will be possible only under the conditions of art. R56 of the Code.*
- c. Witness to be named: *In order to avoid any further delay, the Respondent is invited to try its best to identify the person described at item 4.3 c) of the appeal brief and to inform CAS accordingly no later than 30 November 2004; this order is made without prejudice for the Panel to accept or refuse the testimony of such “witness” if her examination is requested by the Appellant.*

2. Evidence

*The request by the IOC to have the articles cited by the Appellant's experts Dr Barolin, Dr Friedman and Dr Szendrödi translated in English is denied by the Panel; the Panel has noted that the three experts had filed statements in English, which is sufficient for the Respondent and its experts to study and reply to such statements. The Code does not provide for the translation of documents which are not filed as exhibits”.*

41. On 30 November 2004, the Appellant filed a new Statement, dated 29 November 2004, submitting written declarations made by Dr Karoly Pikó, Mr Antal Fazekas, Mrs Antalné Fazekas and Ms Timea Kalman, as well as an article published in a magazine.
42. On 30 November 2004, the Respondent informed the Panel that it had not been

possible to identify the person described in the Appeal Brief, as requested by the Panel at point 1 c) of the decision communicated on 23 November 2004.

43. On 6 December 2004, the IOC challenged the production of documents made by the Appellant with the Statement dated 29 November 2004.
44. By letter dated 9 December 2004, the CAS Court Office, acting on behalf of the Panel, informed the parties that the Panel had decided as follows:

*“... to allow the following witnesses who have provided CAS with a witness statement on or before 3 December 2004, to give oral evidence at the hearing:*

- *Dr. Karoly Pikó;*
- *Dr. Gerhard Barolin;*
- *Dr. Alexander Friedmann;*
- *Dr. Gyözö Szendrödi;*
- *Dr. Wilhelm Hübner;*
- *Mrs. Antalné Fazekas;*
- *Mr. Antal Fazekas;*
- *Ms. Timea Kalman.*

*... if one or more of the above mentioned witnesses fail to appear at the hearing, their written statement will be disregarded by the Panel.*

*... the article of the magazine ... filed by the Appellant, will not be considered by the Panel as it has not been translated in English within the deadline of 30 November 2004”.*

45. A hearing was held in Lausanne on 10 and 11 February 2005. Dr. Karoly Pikó, Mrs. Antalné Fazekas and Ms. Timea Kalman were heard as factual witnesses for the Appellant; Prof. Gyözö Szendrödi and Prof. Gerhard S. Barolin were heard as expert witnesses for the Appellant. Dr. Panagiotis Tsarouchas was heard as witness for the Respondent. The Appellant himself rendered some declarations to the Panel and answered questions posed by the Respondent. At the conclusion of the hearing, the parties made cogent submissions in support of their respective requests for relief and confirmed that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings.
46. At the hearing, the Respondent informed the Panel that its request for compensation of the expenses incurred with respect to the arbitration proceedings had to be quantified in the amount of CHF 40,000. The Appellant, in turn, by letter dated 23 February 2005, specified the expenses for which compensation was requested as being EUR 70,000.

### III. LEGAL ANALYSIS

#### **Jurisdiction**

47. CAS has jurisdiction to decide the present dispute between the Athlete and the IOC. The jurisdiction of CAS *in casu* is based on Rule 74 of the Olympic Charter and on Article 12.5 of the Athens Rules. In addition it has been confirmed by the signature by all the parties of the Order of Procedure issued by the CAS Court Office on behalf of the President of the Panel.

#### **Appellate Proceedings**

48. As these proceedings involve an appeal against a decision issued, in a dispute relating to an anti-doping rule violation, by an international sports organisation (IOC) whose rules provide for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings, in a disciplinary case of international nature, in the meaning and for the purposes of the Code.

#### **Admissibility**

49. The Athlete's statement of appeal was filed within the deadline set down in Article 12.5 of the Athens Rules: irrespective of the date of actual service of the Decision upon the Appellant, the appeal was filed (on 13 September 2004) within 21-days after the adoption of the Decision (on 24 August 2004). It complies with the requirements of Article R48 of the Code. Accordingly, the appeal is admissible.

#### **Applicable Law**

50. According to Article R58 of the Code, the Panel is required to decide the dispute
- “according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*
51. In this case, therefore, IOC rules and regulations have to be applied primarily, with Swiss law applying subsidiarily.
52. The rules and guidelines relevant to these arbitration proceedings are the following:
- i. Rule 45 [*“Eligibility Code”*] of the Olympic Charter (in force at the time of the Athens Olympic Games):

*“To be eligible for participation in the Olympic Games a competitor, coach, trainer or official must comply with the Olympic Charter as well as with the rules of the IF concerned as approved by the IOC, and the competitor, coach or trainer must be entered by his NOC. The above-noted persons must notably:*

- *respect the spirit of fair play and non violence, and behave accordingly on the sportsfield; and*
- *respect and comply in all aspects with the World Anti-Doping Code”.*

- ii. Rule 25.2.2.1 of the Olympic Charter (in force at the time of the Athens Olympic Games):

*“The measures or sanctions which may be taken by the Session or the Executive Board are:*

*In the context of the Olympic Games:*

*with regard to individual competitors and teams: temporary or permanent ineligibility or exclusion from the Olympic Games ...”.*

- iii. Article 2 [*Anti-doping rule violations*] of the Athens Rules:

*“The following constitute anti-doping rule violations:*

[...]

*3. Refusing, or failing without compelling justification, to submit to Sample collection after notification as authorized in these Rules or otherwise evading Sample collection”.*

- iv. Article 3.1 [*Burdens and Standards of Proof*] of the Athens Rules:

*“The IOC shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the IOC has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability”.*

- v. Article 7.1 [*Procedures and general provisions with respect to anti-doping rule violations arising upon the occasion of the Olympic Games*] of the Athens Rules:

*“...the International Olympic Committee (IOC) Executive Board has delegated to a disciplinary commission .... its powers to hear the Athletes and other persons*

*concerned in relation to all anti-doping rule violations (including but not limited to the handling of adverse analytical findings) arising upon the occasion of the Olympic Games. The right of any person who may be subject to a measure or sanction, to be heard pursuant to Rule 25.4 of the Olympic Charter, will be exercised before the Disciplinary Commission. The Disciplinary Commission will then provide to the IOC Executive Board a report of the hearing, including a proposal as to the decision related thereto. The proposal of the Disciplinary Commission is not binding upon the IOC Executive Board, who retains the ultimate authority to decide”.*

- vi. Article 7.2.5 [*Notifying Athlete or other persons concerned of the anti-doping rule violation*] of the Athens Rules:

*“The IOC President or a person designated by him shall, in confidence, promptly notify the Athlete or other person concerned, the Athlete’s or other person’s chef de mission, the International Federation concerned and the World Anti-Doping Agency of:*

*[...]*

*b) the anti-doping rule violation ...”.*

- vii. Article 7.3.3 [*Violation of procedures and general provisions*] of the Athens Rules:

*“No violation of the above-noted procedures and general provisions can be invoked if the person involved has not been prejudiced by such violation”.*

- viii. Article 8.1 [*Automatic Disqualification*] of the Athens Rules:

*“A violation of these Rules in connection with Doping Control automatically leads to Disqualification of the individual result obtained in that competition (- i.e. with respect to which the Doping Control was carried out) with all resulting consequences, including forfeiture of any medals, points and prizes”.*

- ix. Article 16.6 of the Athens Rules:

*“Notice to an Athlete or other Person who is a member of an NOC, including the NOC’s delegation attending the Olympic Games, may be accomplished by delivery of the notice to the National Olympic Committee”.*

- x. Paragraph 5.1 [*Provision of the urine sample*] of Appendix 2 [*Sampling Procedures*] of the Athens Guide:

*“When the Athlete indicates s/he is ready to provide a urine sample, s/he will be directed into a Sample Processing Room. Only one Athlete at a time shall be called into a Sample Processing Room.*

*The DCO shall inform the Athlete about the procedures that are about to be undertaken (as follows). The Athlete shall select a sealed collection vessel, visually check that it is empty and clean (as outlined in 1.3 above), proceed to the toilet and urinate a minimum of 75ml or if the athlete has been selected for an EPO test, a minimum of 110ml into the collection vessel under the direct observation of a DCO who shall be of the same gender as the Athlete. The Athlete will be required to remove any clothing (at least pants to knees, shirt to mid-chest and sleeves rolled up) preventing the DCO's direct observation of the urine sample leaving the Athlete's body. The Athlete should be encouraged to provide more than the minimum volume requirements if possible.*

*The Athlete shall return to the Sample Processing Room with the collection vessel containing the urine. The Athlete shall maintain control of the Sample at all times until it is sealed.*

*If there are any doubts as to the origin or authenticity of the Sample, the Athlete shall be asked to provide an additional Sample. If the Athlete refuses to provide an additional Sample, the DCO shall inform the ATHOC Doping Control Services Program Manager who will inform the Chair of the IOC MC, through the IOC MC Director, who shall decide on further steps to be taken”.*

- xi. Paragraph 5.5 [*Partial Sample*], first period, of Appendix 2 [*Sampling Procedures*] of the Athens Guide:

*“If the Athlete has produced less than the requested urine volume of 75ml or, in the case of an EPO test, 110ml, the DCO shall inform the Athlete that a further Sample shall be collected to meet the laboratory's volume requirements. The Athlete will be instructed to temporarily seal the partial sample and then wait until further sample can be provided”.*

- xii. Paragraph 5.7 [*Transfer to Village Polyclinic*] of Appendix 2 [*Sampling Procedures*] of the Athens Guide:

*“If an Athlete cannot complete the sample collection procedure at the Doping Control Station within the time limits determined by the Doping Control Venue Manager, the sample collection may be completed at the Village Polyclinic.*

*A member of the doping control team shall accompany the Athlete to the Village Polyclinic. All other representatives may transfer and continue observing the process at the Polyclinic. The DCO shall ensure that all the necessary material for sample collection is available at the Polyclinic. The Athlete must comply with the directions of the DCO and must remain in the sight of the DCO at all times.*

*The DCO who completes the procedure at the Polyclinic may not necessarily be the same with the one who started the procedure at the Venue”.*

- xiii. Paragraph 8 [*Failure to comply*] of Appendix 2 [*Sampling Procedures*] of the Athens Guide:

*“If the Athlete refuses to give a sample of urine, blood or breath or acts in a way which may compromise an Athlete’s test the possible consequences shall be pointed out to him/her by the Doping Control Venue Manager or the IOC MC representative, if present. If the Athlete still refuses, this fact shall be noted in the Doping Control Official Record. This shall be signed by the Doping Control Venue Manager and, if present, the IOCMC Representative and/or the IF representative. The Athlete and the Athlete Representative may, if they wish, sign the Doping Control Official Record.*

*The IOCMC representative shall promptly inform the Chair of the IOCMC or the IOC Medical Director of the situation. If the IOC MC representative is not present, the Doping Control Venue Manager will inform the ATHOC Doping Control Program Manager, who will inform the Chair of the IOCMC, through the IOC Medical Director, who shall decide on further steps to be taken”.*

### **Scope of Panel’s Review**

53. Pursuant to Article R57 of the Code,

*“The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. [...]”.*

### **The Merits of the Dispute**

#### **(a) As to evidentiary matters**

54. Preliminarily the Panel notes that the Appellant submitted, in the course of the arbitration, together with his written pleadings, statements and expert reports from a number of witnesses. By letter dated 9 December 2004 the CAS Court Office, writing on behalf of the Panel, indicated the names of the witnesses and experts that had been allowed to give oral evidence at the hearing; at the same time, the CAS Court Office stressed that the written statement submitted by a witness would be disregarded by the Panel in the event of failure by the witness to appear to the hearing.
55. The witness Mr. Antal Fazekas and the experts Dr. Alexander Friedmann and Dr. Wilhelm Hübner, who had submitted written statements, failed to appear at the hearing. As a result, their respective statements shall not be considered by the Panel.

#### **(b) As to the procedural issues**

56. In a first perspective, the Appellant challenges the disciplinary proceedings before the Disciplinary Commission, which led to the Decision, and submits that his right

to be heard has been violated.

57. In this respect, the Panel notes that, according to Article R57 of the Code, the Panel has full power to review the facts and the law. The Panel consequently hears the case *de novo* and is not limited to considerations of the evidence that was adduced before the Disciplinary Commission: the Panel can consider all new evidence produced before it. This implies that, even if a violation of the principle of due process occurred in prior proceedings, it may be cured by a full appeal to the CAS (CAS 94/129, *USA Shooting & Q. v/ UIT*, *CAS Digest I*, p. 187 at 203; CAS 98/211, *B. v/ Fédération Internationale de Natation*, *CAS Digest II*, p. 255 at 257; CAS 2000/A/274, *S. v/ Fédération Internationale de Natation*, *CAS Digest II*, p. 398 at 400; CAS 2000/A/281, *H. v/ Fédération Internationale de Motocyclisme*, *CAS Digest II*, p. 410 at 415; CAS 2000/A/317, *A. v/ Fédération Internationale des Luttes Associés*, *CAS Digest III*, p. 159 at 162; CAS 2002/A/378, *S. v/ Union Cycliste Internationale & Federazione Ciclistica Italiana*, *CAS Digest III*, p. 311 at 315). In fact, the virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance “fade to the periphery” (CAS 98/211, *B. v/ Fédération Internationale de Natation*, *CAS Digest II*, p. 255 at 264, citing Swiss doctrine and case law).
58. The Appellant has had (and used) the opportunity to bring the case before CAS, where all of the Appellant’s fundamental rights have been duly respected. At the end of the hearing, the Appellant’s counsel expressly confirmed that the Appellant had no objections in respect of his right to be heard and to be treated equally in the arbitration proceedings. Accordingly, even if any of the Athlete’s rights had been infringed upon by the IOC – but without conceding that they had actually been infringed – the *de novo* proceedings before CAS would be deemed to have cured any such infringements.
59. In any case, the Panel wishes to stress that the proceedings before the Disciplinary Commission have taken place in accordance with the applicable provisions set forth in the Athens Rules, and that the rights of the Appellant have been fully respected: the members of the Hungarian delegation appearing before the Disciplinary Commission confirmed that they represented the Athlete; and notice of the hearing was given in accordance with Article 16.6 of the Athens Rules, which confirms that any notice to an athlete can be accomplished by delivery to his National Olympic Committee.
60. Under a second procedural perspective, the Appellant challenges the sample collection procedure, because he could not be accompanied by a representative, assisting him while passing the urine sample, and because two witnesses were present, while the applicable rules allow only for one witness.
61. Contrary to the Appellant’s submission, the Panel notes that the presence of two witnesses (instead of one) cannot be invoked as a circumstance invalidating the entire doping sample collection procedure. The Athens Rules and the Athens Guide, actually, provide for the presence of a witness in the sense that the sample

collection cannot take place without (the testimony of at least) a witness, who is the only person allowed to see the athlete passing the sample; but they do not prohibit at all the presence of two witnesses and do not consider the presence of two witnesses as a reason for the invalidity of the procedure (so that, for instance, an adverse analytical finding could not be considered as an anti-doping rule infringement because the sample was collected before more than one witness). And indeed the Appellant invokes the presence of two witnesses (instead of one) as an element affecting his psychological conditions (and as such will be examined below), more than an irregularity of the sampling procedure.

62. In the same way, the Panel notes that no rule provides for the presence of a representative of the athlete at the moment the athlete passes the sample; the athlete has the right to be accompanied by a representative in the doping control station (right of which the Athlete made use), but not in the toilet where the sample is collected. As a result, the fact that no representative assisted the Athlete while passing the urine cannot be invoked as an irregularity affecting the validity of the sample collection procedure.

(c) *As to the anti-doping rule infringement*

63. The Decision is challenged in its substantive part, *i.e.* with respect to the finding that an anti-doping rule infringement has been committed, preliminarily because the Disciplinary Commission (and later the Executive Board of the IOC) applied rules of which the Athlete had not been informed.
64. In this respect the Panel notes that all athletes, as a condition of entry into the Olympic Games, have accepted to be bound by, and to comply with, the rules dictated by the IOC with respect to anti-doping controls at the Athens Summer Olympic Games (Rule 45 of the Olympic Charter). In addition, the Panel remarks that the Athlete, during the sample collection procedure at the Olympic Stadium was several times advised by those attending, including his representative (Dr. Karoly Pikó), of his obligation to provide a full sample (75 ml) and warned about the possible consequences of a failure. In the same way the Panel stresses that the provision applied to the Athlete (*i.e.* Article 2.3 of the Athens Rules), describing the doping offence imputed to him, is absolutely common to all anti-doping codes (see *e.g.* Article 2.3 of the World Anti-Doping Code approved in 2003, on which the Athens Rules are based). As a result, the Athlete cannot invoke as an excuse for his failure to provide a full urine sample an alleged ignorance or inapplicability of the anti-doping rules in force at the Athens Games.
65. The main issue, therefore, turns out to be whether the doping offence described in Article 2.3 of the Athens Rules has been committed: the IOC holds that it was, the Appellant denies it.
66. Article 2.3 of the Athens Rules indicates three circumstances which constitute anti-doping violations:

- i. refusal to submit to sample collection,
- ii. failure without compelling justification to submit to sample collection, and
- iii. evasion of sample collection.

The IOC maintains that the Athlete failed, and/or in any case refused, to submit to sample collection; the Athlete submits that the attitude of the doping control staff present at the doping control station constitutes a “*compelling justification*” for the Athlete’s decision to discontinue the collection procedure.

67. Preliminarily, in the Panel’s view, it has to be underlined that it is undisputed that a full sample of 75ml was not provided: the Athlete produced only a partial sample of 25ml, as recorded in the Doping Control Official Record and as confirmed by the Appellant throughout the entire arbitration proceedings. The IOC can therefore be held as having proved that a failure to submit to sample collection has occurred, discharging the burden of proof set forth in Article 3.1 of the Athens Rules. In this respect the Panel notes in fact the objective nature of “*failing*” to act. This conclusion is based on two assumptions: first, on the traditional application of a strict liability standard to doping offences, which does not require the federation (the IOC in the current case) to establish the subjective elements (*i.e.* intent or negligence) of an action or failure to act, but only the objective factors constituting the infringement (CAS 2000/A/281, *H. v/ Fédération Internationale de Motocyclisme*, CAS Digest II, p. 410 at 416-417); second, on the fact that Article 2.3 of the Athens Rules already provides, in another part of the rule, by mentioning the “*compelling justification*”, for an element giving relevance to (and therefore “*exhausting*” the possibility to invoke) circumstances affecting the objective action of “*failing*” so to exclude the commission of an anti-doping rule infringement.
68. The question is therefore whether a “*compelling justification*” for such failure existed: in the Panel’s view the Appellant has the burden to prove that such justification is given. The Panel in fact sees the existence of the “*compelling justification*” as an excuse to the doping offence, to be proved, as such, by the subject that invokes it.
69. In this respect, the Appellant submits that the failure (*i.e.*, the production of an insufficient sample) is justified as being the result of a “*psychological trauma*” caused by the conduct of the doping control staff: the “*conduct of the witnesses and the general mood during the doping control*” (as well as the presence of two witnesses instead of one) prevented him from urinating; the decision that “*the same two witnesses*” would accompany him was the reason for him to withdraw his consent to go to the Village Polyclinic in order to continue the procedure.
70. The Panel notes, first of all, that the “*aggressive*” conduct of the doping control staff during the doping control procedure is far from being established. Indeed it is strongly challenged by the Respondent; and the Athlete himself, when heard at the hearing, amended in several points the description of the facts contained in the written submissions to the Panel. In any case, the Panel considers such events as

being completely irrelevant. Even assuming – but without conceding – that the facts occurred exactly as described in writing by the Appellant (circumstance which even the Appellant no longer fully confirms), and even if they had actually caused a “*urinary retention*” (as the experts called by the Appellant maintain), those facts could not be invoked as an excuse not to continue the sample collection procedure at the Village Polyclinic, as provided by the Athens Guide, where medical treatment, in an arguably more comfortable environment, could be provided.

71. In this latter respect, the Appellant submits that he “*rescinded*” his consent to go to the Polyclinic when it became clear that the same two witnesses (that attended to the unsuccessful attempts at the Stadium) would accompany him; and also because he had been reassured (by an unnamed woman) that the partial sample was sufficient for testing.
72. The submissions of the Appellant cannot be accepted. The Panel, in fact, confirms that, pursuant to the applicable guidelines, the doping control officers present at the doping control station had the right to accompany the Athlete to the Village Polyclinic. In addition, the Panel remarks that the Athlete at the hearing admitted that at the end of the procedure he was rather calm, and that he was perfectly aware of the consequences of his decision not to go to the Village Polyclinic. Finally, the Panel stresses that the Athlete could not rely on any declaration, by whomsoever made, as to the sufficiency of 25ml for testing, while it was all the way clear that he had to provide a quantity of 75ml of urine.
73. In conclusion, the Panel confirms that no compelling justification for failing to submit to doping control at the Village Polyclinic existed, and therefore that the Athlete committed the anti-doping rule infringement described in Article 2.3 of the Athens Rules. As a result, the Decision sanctioning the Athlete for such infringement has to be confirmed.

### **Conclusion**

74. In the light of the foregoing, the Panel holds that the appeal has to be dismissed and the Decision has to be confirmed.

### **IV. COSTS**

75. Pursuant to Article R65.1 of the Code, disciplinary cases of an international nature shall be free of charge, except for the Court Office fee to be paid by the appellant and retained by the CAS.
76. Article R65.3 of the Code provides that the Panel shall decide which party shall bear the costs of the parties, witnesses, experts and interpreters, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

77. Having taken into account the outcome of the arbitration – in particular the fact that IOC has prevailed –, the conduct and the financial resources of the parties, the Panel is of the view that the Appellant pay to IOC a contribution, determined in the amount of CHF 20,000 (twenty thousand Swiss Francs), towards the expenses incurred by the Respondent in connection with these arbitration proceedings, including the costs related to the witness called by the IOC.

### **ON THESE GROUNDS**

The Court of Arbitration for Sport rules that:

1. The appeal filed by Robert Fazekas on 13 September 2004 is dismissed.
2. The decision adopted by the Executive Board of the International Olympic Committee on 24 August 2004 is confirmed.
3. This award is rendered without costs, except for the Court Office fee of CHF 500 (five hundred Swiss Francs) paid by Robert Fazekas, which shall be retained by the Court of Arbitration for Sport.
4. Robert Fazekas shall pay to the International Olympic Committee the amount of CHF 20,000 (twenty thousand Swiss Francs) as a contribution towards the expenses incurred by the International Olympic Committee in connection with these arbitration proceedings.

Lausanne, 31 March 2005

### **THE COURT OF ARBITRATION FOR SPORT**

President of the Panel

**Luigi Fumagalli**

Arbitrators

**Michael Geistlinger**

**Dirk-Reiner Martens**