Arbitration CAS 2011/A/2479 Patrik Sinkewitz v. Union Cycliste Internationale (UCI), award of 13 September 2011 (operative part issued on 24 August 2011)

Panel: Prof. Luigi Fumagalli (Italy), President; Prof. Ulrich Haas (Germany); Mr Lucas Anderes (Switzerland)

Cycling
Doping (recombinant human growth hormone – rhGH)
Provisional suspension of a rider
De novo *hearing before a CAS panel*
Interpretation of Article 239 of the UCI Anti-doping rules

1. **Under Articles 239 and 240 of the UCI Anti-doping rules, a provisional suspension based on an adverse analytical finding in respect of an A Sample shall be lifted if: (i) the rider establishes that the apparent anti-doping rule violation has no reasonable prospect of being upheld, or (ii) the rider establishes that that he has a strong arguable case that he bears No Fault or Negligence for such violation, or (iii) any conclusive analysis of the B sample does not confirm the A sample analysis.**

2. **Consistently with a longstanding CAS jurisprudence, the hearing before a CAS panel constitutes a hearing *de novo*, *i.e.* a rehearing of the case heard by the body whose decision is challenged. As a result, this implies that, even if a violation of the principle of due process (including for "lack of reasons" in the challenged decision), occurred in prior proceedings, it may be cured, at least to the extent such violation did not finally impair the appellant's rights, by a full appeal to the CAS. 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"*.**

3. **Both a literal and a systematic construction of Article 239 of the UCI Anti-doping rules show that this rule is to be narrowly interpreted. First, Article 239 clearly indicates that the lifting of the provisional suspension is an exception to its ordinary application; second, the UCI Anti-doping rules (Article 235) provide for the automatic imposition of a provisional suspension following an adverse analytical finding, which should therefore be maintained unless there is a clear indication that such finding does not stand reasonable chances to be confirmed. As a result, the simple casting of doubts as to the possibility that the anti-doping rule violation be confirmed is not sufficient to have the provisional suspension lifted.**

Mr Patrik Sinkewitz ("Sinkewitz" or the "Appellant") is a professional road racing cyclist of German nationality, born on 20 October 1980, member of the German National Cycling Federation (the *Bund Deutscher Radfahrer*, BDR).

The Union Cycliste Internationale (UCI; the "Respondent") is the international governing body for the sport of cycling. UCI is an association under Swiss law and has its headquarters in Aigle (Switzerland).

On 26 and 27 February 2011 Sinkewitz took part in a cycling event (the GP Lugano) in Lugano, Switzerland. In the early morning of 27 February 2011, Sinkewitz underwent an anti-doping control.

The A sample (code A446066) provided by Sinkewitz was analysed by the Swiss Laboratory for Doping Analyses of Epalinges (the "Laboratory"), a laboratory accredited by the World Anti-Doping Agency (WADA). On 15 March 2011, the Laboratory reported the presence of recombinant human growth hormone (rhGH), a prohibited substance under the UCI anti-doping rules, in the sample (identified by the Laboratory with the internal code A2011-00784) provided by Sinkewitz, as follows:

> *"The analysis using the CMZ hGH differential immunoassays has produced the following analytical values of assay ratios: 2.45 for kit '1' and 2.42 for kit '2', which are greater than the corresponding DL of 1.81 and 1.68, respectively. The combined standard uncertainty (uc) at the DL is 0.18 for kit '1' and 0.13 for kit '2'".*

This analytical finding (the "Adverse Analytical Finding") was confirmed, in a double reading of the results of the A sample analysis, by Prof. David Cowan of the WADA accredited laboratory of London, United Kingdom, in the following terms:

> *"You seem to have a frank adverse analytical finding on your hands. I have a few queries about your QC charted data but nothing that would prevent me from releasing this result (It may be that the way you are presenting the data is unfamiliar to me)".*

On 18 March 2011 the UCI advised Sinkewitz of the Adverse Analytical Finding, informed him, *inter alia*, of his right to request the opening and analysis of the B sample, and imposed on him a provisional suspension (the "Provisional Suspension") pursuant to Article 235 of the UCI Anti-Doping Rules, 2009 edition (the "UCI ADR"). The pertinent passage of the letter imposing the Provisional Suspension (the "Decision of 18 March 2011") reads as follows:

> *"Because your A sample was found to contain a substance which is not listed as a Specified Substance as identified within the 2011 Prohibited List, the UCI has determined in accordance with Article 235 of the Anti-Doping Rules, that you shall be provisionally suspended from the date of your receipt of this notice. The suspension will remain in force until a hearing panel has determined whether you have committed an anti-doping rule violation. Under Article 237 of the ADR, you have the right to request that this provisional suspension is lifted. Such a request should be in writing to the UCI Anti-Doping Commission and should include reasons for your request".*

Following an Appellant's request, on 5-6 April 2011 the B sample (code B446066) was analysed at the Laboratory, at the presence of Prof. Ferrara, an expert appointed by Sinkewitz.

In an email of 6 April 2011, the Italian counsel of Sinkewitz requested the UCI *"les copies des documents de laboratoire qui se réfèrent à l'analyse de l'échantillon B".*

The analysis' report issued on 7 April 2011 confirmed the Adverse Analytical Finding, for the presence of rhGH, also with respect to the B sample as follows:

> *"The analysis using the CMZ hGH differential immunoassays has produced the following analytical values of assay ratios: 3.16 for kit '1' and 2.34 for kit '2', which are greater than the corresponding DL of 1.81 and 1.68, respectively. The combined standard uncertainty (uc) at the DL is 0.18 for kit '1' and 0.13 for kit '2'".*

In a letter dated 7 April 2011, the UCI informed the BDR of the results of the analysis of the B sample, confirming the Adverse Analytical Finding, and invited the BDR to *"initiate disciplinary proceedings in accordance with Articles 249 to 348"* of the UCI ADR. In this regard, the UCI specifically drew the BDR attention to *"the requirements relating to a timely hearing and resolution of this case"*.

On 2 May 2011, the German counsel of Sinkewitz formally requested the UCI, pursuant to Article 237 of the UCI ADR, *"to lift the provisional suspension"*. In the same letter, the Appellant reiterated his request, already contained in an email of 20 April 2011, to be given the full documentation package relating to the B sample analysis. A new request of the B sample documentation package was then submitted by Sinkewitz in an email of 6 May 2011.

On 6 May 2011, the documentation package relating to the B sample analysis was provided to the Appellant.

In an email of 9 May 2011, the Appellant confirmed his request to have the Provisional Suspension lifted, and informed the UCI that the reasons in support of such request would be filed in two weeks.

On 11 May 2011, Sinkewitz requested the German National Anti-Doping Agency (the "NADA"), to which the case had been referred by the BDR, and the UCI to be provided with:

i. the raw data of the A sample analysis, available only with respect to the B sample analysis;

ii. *"the cumulative quality control data of the laboratory for the period before and after the analysis"* of the Appellant's samples;

iii. *"those documents and protocols which the WADA used to calculate the 'decision limit' for Kits 1 and 2 according to the WADA Guidelines"*.

Requests for information and data were reiterated by Sinkewitz on 12, 18, 19, and 20 May 2011. *Inter alia*, in the email of 18 May 2011, the Appellant asked NADA to disclose the formal approval by WADA as *"fit-for-purpose"* of the analytical method applied by the Laboratory. Attached to an email to the NADA of 19 May 2011, then, the Appellant also submitted an expert report signed by Prof. Santo Davide Ferrara of 18 May 2011 (the "First Ferrara Report"), intended to show *"the lacking reliability of the applied method in any respect"* and *"further severe defects, also with regard to the concrete analysis"*, concluding as follows:

> *"In the light of the above integrated evaluations, there is no evidence, of forensic toxicological relevance, that the Rec/Pit ratio, determined with the method adopted by the Swiss Laboratory for Doping Analyses of Lausanne, can be assumed to be an unquestionable marker of exposure to recombinant growth hormone".*

On 23 May 2011, Sinkewitz submitted to the UCI the reasons in support of his request to have the Provisional Suspension, as imposed by the Decision of 18 March 2011, lifted.

On 26 May 2011, Sinkewitz indicated some additional reasons in support of his request, and asked for further information regarding the second opinion signed by Prof. Cowan with respect to the results of the A sample analysis (see above).

On 31 May 2011, the NADA sent to Sinkewitz a statement of the WADA Science Department, signed on 30 May 2011 by Dr Osquel Barroso (the "First Barroso Report"), intended to provide *"clarifications on the definition of the test's decision limits for the hGH isoform differential immunoassays"*.

On 1 June 2011, the Appellant, in an email to the UCI, commented on the First Barroso Report. Attached to an email dated 6 June 2011, then, Sinkewitz filed the observations, dated 1 June 2011, of Prof. Ferrara on the First Barroso Report (the "Second Ferrara Report").

On 3 June 2011, the UCI Anti-Doping Commission Doping Panel issued a decision (the "Decision of 3 June 2001") on Sinkewitz's request to have the Provisional Suspension lifted, in which it held the following:

> *"The Commission has found no evidence to indicate that the alleged anti-doping rule violation has no reasonable prospect of being upheld. Nor has any evidence been presented to show that Mr Sinkewitz bears no fault or negligence for this anti-doping rule violation.*
>
> *Under the circumstances, we are unable to accede to your request to lift the provisional suspension".*

The Decision of 3 June 2011 was notified by the UCI to Sinkewitz on 6 June 2011.

On 14 June 2011, Sinkewitz filed a statement of appeal with the Court of Arbitration for Sport (CAS), pursuant to Article R48 of the Code of Sports-related Arbitration (the "Code"), to challenge the Provisional Suspension imposed by the Decision of 18 March 2011 and confirmed by the Decision of 3 June 2011. In such submission, the Appellant indicated, for the purposes of Article R51 of the Code, that the statement of appeal would also serve as appeal brief.

In his statement of appeal, the Appellant submitted to the CAS the following request for relief:

> *"1. The provisional suspension imposed on Appellant by Respondent on March 18, 2011 pursuant to art. 235 – 236 of the UCI Anti-Doping Rules (hereinafter: "the Provisional Suspension" respectively "the UCI ADR") and confirmed by Respondent's decision of June 3, 2011 pursuant to art. 237 – 239 UCI ADR (hereinafter: "the Decision") shall be lifted.*
>
> *2. In the alternative, the matter shall be remanded to Respondent, and Respondent shall be ordered to lift the Provisional Suspension.*
>
> *3. By way of interim relief pursuant to art. R37 Code the Provisional Suspension shall be lifted immediately and for the duration of the appeal arbitration procedure (hereinafter: "the Appellate Proceedings"). Respondent shall be invited to express its position on Appellant's application for interim relief within no more than five days, and the CAS itself shall rule on Appellant's application for interim relief within a short time and prior to the transfer of the file to the Arbitral Tribunal.*

4. *Respondent shall be ordered to pay all costs in relation to these Appellate Proceedings, including but not limited to the costs and expenses of the CAS and the Arbitral Tribunal, and to compensate Respondent for all costs incurred in connection with these Appellate Proceedings, including but not limited to attorneys' fees and expenses, experts' costs and expenses, as well as pre-arbitration fees and expenses, including but not limited to those incurred in connection with Appellant's efforts to have Respondent lift the Provisional Suspension".*

The statement of appeal contained also an application for interim relief pursuant to Article R37 of the Code, requesting that the Provisional Suspension be provisionally stayed.

On 27 June 2011, the Respondent filed its observations on the Appellant's request for interim measures.

On 30 June 2011, the Appellant filed with the CAS a reply to the Respondent's observations on the Appellant's application for interim relief. On the same day, the Respondent expressed its opposition to such reply, deemed to be not admissible. On 1 July 2011, the CAS Court Office informed the parties that the admissibility of the Appellant's observations would be evaluated by the President of the CAS Appeals Arbitration Division in his order on the request for a stay.

On 8 July 2011, the Deputy President of the CAS Appeals Arbitration Division issued an Order on Request for Provisional Measures as follows:

"1. The request for provisional measures filed on behalf of Mr Patrik Sinkewitz is dismissed".

On 18 July 2011, the Respondent filed its answer, seeking the dismissal of the appeal. It submitted the following request for relief:

"May it please to the CAS:

1. *Dismiss Patrik Sinkewitz's requests;*
2. *Condemn Patrik Sinkewitz to pay the costs of the proceedings;*
3. *Condemn Patrik Sinkewitz to participate in the UCI's costs".*

In letters dated 26 July 2011, the parties informed the CAS that they allowed the Panel to render an award on the basis of the written submissions only. More specifically, the Appellant stated that, because of *"time constraints"*, he *"is no longer insisting on a hearing in this matter"*, so that an award be issued "*at the Panel's earliest convenience*"; the Respondent submitted that it *"does not consider necessary that a hearing be held"*.

In a letter dated 28 July 2011, the Respondent reacted to some observations contained in the Appellant's letter of 26 July 2011. In another letter of the same day, the Respondent informed the Panel of a communication sent by the cycling team of Sinkewitz, indicating that the team would refuse to *"reintegrate him should the provisional suspension be lifted"*.

In a letter of 29 July 2011, the CAS Court Office, writing on behalf of the Panel, advised the parties that the Panel had decided to hold a hearing.

Following some requests for clarifications submitted by the parties concerning the hearing, in a letter dated 15 August 2011, the Panel informed the parties, *inter alia*, that:

> *"At such hearing, the Panel wishes:*
>
> *(i) to hear submissions with respect to the scope of the present CAS proceedings, and with regard to the reasons justifying the lifting of a provisional suspension, and*
>
> *(ii) to grant the Appellant an opportunity to reply to the Respondent's answer.*
>
> *The Panel has noted that no party has requested to cross examine the other party's experts and that it does not need to ask questions of the experts indicated by the parties. Therefore, the attendance of such experts, in person or via telephone, is not necessary".*

A hearing was held on 23 August 2011. At the hearing, the parties made submissions in support of their respective cases. Sinkewitz rendered declarations, *inter alia*, on the circumstances of the doping control and denied having taken rhGH. At the conclusion of the hearing, the parties, then, confirmed that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings.

LAW

Jurisdiction

1. CAS has jurisdiction to decide the present dispute between the parties.

2. The jurisdiction of CAS is not disputed and has been confirmed by the signing of the Order of Procedure. In addition, it is contemplated, pursuant to Article R47 of the Code, by Article 329 para. 9 of the UCI ADR.

3. More specifically, the provisions referring to CAS contained in the UCI ADR, which are relevant in these proceedings, are the following:

   i. Article 329

   "The following decisions may be appealed to the Court of Arbitration for Sport:

   (…)

   9. a decision that a Provisional Suspension is imposed or shall not be lifted";

   ii. Article 338

   "In cases under article 329.9 (…) the Rider only shall have the right to appeal to the CAS. The appeal shall be made against the UCI.

The time to file the appeal to the CAS shall be 8 (eight) days from receipt of the decision by the Rider or his National Federation or his club or team".

Appeal Proceedings

4. As these proceedings involve an appeal against decisions rendered by an international federation (UCI) regarding an international level athlete in a disciplinary matter brought on the basis of rules providing 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 of the Appeal

5. The statement of appeal was filed within the deadline set in Article 338 of the UCI ADR. No further recourse against the Decision of 3 June 2011 is available to the Appellant within the structure of UCI. Accordingly, the appeal is admissible.

Scope of the Panel's Review

6. According to Article R57 of the Code, the Panel, in principle, has full power to review the facts and the law of the case. Whether or not a restriction in the Panel's scope of review follows from the applicable provisions on the merits will be discussed in further detail below. Furthermore, the Panel may issue a new decision which replaces the decision challenged, or may annul the decision and refer the case back to the previous instance.

Applicable Law

7. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

8. Pursuant 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".

9. Article 345 of the UCI ADR provides that:

"The CAS shall decide the dispute according to these Anti-Doping Rules and for the rest according to Swiss law".

10. The Panel, therefore, considers the UCI ADR to be the "applicable regulations" for the purposes of Article R58 of the Code. Swiss law, being the law referred to "for the rest" in the UCI regulations and being the law of the country in which the UCI is domiciled, applies subsidiarily.

11. The provisions set in the UCI ADR which are relevant in this arbitration include the following:

i. Article 235

"If analysis of an A Sample has resulted in an Adverse Analytical Finding for a Prohibited Substance that is not a Specified Substance or for a Prohibited Method, and a review in accordance with article 204 does not reveal an applicable TUE or departure from the International Standard for Testing or the International Standard for Laboratories that caused the Adverse Analytical Finding, the Rider shall be Provisionally Suspended pending the hearing panel's determination of whether he has committed an anti-doping rule violation";

ii. Article 236

"Provisional Suspension shall apply as from the day indicated in its notification to the Rider.

Notification may be made by any available means, including per fax or e-mail and via the Rider's club, team or National Federation";

iii. Article 237

"The Rider may request that the Provisional Suspension shall be lifted.

The request shall be made to the Anti-Doping Commission in writing and state the reasons";

iv. Article 238

"The case shall be examined and the decision shall be taken by one or more members of the Anti- Doping Commission.

The decision shall be based on written submissions only. No hearing shall be organized";

v. Article 239

"The Provisional Suspension shall not be lifted unless the Rider establishes that the apparent anti-doping rule violation has no reasonable prospect of being upheld or that he has a strong arguable case that he bears No Fault or Negligence for such violation";

vi. Article 240

"If a Provisional Suspension is imposed based on an Adverse Analytical Finding in respect of an A Sample, and any conclusive analysis of the B Sample does not confirm the A Sample analysis, then the Rider shall not be subject to any further Provisional Suspension on account of a violation of article 21.1 (Presence of a Prohibited Substance or its Metabolites or Markers). In circumstances where the Rider (or the Rider's team) has been removed from a Competition based on a violation of article 21.1 and the subsequent B Sample analysis does not confirm the A Sample finding, if, without otherwise affecting the Competition, it is still possible for the Rider or team to be reinserted, the Rider or team may continue to take part in the Competition".

12. In addition, the Panel finds, in agreement with the parties, that, pursuant to Article 198 of the UCI ADR, the International Standard for Laboratories (ISL) applies in the present case. In

connection with the ISL, then, the hGH Guidelines, as well as the TD2010DL, issued by WADA, are also relevant with respect to hGH tests conducted by accredited laboratories.

The Dispute

13. In his appeal Sinkewitz requests this Panel to lift the Provisional Suspension, imposed on him pursuant to Article 235 of the UCI ADR on the basis of the Adverse Analytical Finding reported following the A sample analysis. In support of his petition, the Appellant invokes several reasons, relating to the analyses performed on the samples he provided and the procedure which followed the reporting of the Adverse Analytical Finding. On the other hand, the UCI denies that the conditions of the lifting of the Provisional Suspension are met.

14. On the basis of the relief requested by the parties, object of these proceedings is, in essence, the Provisional Suspension: the Appellant wants it to be lifted; the Respondent requests it to be maintained. As a result, the duty of this Panel is to verify whether the conditions for the lifting of the Provisional Suspension are met or not.

15. In that connection, therefore, the Panel underlines that its task is not to determine whether an anti-doping rule violation has been committed by Sinkewitz and, if so, whether Sinkewitz has to be sanctioned. This duty is left for the NADA's competent hearing body (*i.e.* the *DIS-Deutsche Sportschiedsgericht*, "DIS-SportG") – which shall have to assess the available evidence, including expert opinions, and apply the pertinent rules. As a consequence, any decision taken by this Panel with respect to the lifting of the Provisional Suspension does not affect the different question of the existence of an anti-doping rule violation (and of an alleged disciplinary responsibility of Sinkewitz) or bind any body (including any possible CAS panel at a later stage) called to adjudicate on it.

16. A first issue that the Panel has to decide, however, concerns the identification of the conditions under which a provisional suspension has to be lifted: the parties, in fact, do not entirely agree on this point.

17. The parties actually agree on the relevance of Articles 239 and 240 of the UCI ADR. Under those rules, a provisional suspension based on an adverse analytical finding in respect of an A Sample shall be lifted if:

    i. the rider establishes that the apparent anti-doping rule violation has no reasonable prospect of being upheld (Article 239), or

    ii. the rider establishes that that he has a strong arguable case that he bears No Fault or Negligence for such violation (Article 239), or

    iii. any conclusive analysis of the B sample does not confirm the A sample analysis (Article 240).

18. More exactly, the Appellant refers to the first and the third conditions mentioned above: Sinkewitz, in fact, denies the anti-doping rule violation and is not advancing a case based on No Fault or Negligence for any such violation.

19. The Appellant, however, argues that the conditions mentioned in Articles 239 and 240 of the UCI ADR are not exhaustive, and maintains that, *"pursuant to the CAS jurisprudence and general principles of due process"*, a provisional suspension must be lifted if the rider's procedural rights have been violated. As a result, he requests the Provisional Suspension to be lifted, because (i) he had not been given the documents he requested, necessary for the preparation of his defence, (ii) the Decision of 3 June 2011 is unreasoned, and/or (iii) the disciplinary proceedings before the DIS-SportG were not timely started. UCI denies both the relevance and the existence of such procedural violations.

20. This Panel, whose task is to settle a specific case, does not find it necessary to express a position in general terms with respect to the exhaustive nature, or not, of the circumstances listed in Articles 239 and 240 of the UCI ADR justifying the lifting of a provisional suspension. The Panel, in fact, finds that no *"procedural"* violations of a kind is submitted by the Appellant to give reasons for the lifting of the Provisional Suspension:

    i. as to the disciplinary proceedings before the DIS-SportG, the Panel actually notes that they were eventually started, by notice of 15 July 2011 given to the Appellant. As a result, it is not necessary for the Panel to exercise a power (that this Panel could find to have, consistently with the order issued by the Deputy President of the CAS Appeals Arbitration Division on 15 May 1997 in CAS 97/169) to cure the "denial of justice" implied in a provisional suspension, which, not being followed by disciplinary proceedings, would be *de facto* turned into a final sanction without a hearing;

    ii. as to the delivery of the requested documents, the Panel does not see how an alleged violation of an assumed procedural right could *per se* justify the setting aside of a provisional suspension. Indeed, the documents requested, as the Appellant's submissions make clear, would serve for the preparation of the Appellant's case on the merits or even to show that UCI's claim has no reasonable prospect of success: but the Panel notes that no application for an order for production of documents has been filed in these proceedings, and remarks that, with respect to the decision on the merits (which is not for this Panel to adopt), Sinkewitz can apply to the DIS-SportG to obtain those documents. Therefore, even assuming, without conceding, the existence of a right of Sinkewitz to obtain the documents sought, the Appellant, who has not moved to this Panel to obtain those documents in order to advance its case that UCI's claim has no reasonable prospect of success, has not established the relevance, for the purposes of the object of these proceedings, of a violation of such assumed right;

    iii. as to the Decision of 3 June 2011, the Panel notes that, contrary to the Appellant's view, the UCI Anti-Doping Commission expressly based its dismissal of the Appellant's request on the lack of evidence proving that the alleged anti-doping rule violation had no reasonable prospects of being upheld: in other words, reasons for its decision were offered by the UCI Anti-Doping Commission. In any case, this Panel confirms, consistently with a longstanding CAS jurisprudence (see for instance CAS 98/211, award

of 7 June 1999; CAS 2000/A/281, award of 22 December 2000), that the hearing before a CAS panel constitutes a hearing *de novo*, i.e. a rehearing of the case heard by the body whose decision is challenged. As a result, this implies that, even if a violation of the principle of due process (including for "lack of reasons" in the challenged decision), occurred in prior proceedings, it may be cured, at least to the extent such violation did not finally impair the appellant's rights, by a full appeal to the CAS. 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, citing Swiss doctrine and case law). In other words, even assuming that the Decision of 3 June 2011 was unreasoned, this fact does not justify its setting aside, should this Panel find, in this reasoned award, that it was correct.

21. As a result of the above, the points that remain to be considered concern the (other) conditions, relevant in this case, under which a provisional suspension can be lifted: *i.e.*, whether the rider has established that the apparent anti-doping rule violation has no reasonable prospects of being upheld, or that the B sample analysis does not confirm the A sample analysis.

22. With respect to verification of the second condition, indeed, and in order to distinguish it from the first, the Panel finds itself to be limited to the mere examination of the results shown by the A and the B sample analyses: in the Panel's opinion, in fact, any challenge to the A or B sample results, linked to the analytical method that led thereto, or to its application in the specific case, even if advanced to show that B does not confirm A, falls in the category covered by the first condition, that is to say that, notwithstanding the fact that the B results (apparently) confirm the A results, grounds are given to show that the (apparent) anti-doping rule violation does not stand a reasonable chance to be upheld.

23. Now, the Panel sees – on the basis of the documents filed by the parties – that:

    i. the *"Decision Limits"* (DL) for hGH[1], as set by WADA, is 1.81 for kit 1 and 1.68 for kit 2. Therefore, an adverse analytical finding has to be reported in the event the analysis' results[2] from the athlete's sample exceed the DL values for both kits;

---

[1] The *"Decisions Limits"* (DL) are, according to the WADA Technical Document TD2010DL (*"Decision Limits for the Confirmatory Quantification of Threshold Substances"*), version 1.0, effective since 1 September 2010 (the "TD2010DL"), a set of limits intended for application in connection with the quantitative determination of a Threshold Substance, in order to determine whether the test results indicate an adverse analytical finding: in other words, an adverse analytical finding for a prohibited (threshold) substance is to be report in the event the values detected exceed the defined DL. According to the definition contained in the ISL, a *"Threshold Substance"* is *"a substance listed on the Prohibited List for which the detection and quantification of an amount in excess of a stated threshold is considered an Adverse Analytical Finding"*. With respect to hGH, the DL for males are, according to the WADA Guidelines on hGH Isoform Differential Immunoassays for Anti-Doping Analysis of June 2010 (the "hGH Guidelines"), 1.81 for Kit 1 and 1.68 for Kit 2.

[2] As explained in the hGH Guidelines, the hGH detection method is essentially based on the principle that the normal composition of hGH in blood is a mixture of different isoforms, present at constant relative proportions. In contrast, rhGH is only comprised of the 22-KDa molecular form. The administration of exogenous rhGH not only leads to an increase in the concentration of the 22-KDa isoform, but also causes a reduction of the non-22-kDa concentrations, thus altering the natural ratios established between these hGH isoforms. In order to perform the tests, two separate kits ("1" and "2") are used for the measurement of the hGH isoforms for each sample analysis. Each kit contains one "recombinant" (exogenous) and one "pituitary" (*i.e.*, endogenous) assay. In the "recombinant" ("recGH") assay, the coated capture antibody preferentially binds to the 22-kDa hGH present in the samples, whereas the "pituitary"

ii. the Appellant's A sample analysis produced the following values, exceeding the hGH DL:
- kit 1: 2.45
- kit 2: 2.42;

iii. the Appellant's B sample analysis produced the following values, again exceeding the hGH DL:
- kit 1: 3.16
- kit 2: 2.34.

24. The Panel, therefore, concludes that the B sample analysis confirm the Adverse Analytical Finding reported on the basis of the A sample analysis. The condition, inferred from Article 240 of the UCI ADR, for the lifting of the Provisional Suspension is consequently not satisfied.

25. The Adverse Analytical Finding, as (apparently) confirmed by the B sample results, is however challenged by the Appellant, for various reasons, intended to show, under Article 239 of the UCI ADR, that the apparent anti-doping rule violation has no reasonable prospect of being upheld: in the Appellant's opinion, the method applied by the Laboratory is unable to produce reliable results, lacks sufficient validation and is not *"fit-for-purpose"*; in addition, the A sample analysis is not sustained by a conclusive second opinion, and, because of the excessive discrepancies shown in the test results, is not confirmed by a conclusive B sample analysis.

26. As mentioned, under Article 239 of the UCI ADR, *"the Provisional Suspension shall not be lifted unless the Rider establishes that the apparent anti-doping rule violation has no reasonable prospect of being upheld"*. The rule, therefore, makes it clear that the rider bears the burden to prove that the apparent anti-doping rule violation has no reasonable prospect of being upheld: in fact, if this burden is not discharged, the provisional suspension *"shall not be lifted"*.

27. The Panel finds that, in the verification of such condition, its assessment is limited to an evaluation of the *chances* of success of the UCI case, in order to determine whether the Appellant has proved that they are not reasonable. As already mentioned, in fact, it is not for this Panel to consider whether an anti-doping rule violation has actually been committed.

28. In addition, the Panel holds that the condition for the lifting of a provisional suspension, mentioned in Article 239 of the UCI ADR, is to be narrowly interpreted. Such conclusion is based both on a literal interpretation and a systematic construction of the rule: from the first point of view, in fact, the Panel remarks that Article 239 clearly indicates (by way of a "double negative" expression: *"shall not (…) unless"*) that the lifting of the provisional suspension is an exception to its ordinary application; from the second point of view, the Panel notes that the

("pitGH") assay employs a capture antibody that recognizes a variety of pituitary-derived hGH isoforms. The respective assays are referred to as "rec1", "pit1", "rec2" and "pit2". The result of the test is expressed as the ratio of the concentration values recGH / pitGH for each particular kit. The final determination of an adverse analytical finding is dependent on the kit ratio for the sample, which is calculated by dividing the mean value of the results of the "recombinant" assay (concentration of recGH in ng/mL) by the mean value of the results of the "pituitary" assay (pitGH in ng/mL), obtained from the measured replicates of the sample aliquot (ratio1 = rec1 / pit1; ratio2 = rec2 / pit2).

UCI ADR (Article 235) provide for the automatic imposition of a provisional suspension following an adverse analytical finding, which should therefore be maintained unless there is a clear indication that such finding does not stand reasonable chances to be confirmed. As a result, the simple casting of doubts as to the possibility that the anti-doping rule violation be confirmed is not sufficient to have the provisional suspension lifted. The Panel finds that these restrictions as to its scope of review in relation to the matter in dispute are, in principle, compatible with general principles of access to justice provided that disciplinary proceedings are pending before the competent hearing body, that the latter has unrestricted powers when reviewing the subject matter before it and that the latter may order any provisional and procedural measures it deems necessary to safeguard the interests and the rights of the parties involved.

29. In light of the above, the Panel finds that the Appellant's submissions do not show that the apparent anti-doping rule violation has no reasonable prospect of being upheld. In fact, the UCI's case is supported by expert opinions, which contradict the expert reports filed by the Appellant, and support the Respondent's position that the hGH detection method endorsed by WADA and applied by the Laboratory is reliable and sufficiently validated, that it (and its application by the Laboratory) does not need to be determined as *"fit-for-purpose"* or require an extension of the scope of the Laboratory's accreditation; that the different values detected in the A and in the B sample analysis are not significant and do not impact on the Adverse Analytical Finding; and that the second opinion issued by Prof. Cowan confirmed such Adverse Analytical Finding. This does not mean, the Panel underlines, that the Appellant's contentions in the merits (challenging the Adverse Analytical Finding) are bound to fail and that UCI shall prevail. This point is for the competent disciplinary or arbitration body to decide. The Panel only notes that the UCI's position, based on the analyses reports and the various expert opinions, is not unreasonable. Also the condition set by Article 239 of the UCI ADR for the lifting of the Provisional Suspension is consequently not satisfied.

Conclusion

30. In light of the foregoing, the Panel holds that the appeal brought by Sinkewitz against the Provisional Suspension is to be dismissed.

31. The Panel at the same time emphasizes that the above conclusion does not mean or imply that Sinkewitz has committed an anti-doping rule violation. Any determination on the point is left for the competent hearing and/or arbitration body to decide.

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr Patrik Sinkewitz against the provisional suspension imposed on him by the Union Cycliste Internationale (UCI) on 18 March 2011, as confirmed by the decision issued on 3 June 2011 by the UCI Anti-Doping Commission, is dismissed.

(…)

4. All other prayers for relief are dismissed.