CAS 2016/A/4631 William Brothers v. Fédération Internationale de Natation (FINA)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President: Mr. John A. Faylor, attorney-at-law in Frankfurt am Main, Germany

Arbitrators: Mr. Patrice M. Brunet, attorney-at-law, Montréal (Québec), Canada

Mr. Alexander McLin, attorney-at-law, Geneva, Switzerland

in the arbitration between

William Brothers, British Columbia, Canada

Represented by Mr. Michael S. Straubel, attorney-at-law, Valparaiso University, Valparaiso, Indiana

Appellant

v.

Fédération Internationale de Natation (FINA), Lausanne, Switzerland

Represented by Mr. Jean-Pierre Morand and Mr. Nicolas Zbinden, attorneys-at-law with Kellerhalls Carrard in Lausanne, Switzerland

Respondent

I. PARTIES

1. The Appellant, William Brothers, is an elite-class swimmer affiliated with the Canadian national swimming team through Swimming Canada. He was a member of the national Junior Team between 2010 and 2012, placing 6th at the 2011 World Junior Championships and winning silver and bronze at the 2012 Junior Pan-Pacific Championships. In the 2013/14 season, the Appellant moved up to the Canadian Senior National Team where he represented Canada at the World Swimming Championships, the Commonwealth Games and the Pan-Pacific Championships.

2. The Fédération Internationale de Natation ("Respondent" for "FINA") is the International Federation which promotes the development of five disciplines of aquatic sports throughout the world. FINA conducts a doping control program, the rules of which are set out in the FINA Doping Control Rules valid as of 1 January 2015 ("FINA Rules"), which implement both in-competition and out-of-competition testing. Swimming Canada is a member association of FINA and, as such, has submitted to the FINA doping control program.

II. FACTUAL BACKGROUND

3. This dispute concerns the Appellant's refusal to submit to an out-of-competition blood doping test conducted in his apartment residence in Vancouver, Canada, on 26 August 2015.

4. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

5. On the evening of 26 August 2015 at approximately 22:00 hours, the testing agency IDTM represented by the Doping Control Officer (DCO) and the chaperone (BCO) were called to the Appellant's residence for the purpose of conducting an out-of-competition blood test. Present in the residence, in addition to the Appellant, was the Appellant's girlfriend at the time.

6. After being escorted to the kitchen table of the small residence, the Appellant, assisted by the DCO, commenced filling out the Doping Control Form (DCF) Blood. The Appellant then took a telephone call from his father in close proximity to the kitchen table where the DCO and the chaperone remained sitting. He then completed and

signed the DCF and recorded to the DCF under Pt. 4 (Confirmation of Procedure for Blood Testing) that

"Due to health reasons, I cannot take the test."

7. Being confronted with the Appellant's refusal to submit to the blood test, the visit having lasted approximately 20 to 30 minutes, the DCO and the BCO departed the residence.

8. In the Unsuccessful Attempt Form (UAF) subsequently completed by the DCO, the following description of the failed test was recorded by the DCO:

> *"Initially the athlete was friendly and cooperative. As the blood DCF was being completed and we were just about to begin process of selecting Bereg Kit, the athlete took a phone call from his father – as girlfriend stated. He spoke for a few minutes, upon completion of phone call, athlete stated he will not be taking the test due to health reasons. He wrote this on the DCF. Then the BCO, myself and athlete signed the DCF. Girlfriend was present: Kessia Derks. . . . . I reiterated we only had to draw one vial of blood. If he refused his sport federation would be in touch regarding repercussions. BCO and myself overheard part of phone conversation between athlete and father. Father was saying to not say anything, refuse the test and they will deal with the suspension."*

9. On 2 September 2015, the Appellant submitted forms declaring his decision to retire from the sport of swimming.

10. Following the Appellant's refusal, a hearing was held before the FINA Doping Panel on 8 March 2016. The Panel rendered its decision on 17 May 2016 and finding that the Appellant committed an Anti-Doping Rule Violation under FINA Rules DC 2.3.

11. In accordance with DC 10.3.1 of the FINA Rules, the Appellant was sanctioned with a four (4) year period of ineligibility commencing on 26 August 2015 and ending on 25 August 2019 based on his first anti-doping rule violation. All results obtained by him on or after 26 August 2015 were disqualified; any medals, points and prizes achieved during this period were forfeited.

12. The Panel held that the Appellant's refusal to submit to the blood test evidenced intentional behavior. However, the Panel did not go so far as to state that the Appellant's refusal constituted "cheating." His "spur of the moment decision" not to submit was, in the view of the Panel, clouded by his father's advice on the telephone not to take the test and the Appellant's problematic medical history.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 3 June 2016, the Appellant appealed the FINA Doping Panel's decision of 17 May 2016 to the Court of Arbitration for Sports, citing Art. 13.2.1 of the FINA Rules. The

Appellant nominated Mr. Patrice M. Brunet, attorney-at-law, in Montreal, Canada, as arbitrator.

14. On 20 June 2016, the Respondent nominated Mr. Alexander McLin, attorney-at-law in Geneva, as arbitrator in accordance with Article R53 of the Code.

15. On 29 August 2016, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, notified the parties of the constitution of the Panel, namely Mr. Patrice M. Brunet, Mr. Alexander McLin and Mr. John A. Faylor, attorney-at-law in Frankfurt am Main, Germany, as President of the Panel.

16. Following various requested extensions of the deadline for filing the Appeal Brief, the brief was filed on 7 September 2016 in accordance with Article R51 of the Code.

17. On 7 October 2016, the Respondent filed its Answer in accordance with Article R51 of the Code.

18. On 18 November 2016, following receipt of the Respondent's Answer, the Appellant requested leave to submit further evidence and argument on the issue of Respondent's allegation that the doping test of 26 August 2015 was a target test initiated by FINA on the recommendation of WADA following an "atypical sample" provided by the Appellant in an earlier test conducted in July 2013. The Panel granted this request on 28 November 2016.

19. The Appellant thereafter filed an additional Reply Brief on 2 December 2016 stating that the 2013 test results were not "atypical" and could not be considered support of the claim that the Appellant had anything to conceal during his test on 26 August 2015.

20. A hearing was held at CAS Headquarters in Lausanne on 12/13 January 2017. The Panel was joined by Mr. Brent J. Nowicki, Managing Counsel, and by the following:

For the Appellant:

- Mr. William Brothers
- Mr. Michael Straubel, Lead Counsel
- Mr. DeMarkus Muhammad, Legal Representative
- Mr. Dallas Coleman, Legal Representative
- Ms. Hanna Paper, Legal Representative
- Mr. Charles Watterson IV, Legal Representative
- Dr. Alex Brothers, Appellant's Father and Witness
- Dr. Janet McKeown, Witness (by Telephone)
- Dr. Barry Stein, Witness (by Telephone)

For the Respondent:

- Ms. Katarzyna Jozwik, FINA representative
- Mr. Jean-Pierre Morand, Counsel
- Ms. Breanna Short, DCO (by Video)
- Ms. Emilyn Castro, BCO (by Video)

21. Witnesses heard at the hearing for the Appellant were, both testifying by telephone, and Dr. Alex Brothers, father of the Appellant, who was personally present at the hearing. The announced witness, Ms. Kessia Derks, was withdrawn by the Appellant shortly before the hearing.

IV. THE PARTIES' SUBMISSIONS

A. The Appellant's Submission

22. The Appellant raises four chief arguments in defense of his refusal to submit to the test:

First, subsequent to the DCO and BCO entry into his small apartment residence and during the course of completing the Doping Control Form (DCF), he experienced a panic attack. This constituted "compelling justification" within the meaning of DC 2.3 FINA Rules for refusing the sample collection at that time;

Second, the DCO violated the mandatory International Standards for testing when they failed to warn him of the consequences of his refusal;

Third, he had no intent to cheat or refuse the sample collection as he was compelled by his medical emergency, i.e., the panic attack, to refuse the sample collection;

Fourth, a four-year suspension, or even a one-year suspension, violates principles of proportionality.

1. The Appellant's Panic Attack

23. Although the timing of the test at 22:00 hours on 26 August 2015 lay within the appropriate time range, it was late in the evening and the Appellant was preparing for bed. He had never been tested at home and never this late in the evening.

24. In the words of the Appellant, the panic attack which he experienced while the DCO was completing the DCF was characterized by *"extreme anxiety and an uncontrollable sense of panic, with physical symptoms of shortness of breath and racing heart rate*".

25. Noticing these symptoms, his roommate, Kessia Derks, out of concern for his well-being, immediately texted the Appellant's father, the witness Dr. Alexander Brothers, an Emergency Physician/Sport Medicine Physician, on her mobile phone. Dr. Brothers

testified that he received the text on his mobile phone while on duty in the hospital and immediately called back to Kessia Derks. Ms. Derks then passed her phone to the Appellant.

26. Upon hearing the voice of the Appellant on his mobile phone, Dr. Brothers immediately sensed that the Appellant was experiencing a panic attack. Knowing how he had handled attacks of this kind in the past, Dr. Brothers assured the Appellant that "*he could work through this.*" As they spoke with each other, the Appellant continued to say that "he needed the DCOs to leave". The phone conversation lasted about a minute. The Appellant, upon ending the call, then asked the DCOs to leave.

27. The Appellant submits that he was "incapacitated by the panic attack to the point of being unable to make a clear and rational decision, thus making his actions and response completely involuntary and without intent". He had no control over the onset of the attack. It was unavoidable and beyond his control.

28. In confirmation of his reaction, the Appellant cites the Out-of-Competition Mission Summary dated 26 August 2015 where the DCO noted that "he looked very nervous, his face was red, and he wouldn't look at me".

29. In his testimony given before the Panel during the hearing on 12 January 2017, the Appellant also cited his "fear of needles" as a chief contributing cause of his panic attack. This fear had its origin in the various surgical operations and medical treatments which he underwent during childhood and his teenage years.

30. In this regard, the Appellant submits that the panic attack which he experienced on 26 August 2015, the "feeling of doom" which emerged during the procedure, must be evaluated against the background of his medical history. From birth, he endured a number of severe illnesses. He describes these illnesses in his Appeal Brief in detail. The witness, Dr. Brothers, further elucidated these illnesses during his testimony.

31. Prior to reaching two years of age, the Appellant already underwent seven (7) operations to correct a venous malformation on his face. At the age of fourteen, he developed an illness, Guillain-Barré syndrome, a condition that causes the immune system to attack the nervous system. In 2013, he was diagnosed with basilar migraines, which induced a feeling of vertigo.

32. In 2015, he was diagnosed for a malfunction of his hormonal system and most recently has developed a condition which causes air to fill the chest cavity between the lungs. In addition to the foregoing, the Appellant suffers from asthma.

33. Most recently, in March 2015, the Appellant was diagnosed with depression and associated anxiety. In evidence of this condition, the Appellant cited the medical

opinion of Dr. Susan White of Australia which was submitted to the FINA Doping Panel. In that opinion, Dr. White stated that

> *". . . given this clinical history, it is possible that a panic attack did occur at the time of the doping control test, however, the FINA DCRB cannot say with certainty that it did occur as there was no medical assessment at the time of the attack*".

34. Contributing to his depression and anxiety, both of which induced his susceptibility for panic attacks, was also the "overtraining" which followed his successes at the 2013 World Championships. His coach at that time increased the Appellant's training volume and intensity; the coach became more and more demanding and at times abusive. This stress culminated in the Appellant's change of coaches in 2014.

35. Despite this strained relationship to his former coach, however, he continued to remain close and emotionally attached to his former trainer. When the coach was diagnosed with brain cancer resulting in his death in April 2015, the Appellant became even more distraught and emotional at the thought that their falling out may have been caused by the brain cancer.

36. Following his first anxiety attack at the 2014 Pan Pacific Championship, the Appellant sought treatment from Dr. Janet McKeown, a clinical psychologist at the University of British Columbia Health Clinic. In her statement of 30 September 2015, submitted by the Appellant together with his Appeal Brief, Dr. McKeown confirmed that she was treating the Appellant for signs of depression and panic attacks and had prescribed antidepressant medication.

37. Subsequent to this diagnosis and a follow-up diagnosis of a hormonal malfunction, and prior to the testing mission at issue, the Appellant advised his coaches, family and friends that he intended to take a break from swimming and voiced his intention to retire from competition. The proper paperwork, however, was not received by the Respondent until 2 September 2015. The decision "to take a break from swimming" had been made, however, prior to 26 August 2015.

38. Due to his state of mind at the time, he could not be aware of the repercussions of refusing to give the sample nor did the DCOs ever inform him of the consequences of failing to complete the sample collection. Instead, they stated merely that his refusal would be reported to FINA and that he would be hearing from them. They did not inform him that he could face anti-doping sanctions for failing to provide a sample.

2. Violation of the International Standards; Failure to Warn of Consequences

39. The Appellant submits that the DCO's failure to properly inform him of the consequences of his refusal, in particular, the possible imposition of a four-year ineligibility sanction, constitutes a violation of the International Standards for Testing

and Investigations (ISTs), adherence to which is mandatory for compliance with the WADC and, in turn, the FINA Rules.

40. Citing *B. v. FEI* (CAS 2007/A/1415), the Appellant asserts that, although he signed the DCF, his signature is *"not enough for the Panel to accept the notification [of the consequences] as valid."*

> *"It is essential, in the context of a strict procedural regime such as that which applies to anti-doping, that the prosecuting body, whether an NGB or a NADO, communicates in the clearest of terms with those accused of anti-doping violations in relation to matters concerning their rights and obligations."*

41. Moreover, Art. 6.9.6 of the DCO Training Manual provides further evidence of the importance of notifying the athlete of possible sanctions. Even the "Summary Checklist" for the DCO states that he/she must inform the athlete of the sanctions which he/she will incur in consequence of the refusal. For this reason, the sanction should be vacated.

3. No Intent to Cheat

42. The Appellant argues that, if the Panel finds that his panic attack did not constitute "compelling justification", then WADC Article 10.3.1 provides that

> *"The period of ineligibility shall be four years unless, in the case of failing to submit to Sample collection, the Athlete can establish that the commission of the anti-doping rule violation was not intentional [as defined in Article 10.2.3], in which case the period of ineligibility shall be two years."*

43. The Appellant asserts that he had no intent to avoid the sample collection or to cheat, the definition of which is set out in WADC Article 10.2.3, the essence of which is that "intentional" is meant to be the specific intent to cheat. The Appellant's only intention was to save his life.

44. In default of the "compelling justification" defense in WADC Article 2.3, however, WADC Article 10.5.2 provides that the period of ineligibility shall be reduced if the Appellant can show that he bore no significant fault. The occurrence of the panic attack being beyond his control, the Appellant submits that it rendered him physically and cognitively incapable of completing the sample collection.

45. There should therefore be a finding of no significant fault in the case at hand. The Appellant's panic attack rendered him unable to make conscious decisions because of his intense fear. His only intent at the time of the test was to save his life. Due to the physical and cognitive impairment caused by his panic attack, he could not form the intent to cheat.

4. Violation of the Principle of Proportionality

46. Finally, citing the principle of proportionality as further developed in the CAS decisions of *The Football Association v. Jake Livermore* (Regulatory Commission 2015/2015) and *M. Puerta v. ITF* (CAS 2006/A/1025), the Appellant submits that his level of fault, if any at all, is very small and any punishment beyond that which he has already received would be disproportionate.

47. In conclusion, the Appellant submits the following prayer for relief:

> *"Mr. William Brothers prays that this tribunal accept and take jurisdiction over his appeal, find that he had compelling justification for refusing the sample collection, find that the FINA DCOs failed to inform him of the consequences of his refusal and therefore dismiss the anti-doping charge against him. In the alternative, Mr. Brothers prays that this tribunal find that he did not intentionally refuse sample collection, that he was not significantly at fault, and that a period of suspension of more than the time he has already been suspended is out of proportion to his fault in this matter."*

B. The Respondent's Submission

48. In its Answer, the Respondent addresses each of the four arguments raised by the Appellant in the same order as they were presented in the Appeal Brief.

1. The Appellant's Panic Attack

49. With regard to the issue of "compelling justification", the Respondent points out that CAS jurisprudence has enforced the terms of DC 2.3 FINA Rules restrictively. In *Azevedo v FINA*, CAS 2005/A/925, the Panel held:

> *No doubt, we are of the view that the logic of the anti-doping tests and of the DC Rules demands and expects that, whenever physically, hygienically and morally possible, the sample be provided despite objections by the athlete. If that does not occur, athletes would systematically refuse to provide samples for whatever reasons, leaving no opportunity for testing."*

50. Respondent also cites *Troicki v. ITF*, CAS 2013/A/3279, where the Panel held:

> *" [. . .] whether the Athlete had a compelling justification for failing to provide a blood sample needs to be determined objectively. The question is not whether the Athlete was acting in good faith, but, whether objectively, he was justified by compelling reasons to forego the test."*

51. In addition, in the CCES v. Boyle decision (SDRCC, 31 May 2007), the tribunal held that "to be compelling [the] departure would have to have been unavoidable."

52. The Respondent takes issue with the Appellant's claim that he experienced a loss of control. While he may have been understandably more nervous, he did not behave in a

manner which in any way could be described as "panic". During the initial phase of the DCO's visit, he acted calmly and without any sign of particular anxiety.

53. Indeed, until the phone call with his father, the Appellant was described by the DCO as "friendly and cooperative". It was not the Appellant who required calling his father, but he was rather told by his girlfriend to take the call. Moreover, the DCO did not record excited behavior of the Appellant during the conversation with his father. Instead, he mostly acknowledged what his father was telling him, since parts of the conversation were within earshot of the DCOs.

54. The DCO and BCO further confirmed in their Out-of-Competition Mission Summary that they overheard the Appellant's father giving instructions to his son: "don't say anything else, you don't have to tell them anything, to refuse the test, and that they would deal with the suspension."

55. The Respondent submits that the Appellant's letter to FINA of 7 September 2015, in which he described the "serious medical problem" which he experienced as of 14 August 2015 and which determined his behavior during the test on 26 August 2015 makes no mention of a "panic attack". The Appellant simply stated that the situation was "stressful" and that he "was not prepared to undergo further testing at this time."

56. The Respondent concludes on the basis of the above that the evidence submitted does not support the Appellant's allegation that he suffered a panic attack during the DCO's visit. On the contrary, the evidence shows that he probably, on advice of his father, deliberately decided to refuse the doping control.

2. Violation of the International Standards; Failure to Warn of Consequences

57. With regard to the Appellant's allegation that he was not properly notified by the DCO of the consequences for refusing the test or failing to comply, the Respondent submits that the Appellant signed the DCF which clearly states on the line above his signature that

> *"I understand that any refusal or failure to submit to doping control, and/or any attempt to interfere with the doping control process, may be treated as an anti-doping rule violation."*

58. The Respondent further submits that the Appellant cannot reasonably argue that he was not aware that, by refusing to submit to a doping test, he would face a possible suspension. The DCO and the BCO clearly confirmed that they overheard the Appellant's father inform him that "they would deal with the suspension". The Appellant knew therefore what was at risk.

3. No Intent to Cheat

59. With regard to the Appellant's argument that his refusal to submit to the test was based on no intention and no significant fault, the Respondent asserts that the evidence does not show that he suffered a panic attack on 26 August 2015, but rather that he deliberately, after consulting with his father, decided to refuse to submit to testing.

60. The Respondent takes the position that the commentary to "No Significant Fault" pursuant to DC 10.5.2 FINA Rules "may be applied to any anti-doping rule violation except those rules where intent is an element of the anti-doping rule violation." The commentary to DC 2.3 FINA Rules clearly sets out that "'evading' or 'refusing' sample collection contemplates intentional conduct by the Athlete". The regime of No Significant Fault and Negligence is therefore not applicable in the context of a refusal violation (DC 2.3. FINA Rules).

4. Violation of the Principle of Proportionality

61. With regard to the Appellant's "Proportionality" challenge, the Respondent cites the settled jurisprudence of CAS which has repeatedly confirmed that the provisions of the sanctions set out in the WADC are sufficiently compliant with the principle of proportionality.

62. In this regard, the Respondent rejects the notion that Appellant's reference to *Livermore* applies to this case. The present case, in the view of the Respondent, has nothing to do with *Livermore*. The circumstances in *Livermore* were "extreme and unique". In contrast, the present case is that of an athlete who deliberately refused a doping control in order, potentially, to hide a violation.

63. After all of the above, the Respondent states its prayer for relief:

> *I. The Appeal filed by Mr. William Brothers is dismissed.*
>
> *II. FINA is granted an award for costs.*

V. JURISDICTION

64. Article R57 of the Code provides:

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

65. DC 13.2.1 FINA Rules provides that, in cases of International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions

applicable before such court. The Appellant is such an International-Level Athlete who has participated in International Competition.

66. Having said the above, the parties have expressly accepted the jurisdiction of CAS in the Appellant's Statement of Appeal and in the Respondent's Answer. Both parties have reconfirmed the jurisdiction of CAS both in their written submissions and in their respective Order of Procedure.

VI. ADMISSIBILITY

67. Article R49 of the Code provides as follows:

> *In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.*

68. DC 13.7.1 FINA Rules provides that the deadline to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party. The decision of the FINA Doping Panel is dated 17 May 2016. Appellant's Statement of Appeal was received by the CAS Court Office on 3 June 2016 within the twenty-one day deadline.

69. The Respondent initially challenged the timeliness of the Appeal Brief. Upon clarification from CAS regarding the electronic receipt of the Appeal Brief, the Respondent withdrew its challenge. In its Answer dated 7 October 2016, Respondent confirmed that the admissibility of the Appeal was not disputed.

VII. APPLICABLE LAW

70. In accordance with Article R58 of the Code,

> *The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen be the parties or, in the absence of such a choice according to the law of the country in which the federation, association or sport-related body which has issued the challenged decision is domiciled or according to the rules of law of the Panel deems appropriate. In the latter case the Panel shall give reasons for its decision.*

71. The Respondent is a registered Swiss association with its legal domicile in Switzerland; the Appellant is a resident national of Canada. With the seat of this arbitration being Switzerland, this arbitration is governed by articles 176 et seq. of the Swiss Private International Law Act (PILA). Pursuant to art. 182, para. 2 PILA, the CAS Code governs the procedural aspects of this arbitration.

72. With regard to the adjudication of the merits, the applicable body of law governing this dispute are the FINA Doping Control Rules. Swiss law shall apply subsidiarily.

VIII. MERITS

73. After a thorough review of the facts of this case, the pleadings of the parties and the testimonies provided by the various witnesses, the Panel had concluded that the Appellant indeed committed, with intent, a violation of DC 2.3 FINA Rules. Upon finishing the telephone call with his father, he informed the DCO and BCO, as evidenced by his entry on the DCF, that "*due to health reasons, I cannot take the test.*" The test was refused and the DCO and BCO thereupon left his residence.

A. THE APPLICABLE PROVISIONS OF THE FINA RULES; THE ABSENCE OF COMPELLING JUSTIFICATION

74. DC 2.3 FINA Rules prescribes that the following actions constitute an anti-doping violation:

> *Evading Sample collection, or without compelling justification, refusing or failing to submit to Sample collection after notification as authorized in these Anti-Doping Rules or other applicable anti-doping rules.*

75. Human actions have both an objective and a subjective element and the commission of an anti-doping offense is no different from any other human action. From the perspective of the DCO and the BCO, the Appellant clearly and objectively refused to permit the drawing of a vial of blood from his arm on the evening of 26 August. The issue at hand is what was happening in the Appellant's mind.

76. Notwithstanding these objective and subjective components of the act, however, the language of DC 2.3 FINA sets out an inherent defense. If the athlete can prove on the balance of probability that his act was compellingly justified, his rejection of the test will be excused. The question posed is whether the Appellant can avail himself of this defense.

77. After due consideration, the Panel chooses to follow the precedent set in the *Azevedo*, *Troicki* and *Boyle* decisions cited above. If it remains "*physically, hygienically and morally possible*", for the sample to be provided, despite objections by the athlete, the refusal to submit to the test cannot be deemed to have been compellingly justified.

78. Obviously, this would not be the case if the athlete were to faint unconscious on the floor upon seeing the DCO's needle, or if he were stone drunk or would experience an epileptic fit at the time of the test. Even a refusal to submit to the test because the athlete must rush his expectant wife to hospital might qualify as a "compelling justification."

79. Examples of this kind in which it is established that an athlete is deprived of his rationality and cognitive senses will, in most cases, be sufficient to ground the excuse of "compelling justification". These situations present physical and moral hindrances to going ahead with the test. These circumstances are, however, not present in the case at hand.

80. When the Appellant greeted the DCO and BCO at his front door at 22:00 hours on 26 August 2015, he was in complete control of his senses. He identified the callers as coming from IDTM, understood their mission and ushered them to his kitchen table to proceed with the test. He watched them fill out the DCF and ready the Bereg kit.

81. In the view of the Panel and based on the testimony of the witnesses, the Appellant's feelings of anxiety were triggered after the test procedure was initiated at his kitchen table. The Panel is also willing to believe that Ms. Derks perceived quickly that an attack of sorts was in the making and called the Appellant's father, whom she knew understood his son's physical constitution and medical history, for help.

82. The Panel prefers not to label the Appellant's mounting fear and anxiety with the term "panic attack". Panic implies the inherent loss of judgment and ability to discern, a situation characterized by a loss of voluntary control over one's cognitive faculties and actions.

83. As the anxiety developed, however, the Appellant retained his rationality to the degree that he was still able to identify and converse with his father on the mobile telephone which Ms. Derks placed in his hand. He maintained his ability to understand and to contemplate what his father was saying to him. As during his many past illnesses and health crises, he listened closely to his father's advice.

84. In the view of the Panel, the Appellant's decision to refuse the test (alternatively, his decision to acquiesce in his father's decision to refuse the test) were made under mounting stress, perhaps under extreme stress. It is even possible that the Appellant experienced the onset of "panic" in the classical sense of that term. But the Panel is unwilling to find a situation in which the Appellant experienced a complete loss of his cognitive senses, being unable to think and to rationalize with a concomitant loss of control.

85. His remaining ability, although possibly impaired, to think and discern was impressively demonstrated by the Appellant's question to the DCOs as they were packing their kit what the consequences of his refusal might be. He had, even at this point, the perception that his actions might constitute an anti-doping violation and he was concerned about what the sanctions might be.

86. The Panel is unable to find any physical, hygienic or moral circumstances which would have justified Appellant's refusal to provide the blood sample. The refusal was not unavoidable. There was no thought given, neither by the Appellant nor his father, as to how the "anxiety attack" might have been assuaged in order to let the test proceed, e.g. by a 15-minute pause on the couch.

87. Based on the above considerations, the Panel concludes that the objective facts and circumstances of the Appellant's refusal do not permit a finding of "compelling justification". As the Panel held in *Troicki v. ITF*,

> *"The question is not whether the Athlete was acting in good faith, but, whether objectively he was justified by compelling reasons to forego the test."*

B. THE APPELLANT'S FAULT AND THE MEASURE OF THE SANCTION

88. Having established that the Appellant objectively committed a violation of DC 2.3 FINA Rules, it turns to the issue of the appropriate sanction.

89. DC 10.3.1 FINA Rules mandates the following:

> *For violations of DC 2.3 or DC 2.5, the Ineligibility period shall be four years unless, in the case of failing to submit to Sample collection the Athlete can establish that the commission of the anti-doping rule violation was not intentional (as defined in DC 10.2.3), in which case the period of Ineligibility shall be two years.*

90. DC 10.2.3 FINA Rules, which defines the term "intentional", reads in its relevant segment, as follows:

> *As used in DC 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk . . . .*

91. The formulation of DC 10.3.1 poses interpretational issues with regard to the meaning and application of the term "intentional." A close reading of the language of DC 2.3 FINA Rules would indicate that the drafters of the provision were thinking in terms of three different and distinguishable categories: (1) evasion, (2) refusal and (3) failure to submit to Sample Collection.

92. Indeed, the official commentary to DC 2.3 attempts to further define these categories in terms of the levels of intent or fault which can be attributed to each of them. The commentary reads as follows:

> *[Comment to DC 2.3: For example, it would be an anti-doping rule violation of "evading Sample collection" if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or Testing. A violation of*

"failing to submit to Sample collection" may be based on either intentional or negligent conduct of the Athlete, while "evading" or refusing" Sample collection contemplates intentional conduct by the Athlete.]

93. Based on the above commentary, the reader is led to deduce that action constituting a "refusal" to submit to sample collection must be automatically and exclusively categorized as "intentional conduct" with the further consequence that a four-year sanction is no longer eligible for elimination or reduction on the grounds of No Fault or Negligence (DC 10.4) or No Significant Fault or Negligence (DC 10.5.2).

94. In the view of the Panel, both the drafting of DC 10.3.1 FINA Rules and, more pointedly, the commentary to DC 2.3 FINA Rules, do not permit, on the individual facts of this case or any other case, the conclusion to be drawn that in a "refusal situation" application of DC 10.5.2 is to be ruled out with the accused athlete being denied the possibility of elimination or reduction of the sanction. Stated differently, the objective fact of a "refusal" does not automatically make the athlete a "cheat". The terms and concepts applied in the commentary to DC 2.3 are, therefore, in the view of the Panel, imprecise and indiscriminately applied.

95. It would appear to the Panel that the term "failing to submit", which the drafters state "may be based on either intentional or negligent conduct", more properly serves as an "umbrella" concept to describe all types of actions or situations which result, for whatever reason, from the objective fact of not having submitted to the test. Viewing the objective refusal to submit to a test as being a sub-category of the broader category of "failing to submit" would also facilitate a better understanding of the commentary's use of the term "contemplates intentional conduct." If "refusal" to submit to a test merely "contemplates" the presence of intent or the intention to cheat, it does not inexorably follow that intent will always be present; it may or may not be present at all or may or may not be present in significant degree in the given set of facts.

96. It is the view of the Panel that the Appellant's refusal to submit to the blood test *("Due to health reasons, I cannot take the test")* does not and cannot deprive the athlete, based on the facts of the individual case, from pleading that the degree of his fault or intent justifies a possible elimination or reduction of the sanctions on the grounds of No Fault or Negligence or No Significant Fault or Negligence under DC 10.5.2 FINA Rules.

97. The conclusion drawn by the Panel is also compelled by a comparison of the sanctioning regimes applicable to the athlete who ingests a prohibited substance, on the one hand, and the athlete who evades, refuses or fails to submit to an anti-doping test, on the other. If the doped athlete who commits a strict liability doping offense is eligible for a possible elimination or reduction of the sanction dependent upon the degree of his or her fault or negligence under DC 10.4 and DC 10.5.2 FINA Rules, it

is not wholly understandable why these same provisions should not be available to the athlete charged with evasion or refusal.

98. Moreover, and as illustrated in *Troicki v. ITF*, the previous edition (2009) of the WADC provided for exactly this scenario – one in which an analysis of the degree of fault was applicable to a "refusal" and/or "failure to submit" situation. The comment to DC 2.3 (which reflects verbatim the corresponding comment to the 2015 WADC) still clearly envisions that a negligence rationale is applicable in certain scenarios. A reading of DC 10.3.1 that improperly distinguishes "refusal" from "failure to submit" along somewhat arbitrary lines would therefore risk incongruence with the comment to DC 2.3.

99. In the case at hand, the Panel views the refusal of the Appellant to submit to the blood test as constituting intentional action for which he bears fault, but nevertheless fault which, in light of the unique facts of this individual case, must be assessed in terms of its degree and significance and the proportionality of the resulting sanction.

C. The Exceptional Circumstances of the Appellant's Refusal

100. In the view of the Panel, there can be little doubt that the Appellant's past and more recent medical history has had an effect on his recent psychological make-up. With regard to his medical history, the testimonies of the Appellant, his father, Dr. McKeown and Dr. Stein, were informative and persuasive. Even before reaching his 2nd birthday, the Appellant had undergone seven operations. The illnesses which he suffered during childhood and his teenage years were severe, and not without lasting psychological effect.

101. Dr. Brothers' testimony described the role which he, as a father, had played during the Appellant's various health crises. It became clear to the Panel on the basis of the testimonies of the father and the son that a close bond was shared between them. Having the additional insight of a physician, Dr. Brothers was perhaps better able than other parents to understand these illnesses and to assist his son in overcoming them.

102. Having herself observed this bond between father and son, it is also understandable why Ms. Derks, although unfortunately not appearing as witness, texted Dr. Brothers within minutes after the arrival of the DCO in order to inform him that "a doping control is taking place and Will is not looking well." She could observe the Appellant's facial appearance in the small quarters around the kitchen table.

103. Dr. Brothers testified that the Appellant had experienced anxiety situations several times over the past years, usually triggered by competition. Most recently, just a few weeks before, he had experienced an anxiety attack in national competition. He advised his son then to "come home". In the meantime, the Appellant had been

diagnosed in March 2015 for depression and anxiety and was taking medication. In August 2015, he was diagnosed with a hormonal disorder. The Appellant's physical and mental constitution on the evening of 26 August 2015 can only be described as unstable and labile.

104. Considering the above, the Panel holds Dr. Brothers' testimony to be credible when he stated that, although under the pressure of his emergency room duties and finding himself in a "public place" where he could not openly speak, he detected the Appellant was experiencing stress and anxiety. A father, who had accompanied his son through so many health crises, should be able to detect on the tone of his son's voice and in his articulation whether he is suffering distress.

105. The testimony given by the DCO, Ms. Breanna Short, disputed Dr. Brother's statement that the Appellant complained two or three times during the short call that he "just wanted these people [the DCO/BCO] to leave". To the contrary, Ms. Short testified that she, sitting at the kitchen table, approximately 10 feet from the pacing Appellant speaking over the phone, could hear Dr. Brother's advising his son "*to just refuse to take the test. We will deal with the suspension later.*"

106. Although both the DCO and the BCO stated that they could hear mostly all of the words spoken by the Appellant to his father, these being very few as the father is alleged to have done most of the talking, Ms. Short confirmed that she explicitly heard the word "suspension" spoken by Dr. Brothers, although she conceded to have heard only about 30% of his conversation.

107. Both Ms. Short and the BCO, Ms. Emilyn Castro, stated in their testimonies that the Appellant evidenced no visible signs of stress, no anxiety, and no shortness of breath, during the five- to ten-minute period prior to the call while the paperwork was being completed. It was only after the call with his father that the Appellant's demeanor changed to nervousness, a red face and inability to look the DCO in the eye when he refused to take the test.

108. Although the testimonies of Dr. Brothers and the Appellant, on the one hand, and the DCO and BCO, on the other, differ in their rendition of what was actually said on the call and the visible anxiety levels of the Appellant before and after the call, the Panel takes the view that these differences are not determinative of the Appellant's intent or fault on the grounds of the following considerations:

(i) Dr. Brothers, being the Appellant's father who had withstood many medical crises with him since childhood and possessed a physician's insight with regard to the Appellant's more recent physical and psychological disorders, realistically and believably detected upon hearing the voice of his son that he

stood under stress and was in trouble. His medical training and his fatherly instinct told him to try to calm the Appellant down;

(ii) whether Dr. Brothers advised the Appellant "*to refuse to take the test*", thus making the decision for his son, or whether he told him *"to do what you think you need to do, we will deal with whatever happens later"* generated the same subjective and objective effect in the Appellant. If the Appellant decided himself to refuse, that decision was impulsive and unconsidered; if he took instructions from his father, the acceptance of those instructions was likewise impulsive and unconsidered;

(iii) whether Dr. Brothers actually spoke the word "suspension" is of little relevance. Dr. Brothers is no stranger to sports. He holds a degree in sports medicine and has treated numerous swimmers in the past. He is aware, even without a formal anti-doping education, that sanctions will apply in the event anti-doping rules are violated. "*We will deal with whatever happens later*" was a clear reference to the possibility of sanctions. Dr. Brothers wished to reassure his son that the two of them, as in the face of past crises, would also surmount this crisis together.

109. None of the above detract from the Panel's finding that the Appellant's conversation with his father triggered his objective refusal to submit to the test. Whether the decision was made by his father with the Appellant merely following instructions to tell the DCO "*due to health reasons, I cannot take the test*", or whether the decision was made by the Appellant himself impulsively and without consideration upon ending the call, the Panel is unwilling to attribute the decision to a condition of irrationality, a loss of cognitive faculties or an involuntary lapse of comprehension. The Appellant cannot exonerate himself of fault completely.

110. Just as the Panel was unable to find a situation of compelling justification, it is unable to hold that the Appellant's anxiety, which may indeed have reached "attack" dimensions in the course of his call, totally deprived him of his ability to discern that the denial of the test would have its consequences. The Appellant acted with fault; his fault was, however, diminished by the extraordinary circumstances of this case. His decision to refuse (or to follow his father's instructions to refuse) was still made with an awareness that his decision would bear consequences in terms of possible sanctions.

111. In reaching this finding, the Panel does not overlook the doubt raised by Appellant's counsel during the questioning of the DCO as to whether the Appellant proactively raised the question whether sanctions would be imposed from his refusal to submit to the test. At no time, however, did the Appellant deny that he raised the question.

112. In both the Unsuccessful Attempt Form (UAF) and the Out-of-Competition Mission Summary, it was clearly reported by the DCO and confirmed by the testimony of the BCO that "*if he refused, the FINA would be in touch with him regarding repercussions.*" Ms. Short stated clearly that the Appellant asked her regarding the consequences of the refusal. The Out-of-Competition Summary, which was filed after 26 August 2015, makes explicit mention of the Appellant's question recorded to the protocol.

113. In light of the above, the Panel is not persuaded on the balance of probability that the DCO might have subsequently "embellished" the Summary by inserting a question which was never actually raised. The fact that the DCO, while packing up her kit, stated that the Appellant would be contacted by FINA regarding the "repercussions" indicates strongly that the corresponding question was raised. This was not disputed. This issue could have been resolved, perhaps to the satisfaction of the Appellant, if his girlfriend, Kessia Derks, had not been withdrawn as witness several days prior to the hearing.

114. The fault which the Panel finds to rest upon the Appellant derives from the finding that, regardless of its psychological or pathological origin, stemming from his unfortunate medical history and, more recently, from his depression and hormonal disturbances, he did indeed find himself in a situation on the evening of 26 August 2015, in which his rational faculties were most likely impaired by feelings of fear, extreme anxiety and perhaps even doom. But he still remained able to discern that his refusal could have consequences.

D. THE APPROPRIATE SANCTION

115. To sanction the Appellant with a four-year period of ineligibility would, in the view of the Panel, ignore the extraordinary circumstances of this case. It would ignore the impact of his difficult medical history and the fact of his past anxiety attacks. These considerations, supported by the expert testimonies provided by Dr. McKeown and Dr. Stein, justify the application of DC 10.5.2 FINA Rules.

116. Having said the above, the Panel is indeed troubled by the adequacy of the DCO's answer to the Appellant regarding the nature of the sanctions which would result from his denial. It is clear that a mere statement, "*the Federation will be in touch regarding repercussions*", is not sufficient and may indeed constitute a breach of the DCO's duties and responsibilities. If, at the end of the visit, the Appellant's demeanor had reached a level of visible stress and anxiety, as indicated by the DCO and BCO in their testimonies, it is understandable that they preferred to hold their responses short.

117. The Appellant is, however, an international-level athlete who had been urine-tested "between 6 and 12 times" since 2013, and blood-tested twice. Even if he had not

undergone "formal education" with regard to the provisions of the FINA Doping Control Rules, he could not realistically have assumed that his refusal would be without consequence. The Appellant also made no attempt in the days following the failed test to contact FINA regarding a repeat of the test.

118. In determining the measure of the sanction, the Panel finds, based on the above considerations, that the period of ineligibility imposed by the FINA Anti-doping Panel should be reduced. Pursuant to DC 10.5.2. FINA Rules, the reduction cannot be less than one half of the period of Ineligibility otherwise applicable, which in the case at hand would be four years (DC 10.3.1 FINA Rules). The Panel holds that a reduction from four years to two years is both appropriate and proportional on the merits of this case.

IX. COSTS

119. In disciplinary cases of an international nature ruled on appeal to CAS, such as this case, the relevant sections of Art. R65 of the Code provide the following:

> *R65.2 Subject to Articles R65.2 para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by CAS.*
>
> *R65.3 The costs of the parties, witnesses, experts and interpreters. In the arbitral award, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.*

120. Given the international nature of this case, the proceedings will be free for the Appellant, except for the Court Office filing fee of CHF 1,000 which the Appellant has already paid. The CAS shall retain this fee.

121. In the present case, considering that such appeal was partially upheld, the Panel finds it reasonable and appropriate to order that each party shall bear his/its legal and other costs incurred in connection with these arbitration proceedings.

ON THESE GROUNDS

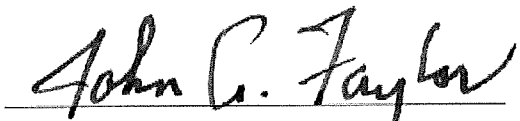
The Court of Arbitration for Sport rules:

1. The appeal filed by Mr. William Brothers against the Fédération Internationale de Natation (FINA) with respect to the decision of the FINA Doping Panel dated 17 May 2016 is partially upheld.
2. Mr. William Brothers has committed a violation of Article 2.3 of the FINA Doping Control Rules and is declared ineligible to compete for a period of two (2) years commencing as of 26 August 2015.
3. This award is pronounced without costs, except for the Court Office fee of CHF 1,000 paid by Mr. William Brothers which shall be retained by CAS.
4. Each party shall bear his/its legal and other costs incurred in connection with these arbitration proceedings.
5. All other or further claims are dismissed.

Lausanne, Switzerland

Dated: 21 March 2017

COURT OF ARBITRATION FOR SPORT



John A. Faylor
President of the Panel