



Tribunal Arbitral du Sport  
Court of Arbitration for Sport

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TAS 96/149 Cullwick v/ FINA

## ARBITRAL AWARD

pronounced by the

### COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: The Hon. Michael J. Beloff, Q.C., London/GBR  
Arbitrators: Mr. Timothy J. Castle, Barrister at law, Wellington / NZL  
Mr. François Carrard, Attorney at law, Lausanne / CH  
Ad hoc Clerk of Court: Ms. Inès Feldmann, Lawyer, Lausanne / CH

in the case between

Mr. Antony Cullwick Wellington / NZL

represented by Mr. David Howman, Barrister at law, Wellington / NZL

v/

Fédération Internationale de Natation Amateur (FINA), Lausanne / CH

represented by Mr. Jean-Pierre Morand, Attorney at law, Geneva / CH

Hearing: 1st February 1997

\*\*\*\*\*

## 1. NATURE OF APPEAL

- 1.1 Mr. Cullwick, a New Zealand Waterpolo player, tested positive for Salbutamol at the VIII Junior Men's Waterpolo World Championships held in Dunkirk/FRA from 21 to 30 July 1995. In consequence, the FINA Executive in their meeting held in Rio de Janeiro on 1 December 1995 decided to suspend him for a period of two years in accordance with FINA Rule MED 4.17.4.1 from 26 July 1995 to 26 July 1997. Mr. Cullwick submitted an appeal in accordance with FINA Art. C 10.5.1 and C 10.5.2. By a mail vote concluded on 20 April 1996 by the FINA Bureau, Mr. Cullwick's appeal was rejected. He submitted an appeal in accordance with FINA Art. C 10.5.3 to this Tribunal on 2 May 1996.
- 1.2 The appeal was submitted in time and in compliance with the provisions of the Art. C 10.5.3 of the FINA Constitution which provides that *"An appeal against a decision by the Bureau shall be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland, within the same term as in C 10.5.2."* and Art. C 10.5.2 of the FINA Constitution which provides that *"An appeal shall be submitted to the Honorary Secretary of FINA not later than one month after the sanction has been received by the member or individual sanctioned."*
- 1.3 The competence of CAS is based on art. C 10.5.3. as cited above and on regulation R47 of the Regulations of the CAS (as amended on 22 November 1994) which provides: *"A party may appeal from the decision of a disciplinary tribunal or similar body of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body."*
- 1.4 Regulation R58 of the CAS Regulations (as amended on 22 November 1994) provides: *"The Panel shall 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 body is domiciled*". The applicable regulations are those of FINA. In the absence of choice of rules or law by the parties, the law of Switzerland applies as the law of the country in which FINA is domiciled.

- 1.5 Regulation R57 of the CAS Regulations (as amended on 22 November 1994) provides: "*The Panel shall have full power to review the facts and the law.*" Accordingly, this Tribunal is not limited to consideration of the evidence that was adduced before FINA either at first instance or the appellate stage; but has considered all evidence, documentary oral and real, produced before it.
- 1.6 Oral evidence was received from the Appellant, his father, Dr. David Cullwick, and Mr. Cornel Marculescu, Director of FINA.

## **2. FACTS FOUND**

- 2.1 Mr. Cullwick was born in New Zealand, where he was brought up and educated.
- 2.2 He first represented New Zealand in Waterpolo at the age of 14, and participated in five international tours with New Zealand Waterpolo teams since that date along with a number of domestic games and national team camps. In 1991, he attended his first World Junior Waterpolo Championships in Southern California with the New Zealand Junior Team.
- 2.3 In 1993, he was offered an athletic scholarship to attend the University of the Pacific and compete for their Waterpolo and swimming programs. He participated in the NCAA Championship Tournament in that year.
- 2.4 He was selected for the New Zealand Junior Waterpolo Team Tour of Europe in 1995, which culminated in the World Junior Championships in Dunkirk. He was participating in those World championships at the time of the positive test.

- 2.5 As it appears from the Appellant's own undated statement submitted to the Tribunal (but whose accuracy was confirmed in his oral evidence, coupled with two written statements, the first dated 10 October 1995 and the second dated 20 September 1996 by Dr. Treadwell of Wellington/NZL, medical practitioner), the Appellant has for many years suffered from asthma, induced by infection, allergy and changes in environment (including in closed swimming pools). He was first given Ventolin inhalers (Salbutamol) in October 1985 when he was aged 10.
- 2.6 According to Dr. Treadwell's record, the Appellant was last prescribed a Ventolin inhaler in June 1991; and he confirmed that it was the same inhaler that he was using during the World Junior Championships in Dunkirk at the time of his positive test.
- 2.7 The inhaler itself was produced at the hearing. It can only be purchased on prescription.
- 2.8 It appears from a statement of Mr. Roberts, a former coach of the Appellant, dated 11 August 1996 that both the Appellant's asthmatic condition and his use of Ventolin would have been well known to many others "including his team colleagues" who were involved in Waterpolo. It further appears from an undated statement of October 1995 from Mr. Craig M. Knowles, a fellow member of the NZL Junior Men's Waterpolo Team at the World Championships in Dunkirk in 1995, that the Appellant made open use of his inhaler.
- 2.9 Letters written by the Executive Director of the Federation dated 8 September 1995 to FINA and signed by Dr. Gerrard, Medical Adviser to the NZL Swimming Federation and also of 12 September 1995 to FINA signed by Mr. David Meyer, Executive Director of that national federation, confirms that the Appellant's condition was documented as far as his own medical adviser was concerned, but we are unable to interpret them as evidencing notification to the Federation itself.
- 2.10 There is accordingly no satisfactory evidence of any formal notification by the Appellant (his family, or his doctor, or anyone else) to the New Zealand Swimming

Federation of his use of a Ventolin inhaler for therapeutic purposes, prior to the date of the positive test.

- 2.11 At the time of his participation in the World Junior Waterpolo Championships in Southern California in August and September 1991, the Appellant received from the national federation a credit-card sized plastic card which indicated as follows:

***"TREATMENT GUIDELINES***

***EXAMPLES OF PERMITTED AND BANNED SUBSTANCES***

*(based on IOC doping classes)*

***ASTHMA      ALLOWED .....Ventolin, ..... by inhaler only"***

Elsewhere, the card identified banned and allowed substances of other kinds.

- 2.12 Since that date, the Appellant has received no information from his national federation, either oral or in writing, to contradict the information on that plastic card.
- 2.13 Mr. Knowles states that a card, providing the same information, was supplied to the team in 1995. The information was stated as being "*valid in New Zealand until December 31 1995*".
- 2.14 Since the date of the Appellant's positive test (and, we infer, in consequence of it) the New Zealand Sports Drug Agency has published a sheet entitled

***"ASTHMA MEDICATION - Banned & Allowed***

***INFORMATION SHEET FOR SPORTING COMPETITORS***

*(VALID to January 31, 1997)*

*Sporting competitors who are on medication for asthma should take comfort in the fact that many brands of medication are allowed, but there are a few important exceptions and it is important for all competitors who may require asthma medication to understand fully the rules.*

*Asthma is usually treated by using inhaled drugs, oral drugs or a combination of both. Examples of drugs in the various categories are listed below.*

INHALERS

*This is the present status of INHALATION treatment.*

*ALLOWED - .... Ventolin, .....*

*....*

*.... - all by inhalation only.*

*.....*

*Athletes using these drugs should obtain a note from their doctor specifying why it is necessary, the date prescribed and lodge it with their national sporting organization.*

*....*

*....*

*....*

*You are advised to declare all medication at the time of a drug test, including asthma medication, even if they are listed above as "allowed".*

*If taking part in an International event, make sure you have obtained prior notification and approval and be prepared to declare use to the organizers prior to competition.*

*.....".*

- 2.15 On the date of the test the Appellant, as was his habit, had used the Ventolin inhaler prior to the competition, taking two draughts of it.
- 2.16 When selected for doping, on the doping control record, which invited to include all drugs taken recently, medical prescriptions given to, etc., the Appellant wrote Lodine (prescription) (anti inflammatory), and did not refer to Ventolin; because he laboured under the belief that he was not obliged to disclose what was, in his understanding, a permitted drug.
- 2.17 The doping test was duly carried out on 7 July 1995, and proved positive for Salbutamol.
- 2.18 The FINA Guidelines for Doping Control in force up to at least June 1995 are set out in the first edition (the "blue book").

- 2.19 In June 1995 FINA produced a second edition of those Guidelines ("the red book").
- 2.20 According to Mr. Hesketh, Chairman of the New Zealand Waterpolo Association, in a statement dated 21 October 1995, his association was not given a copy of the blue book. Mr. Marculescu told us that it is normal procedure for Guidelines to be sent by airmail to all associated federations (which should include the New Zealand Swimming Federation - see FINA Handbook 1994-96 p. 60) and it is reasonable to infer that that Federation was in receipt of the blue book for the Junior World Championships in 1995; certainly, the letter from Dr. Gerrard to FINA dated 8 September 1995 gives rise to at least that inference.
- 2.21 Mr. Marculescu was however unable to confirm the date on which "the red book" was circulated to the member federations.
- 2.22 Mr. Hesketh (in his statement) confirmed that the red book "*was not received by New Zealand Swimming Federation until 31 July 1995.*" This would appear to be confirmed by the date stamp of 31 July 1995 stamped on the FINA covering letter dated June 1995 to all FINA member federations (including New Zealand) enclosing the red book indicating the date of its receipt in New Zealand; and by the statement in the letter from Simpson Grierson, the well-known New Zealand law firm, in its letter dated October 18 1995 which, on behalf of the NZL Swimming Federation, advised counsel for the Appellant as follows: "*We have given you a copy of the letter dated June 1995 and received by our client on July 31, 1995, enclosing the second edition of the FINA Guidelines.*"
- 2.23 In the absence of any indication in the red book as to the precise date when the Guidelines came into effect (which we consider regrettable), we hold that they did not come into effect until 31 July 1995 (inferring, as we do, that the sending to and receipt by all member federations was simultaneous), i.e. after the date of the positive test of the Appellant.
- 2.24 We must therefore consider the appeal by reference to the provisions of the "blue book."

### 3. LEGAL INSTRUMENTS

- 3.1. The FINA Medical Rule at the date of the positive test ("the yellow book") provided, so far as material, as follows:

*"MED 4 Doping Control*

*MED 4.1 Doping is strictly forbidden and can be defined as the use, or distribution to a competitor, of any banned substance or procedure defined by FINA.*

*MED 4.2 All FINA Member federations shall comply with this MED 4. The regulations of FINA Member federations shall indicate that all FINA Rules including doping control Rules shall be followed. Such Rules shall also include comprehensive doping regulations in order that members be informed of their rights, doping control collection procedures, and disciplinary procedures and sanctions. Member federations shall report all cases of misuse within their jurisdiction to FINA.*

*MED 4.3 The identification of a banned substance and/or any of the metabolites in a competitor's urine or blood sample will constitute an offence, and the offender shall be sanctioned. Evidence of blood doping, pharmacological, chemical, or physical manipulation of the urine or blood sample is also an offence which shall be sanctioned.*

*MED 4.5 Banned Substances and Procedures*

*MED 4.5.1 The Medical Committee will periodically review the IOC list of banned substances and procedures.*

*MED 4.11 A form shall be completed for each competitor. The form (which shall include four copies for distribution) shall provide the names of the people present at the doping control station involved with the obtaining of the sample, including the representative of the Medical Committee if present, and the head of the station. Any irregularities must be registered on the form. The competitor's name, country, code number and the event will be entered into the form, as well as any medication taken by the competitor during three days prior to the competition.*

*MED 4.17 Sanctions*

*MED 4.17.1 If a competitor is found to have a positive result, the sanctions shall be applied by the Executive. The Medical Committee shall advise the Executive of the severity of the misuse.*

*MED 4.17.2 A competitor who is found to have a positive A test result may be provisionally suspended by the Executive without hearing until a final decision has been made by the Executive or upon appeal by the Bureau.*

*MED 4.17.3 Before a final decision is made on a particular case, a fair hearing must be granted the competitor (and possibly other persons concerned). Such a hearing should take into consideration the circumstances and the known facts of the case. During the hearing, it is also recommended that the head of the IOC accredited laboratory who reported the result be consulted.*



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*MED 4.17.4 Sanctions are as follows:*

*MED 4.17.4.1 Anabolic steroids, amphetamine-related and other stimulants, caffeine, diuretics, beta-blockers, narcotic analgesics and designer drugs:*

*- 2 years for the first offence, and subject to subsequent testing at the discretion of the Bureau.*

*- Life ban for the second offence.*

- 3.2 The FINA Medical Rules in relation to sanctions only at the time of the hearing ("the purple book") before us (as distinct from at the time of the positive test) provide so far as material as follows:

*DC 9 Sanctions*

*DC 9.1 For the purpose of these Rules, the following shall be regarded as "doping offences":*

- (a) the finding in competitor's body tissue or fluids of a banned substance;*
- (b) the use or taking advantage of banned techniques;*
- (c) admitting having taken advantage of, or having used, a banned substance or a banned technique;*
- (d) the failure or refusal of the competitor to submit to doping control;*
- (e) assisting or encouraging others to use a banned substance or banned technique, or admitting having assisted or incited others;*
- (f) trading, trafficking, distributing or selling any banned substance.*

*DC 9.2.....*

*The finding in a competitor's body tissue or fluids of a banned substance listed in this DC 9.2 (a) shall constitute an offence, and the competitor shall be sanctioned in accordance with DC 9.2 (a), regardless of whether the competitor can establish that he or she did not knowingly ingest the banned substance.*

*(b) Amphetamine-related and other stimulants, diuretics, beta-blockers, beta-2 agonists and related substances:*

*- first offence:*

*- up to two (2) years' suspension.*

*- second offence:*

*- a minimum of two (2) years' suspension up to a lifetime expulsion."*

- 3.3 The blue book provides, so far as material, as follows:

*"Doping is, expressly forbidden and any competitor breaching the FINA Doping Rules (MED 4) renders himself ineligible to take part in competitions under FINA Rules or the Rules of his National Federation.*

*These Guidelines take into account that the FINA Doping Rules MED 4 and the guidelines should be followed as far as is reasonable practicable.*

**"Introduction to Help-Notes**

*One of the corner stones of FINA sports is "fair play". This means that cheating is unacceptable. A particularly disgraceful form of cheating is doping. Doping is the use of methods or the taking of substances (usually various forms of medicaments) which will increase physical performance in an artificial way. Doping is forbidden on medical, as well as ethical grounds.*

*A. Medicaments are intended for the prevention and cure of diseases and not to enhance sports performances by healthy competitors. Medicaments taken to mask pain may lead to serious and permanent injury.*

*B. Doping can be dangerous to your health. Doping substances are usually potent drugs which can cause extremely serious side-effects, particularly in young people. "Drugs cure the sick, but make the healthy ill!"*

*C. Sport, and swimming in particular, should promote physical and mental health. Doping has the opposite effect.*

*From a practical point of view, doping substances and methods, fall into two main categories, one in which they are used at competitions to temporarily increase physical capacity (e.g. stimulants, narcotic analgesics), and one in which they are used outside of competition to enhance the effects of training (e.g. anabolic agents, peptide hormones). For this reason, an anti-doping programme cannot act as a deterrent unless it includes testing both at competitions (all substances) and out of competitions (anabolic agents and peptide hormones).*

*Some substances on the doping list (e.g. ephedrine and related substances) may be ingredients of preparations that can be purchased over the counter without a doctor's prescription. In such preparations, the concentrations of the banned substances are usually low, as are their stimulating effects. Doping with such substances, therefore, renders the competitor ineligible for up to three months (first offence - MED 4.17.3.2.), whereas doping with other listed substances (heavy stimulants, anabolic agents, peptide hormones) renders the competitor ineligible for two years after a first offence (MED 4.17.3.1). Repeated offences result in increasingly severe penalties and sanctions.*

*Since doping is forbidden, competitors who dope themselves violate one of the most important principles of competitive sport, i.e. competition on an equal basis for all competitors. No competitor can feel any pride or joy from a victory achieved through doping.*

**Say no to doping**

(p. 7/8 blue book)

*- Beta 2 agonists -*

*The choice of medication in the treatment of asthma and respiratory ailments has posed many problems. Some years ago, ephedrine and related substances were administered quite frequently. However, these substances are prohibited because they are classed in the category of "sympathomimetic amines" and therefore considered as stimulants.*

*The use of only the following beta 2 agonists is permitted by inhalation:*

*Salbutamol*

*Terbutaline*

*ANY TEAM DOCTOR WISHING TO ADMINISTER THESE BETA 2 AGONISTS BY INHALATION TO A COMPETITOR MUST GIVE WRITTEN NOTIFICATION TO THE IOC MEDICAL COMMISSION."*

*(p. 35 blue book)*

- 3.4 The red book provides, so far as material, as follows:

*"Doping is, expressly forbidden and any competitor breaching the FINA Doping Rules (MED 4) renders himself ineligible to take part in competitions under FINA Rules or the Rules of his National Federation.*

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**Say no to doping**

(p. 5, 6 and 7 "red book")

**DEFINITION OF DOPING** (25 January 1995)

*Doping contravenes the ethics of both sport and medical science. The IOC Medical Commission's definition of doping consists of 2 points:*

- A. *A ban on the administration of substances belonging to selected classes of pharmacological agents, namely stimulants, narcotics, anabolic agents, diuretics, peptide hormones and analogues*

...

I. **Doping classes**

- A. *Stimulants*

....

**DOPING CONTROL**

**Examples and explanations**

*The following list represents examples of the different doping classes to illustrate the doping definition. No substances belonging to the banned classes may be used even if they are not listed as examples. For this reason, the term "and related substances" is introduced. The term describes drugs that are related to the class by their pharmacological actions and/or chemical structure. A longer list of examples belonging to different pharmacological classes of banned substances can be found at the end.*

*If the substances of the banned classes are identified by an IOC accredited laboratory the relevant authority will act.*

I. DOPING CLASSES

A. Stimulants

*Stimulants comprise out various substances which increase alertness, reduce fatigue and may increase competitiveness and hostility. Their use can also produce loss of judgement, which may lead to accidents to others in some sports. Amphetamine and related compounds have the most notorious reputation in producing problems in sport. Some deaths of sportsmen have resulted even when normal doses have been used under conditions of maximum physical activity. There is no medical justification for the use of amphetamines.*

*One group of stimulants is the sympathomimetic amines of which ephedrine, pseudoephedrine, phenylpropanolamine and norpseudoephedrine are examples. In high doses, this type of compound produces mental stimulation and increased blood flow. Adverse effects include elevated blood pressure and headache, increased and irregular heart beat, anxiety and tremor. These compounds are often present in cold and hay fever preparations which can be purchased in pharmacies and sometimes from other retail outlets without medical prescription.*

*Another group of stimulants is the beta-2 agonists. These drugs are unusual because they are classified as both stimulants and anabolic agents. When taken by mouth or by injection they exert powerful stimulatory and anabolic effects.*

***Oral and injectable administration of beta-2 agonists is banned***

*Of the beta-2 agonists only SALBUTAMOL and TERBUTALINE are permitted and only by inhalation. Any physician wishing to administer beta-2 agonists by inhalation must give written notification to the relevant authority.*

*The choice of medication to treat asthma and other common respiratory disorders pose problems because some of the more commonly prescribed substances are powerful stimulants. Furthermore because these drugs have many different product names, the status of a drug may be confusing. The most prudent approach is never take or prescribe a product for colds, sore throats, and flu without first checking with a physician or pharmacist who has special expertise in this area.*

*Some examples of stimulants are:*

<i>amiphenazole</i>	<i>amphetamines</i>
<i>amineptine</i>	<i>caffeine*</i>
<i>cocaine</i>	<i>ephedrines</i>
<i>fencamfamine</i>	<i>mesocarb</i>
<i>pentylentetrazol</i>	<i>pipradol</i>
<i>salbutamol**</i>	<i>terutaline**</i>

*and related substances.*

*\* For caffeine the definition of a positive depends on the concentration of caffeine in the urine. The concentration in urine may not exceed 12 micrograms per millilitre.*

*\*\* Permitted by inhaler only and must be declared to the relevant authority.*

*(see "notification form").*

(p. 33-34 "red book")

**ANNEXE 2  
MEDICAL NOTIFICATION FORM**

**FROM:**.....

**TO:**.....

**THE UNDERSIGNED CONFIRM TO HAVE ADMINISTERED FOR  
MEDICATION REASONS TO:**

**COMPETITORS NAME:**.....

**EDICATION NUMBER:**.....

**SPORT:**.....

**A PERMITTED BETA-2 AGONIST AND A SUBSTANCE OF CLASS III OF THE  
IOC LIST OF DOPING CLASSES AND METHODS, HAVE TO BE REPORTED  
TO THE RELEVANT AUTHORITY:**

**NAME OF SUBSTANCE:**.....

**DOSAGE:**.....

**ROUTE AND DATE OF ADMINISTRATION:**.....

**DURATION OF ADMINISTRATION:**.....

**DIAGNOSIS:**.....

**DATE:**.....

**NAME OF HEAD PHYSICIAN:**.....

**SIGNATURE:**.....

**FINA MEDICAL COMMITTEE**

**DECLARATION OF DRUG USE** DATE:.....

*The following athlete has been given, or used, the following medications for the following circumstances:*

**NAME OF ATHLETE:**.....**M/F**.....

**SPORT:**..... *Swimming*.....*Waterpolo*.....*Synchro*.....*Diving*  
.....*Open Water*

**COUNTRY:**.....

**MEDICATION:**.....

**METHOD OF ADMINISTRATION:** ..... *Oral*  
..... *Intramuscular*  
..... *Intravenous*  
..... *Intra-articular*  
..... *Subcutaneous*  
..... *Topical*  
..... *Other:* .....

**APPROXIMATE DATE OF ADMINISTRATION:**.....

**DIAGNOSIS FOR TREATMENT:**.....

**TREATING PHYSICIAN: HYSICIA:**.....

**TEAM PHYSICIAN:**.....

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*The decision of the FINA Medical Committee regarding the above described use of medication is:*

..... *Approved without reservation*

..... *Approved with comment:*.....

..... *Disapproved*

**Comments:**.....

(p. 46/47 Annex 2, "red book")

### **DOPING CONTROL FORM**

- Q.** *What is the Doping Control Form?*
- A.** *The Doping Control Form is made up of a set of four or more sheets of paper.*
- Q.** *Why are there so many sheets?*
- A.** *Usually, the top or original sheet plus one copy are kept by the Doping Control authority; one is given to you to keep and another is sent to the laboratory along with your sample.*
- Q.** *What if the laboratory recognises my name on the form?*
- A.** *To protect your privacy, the sheet that is sent to the laboratory will not have your name and signature on it. Your sample will only be known to the laboratory as a code.*
- Q.** *What is on this form?*
- A.** *These forms contain a list of standard details. The most important from your point of view is: .....*  
*Your family name,*  
*Your first name,*  
*Your event,*  
*Bottle Code A,*  
*Bottle Code B,*  
*Container Code A,*  
*Container Code B,*  
*Declaration of medication taken recently,*  
*Your signature.*
- Q.** *Why do I need to "Declare medication taken recently"?*
- A.** *The "Declaration of medication taken recently" section of the form helps the laboratory when they do their test of your sample. Everything you take, even vitamins and herb teas, should be written on this list. If you keep a list of what you are taking with you always, you can write their proper names on the form.*
- Q.** *Do I need to check this form before signing it?*
- A.** *For your own good, it is important you check the form very carefully before you sign it. This is your chance to make sure all the important details like your name, the codes on the bottles, etc., are correct. If you have anything to say about the test (good or bad) always write this down on the form in the place provided. Don't forget to take your copy of the Doping Form when you leave the Doping Control and to keep it somewhere safe. Think of the form as your proof of what happened during the Control."*

(p. 12 and 13 "red book")



#### **4. DOPING CONTROL FORM**

4.1 It was not contended by FINA that the absence of a declaration of Salbutamol in the doping test form would constitute a doping offence. The obligation to declare in Rule MED 4.11 (quoted above) is not an obligation, the breach of which is attended by any sanction (see MED 4.17 which is the exclusive code in relation to sanctions). Our interpretation is consistent with that of the Tribunal in the Lethinen case which said in paragraph 42 p. 15:

*"The absence of a declaration does not in itself constitute a doping offence."*

4.2 In these circumstances we note only this.

- (1) We endorse, with respect, what was said by the Tribunal in Lethinen case (para. 42, p. 15) namely that it is important that a declaration should be clear and frankly completed; both because it helps the laboratory, which carries out a test of a sample (see red book p. 13 B.); and because of its utility in assisting the competitor in establishing the medical necessity (if such exists) for the use of the substance in question.
- (2) It would clearly be desirable if the FINA Medical Rules were revised so as to attach a flexible sanction to a failure to comply with an important and mandatory obligation of this character.

#### **5. DOPING OFFENCE**

5.1 The arguments, impressively advanced by Counsel for each party, can be succinctly summarized.

Mr. Howman for the Appellant contended that since the evidence showed (as we have found, and as was indeed not challenged) that the Appellant had used Salbutamol by inhalation, it was in the circumstances, under the rules or regulations, a permitted and not a banned substance; and therefore no doping offence was committed.

Mr. Morand for FINA contended that, upon a purposive construction of the rules and guidelines [the red and/or blue book(s)], in order to constitute Salbutamol a permitted as distinct from a banned substance not only had it to be taken by inhalation, but also there must be prior notification to a relevant authority, either a national federation or FINA itself.

If Mr. Morand's construction is correct, and in the light of our finding as to the absence of any such notification at the material time to either the New Zealand Swimming Federation, or to FINA (or to the IOC Medical Commission) (para. 2.9-10 above), the Appeal must fail.

- 5.2 The key issue before this Tribunal accordingly, is exposed as one of construction of the rules and regulations as we find apply to the facts of this case.
- 5.3 If one adopts a literal construction of the rules only, Mr Howman's submission would be extremely persuasive. A doping offence under the rules is an offence of strict liability; constituted by the identification of a "banned substance" in a competitors urine or blood sample (MED 4.3. "Banned substances" are those which derive from the IOC's only "Medical Rule 4.5").

We observe that it would be preferable if there were a direct definition of "banned substance" by cross reference, if need be, to the IOC list, rather than an indirect reference as it is to found in FINA's Medical Rule MED 4.5.1. However, the competitors who are the interested parties could scarcely have any doubt about what the rules contemplate to be banned substances.

- 5.4 In the blue book, Beta 2 agonists are identified as stimulants, thus prohibited substances (B. 35).

An exception is made in the following circumstances, which for convenience, we quote again:

*"The use of only the following beta-2 agonists is permitted by inhalation:  
salbutamol  
terbutaline*

*ANY TEAM DOCTOR WISHING TO ADMINISTER THESE BETA 2 AGONISTS BY INHALATION TO A COMPETITOR MUST GIVE WRITTEN NOTIFICATION TO THE IOC MEDICAL COMMISSION.*

(p. 35 "blue book")

- 5.5 On Mr. Howman's constructions, use by inhalation is sufficient to convert Salbutamol from a banned into a permitted substance; and the obligation imposed upon team doctors (and highlighted in the text) to notify does not have to be performed in order to achieve such conversion. It is, in other words, completely independent of the elements which go to make Salbutamol in certain circumstances a permitted substance, and is, moreover, an obligation whose breach is without sanction. Not without hesitation we found ourselves unable to agree.
- 5.6 It is clear from the juxtaposition of the instructions to the doctors, as well as the context in which the relevant provision appears (e.g. reference to medication) that, at the very least, Salbutamol is only a permitted substance where used for bona fide, medically sanctioned, therapeutic purposes. Indeed, Mr. Howman founded his submission in support of the Appeal on the basis that the Ventolin was medically prescribed.
- 5.7 In the Lethinen case where, unlike in the present case, there was evidence of doctor's written notifications (to a Finnish Antidoping Committee) of the accused athlete's use of Ventolin by inhalation prior to the positive test (see para. 5.1 p. 17), the Tribunal said expressly "*the Panel agrees with FINA that one should not admit any evidence to prove medical assistance otherwise than through prior notification*" (in para. 40 p. 14) stressing in the previous sentence that the "*the duty of prior notification may serve as a strong deterrent against some forms of possible cheating.*" Although we are not obliged to follow the reasoning of a previous Tribunal (especially where it was not essential to the decision which they reached), we are disposed to do so, both out of a sense of comity and because of the desirability of consistent decisions of the CAS, unless there were a compelling reason, in the interest of justice, not to do so.

- 5.8 We do not find such a reason in the present case. Adopting a purposive construction of the relevant rules and Guidelines incorporated into the manner which we have identified, we conclude that a prior notification is not in matter of evidence only going to establish a medical necessity, but a sine qua non of the proof of such necessity.
- 5.9 In the Quigley case (TAS 94/129) the Tribunal said:  
*"55. The fight makers against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders."*
- 5.10 We have borne this principle in mind. We do not, however, base our decision on de facto practice or on "mutually qualifying or event contradictory rules" but on an approach to interpretation which seeks to discern the intention of the rule-maker, and not to frustrate it.
- 5.11 In particular we consider that, in this context, we are permitted to have regard to the provisions of the red book, which seem to us to be clarificatory rather than emendatory of the predecessor provisions in the blue book. In this instance, at p. 35, Salbutamol is identified as *"permitted by inhaler only and must be declared to the relevant authority"*. No competitor, in whose case was governed by the Doping Control Guidelines in the red book (in force, as we have determined, from 31 July 1995), would be able to advance with any efficacy the argument advanced before us by Mr. Howman.
- 5.12 Accordingly, we conclude that the Appeal as to liability must fail, and that a doping offence has been proved. For the reasons we now go on to set out, we consider the Appellant's offence to be of the nature of a technical breach only.

## 6. SANCTION

- 6.1 On the basis of the Rules as to sanction in force at the date of the hearing and the Appeal before FINA, the relevant organs of that body had no option but to impose the sanction of two years suspension that they did. (However, we had our attention drawn to the case of Samantha Riley, when the FINA Executive administered the sanction of a severe warning only, having, as it appears, determined that a literal application of the inflexible rules would result in an injustice.)
- 6.2 As a matter of law, we consider we enjoy a freedom not strictly available to FINA. The Rules in "the purple book", which came into effect on 17 July 1996, allow for discretion in the imposition of the sanction for a doping offence involving a substance such as Salbutamol, substituting the two years suspension as a maximum rather than a mandatory sanction.
- 6.3 The doctrine of *lex mitior*, i.e. that which permits a disciplinary tribunal to apply current sanctions to the case before it, if sanctions are less severe than those which existed at the time of the offence, is applicable in this case.
- 6.4 We cite in this context from the advisory opinion pronounced by the CAS and the request of the International Cycling Union and the Italian National Olympic Committee on February 1995 (TAS 94/128, para. 33 p. 48 to 49):
- "In the Panel's opinion, the principle whereby a criminal law applies as soon as it comes into force if it is more favourable to the accused (ex mitior) is a fundamental principle of any democratic regime. It is established, for example, by Swiss law (art. 2 para. 2 of the Penal Code) and by Italian law (art. 2 of the Penal Code). This principle applies to anti-doping regulations in view of the penal or at the very least disciplinary nature of the penalties that they allow to be imposed. By virtue of this principle, the body responsible for setting the punishment must enable the athlete convicted of doping to benefit from the new provisions, assumed to be less severe, even when the events in question occurred before they came into force."*

6.5 We do not believe FINA either would or should have imposed the sanction of two years' suspension, if they had enjoyed the freedom as to penalty which we now enjoy, on the facts as found by us. In any event, we do not consider it necessary to do so. On the contrary we consider that, as far as the Appellant is concerned, the offence is a technical one; and that the fact of the finding of liability by the FINA organs, which we have felt obliged to uphold, by itself constitutes a sufficient penalty.

6.6 The following matters, in particular, incline us to that conclusion.

1. FINA through its counsel made clear on several occasions that the Appellant was, in their view, neither a cheat nor a liar. FINA do not suggest that the Appellant used the Ventolin inhaler for the purpose of gaining a competitive advantage; or that he sought to mislead any person about or in connection with misuse of it.  
Having seen and heard the Appellant, we entirely agree that the Appellant should not suffer any suggestion that by reason of what we consider to have been a technical breach of the rules he is therefore a cheat or a liar. We are satisfied he is neither. The Appellant impressed us as an honest, dedicated athlete of complete integrity. We consider FINA's counsel to have very properly conceded that the Appellant is neither a cheat nor a liar. There should be no such stigma attaching to him.
2. The Appellant, as we have found, operated under the bona fide belief that his use of the Ventolin inhaler, even during the course of international competitions, was entirely legitimate.
3. The Appellant, as the evidence shows, used Ventolin as a matter of medical necessity, and for the purpose of enabling him to participate in sport, including water-polo. It removed an obstacle, rather than provided a ladder. It levelled the playing field, and did not tilt it in his favour.
4. It is common ground that had the Appellant by himself, his doctor, or other appropriate agent, informed his national federation, or FINA or other relevant international body, of his use of the Ventolin inhaler for medical purposes (which he did not), the offence would not have been committed. It was non-compliance with procedures rather than abuse of substance, which was the foundation of the charge against him, and of FINA's (and our) finding. (It is accordingly quite unnecessary for us to enter into the debate (if debate there be) as to whether Salbutamol taken by inhaler enhances performance. The

Appellant's evidence states that it did not, and FINA, for its part, considering the matter to be irrelevant, did not seek to adduce evidence to contrary effect).

5. The fault in this matter appears to us to lie with the national federation. Medical Rule MED 4.2 (quoted above), as well as the responsibilities inherent in the status of a national federation, obliged the NZL federation, in our view, to take every step to ensure that competitors under their jurisdiction were familiar with all rules, regulations, guidelines and requirements in such a sensitive area as doping control. (Only in this instance do the national federations appear to have fallen short of that obligation; but they appear to have been responsible (no doubt through inadvertence) for providing misinformation to the competitors that received the credit-card sized plastic cards to which reference is made above. [In so saying, we are conscious that we have not had direct evidence from the national federation; but consider that the plastic card by itself justifies the comments we have made]; we are gratified to see that the NZL Sports Drug Agency has now taken effective corrective measures and has explained the position to all interested persons with great clarity.

## **7. GENERAL OBSERVATIONS**

The experience of this Appeal allows us to stress the following matters:

- 7.1 It is important that fight against doping in sport, national and international, be waged unremittingly. The reasons are well known, and are set out in the introducing notes to the FINA Guidelines, which we have quoted above at para. 3.3 and 3.4
- 7.2 It is equally important that athletes in any sport (including Waterpolo) know clearly where they stand. It is unfair if they are to be found guilty of offences in circumstances where they neither knew nor reasonably could have known that what they were doing was wrong (to avoid any doubt we are not to be taken as saying that doping offences should not be offences as a strict liability, but rather that the nature of the offence (as one of strict liability) should be known and understood.

- 7.3 For this purpose, it is incumbent both upon the international and the national federation to keep those within their jurisdiction aware of the precepts of the relevant codes.
- 7.4 We have already made observations as to the actions of a national federation in this context (see para. 6.6 above).
- 7.5 As to FINA, it would be useful if the relevant rules could be made clear and more precise so that all athletes could understand them more easily and disputes over the meaning, if possible, avoided. If, the FINA Rules provided that Salbutamol was a banned substance except in circumstances where (i) it was taken by inhaler (ii) upon medical advice and as a matter of medical necessity (iii) advance notification of its use by that means and for that purpose having been given to the national or international federation, the issue in this appeal would have been a relatively simple issue of fact.

The Rules would be further improved by (i) a clear definition of "*banned substances*" (see para. 5.3 above); (ii) a clear identification of the relevant authority to whom prior notification must be given; (iii) if the FINA Guidelines were incorporated within the Rules by cross reference to the Rules; (iv) if the Rules contained a date for their coming into effect; (v) if particular sanctions were applied for those provisions in rules or guidelines which are of mandatory nature (e.g.: the obligation to declare, see para. 4.2.2 above); an obligation without a sanction attached is not an effective obligation.

## 8. COSTS

- 8.1 Our jurisdiction to allocate the costs of this appeal derives from Rule R65.3 of the CAS regulations (as amended), "*the costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.*"



- 8.2 We are obliged by that rule in determining the allocation of cost, to take into account the outcome of the proceedings, as well as the conduct and financial resources of the parties. We are also entitled, in our view, to take account of other matters potentially material to an award of costs.
- 8.3 In our view, Mr. Cullwick has been the substantial, if not the complete winner of this appeal. True it is that the finding of an offence remains untouched; but we trust that (i) our finding that the offence was a technical one, (ii) our finding that the primary responsibility rests with the national federation and not the Appellant, demonstrates that even on the issue of liability, the Appellant's position has been ameliorated. We have further taken the view that this is not a circumstance in which the offence justifies any suspensive penalty at all by a body with a freedom to abstain from the imposition of such.
- 8.4 On the other hand, FINA have had the finding of an offence upheld; and have reinforced the obligation that then as now lies on competitors to give prior notification to the relevant authorities of therapeutic use by inhaler of Salbutamol.
- 8.5 All these facts together (and bearing in mind the distance which the Appellant has had to travel in order to seek justice), we consider that a fair award would be of SF4,000.- to the Appellant, to be paid to him by FINA; and FINA should pay their own costs. We have, of course, no power to order costs to be paid by the NZL Swimming Federation. We would only observe that, had we enjoyed such power (subject always to hearing arguments), we should have felt justified in exercising it in view of their primary responsibility for this unfortunate affair.

\* \* \* \* \*

**DECISION**

The Panel hereby rules:

1. The appeal lodged by Mr. Anthony Cullwick is partially upheld.
2. The sanction pronounced against the Appellant is cancelled.
3. The Respondent shall pay SF4,000.- to the Appellant in reimbursement of part of his costs.

Done in Lausanne and dated March 13, 1997.

**The Court of Arbitration for Sport**

**The President:**

Michael J. Beloff, Q.C.

**The Arbitrators:**

Timothy J. Castle

François Carrard