



**Arbitration CAS 2009/A/1831 Fédération Internationale de Natation (FINA) v. Czech Swimming Federation (CSF) & Zofie Kvackova, award of 21 January 2010**

Panel: Mr Efraim Barak (Israel), President; Mr Denis Oswald (Switzerland); Mr Markus Wanger (Liechtenstein)

*Aquatics (swimming)*

*Doping (failure to provide whereabouts information)*

*Admissibility of the appeal*

*Applicable law*

*Obligation to provide whereabouts information for an athlete included in the national registered testing pool list*

*Notification of the filing failure as a precondition for conviction*

*Burden of proof*

- 1. The principle of the prohibition against the retroactive application of law is subject to several exceptions, including an exception for law or rules which are of procedural nature. In the absence of an express provision to the contrary, laws and rules related to procedural matters apply immediately upon entering into force and regardless of when the facts to be judged occurred. Such is the case for the 2009 FINA Anti-Doping Rules, which provide for a direct appeal to the CAS. In any event, FINA's entitlement to appeal a federation's decision directly to CAS would also have been admissible on the basis of the 2008 FINA Doping Control Rules – the applicable substantive anti-doping rules – which provide that the decision may be appealed exclusively to CAS if an athlete is to be considered an international-level competitor.**
- 2. As a matter of principle, the FINA Anti-Doping Control Rules are not directly applicable to doping violations on a national level and a member of FINA should therefore implement their own anti-doping rules and should, pursuant to the FINA Doping Control Rules, indicate that the FINA Anti-Doping Rules shall be deemed as incorporated and shall be directly applicable and shall be followed *inter alia* by the competitors. However, the national regulations for doping control and sanctions in sport also apply on athletes as clearly stated in the "*Purpose and Scope*" chapter of those rules. Therefore both anti-doping rules, those of FINA's and the national regulations are mutually applicable. In this respect, it is the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred which apply unless the principle of "*Lex mitior*" applies under the circumstances of the case.**
- 3. Once a swimmer is included in the National Registered Testing Pool list and in the absence of any official statement or notification that this swimmer is stroked out of the list, the swimmer remains on the list for the whole period of the validity of this list, regardless from the question whether or not s/he was a member of the national team. S/he is therefore under the obligation to comply with the whereabouts requirements.**

4. **The failure to provide whereabouts information, will be considered a violation under the applicable regulations only after the competent body had submitted a written warning to the swimmer. The written warning appears as a precondition to convict a swimmer for a failure to provide whereabouts information. Furthermore, it seems essential to establish the existence of duly notified warnings, as the aim of the warning is to bring athletes to the awareness that they should comply with the obligation to provide the whereabouts information.**
5. **FINA and its member federations shall have the burden of establishing that an anti-doping rule violation has occurred. In this respect, the occurrence of an anti-doping violation should be established to the comfortable satisfaction of the hearing body. By not being in a position to produce the evidence of the formal written warnings, the minimum requirements for sanctioning an athlete for a failure to provide whereabouts information are not met and the anti-doping violation is not established.**

The Fédération Internationale de Natation (FINA or the “Appellant”) is the governing body of swimming on a worldwide level and has its registered office in Lausanne, Switzerland.

The Czech Swimming Federation (CSF or the “First Respondent”) is the governing body for swimming in the Czech Republic and is itself affiliated with FINA.

Ms Zofie Kvackova (the “swimmer” or the “Second Respondent”) is a Czech swimmer, who is affiliated with the Czech Swimming Federation (CSF).

On three occasions during the year 2008, the swimmer did not provide up-to-date “*whereabouts information*” so that out of competition testing could be conducted. Pursuant to the World Anti Doping Code (WADA Code), out of competition testing forms an essential part of the regime for the prevention of doping.

In a letter dated September 25, 2008, the Czech Anti-Doping Committee informed FINA that the swimmer failed to provide whereabouts information on three occasions after being notified on April 17, July 22 and August 20, 2008. The aforementioned notifications to the swimmer were not included in the exhibits produced by the Appellant nor were they submitted by the CSF although required by the Panel to do so.

Further to this information, FINA addressed a fax, dated November 11, 2008, to the CSF asking them to keep FINA informed about the steps taken towards the swimmer regarding her failure to provide whereabouts information.

On November 22, 2008, the CSF Disciplinary Commission held a hearing in presence of the swimmer and considered that she had committed a breach of rule 2.4 of the regulations for doping control and

sanctions in sports in the Czech Republic, and decided to sanction the Swimmer by a conditional suspension for a period of three months, “*with a probation period of 6 months*”, as of November 23, 2008.

The written decision was rendered on November 24, 2008 by the CSF Disciplinary Commission. However, according to the Appellant, this decision was only sent to FINA on March 25, 2009.

On March 25, 2009, after several requests and inquiries by FINA, CSF sent a copy of the minutes of the hearing held by the CSF Disciplinary Commission to FINA, both in Czech and in English. The minutes contained also the decision and the CSF expressly mentioned in its letter to FINA that the decision contained in the minutes of the hearing was to be considered “*final*”.

In a letter dated April 1<sup>st</sup>, 2009, sent to the CSF, FINA complained about the lack of cooperation of the CSF, which had been repeatedly requested to forward the decision since November 2008. Moreover, in the same correspondence, the Appellant informed the CSF that the decision of November 24, 2008 taken by the CSF Disciplinary Commission was not compliant with the “*DC Rules*” and expressed its intention to appeal this decision. In that respect, FINA asked the CSF to indicate if there was any Appellate Body which could be seized, reserving its rights to appeal the decision before the CAS.

The CSF did not answer to the above mentioned letter of April 1<sup>st</sup>, 2009.

On April 15, 2009, FINA filed a Statement of Appeal before the Court of Arbitration for Sport (CAS) against the decision rendered on November 24, 2008 by the CSF Disciplinary Committee in the matter concerning Ms Zofie Kvackova.

At the Appellant’s request, the CAS, by means of its letters of April 21<sup>st</sup> and May 18, 2009, granted an extension of the deadline for the Appellant to file the Appeal Brief to CAS, until FINA was provided with the complete case file by the CSF. The granted deadline extension implied that FINA would have to file its Appeal Brief within ten days as from receipt of the complete file by the CSF.

On 1<sup>st</sup> June 2009, while the appeal was already pending, the CSF sent an additional letter to FINA, containing explanations on the reasons for the setting of the conditional suspension. In substance, the CSF explained that it had decided to do so because, according to the view of the CSF, when the swimmer received her second and third notice she was not a member of the Czech National Swimming Team anymore, and therefore, in the opinion of the CSF, not obliged to submit the requested whereabouts information.

On June 3, 2009, the Appellant informed CAS that it received additional documents sent by the CSF on 2<sup>nd</sup> June 2009 and informed CAS that the Appeal Brief would be filed in the ten days deadline extension which would expire on June 12, 2009.

On June 12, 2009, the Appellant filed its Appeal Brief to CAS. The Appellant reiterated the conclusions already taken in its Statement of Appeal of April 15, 2009, and submitted the following requests for relief:

1. *“The Appeal of FINA is admissible.*
2. *The Decision of the CSF Disciplinary Committee rendered on November 22, 2008 in the matter of Ms Zofie Kvackova is set aside.*
3. *Ms Zofie Kvackova is sanctioned with a period of ineligibility between three months and two years starting on the date on which the CAS Award will enter into force. Any period of ineligibility (whether imposed to or voluntarily accepted by Ms Zofie Kvackova) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
4. *All competitive results obtained by Ms Zofie Kvackova from August 29, 2008, through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.*
5. *FINA is granted an award for costs”.*

On June 15, 2009, CAS granted to both the CSF and Ms Zofie Kvackova a twenty days deadline to submit their answers to CAS, pursuant to article R55 of the Code of Sports-related Arbitration (the “Code”), emphasizing that, in case of failure to submit their response in the given time limit, the appointed Panel may nevertheless proceed with the arbitration and deliver the award.

On June 17, 2009, CAS requested from the CSF that additional documents should be provided before July 6, 2009, notably the complete case file and the CSF Anti Doping Regulations to include also the regulations and procedural requirements regarding competitors’ availability for “Out of competition Testing”.

The CSF answered on 23<sup>rd</sup> June 2009 that all possible material had already been sent, and only acknowledged that it would send a copy of the Regulations for Doping Control in Sport in the Czech Republic into force between 2004 and 2008. In the same letter, the CSF furthermore explained that, the swimmer thought she was not obliged to comply with the whereabouts information, since, at that time, she was not member of the National Swimming Team anymore.

On 7 July 2009, and as demanded by the Appellant CAS requested additional information from the Czech Anti-Doping Committee, in particular to verify whether Ms Zofie Kvackova was registered in the National Testing Pool between April and August 2008.

By fax of 13 July 2009 sent to CAS, the Czech Anti-Doping Committee provided the complete Czech national swimming team list for the period between 1<sup>st</sup> September 2007 and 31<sup>st</sup> August 2008. It furthermore explained that, according to the criteria accepted by the CSF at the beginning of year 2005, any member of the Czech national swimming team is also to be considered as a member of the National Testing Pool. Therefore, in the Czech Anti-Doping Committee’s view, Ms Zofie Kvackova, who is mentioned as a member of the Czech national swimming team, was registered in the National Testing Pool between April and August 2008.

Although duly requested to provide CAS with their formal answer to the Appeal Brief, neither the CSF nor Ms Zofie Kvackova did react to this invitation. On 14 July 2009, the CAS Counsel reminded the Respondents that still no Answer was received by the CAS and informed them of the letter sent by the Czech Anti-Doping Committee.

By letter of July 29, 2009, the CAS informed the Parties that the Second Respondent did not submit any answer and that, in absence of any formal answer of the First Respondent, the letter sent on June 23, 2009 was considered as the answer of the First Respondent to the Appeal.

By letter dated 28 August 2009, the Panel *inter alia* noted that some requested documents had still not been produced and requested both the Appellant and the CSF to produce on or before 4 September 2009 (i) the complete case file, (ii) the edition of the Regulations for doping control and sanctions in sports in the Czech republic, applicable between April and August 2008, and any other regulations that they deem applicable and that had still not been produced.

No additional documents have been sent further to this request.

On 31<sup>st</sup> August 2009, the counsel to the CAS, on behalf of the President of the Panel, issued an Order of Procedure, which was consequently accepted by all parties which duly countersigned it.

In accordance with Article R57 of the Code, and after consultation of the parties, The Panel decided not to hold a hearing and to issue an award on the sole basis of the written submissions.

The Panel discussed the case on a first occasion during a conference call held on 14 September 2009 between the members of the Panel, the counsel of the CAS as well as the appointed ad hoc clerk. On this occasion, the Panel decided to suspend the deliberations, in order to request the CSF to provide the Panel with evidence of the three notifications sent to the swimmer. As already mentioned the notifications were not submitted by neither of the parties, and therefore the Panel decided to grant the CSF another possibility to submit those documents.

The CSF did not respond at all to this request.

Therefore, the Panel continued the deliberations by means of a second conference call on 20 October 2009.

## LAW

### **Jurisdiction of the Panel and Admissibility of the Appeal**

1. The jurisdiction of CAS, which is not disputed, derives from art. 13 ff. of the FINA Doping Control Rules and art. R47 of the Code. It is further confirmed by the order of procedure duly signed by the Parties. Consequently, CAS has jurisdiction to decide the present dispute.
2. Under art. R57 of the Code, the Panel has the full power to review the facts and the law. The Panel, therefore, in the exercise of its jurisdiction, does not examine only the formal aspects of

the appealed decision, but holds a trial *de novo*, evaluating all facts, including new facts, which had not been mentioned by the parties before, and all legal issues involved in the dispute.

3. The Panel has to examine whether the swimmer failed to provide whereabouts information on April 17, July 22 and August 20, 2008, and as such violated the 2008 FINA Doping Control Rules.
4. Preliminary, the Panel wishes to recall that the principle of the prohibition against the retroactive application of law is subject to several exceptions, including an exception for law or rules which are of procedural nature. In the absence of an express provision to the contrary, laws and rules related to procedural matters apply immediately upon entering into force and regardless of when the facts to be judged occurred (see CAS 2000/A/274).
5. FINA's entitlement to appeal the decision of the CSF's Disciplinary Committee directly to CAS relies on the 2009 FINA Anti-Doping Rules, DC 13.1.2, in conjunction with the principle that the prohibition against the retroactive application of rules is not applicable to rules that are procedural in nature (see CAS 2000/A/274). Furthermore, this right of appeal is also provided for by the rule 13.1 of the Regulations for doping control and sanctions in sports in the Czech Republic.
6. Nevertheless, the Panel observes that even if the 2008 FINA Doping Control Rules would have applied, still the direct appeal would be admissible, taking into account that in the case at hand Ms Zofie Kvackova is to be considered an international-level competitor and FINA's right to lodge an appeal finds its basis in Articles DC 13.2.1 and DC 13.2.3 of the 2008 FINA Doping Control Rules, which provide that the decision may be appealed exclusively to CAS.
7. Article DC 13.1.2 of the FINA 2009 Doping Control Rules reads as follows:  
*"Where FINA has a right to appeal under DC 13 and no other party has appealed a final decision within the Member Federation's process, FINA may appeal such decision directly to CAS without having to exhaust other remedies in the Member Federation's process".*
8. FINA's right to appeal the decision of 24 November 2008 delivered by the CSF Disciplinary Commission, derives from this provision and is undisputed.
9. The appeal was filed on April 15, 2009, within the deadline provided by art. DC 13.6 of the FINA Doping Control Rules namely within 21 days after receipt of the decision, which was only notified to FINA on 25 March 2009.
10. The Panel observes that the appeal filed formally complies with the requirements of art. R48 of the Code. It follows that the appeal filed by FINA is admissible, which is also undisputed.

### Applicable law

11. Art. R58 of the Code provides that 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-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate.
12. The Panel notes first that it is essential to establish which Anti-Doping Rules are applicable to the case at hand since FINA and the CSF have different views on the applicable regulations. On the one hand FINA asserts that the FINA Anti Doping Control Rules are the applicable one, but on the other hand the CSF Disciplinary Committee decided that the swimmer had committed a breach of rule 2.4 of the Regulations for doping control and sanctions in sports in the Czech Republic.
13. As a matter of principle, the FINA Anti Doping Control Rules are not directly applicable to doping violations on a national level and a member of FINA should therefore implement their own anti-doping rules and should, pursuant to Art. DC 14.1 of the 2009 FINA Doping Control Rules, indicate that the FINA Anti-Doping Rules “*shall be deemed as incorporated and shall be directly applicable and shall be followed*” *inter alia* by the competitors. Regarding the CSF, it indeed implemented the FINA Doping control Rules on its affiliated members, including the Second Respondent, through the Charter of The Czech Swimming Federation (Art. 3.1.2) and the CSF Rules of Disciplinary Proceedings (Art. 9.4).
14. However, the 2008 Czech Regulations for Doping Control and Sanctions in Sport in the Czech Republic also apply on the Second respondent as clearly stated in the “*Purpose and Scope*” chapter of those rules which oblige the sporting bodies in the Czech Republic “*to incorporate the regulations by reference to their sporting and technical rules and to ensure that all participants under their authority are provided information on the regulations and are bound by its provisions*”. Here again, as is the case also with the FINA Rules, Art. 9.4 of the CSF Rules of Disciplinary Proceedings incorporate these rules.
15. The conclusion of the Panel is therefore that both Anti Doping Rules, those of FINA’s and the Czech Regulations for Doping Control and Sanctions in Sport are mutually applicable on the facts of this case. This fact may create difficulties in a situation in which the Rules are contradictory or could bring to different results under the same facts. However this is not the case here. As will be further explained, the examination of the facts in light of both sets of regulations will bring to the same conclusion.
16. Art. DC 17.7 of the 2009 FINA Doping Control Rules expressly provides that its rules are non-retroactive. According to this provision, “*the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred unless the Panel determines the principle of “Lex mitior” appropriately applies under the circumstances of the case*”. The same principle is to be found in the Art. 20.1 of the 2009 Regulations for Doping Control and sanctions in Sport in the Czech Republic.

17. Therefore, the Panel is of the opinion that the 2008 FINA Doping Control Rules and the 2008 Regulations for Doping Control and sanctions in the Czech Republic shall mutually govern the merits of the present case since the alleged failures all occurred in 2008.

### Merits

18. The main issues to be resolved by the Panel in deciding this dispute are the following:
- Was the swimmer included in the Registered Testing Pool on the dates of the notifications and therefore liable to comply with whereabouts requirements?
  - If so, did the swimmer commit a violation under the 2008 FINA Doping Control Rules?
  - If so, which sanction is to be deemed appropriate in the case at stake?

*A. Was the swimmer part of the Czech Registered Testing Pool?*

19. The Panel observes that the question whether the swimmer was included in the Czech Registered Testing Pool is far from being clear and simple. This question has to be clarified, since the CSF and the Czech Anti-Doping Committee, two very distinguish and important national bodies in the Czech Republic do not have the same perception of the question.
20. The CSF's opinion derives from its letter of June 1<sup>st</sup> 2009. According to this correspondence, the sanction imposed on the swimmer was conditional, since at the time the swimmer received her second and third notice, she was not a member of the Czech National Swimming Team anymore and therefore not obliged to submit the whereabouts. In other words, the CSF considers that on the moment the swimmer left the National Swimming Team, she was no longer registered in the National Registered Testing Pool and therefore released from the duty to comply with the whereabouts requirements.
21. As opposed to the CSF's view, the Czech Anti-doping Committee asserts that the swimmer was under the obligation to comply with the whereabouts requirements since she was included in the National Registered Testing Pool for the period between 1<sup>st</sup> September 2007 and 31<sup>st</sup> August 2008. The Panel understands from these explanations that, in the view of the Czech Anti-Doping Committee, once the swimmer was included in the list, her status as being part of the National Registered Testing Pool remained unchanged during the full period of the validity of the list (one year), regardless of the question whether or not she continued to be at the same period a member of the National Swimming Team. Hence, the swimmer was included in the National Registered Testing Pool, even if after April 2008 she was no longer a member of the Czech National Swimming Team. This view is also supported by the wording of the documents produced to the Panel by the Czech Anti-Doping Committee on July 13, 2009.
25. The Panel has to decide which of the two above-mentioned bodies correctly appreciates the situation. On the one hand, it has to be noted that if the CSF's view - that the swimmer was not



anymore included in the National Registered Testing Pool when she left the National Swimming Team- was to be considered as the correct one, this would necessarily imply that the swimmer was not obliged to comply with the whereabouts requirements anymore, and should therefore not have been charged at all and once charged should have been acquitted by the CSF Disciplinary Committee. On the other hand, the Panel observes that the fact that the swimmer was nevertheless sanctioned by the CSF is contradictory to the above-mentioned opinion. In that respect, it is the opinion of the Panel that the letter sent by the CSF dated 1<sup>st</sup> June, 2009 merely appears as an attempt to explain the swimmer's behaviour or to submit what the CSF considers as a justification for reducing the sanction imposed on the swimmer to a conditional one. It is also hard to believe that the swimmer's conviction was wrong "*ab initio*", since neither the CSF nor the swimmer deemed it appropriate to lodge a counter-appeal.

26. Under these circumstances, the Panel is of the opinion that the view of the Czech Anti-Doping Committee is the right one, and therefore came to the conclusion that once a swimmer is included in the National Registered Testing Pool list and in the absence of any official statement or notification that this swimmer is struck out of the list, the swimmer remains on the list for the whole period of the validity of this list, regardless from the question whether or not she was a member of the national team. In other words, regardless of the fact that the swimmer was - or not- selected in the Czech National Swimming Team at the time the alleged failures occurred, she was still part of the National Registered Testing Pool, since there is no evidence that she was off the list. In the Panel's view, she was therefore still under the obligation to comply with the whereabouts requirements.

B. *Did a violation of the 2008 FINA doping control rules and the 2008 Czech Regulations for doping control and sanctions in sport occur?*

a) Relevant provisions

27. Article DC 2.4 of the 2008 FINA Doping Control Rules reads as follows:

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

*Violation of the requirements regarding Competitor availability for Out-of-Competition Testing including failure to provide required whereabouts information and missed test in violation of DC 5.4.4, DC 5.4.5 and DC 5.4.6".*

Art. 2 of the 2008 Regulations for Doping and sanctions in Sport in the Czech Republic reads as follows:

*"The Following constitute anti-doping rule violations: ...*

*2.4 Violation of applicable requirements regarding Athlete availability for out-of-competition testing including failure to provide whereabouts information and missed tests which are declared based on reasonable rules".*

28. In order for a violation to occur under the 2008 FINA DC 2.4, the failure to provide whereabouts information should be in violation of DC 5.4.4, DC 5.4.5 or DC 5.4.6. Article DC

5.4.6 of the 2008 FINA Doping Control Rules, on which the anti-doping rule violation allegedly committed by the swimmer obviously relies, stipulates:

*“A competitor who fails to submit location information as required by FINA after receipt of a formal written warning from FINA to do so shall be considered to have committed a doping violation under DC 2.4”.*

29. Under Art. 5.6.4 of the 2008 Czech Republic Regulations for Doping and Sanctions in Sport:

*“Each Athlete included in the Registered Testing Pool who does not submit on time the required quarterly information after he/she received during the previous 18 months two written warnings requiring him/her to do so, will be considered to have violated the Anti-Doping Rule under Art. 2.4”.*

b) Formal written warnings/written warnings

30. In the Panel’s opinion, a careful reading of the above-quoted articles leads to the understanding that the failure to provide whereabouts information, which is the alleged violating in the case at hand, will be considered a violation under DC 2.4 only after the competent body had submitted *“a formal written warning”* or under art. 5.6.4 of the Czech Republic Regulations for Doping Control and sanctions in Sport a *“written warning”* to the swimmer.

31. The Panel observed that the file did not contain any evidence that formal written warnings, as provided by those articles, had been duly notified to the swimmer. In the Panel’s opinion, this specific point is of importance, as the *“formal written warning”* or the *“written warning”* literally appears as a precondition to convict a swimmer for a failure to provide whereabouts information. Furthermore, it seems essential to establish the existence of duly notified warnings, as the aim of the warning is to bring athletes to the awareness that they should comply with the obligation to provide the whereabouts information.

32. The Panel observes that the appealed decision rendered by the CSF Disciplinary Commission does not make any reference to formal written warnings which would have been notified to the swimmer. As the CSF was requested to provide CAS with the entire file, the documents sent by CSF did not contain any elements or evidence of (formal) written warnings sent to the swimmer. In order to make a last attempt to complete the file and obtain the missing information regarding these written warnings, CAS again requested by a letter of 14 September 2009 the Czech Swimming Federation to provide the copies of the notifications sent to the swimmer. The aim of this request was to examine whether the *“notifications”* could be considered, taking into account their wording or any other elements contained in the notifications, as *“formal written warnings”* or *“written warnings”*. The Czech Swimming Federation totally ignored this additional request and did not submit the notification forms nor any other (formal) written warnings that were sent to the Swimmer.

33. In the Panel’s opinion, establishing the existence of these warnings is essential, as DC 5.4.6 of FINA’s Doping Control Rules and Art. 5.6.4 of the Czech Republic Regulations on Doping Control and sanctions in Sport present it as a precondition to convict the swimmer who fails to provide the requested whereabouts information. This is in particular important if the swimmer is under the assumption, presumably by mistake, that she was not longer part of the National

Registered Testing Pool and thus not obliged to submit her whereabouts information. In such case the receipt of a formal written warning is essential as it would have contributed to clarify the situation. After receipt of such a warning Ms Zofie Kvackova would have been in a position to contact the Czech Swimming Federation and verify whether she was still under the obligation to file her whereabouts, to avoid any mistake, and what is even more important, to avoid any violation of the Rules.

34. This specific question is particularly important in the case at hand, since two important sport bodies in the Czech Republic (The CSF and the Czech Anti-doping Committee) have different views on whether or not a swimmer, who was originally on the list of the National Registered Testing Pool but is no longer member of the National Swimming Team still has to comply with the whereabouts requirements. In the case at stake, the only evidence provided to the Panel relies on the Czech Swimming Federation's statement that the swimmer received "two notices", which are not produced and which are not even referred to as "formal written warnings". It is therefore the opinion of this Panel that the receipt by the swimmer of a formal written warning was not proven.
35. However, before coming to the final conclusion, this finding of the missing proof of the existence of a precondition to the establishment of a doping violation, leads the Panel to discuss the burden of proof and its consequences in the case at hand.

c) Burden of proof

36. Article DC 3.1 of the 2008 FINA Doping Control Rules stipulates:

*"FINA and its Member Federations shall have the burden of establishing that anti-doping rule violation has occurred. The standard of proof shall be whether FINA or its Member Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these rules Anti-Doping Rules place the burden of proof upon the Competitor or other persons alleged to have committed an Anti-Doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability".*

Art. 3.1 of the Regulations for Doping Control and sanctions in Sport in the Czech Republic reads exactly the same.

37. The usual position is therefore that FINA or its Member (in this case CSF) bears the burden of proof. In other words, FINA and the CSF have the burden of proof and the occurrence of an anti-doping violation should be established to the comfortable satisfaction of the hearing body. It is clear that Article DC 3.1 of the 2008 FINA Doping Control Rules as well as Art. 3.1 of the Czech Republic Regulations for Doping Control and sanctions in Sport puts that the burden of proof on FINA or its Member Federation (on the same issue, see CAS 2007/A/1318).
38. As explained, the Panel does not consider that FINA has succeeded in showing that formal written warnings have been sent to the swimmer after any one of her alleged failures to provide whereabouts information on April 17, July 22 and August 20, 2008. The Panel considers that

the doubts surrounding the transmission of formal written warnings to the swimmer by the CSF lead to the conclusion that in this particular case it was more likely than not, that these written warnings have not been transmitted to the swimmer.

39. This being said, by not being in a position to produce the evidence of the formal written warnings, the minimum requirements for sanctioning the swimmer are not met and the anti-doping violation is not established to the comfortable satisfaction of the Panel. The Second Respondent did not appeal the decision nor did she submit a counter appeal. Therefore, the only possible outcome in these circumstances is the rejection of the appeal.
40. Based on the written submissions made and the evidence available, no further issues, and notably the determination of the sanction imposed on the swimmer, are relevant to the case at hand and any other claims can be dismissed.

*C. Additional Final remarks by the Panel*

41. The need and importance of what can be considered as a “*formal written warning*” is also recognized by WADA who implemented a very specific new system in their 2009 Regulations to establish how a filing failure should be notified to the athletes. However, under the 2003 WADA Code these detailed procedures were not yet implemented.
42. In the case at stake, the Panel has decided to dismiss FINA’s appeal mainly because the Appellant could not provide evidence that formal written warnings had been received by the swimmer. The Panel is perfectly aware of the fact that FINA cannot prove these elements if the CSF, which is the body that should have sent and kept copies of the written warnings, does not cooperate. Nevertheless, the Panel considers that this is a matter to be dealt with between an international federation and its affiliated member and it cannot condemn, confirm or extend the sanction of an athlete on the sole basis of assumptions.
43. The Panel however wishes to stress that nothing in this decision is to be taken as detracting from the obligations for swimmers and other athletes, included in the testing pool, to fully comply with their whereabouts obligations (see CAS 2006/A/1165).

**The Court of Arbitration for Sport rules:**

1. The appeal of The Fédération Internationale De Natation (**FINA**), against the decision issued on 24 November 2008 by the Disciplinary Committee of the Czech Swimming Federation (**CSF**) and notified on 25 March 2009 to the Appellant, is dismissed.
2. (...).
3. All other or further claims are dismissed.