



Tribunal Arbitral du Sport  
Court of Arbitration for Sport

**CAS 2003/A/459 Van Herk v/FINA**

**ARBITRAL AWARD**

Pronounced by the

**COURT OF ARBITRATION FOR SPORT**

Sitting in the following composition:

**President:** The Honourable Michael J. **Beloff**, MA QC, London, England

**Arbitrators:** Mr Ian S. **Blackshaw**, LL.M, Solicitor, Weybridge, England  
Dr. Denis **Oswald**, Attorney-at-Law, Neuchâtel, Switzerland

in the arbitration between

**Linda Van Herk,**  
**- the Appellant -**

represented by Mr Diederik A. Molier, Utrecht, Netherlands

and

**Fédération Internationale de Natation Amateur (FINA),** Lausanne, Switzerland  
**- the Respondent -**

represented by Mr. Jean-Pierre Morand, Geneva, Switzerland

\* \* \* \* \*

**1. Introduction**

- 1.1 The Appellant is a female competitive swimmer at secondary national level, affiliated to KNZB, and was fourteen years old at the relevant time.
- 1.2 The Respondent, FINA, is the international federation which governs amateur swimming, including in matters of discipline.
- 1.3 The KNZB is the national body which governs amateur swimming in the Netherlands and is a member federation of FINA.
- 1.4 On 11<sup>th</sup> April 2003 the FINA Doping Panel ("the Panel") decided that the Appellant had committed a doping offence under FINA Rules DC2.1(d); DC9.2 and DC9.1.1. Accordingly she was suspended for two years starting from 5<sup>th</sup> December 2002 and ending on 24<sup>th</sup> October 2004. Furthermore, the results achieved by the Appellant in competitions during the period from 30<sup>th</sup> September 2002 until 10<sup>th</sup> April 2003 were cancelled ("the Panel decision").
- 1.5 On 14<sup>th</sup> April 2003 the Appellant received notice of the Panel decision.
- 1.6 The Appellant appeals against the decision to CAS asserting that
- (i) she was not guilty of any doping offence;
  - (ii) if (contrary to (i)) she was guilty of a doping offence, the suspension was disproportionate.

**2. Jurisdiction**

The competence of CAS is based on Article C 12.8.3 of the constitution of FINA which provides "*An appeal against the decision by the Bureau of the FINA Doping Panel shall be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland, within the same term as in C12.8.2. The only appeal from a decision of the Doping Panel shall be to CAS.*"

**3. Law**

3.1 Art. R45 of the Code of Sports-related Arbitration (Code) provides that the Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss Law.

3.2 In the present matter, the parties refer exclusively to FINA's regulations. They have not agreed on the application of any other particular law. Therefore, subject to the primacy of applicable FINA's regulations, Swiss Law shall apply complementarily.

**4. Admissibility**

4.1 The request of arbitration of the Appellant was filed on 9<sup>th</sup> May 2003 within 1 month. The Panel informed the Appellant of her right to appeal to CAS within a month of receipt of the judgment.

4.2 The application is therefore admissible.

**5. The Facts**

5.1 The Appellant waived her right to an oral hearing and we make the following findings of fact from the documents submitted to us including the Panel decision and decisions of relevant KNZB bodies.

5.2 On 30<sup>th</sup> March 2002, in Amersfoort (in the Netherlands), the Appellant participated in a national "limit" competition ~ which is a regional competition under the auspices of KNZB – in which competitors are to swim times set by the KNZB in order to qualify for the national championships. She was to swim in two events but took part only in the first (100 metres breaststroke Program Event 5) and renounced participation in her second event because she was in indifferent form and in any event had to leave early together with her father who had an important business appointment.

5.3 The Appellant was not notified of a need to submit for doping control immediately after the finish of her race, nor did she thereafter stay in the view of a doping control official. She had indeed already urinated before she was told by a club mate that her coach was looking for her, and by her coach that she had to proceed to the doping control station no later than 18:30.

At 18:20 hours the Appellant presented herself at the station and signed both the notification doping control and doping control forms. On the notification doping control form, her willingness to co-operate was expressly noted. However she was, despite several attempts, unable to urinate. Her father then appeared and requested that the procedure be stopped, on the basis of his business appointments

According to them the doping test officials warned the Appellant of the consequences, but she left the doping control station 25 minutes after her arrival without having given a urine sample. (The Notification Doping Control form signed by the Appellant also stated that "failure to co-operate may result in sanctions applied by the sport organization.") The time of the failure to co-operate was noted on the Doping Control form as being 18:45. Although the Appellant accepted that she was warned of the "consequences", she said that the nature and seriousness of them were not elaborated.

5.6 On 9<sup>th</sup> September 2002, in consequence, the Disciplinary Committee of KNZB imposed on the Appellant a suspension for a period of 4 years, of which

- 0.5 years were to be unconditional taking effect from 14<sup>th</sup> September 2002 and ending on 14<sup>th</sup> March 2003

- 3.5 years with a probation period of 2 years taking effect from 15<sup>th</sup> March 2003 and ending on 14<sup>th</sup> March 2004

3.7 The Disciplinary Committee stated that

*Together in view with her young age and inexperience, the person in question has not realized which consequences her behaviour would have, as well as the fact that she wanted to avoid a loyalty conflict with her father, who failed to have a clear view of the consequences, either. Unaltered application of art. P9 J.1 would in this case have led to a disproportional sanction "*

On 14 September 2002 the Appellant appealed the suspension to the Committee of Appeal of KNZB.

On 2 October 2002, KNZB sent the judgment to the Disciplinary Committee of FINA in accordance with FINA Rule DC.12.5.

On 8 October 2002, (apparently in ignorance of the appeal), the FINA Executive Committee stated that it believed that KNZB "*has not followed the FINA rules related to doping control within its jurisdiction*" and referred the matter to the Panel in accordance with FINA Rule DC.12.5.

3.11 On 12 October 2002 the Committee of Appeal conducted a hearing which was attended by the Appellant, her father and her coach.

3.12 On 26 October 2002 the Committee of Appeal "*in the second instance doing justice*" (sic) decided to annul the judgment of the Disciplinary Committee, and acquit the Appellant of the charge in question. It stated:

*"The Committee determines that the procedure stated under 4. with regard to appellant has not been observed correctly. neither a notification card was presented to appellant immediately after the relative program event, nor was she personally*

*summoned to present herself at the doping test station. She did not stay in the view of the doping test official, either. Only upon leaving the swimming pool she was informed of the doping test by a club mate. The Committee considers that owing to the fact that the procedure rules were not strictly observed by the officials responsible for the doping test appellant has been harmed in her interests in a disproportionate way. Thus, if these rules would indeed have been observed in the right way the problems had not occurred; appellant would then have been able to urinate for the doping test. She was quite willing to do so."*

On 5 November 2002 KNZB duly reported to FINA on the domestic proceedings, and enclosed, inter alia, the full and unabridged decision of the Committee of Appeal.

On 5 December 2002 the FINA executive repeated its belief that FINA Rules relating to doping control were not followed by KNZB and again decided to refer the matter to the Panel for review in accordance with FINA Rule DC 12.5. Curiously, no reference was made to the decision of the Committee of Appeal. However, on the same date, the FINA executive decided provisionally to suspend the Appellant until judgment by the Panel, which suggests an awareness that the suspension by the Disciplinary Committee had been set aside; and on the same date informed the Appellant of her suspension.

On 27 December 2002 the Panel informed the Appellant of her right to a hearing or to make submissions in writing.

On 18 January 2003 the Appellant wrote that she would not appear in person but rely on written statements. She said "*I hope that your decision is the same as the committee of Appeal. I am a secondary level sporter. 14 years old at that time.*"

**5.17** In its determination of 11 April 2003 the Panel held that the Appellant committed a doping offence according to FINA Rule DC 21(3) by refusing to submit to doping control.

5.18 After review of the facts and competing contentions, the Panel stated:

***"IN LAW***

***Jurisdiction of FINA***

*The swimmer does not challenge FINA Rules to be applicable to her, and her case having been transferred to the FINA Doping Panel for review according to FINA Rule DC 12.5.*

*According to FINA Rule C 21 the FINA Doping Panel*

*"shall apply sanctions in accordance with FINA Rule DC 9 to those individuals or Member Federations who are found to be in violation of FINA's Rules relating to doping control" (FINA Rule C 21.5)*

*Provisions on doping are to be found in the FINA Doping Control Rules.*

***The doping offence***

*Ms. Linda van Herk has committed a doping offence according to FINA Rule DC 2.1.(d). She has refused to submit to doping control.*

*For the case to be decided by the Panel it is without importance that Ms. van Herk was only 14 years old, when she committed the doping offence. Within regular private law in Netherlands and many other countries including Switzerland it is the parent who is responsible for the acts of his/her minor child. However, within sport federations this is different. Usually the rules and regulations within sport federations do not distinguish between minor and major sportsmen / sportswomen. In principle it is not relevant whether a swimmer is under or above 18 years old. Individual members above and under 18 have the same rights and obligations, they have to pay contributions, they have voting rights in meetings, and they may become World and Olympic Champion.*

*The Doping Panel is aware that the procedures to be followed at doping controls according to FINA DC Rules were not observed completely. However, the departure from the procedure set out in FINA Rules do not invalidate the facts found in the case to be decided as this departure was not such as to cast genuine doubt on the reliability of that finding (FINA Rule DC 1.4).*

*The swimmer was not presented a notification card immediately after the relevant event and she was not personally summoned to present herself to the doping control station. But despite this lack the swimmer presented herself at the doping control station to submit herself to doping control. She was requested to be at the doping control station no later than 18 30 hrs., and she was present at 18.20 hrs.*

*The swimmer did not stay in the view of a doping control official after having finished her race. This might affect the validity of a urine sample delivered by the swimmer. But it is not invalidating the fact that the swimmer after having presented herself to the doping control station left, before she was able to deliver a urine sample at all*

*As the swimmer had not been notified to submit for doping control immediately after the finish of her race she had already urinated and was not any more able to deliver a urine sample quickly. If the rules would have been observed in the right way the swimmer would have been able to urinate in the doping control station, which she was quite willing to do. However, this circumstance is not leading to the result that she was permitted to leave the doping control station without having delivered a urine sample. It is only resulting in a longer waiting time within the doping control station.*

### **SANCTION**

*According to FINA Rule DC 9.2*

*a doping offence under DC 2.1 (d) shall be regarded as an offence under DC 2.1. (a) and shall be sanctioned according to DC 9.1.1*

*The sanction provided for in FINA Rule DC 9.1.1 is a minimum of four years' suspension plus a retroactive sanction involving cancellation of all results achieved in competitions in the period prior to the date the suspension takes effect and extending back to six (6) months before the date of the refusal to submit to doping control.*

*However, in the specific case the minimum sanction was to be lessened according to FINA Rule DC 9.10.*

*FINA Rule DC 9.10 is also applicable for doping offences under FINA Rule DC 2.1 (d) The wording of Rule DC 9.10 in the beginning*

*"Where the rules impose a minimum term suspension....."*

*is indicating that DC 9.10 shall be applicable for all (!) Rules providing a minimum sanction, including the Rules providing a minimum sanction for a doping offence under DC 2.1. (d). Even if the further wording*

*".....if the competitor can clearly establish how the prohibited substance got into the competitors' body or fluids and that the prohibited substance did not get there as a direct or indirect of any negligence of the competitor...."*

*may be interpreted contrary that way that Rule DC 9.10 shall be applicable only for doping offences under DC 2.1. (a). Whatever the interpretation may be, a clear answer cannot be found in the wording of the rule. Therefore the meaning of Rule DC 9.10 in this regard remains doubtful. And these doubts must take effect in favour of the swimmer*

*FINA Rule DC 9.10 under specific and restricted circumstances is allowing to lessen the minimum sanction. It would be incomprehensible if this possibility would be given only for a doping offence where a swimmer has taken a prohibited substance and not also for a doping offence where a swimmer has refused to submit for doping control*

*With regard to FINA Rule DC 9.10 the swimmer has clearly established how her refusal to submit to doping control was caused. And the refusal was not a direct or indirect result of any negligence of the competitor. It was the father of the swimmer who insisted that she did not any longer wait until she was able to urinate. As the girl was only 14 years old she was in a loyalty conflict. She knew that she had to follow the respective rules and that she had the personal responsibility to follow the relevant rules related to doping control. She knew that she had to deliver a urine sample before she left the pool. On the other hand she also knew that she had to obey her father and did not dare not to follow his instructions. It was not a matter of negligence, when the swimmer finally decided to give priority to her fathers instructions and to follow him.*

*Having found the criteria for a lesser sanction than the minimum provided for according to FINA Rules DC 9.2 and 9.1.1 to be satisfied, the Panel considered the following circumstances to find an adequate sanction in the case to be decided:*

*When the swimmer finished her race she was not notified to submit to doping control. She had cancelled the second event she was entered for. With the intention to leave the pool she went to a toilet and after that to the dressing room. Only when she was about to leave the swimming pool she was informed, and this only by a team mate, that she had to submit to doping control. She presented herself to the doping control station within the time period given and was ready to submit to doping control. However, having urinated shortly before, she was not able to deliver a urine sample within a short time period. When it was clear that she was not able to urinate within a foreseeable time period it was her father who insisted that she had to come with him.*

*Considering these factual circumstances the Panel finds it just to apply the equitable principle found in Rule DC 9.10, and, therefore felt a sanction of a*

***two (2) years' suspension***

*to be adequate. In principle it is a severe doping offence to refuse a doping control. However, the special situation the swimmer was in, is allowing not to sanction her with the usual suspension of four (4) years.*

*This decision shall become effective immediately. And the suspension imposed by the Doping Panel will finish on 24 October 2004*

*The FINA Executive has already suspended the swimmer provisionally, having been in effect since 5 December 2002. This time period shall be included in the period of the two (2) years suspension.*

*Also the swimmer was suspended for 42 days (from 14 September 2002 until 26 October 2002) by judgements within KNZB. This time period shall be deducted from the two (2) years' suspension decided by the FINA Doping Panel.*

*"Suspension" shall mean*

*"that the individual sanctioned shall not participate in any activities of FINA or any of its Member Federations, in any discipline, including acting as a competitor, delegate, coach, leader, physician or other representative of FINA or a Member Federation. "*

*(FINA Rule DC 9.11)*

*According to FINA Rules DC 9.2 and DC 9.1.1 also a retroactive sanction was to be decided involving cancellation of all results achieved in competitions during the period until 10 April 2003 (the date prior this suspension takes effect) and extending back to 30 September 2001 (six (6) months before the refusal to submit to doping control)."*

The Panel informed the Appellant of her right to appeal to CAS within a month of receipt of the judgement.

## 6. The Law

- 6.1 The Doping Control Rules promulgated by FINA on which the decision of the Panel is based, provided, so far as material, as follows:

### *Reporting and recognition*

*"DC 10.5 If the Executive believes that a Member Federation has not followed FINA Rules relating to Doping Control within its jurisdiction, the Executive may refer the matter to the Doping Panel for review, in which case the Doping Panel shall have full power to review the facts and the application of the rules."*

### ***Introduction***

*"DC 1.2 All FINA Members shall comply with these DC Rules. The Rules and Regulations of Member Federations shall indicate that the FINA Doping Control Rules shall be directly applicable to competitors, coaches, physicians, team leaders and club and federation representatives under the jurisdiction of the respective Member Federations (...)"*

*"DC 1.3 All competitors shall submit to Doping Control carried out by FINA in competition, out of competition, announced or unannounced. The competitor shall submit to Doping Control whenever requested by an authorized official."*

*"DC 1.4 Any departure from the procedures set out in these Rules shall not necessarily invalidate the finding of the presence of a prohibited substance in a sample or the use of a prohibited method, unless such departure was such as to cast genuine doubt on the reliability of such a finding."*

### ***Doping***

*"DC 2.1 Doping offences are.*

- (a) the finding of a prohibited substance (DC 3.1) within a competitor's body tissue or fluids*
- (b) the failure or refusal of the competitor to submit to doping control, (...):*

### ***Doping control in FINA Competition***

*"DC 6.4 Upon selection of the competitor for doping control during competition, the following procedures shall be followed:*

*DC 6.4.1 A member of the Doping Control Commission, or its designate (the escort) shall write the name of the competitor on a notification card and present it to the competitor, as discreetly as possible, immediately after the event. The competitor shall sign to confirm receipt of the card and retain a copy. The time of signing shall be recorded on the card. The competitor must stay in view of the escort until reporting to the doping control station."*

**Sanctions**

"DC 9.2 *A doping offence under DC 2.1(b) or DC 2.1 (d) shall be regarded as an offence under DC 2.1 (a) and shall be sanctioned according to DC 9.1.1; in the event of a sanction based upon DC 2.1(d), the relevant period for the retro-active cancellation of the results is the period extending back to six (6) months before the failure or refusal to submit to doping control ."*

"DC 9.1 *The sanctions for doping offences involving prohibited substances shall be*

*9.1.1 For a doping offence involving an anabolic agents, diuretics, masking agents, peptide, hormones, mimetics and analogues, and chemically or pharmacologically related substances:*

*First offence:*

*A minimum of four (4) years' suspension; plus*

*A retro-active sanction involving cancellation of all results achieved in competitions during the period prior to the date the suspension take affect and extending back to six (6) months fore the collection of the positive sample, shall be imposed (...)."*

"DC 9.10 *Where the rules impose a minimum term suspension, the minimum may be lessened if the competitor can clearly establish how the prohibited substance got into the competitors body or fluids and that the prohibited substance did not get there as a direct or indirect result of any negligence of the competitor. Every competitor has the personal responsibility to assure that no prohibited substance shall enter his or her body and that no prohibited method be used on such competitor's body and no competitor may rely on any third party's advice in this respect."*

6.2 The Panel also referred to FINA Rule C 21.5 in connection with FINA Rule DC 12.5.

FINA Rule C 21.5 states that:

C21.5 *"The Doping Panel shall hear all controversies regarding doping control within FINA and shall apply sanctions in accordance with FINA Rule DC 9 to*

*those individuals or Member Federations who are found to be in violation of FINA Rules relating to doping control. "*

### **KNZB Doping Rules**

6.3 In conformity with Article DC 1.2 of the Doping Control Rules of FINA, the KNZB has issued the KNZB-Doping Reglement (KNZB Doping Rules) of which the last version is dated July 2002.

6.4 As a Member Federation of the FINA, the KNZB has adopted all the aforementioned doping control rules of the FINA. By means of the KNZB Doping Rules those Rules are directly applicable to competitors, coaches, physicians, team leaders and club and Federation representatives. The KNZB Doping Rules which correspond with the above mentioned FINA Doping Control Rules are as follows:

- DC 1.1 – P 1.1 (KNZB)
- DC 1.2 – P 1.2
- DC 1.3 – P 1.3
- DC 1.4 – P 1.4
- DC 2.1(a) – P 2.1(a)
- DC 2.1(d) – P 2.1(d)
- DC 6.4/6.4.1 – P 6.4/6.4.1
- DC 9.2 – P 9.2
- DC 9.1.1 - P 9.1.1
- DC 9.10 – P 9.10

## 7. Grounds of Appeal

### 7.1 The Appellant relies on the following grounds of appeal:

- On a true construction and application of DC 12.5 the FINA executive was not entitled to refer the matter to the Panel to review without giving any explanation as to why they believed that the KNZB did not follow FINA rules relating to Doping Control, or which specific rules were not followed. Indeed the reference was invalid because what was an issue was not fidelity to the rules, but appropriateness of the sanction only. ("Panel's Jurisdiction")
- On a true construction and application of DC 21.5 it was not the responsibility of the Panel in this case to impose a sanction in accordance with FINA Rule DC 9. ("Panel's powers")
- Under Dutch law and "in general" (sic), a two stage procedure with two additional stages i.e. doping panel and CAS, breaches fair trial principles, as exemplified by the new WADA structure of appeals. ("Unfair Process")
- As the mandatory FINA and KNZB procedures for Doping Control were not followed the Appellant was not obliged to comply with doping controls. ("Breach of procedure").
- The Panel erred in relying on FINA Rule DC 1.4, which was irrelevant. ("DC Rule 1.4")

- For suspension as distinct from disqualification, proof of guilty without or at least negligence is required ("Lack of fault").
- The suspension was disproportionate. ("Lack of proportionality")

7.2 We shall examine those grounds in order.

## 8. ANALYSIS

### Panel's Jurisdiction

- 8.1 In our view the Executive were entitled to refer the matter to the Panel. DC12.5 requires only that the Executive has a belief (naturally one held in good faith and within the parameters of reasonableness) that a Member Federation has not followed FINA rules, to validate such a reference. In this instance an apparent violation of rule DC 2 1(a) (failure to submit to doping control) was nonetheless visited by the Committee of Appeal (the supreme domestic Tribunal) with dismissal of the charge, and in consequence the imposition of no sanction at all. Something in short must arguably appeared to have gone wrong in the decision of the Committee of Appeal, to which (as we have already suggested) the letter of the FINA executive of 5 December 2002 must be considered as relating.
- 8.2 There is no requirement in DC 12.5 that the Executive identify either the Rule not followed, or the nature of the breach as a precondition of making a reference. It is sufficient that the appropriate belief is held. It would no doubt be desirable for the Executive to make such identification, consistent with the modern emphasis upon the provision of reasoned decisions, but it is not essential.

**Panel's Powers**

- 8.3 Under DC R 12.5 the Panel can review both facts and application of rules afresh. It is unfettered by the decision of the appropriate body of the member federation (art. R57 of the Code of Sports-related Arbitration.).
- 8.4 The perceptible policy underlying the rule is to secure uniformity of interpretation and practice across member federations, and to avoid the possibility of 'home town decisions'.

**Unfair Procedures**

- 8.5 There is no general principle of law which suggest that the provisions in the FINA rules or the possibility of an appeal to CAS thereafter – which allow, we accept, for a multiplicity of hearings – undermine any rights to a fair trial or contravene any rule of natural justice. The right of recourse to CAS in particular is a benefit to, not a burden upon, a person in the Appellant's position. We are surprised by the submission in the Dutch Law takes a different position, but since this case is neither substantively nor adjectivally governed by Dutch Law, we do not need to explore the issue further.
- 8.6 WADA seems to us to contemplate an equally layered procedure giving as it does in cases involving national level athletes, a right to an international Federation to appeal both to the National Level reviewing body and to CAS: (see Art 13.2.2), no doubt in pursuit of the same policy objectives that we have outlined in the paragraph 8.4 above

### **Breach of Procedures**

8.7 The admitted departure by KNZB from the stipulated doping control procedures indicated in para 5.3 above is certainly regrettable. The relevant rules are drafted for a purpose and officials who fail to follow them undermine that purpose. Moreover athletes vulnerable to sanctions are entitled to expect fidelity to such procedures.

8.8 However we do not consider that the non-compliance by officials with the procedure laid down in FINA DC 6.4.1 (and domestically P 6.4.1) justifies an acquittal of the Appellant for the following reasons: (i) DC 2.1(d) identifies a failure to submit to doping control as a doping offence. It does not suggest that non-compliance with the proper procedures means that a competitor is justified in a failure to submit; (ii) The Appellant's construction involves reading-in, after the phrase: "doping control" in DC 2.1, the words "as long as carried out in accordance with mandatory procedure". No rule of interpretation ie: of necessary implications seems us to require or justify such reading in; (iii) Albeit FINA DC 6.4.1 is in mandatory terms, non compliance with mandatory procedure does not automatically invalidate what follows. The consequence of non-compliance axiomatically depends upon the context; (iv) All parts of DC 4.4.1 are phrased in mandatory terms. But it cannot sensibly be supposed that the failure to record the time of signing on the card, or for that matter, the failure of the competitor to retain a card should result in annulment of what happened thereafter in connection with doping control; (v) The obvious purpose of DC 4.4.1 e.g. the need for the competitor selected for such control constantly in view of the escort is to prevent acts by a competitor designed to corrupt the doping control procedures; (vi) By corollary it is hard to see what disadvantage a competitor suffers (other than delay) from a failure to be notified of the need to submit to doping control: it cannot put such

competitor at risk of an inaccurate test or false finding; (vii) DC 1.4 envisages such notwithstanding departures from procedure, a positive test will not be invalidated unless such departures cast genuine doubt on the reliability of such a finding. This rule therefore assumes that samples may be taken even after departures from stipulated procedures and, therefore, that such a competitor cannot refuse to provide such a sample because of such departure; (viii) the situation is distinguishable in principle from one in which departure from procedure may cast doubt on the reliability of a finding that a test has proved positive such departure casts no doubt on the actuality of the refusal to submit to a test.

8.9 Even if we were wrong in our above analysis of the effect of a non-compliance with DC 6.4.1 in this case the Appellant was requested by an authorised official to submit to doping control. She agreed to do so by signing the forms and by her conduct. She was, in our view, under an obligation to do so in any event: but such acts must have constituted a waiver of any previous non-compliance.

#### DC 1.4

8.10 We accept that DC 1.4 was not directly relevant. (art. R57 of the Code of Sports-related Arbitration (Code)) It bears specifically upon a finding of the doping offence contained in DC 2.1(a), not DC 2.1(b). The gratuitous reference to such rule did not, however, flaw the Panel's decision. In any event we must decide the matter *de novo*. "The Panel shall have full power to review the facts and the law. Upon transfer of the file, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments. He may also request communication of the file of the disciplinary tribunal or similar body, the decision of which is subject to appeal. Articles R44.2 and R44.3 shall apply. After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing. At the hearing, the proceedings take place in camera, unless the parties agree otherwise. If any of the parties is duly summoned yet fails to appear, the Panel may nevertheless proceed with the hearing" (art. R57 of the Code).

**Lack of fault**

- 8.11 The Appellant intentionally refused to submit to doping control by providing a sample. This is sufficient to engage D.C.2.1 (b).
- 8.12 The Appellant's reference to cases concerned with D.C.2.1 (a) when, in the context of positive tests, a distinction is drawn between the sanctions of disqualification (automatic) and suspension (to which issue of fault are germane) is misconceived. The subject matter of the two doping offences is indistinct.

**Lack of Proportionality**

- 8.13 Both parties to the appeal accept that DC 9.10 should be applied analogically although it (like DC 1.4) is concerned, on its face, with DC 2 1(a), not DC 2 1 (b) offences. This generous construction is arguably validated by DC 9.2 which equates the two offences for the purposes of sanctions and by considerations of common sense.
- 8.14 On 11 September 2003 FINA adopted the WADA principles and impose a fixed 2 year suspension in place of the present 4. It is argued that *mutatis mutandis* the 2 years suspension should be lowered pro rata to 1 year. We rendered our decision on 11 September 2003 in order that the Appellant should have the benefit of the *lex mitior* "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 "* (Digest of CAS Awards I, Advisory Opinion CAS 94/128, Union Cycliste Internationale (UCI) and Comité National Olympique Italien (CONI), of January 5, 1995, p. 509).

8.15 We have considerable sympathy with the Appellant's position. For the following reasons:

- (i) She is a minor: (although we accept that sport codes conventionally do not differentiate between the obligations imposed on competitors by reference to their age, age must be potentially relevant when sentencing discretion is engaged);
- (ii) Both domestic bodies suggest the need for "wide publicity to be given to the doping rules, (although we accept the ignorance of the law is no defence, the extent to which the law is publicized must again be potentially relevant to sentencing).
- (iii) There was an objectionable (and unexplained) departure by officials at the meet from mandatory procedures. There is no reason to believe that had the Appellant been told promptly what was required of her, she would have found herself in her then predicament. On the contrary it seems entirely likely that she would have been able to – and would have – provided a sample before leaving with her father.
- (iv) Had she not been alerted by her club mate and coach to the fact that she had been selected for a test, she might have left with her father without criticism or reproach.
- (v) She clearly sought at the outset to co-operate with the doping control officials. Her inability to urinate on demand was, in the circumstances, widely excusable.

(vi) Her premature departure from the doping control station was at the insistence of her father whom she was naturally accustomed to obey.

(vii) In the absence of contrary evidence, we accept that she was **not sufficiently** warned of the consequences of her departure.

(viii) She has already had to endure, albeit limited media exposure, and embarrassment among her peers.

8.16 In short, we are confronted, not with a mature international athlete apparently attempting to conceal his cheating and retain a major medal, but a young girl in the foothills of aquatic achievement, who, though not fault of her own, was placed in an unenviable problem and confronted with an unenviable dilemma. In *Poll v FINA* (CAS 2002/A/399) it was sapiently stated that: "*it is a widely accepted general principle of sports law that the severity of a penalty must be in proportion with the seriousness of the infringement*". Applying this principle, we find that the infringement is at the lowest end of the scale and substitute the minimum one year suspension now contemplated by the FINA Rules. The suspension will expire on 25 October 2003. The Appellant is no drug cheat.

8.17 Otherwise we leave the Panel's decision untouched.

8.18 We make no order as to costs. We cannot award the Appellant her costs, since she has only partially succeeded in her appeal; but we do not award FINA its costs since we have found fault in its member officials.

## ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by The Appellant on 8 July 2002 is upheld in part and the decision of the FINA Doping Panel varied in part.
2. The Appellant's suspension is reduced to a one-year period to expire on 25 October 2003. The FINA Doping Panel's decision otherwise stands.
3. The award is pronounced without costs, except for the Court Office fee of CHF 500.-- (five hundred Swiss Francs) already paid by the Appellant and to be retained by the CAS.

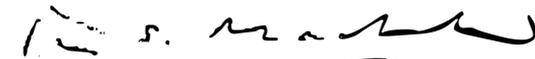
Done in Lausanne, 20 October 2003

### THE COURT OF ARBITRATION FOR SPORT

President of the Panel



The Honourable Michael J. Beloff Q.C.



Mr Ian S. Blackshaw  
Arbitrator



Dr Denis Oswald  
Arbitrator