Arbitration CAS 98/211 B. / Fédération Internationale de Natation (FINA), award of 7 June 1999

Panel: Mr. Yves Fortier QC (Canada), President; Mr. Michael Beloff QC (England); Mr. Denis Oswald (Switzerland)

Swimming
Doping (testosterone)
Hearing de novo
Compliance with the testing procedure
Burden of proof

1. **The virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance fade to the periphery. The CAS appeals procedure allows any defects in the hearing before the first instance tribunal to be cured by the hearing before CAS.**

2. **The standard of proof required of the federation is high: less than the criminal standard, but more than the ordinary civil standard. To adopt a criminal standard (at any rate, where the disciplinary charge is not a criminal offence) is to confuse the public law of the state with the private law of an association.**

On 6 August 1998, the Appellant, B., was suspended for a period of four (4) years ("the decision"), by the Doping Panel of the Respondent, the Fédération Internationale de Natation Amateur (FINA), the international federation governing amateur swimming. B. was found to have committed a doping offence under FINA Rule DC 1.2 (b) concerning "a competitor [who] uses or takes advantage of a banned procedure" and under FINA Rule DC 3.1 (b) prohibiting "use of substances and methods which alter the integrity and validity of urine samples used in doping control".

On 2 September 1998, the Appellant submitted a timeous appeal to the Court of Arbitration for Sport (CAS).

The CAS has jurisdiction in the appeal in virtue of:

- art. C. 10.8.3 of the FINA Constitution which provides, so far as material,
  "An appeal against a decision by the Bureau or the FINA Doping Panel shall be referred to the Court of Arbitration for Sports (CAS) Lausanne, Switzerland, within the same term as in C. 10.8.2."
- FINA Doping Control Rule ("DC Rule") 8.9 which provides,
  "Any person affected by a decision of the FINA Doping Panel may appeal from that decision to the Court of Arbitration for Sport (CAS), Lausanne in accordance with FINA Rule C.10.8.3."

- B.'s statement of appeal dated 2 September 1998; and
- Rule R 47 of the Code of Sports-related Arbitration ("the Code") 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."

On 9 September 1998, the Appellant filed her appeal brief accompanied by four booklets of exhibits, three copies of video evidence and a notice of written statement prior to the hearing.

On 5 October 1998, FINA submitted its answer to the appeal, accompanied by one volume of exhibits.

After consulting the parties, in accordance with R 44.3 of the Code, the Panel informed the parties on 14 April 1999 of its decision to appoint the Institut de Police Scientifique et de Criminologie (the "Institut"), based in Lausanne, as expert, and defined its term of reference as follows:

- *does the container (B-sample) used by [B.] show any sign that there was any attempt illicitly to open the container and to close it again prior to the testing?*
- *is it possible illicitly to open by any means a Versapak container, similar to the one used by [B.], and to close it again without leaving any indication that it has been so opened and closed?*

On 30 April 1999, the Institut conducted its expertise in the presence of the parties' representatives. On the same day, the Institut filed its report with the Panel and submitted copies to the parties (the Institut's conclusions are reproduced in paragraph 12.7 below).

At the request of the Appellant, and with the agreement of the Respondent, the Panel decided that the hearing would be held in public.

On 3 and 4 May 1999, the hearing took place at the Hotel Savoy in Lausanne, in accordance with the Order of Procedure issued by the President on 15 March 1999, as amended.

The following persons gave oral evidence:

<u>For the Appellant</u>

- The Appellant herself

<u>For the Respondent</u>

- Mr. G.
- Mrs. G.
- Dr. Jordi Segura
- Mr. Jeff Hatton
- Mr. Staffan Sahlström

Each witness provided a written statement prior to the hearing.

The following person gave evidence on behalf of the Panel's expert, the Institut: Mrs. Monica Bonfanti.

R 57 of the Code provides: *"The Panel shall have full power to review the facts and the law"*.

Accordingly, the Panel was not limited to consideration of the evidence that was adduced before the FINA Doping Panel, but considered all evidence, oral and written, produced before it. None of the arguments advanced by the parties, discussed below, could or did affect the Panel's responsibility in this regard. In short, the hearing before the Panel constituted a hearing *de novo*, that is, a rehearing of the merits of the case.

On 5 January 1998, International Doping Tests and Management (IDTM), which conducts out-of-competition doping controls on behalf of FINA, requested its sampling officers, Mr. G. and his wife Mrs. G., to collect on its behalf a urine sample from B.

On 10 January 1998, the two sampling officers arrived at the Appellant's home to carry out the sampling procedure.

Mr. and Mrs. G. arrived at the residence of the Appellant at approximately 7:40am. They noticed that the gates to the property were chained and padlocked from the inside. As the house was in total darkness, they parked their car in front of the gates and waited. At approximately 7:50, a light came on upstairs in the house, at which point Mr. G. got out of the car and approached the gate. He saw the Appellant outside her house, walking from the kitchen door toward her automobile. Mr. G. hailed B., and informed her when she approached of the reason for his presence at her home. He asked her to unlock the gate, which she did, leaving Mr. G. to remove the chain and open the gate so that Mrs. G. could park in the driveway.

After unlocking the gate, B. re-entered her house and disappeared from the view of Mr. and Mrs. G. Mr. G. walked up to the kitchen door, which was ajar, and observed that B. was neither in the kitchen nor in the corridor that led from it. Mr. G. waited outside, while his wife unloaded the testing equipment from their car. They then both waited until B.'s return, whereupon Mr. G. entered the kitchen and presented her with the Collection Order. Mr. and Mrs. G. estimated that B. was out of their sight for between 4 and 6 minutes. B. puts the time at closer to 1-2 minutes.

After admitting Mr. and Mrs. G. to her home, B. commented that she had been to the toilet just prior to the Gs' arrival. She also mentioned that she was due to pick someone up from Dublin Airport that morning. B., Mr. and Mrs. G. sat around the kitchen table for approximately 15 to 20 minutes until her husband came into the kitchen. During that period, B. made no attempt to provide a sample, which Mr. and Mrs. G. did not find unusual given that she had told them that she had just recently been to the toilet.

Approximately 10 minutes after the arrival of her husband (25 to 30 minutes after Mr. and Mrs. G. entered the Appellant's home), B. indicated that she was ready to try to provide a sample. She

herself selected a beaker from those laid out on the kitchen table and, with Mrs. G. in close proximity, proceeded to the toilet located off the main corridor leading from the kitchen.

As at all times during the visit, B. was wearing leggings and a baggy fleece which hung to her thighs. Once in the toilet, B. pulled her leggings and panties down around her knees and, while Mrs. G. stood facing her no more than a couple of feet away, proceeded to provide a urine sample.

B. held the beaker in her right hand and held the fleece with her left hand. Mrs. G. stated that the fleece obscured her view of B.'s vagina, such that she did not witness a stream of urine going from the vagina into the beaker. Nonetheless, Mrs. G. stated that she did hear a liquid flow that was consistent with a woman passing urine in the usual fashion.

When B. was finished, she held up the beaker in her right hand. B. placed the beaker on a small shelf in the bathroom and, after dressing and washing her hands, carried the beaker to the kitchen and placed it on the table. At all relevant times, the beaker was handled by B. herself and was in the plain and direct view of Mr. and Mrs. G. At no time did Mr. or Mrs. G. touch either the beaker or the other components of the sampling kit.

As B. had been able to produce only approximately 30 millilitres of urine, which was an insufficient amount for testing purposes, B., her husband and the G.s sat around the kitchen table for approximately 25 minutes until B. stated that she was ready to try to produce another sample.

B. picked up the beaker containing the sample originally produced and, with Mrs. G., returned to the toilet. As had been the case earlier, Mrs. G. stood facing B. and watched as best she could while B. produced the sample. As was also the case earlier, B.'s vagina was obscured from the view of Mrs. G. by the baggy fleece such as to prevent Mrs. G. from actually witnessing a stream of urine going from the vagina into the beaker. Once again, however, Mrs. G. heard a flow of liquid consistent with the sound of a woman passing urine in the usual fashion.

Once finished, B. again placed the beaker on the shelf while she dressed and washed her hands, and then carried the beaker back to the kitchen table. Mr. G. indicated that the amount of urine produced, approximately 70 millilitres in total, was now satisfactory.

B. herself then selected a Versapak kit from among the 4 or 5 kits on the kitchen table made available to her by Mr. and Mrs. G. She opened the sealed bag in which the chosen Versapak kit was contained, removed the kit and placed it on the table. The kit in question, an example of which was examined by the Panel, consists of two plastic containers within each of which is a glass bottle. These are to enable the division of the sample into separate "A" and "B" samples. B. removed each bottle from its container and herself decanted her urine from the beaker into the two bottles. She then screwed the lids onto the bottles and inverted each of them to check for leaks. She then placed each bottle into one of the two plastic outer containers. B. closed the containers and then passed them to her husband, who used his foot to ensure that the lids were firmly sealed. He then handed the sealed containers back to B. who checked them once again before handing them to Mr. G.

Mr. G. placed the two sealed containers in their plastic bag and then placed the plastic bag into a carrying bag that he described as a "rectangular document container" with a "normal clasp"; that is, it was not a "security bag".

It is important to emphasise that at no time during the operation described above did Mr. or Mrs. G. touch the beaker or the components of the Versapak kit prior to the sealing of the outer containers by the Appellant and her husband. Mr. G. only touched the Versapak kit after it had been sealed as described above and handed to him by B.

After B. decanted her urine from the beaker into the two bottles and sealed the bottles in their containers, as described above, and after the containers were placed into Mr. G.'s carrying bag, Mr. G. noticed that there remained in the beaker sufficient urine to enable a litmus test to be carried out on the residue. The test in question, which consists of a pH and specific gravity test, is intended to determine if urine is sufficiently concentrated to enable the sample to be satisfactorily analysed. This litmus test is an element of the IOC sampling procedure and a normal part of IDTM's sampling and collection procedure. It is not, however, mandated by FINA's procedure. Nonetheless, the test was performed and the result confirmed by B.

Mr. G. then completed the Doping Control Form ("DCF"). The numeric code for each of the two sample bottles into which B. had decanted her urine - the "A" and "B" samples - were read out by B. and entered on the form by Mr. G. as: A 074396 and B 074396. B. completed the required declaration relating to drugs recently used, whereupon Mr. G. handed her the completed doping control form which she verified and signed. The husband also signed the form.

Mr. G. then handed Appellant her copies (parts 4 and 5) of the completed doping control form. The Counsel for the Appellant correctly drew our attention to the fact that the copies of the form provided to B. do not include the time of the sampling, as required, whereas the other copies do include the time. This, it was suggested, could only be the result of improper tampering with the form by Mr. or Mrs. G., constituting evidence of their bad faith and casting doubt on the legitimacy of the sampling process. We reject any such inference or suggestion. On the contrary, we accept Mr. G.'s evidence and consider that this in no way compromises either the sampling or the testing procedure. Mr. G. told us, with candour and sincerity, that while he cannot recollect precisely the circumstances in which the time would have been added to certain copies of the form, he surmises that he had already detached parts 4 and 5 and handed them to Appellant, realising only subsequently that he had forgotten to include the time which he then added to the remaining copies.

Mr. and Mrs. G. were conscious of the fact that B. had stated that she had arranged to pick someone up at Dublin Airport. Accordingly, they collected their equipment and exited the house as quickly as possible.

Mr. and Mrs. G. returned to their automobile, into which they placed the bag containing B.'s sample. After starting the car, Mr. G. asked Mrs. G. whether she had "smelled anything" during the collection procedure. This question elicited from Mrs. G. the comment that, while sitting at the kitchen table after the second increment had been produced, she had in fact noticed a sweet liquor-type odour which reminded her of "Irish Mist", a sweet whisky liqueur. Mr. G. stated that he too

had noticed an odour of alcoholic spirits, though for him the smell was more akin to "Southern Comfort".

Both Mr. and Mrs. G. testified that they chose not to say anything about this smell at the time, either because the smell seemed an insufficient basis to intrude further upon B. or because it appeared that the sample had in fact been produced correctly. Nonetheless, while discussing the matter subsequently, in their car, Mr. and Mrs. G. agreed that their observations should be mentioned in the report ("Mission Summary") sent to IDTM. This was done, and the note "peculiar odour – sweet + alcohol/spirit" was included in the report.

On leaving the Appellant's house, Mr. and Mrs. G. drove to the place where they breakfasted at approximately 9:30. They brought with them into the restaurant the bag containing B.'s sample, and the bag remained in their sight at all times. Upon returning to their home, Mr. G. removed the bag from the car and brought it into the house, where he wrapped the two containers in white polystyrene foam and placed them in the refrigerator until they could be turned over to DHL Courier Service for delivery to the testing laboratory in Barcelona.

Mr. G. stated that, in his experience, the staff employed by DHL during the weekend tended to be less experienced and competent than their weekday colleagues. Accordingly, Mr. G. decided not to call DHL, and so not to forward B.'s sample to the laboratory in Barcelona until the following Monday, 12 January.

On the morning of 12 January, Mr. G. telephoned DHL and a courier arrived at his home at approximately 11:15. Mr. G. wrapped the two containers in more polystyrene foam which he secured with brown tape. He then placed the containers thus wrapped into the shipping bag provided by DHL, which he then sealed in front of the courier. The courier signed the waybill and provided Mr. G. with a copy. The required copy was also affixed to the outside of the DHL bag and, at approximately 11:30, the courier took the bag containing the samples and left. Mr. G. then forwarded his copy of the waybill to IDTM.

On 14 January 1998, the laboratory in Barcelona acknowledged receipt of the two containers A 074396 and B 074396.

On 30 January 1998, the laboratory sent its Antidoping Analysis Report to FINA. The Report stated:

> *"Unequivocal signs of adulteration have been found in sample coded A 074396. The content of alcohol of the sample (concentration higher than 100 mg/ml) is in no way compatible with human consumption and the sample shows a very strong whisky odour. Its very low specific gravity (0.983 g/ml) is also compatible with a physical manipulation.*
>
> *Additional laboratory results obtained with the sample (especially, steroid profile and isotope ratio mass spectrometry measurements) suggest the administration of some metabolic precursor of testosterone. Longitudinal follow up is recommended".*

On 27 April 1998, B. was informed by FINA that she had committed an offence according to FINA Rules DC 1.2(b), DC 2.1 and DC 3.1(b) in relation with the "A" sample collected on 10 January 1998, and that FINA was prepared to proceed with the analysis of the "B" sample.

The analysis of the "B" sample was performed on 21 May 1998 at the laboratory. The Counsel for the Appellant attended.

The same day, the laboratory sent its Antidoping Analysis Report concerning the "B" sample to FINA:

> *"Unequivocal signs of adulteration have been found in sample coded B 043396. The content of ethanol of the sample (concentration higher than 100 mg/ml) is in no way compatible with human consumption and the sample shows a very strong whisky-like odour. Its very low specific gravity is also compatible with a physical manipulation.*
>
> *These results are in agreement with those found in the corresponding A sample".*

A hearing before the FINA Doping Panel was held on 24 July 1998.

On 6 August 1998, the FINA Doping Panel found that B. had committed a doping offence under FINA Rules DC 1.2 (b) / DC 3.1 (b). She was suspended from all participation in any activities of FINA or its Member Federations, in any discipline, in international competition for a period of four years, effective immediately.

LAW

1. The FINA DC Rules included in the FINA handbook 1998-2000 apply [refer to the provisions published in Award CAS 98/208 above].

2. The FINA Guidelines for Doping Control, 3rd edition, dated 15 April 1997, stated at the material time, and provide, so far as material:

> *"7. UNANNOUNCED OUT-OF-COMPETITION DOPING CONTROL*
>
> *7.1 Unannounced doping control may be imposed by FINA in every Member country subject to the laws in each country. All Members of FINA should include in their constitution a provision obliging that Member to allow unannounced doping control of any athlete under its jurisdiction. Such unannounced doping control shall focus upon anabolic agents and other substances which will effect the detection of anabolic agents.*
>
> *7.2 FINA will, on the advice of the Medical Commission, appoint Independent Sampling Agencies to conduct unannounced doping control.*
>
> *7.3 FINA shall keep a register of athletes who are subject to unannounced doping control, based upon current world rankings. The Medical Commission shall select athletes from the register for unannounced testing.*

However, individual athletes or groups of athletes not listed on the register may be tested at the discretion of FINA.

7.4 When an athlete has been selected for unannounced doping control, the test person may either make an appointment to meet an athlete or he may arrive unannounced at the athlete's training camp, accommodation or any other place where the athlete is likely to be found. Authorization for doping control shall be in writing by FINA.

7.5 Arrangements for collection of the sample shall be made as soon as possible after contact with the athlete has been made. It is the athlete's responsibility to check arranged date, time and precise location of the meeting.

7.6 Where an SO arrives unannounced he must give the athlete reasonable time to complete any reasonable activity in which he is engaged, but testing should commence as soon as possible. The SO shall show proof of identity and provide a copy of his letter of appointment from FINA. The SO shall also require proof of identity of the athlete. The urine sample shall be collected according to FINA rules to ensure the identity and security of the sample and the privacy of the athlete. The athlete shall stay in view of the SO until the sample is collected.

7.7 If the athlete refuses to provide a urine sample, the SO shall explain to the athlete that by refusing to provide a sample, he shall be deemed to have refused to submit to doping control and may be subject to sanctions under DC 9. If the athlete still refuses to provide a sample, the test person shall note this on the doping control form, sign his name to the form and ask the athlete to sign the form. The test person shall also note any other irregularities in the doping control process.

7.8 The nature of unannounced, out-of-competition, doping control makes it desirable that little or no prior warning is given to the competitor. Every effort will be made by the SO to collect the sample speedily and efficiently with the minimum of interruption to the competitor's training, social or work arrangements. If there is an interruption, however, no athlete may take action to gain compensation for any inconvenience incurred.

7.9 If an athlete is found to have a positive result, the sanctions will be applied by the FINA Doping Panel as if it were during competition.

7.10 Member Federations shall have the obligation to submit the names, addresses and telephone numbers of competitors as requested by FINA, to enable FINA to conduct unannounced testing (Appendix 2d).

7.11 If FINA attempts to conduct unannounced testing but is twice unable to locate a competitor at the address or location provided to FINA for such purposes, FINA shall send notice regarding the situation to both the competitor and his federation, requesting more detailed information as to the competitor's schedule. If the competitor cannot be located thereafter for a doping control test, the competitor may be considered to have refused to submit to doping control.

[emphasis added]

8. SANCTIONS

8.3 Sanctions are set forth in DC 9 as follows:

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

a) the finding in an athlete's/competitor's body tissue or fluids of a banned substance;

b) the use or taking advantage of banned techniques;

…

d) the failure or refusal of the athlete/competitor to submit to doping control;

…

DC 9.2 Rules regarding "sanctions" are set forth in DC 9 as follows:

f) For all other violation of these Rules related to Coping Control, sanctions may be imposed at the discretion of the Doping Panel.

DC 9.4. As used in DC 9.2. and other DC Rules, "suspension" shall mean that the individual sanctioned shall not participate in any activities of FINA or any of its Member federations, in any discipline, in international competition, including acting as a competitor, delegate, coach, leader, physician or other representative of FINA or a Member federation. Unless otherwise determined by the appropriate body, a suspension shall take effect from the date that the athlete/competitor provides a sample. As used in DC 9.2., and other DC Rules "expulsion" shall mean suspension for life."

It should also be noted that at page 27 of the Guidelines, the subject of unannounced/out-of-competition doping control is discussed in the following general, non-normative manner:

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 androgenic steroids, growth hormones, and chemically or pharmacological related compounds). For this reason, an anti-doping programme cannot act as a deterrent unless it includes testing both at competitions (all substances) and unannounced/out-of-competition testing (anabolic androgenic steroids, growth hormones, and chemically or pharmacological related compounds).

The terminology used in unannounced/out-of-competition testing is "Athlete", whilst "Competitor" is reserved for in-competition controls.

3. The Appellant's case was elaborated in writing in several briefs submitted by her attorney:
   - Statement of Appeal (2 September 1998)
   - Appeal Brief (9 September1998)
   - Pre-Hearing Brief (26 April 1999)

4. The Appellant also made a series of so-called "preliminary submissions on points of law". In the view of the Panel, given the nature of its jurisdiction and responsibilities as set out above, Appellant's various submissions, so far as material, were properly to be disposed of in the award and were not truly "strike out" points going to the jurisdiction of the Panel. They are each addressed below.

5. The Appellant's first point was that the Respondent had failed to reach a decision in accordance with the appropriate burden of proof.

6. The Panel did not find it necessary to consider the factual basis for this submission, given that the hearing before it was a hearing *de novo* and, accordingly, any error of law as to burden of

proof or otherwise perpetrated by the FINA Doping Panel could be, and was, corrected on appeal.

7. The Appellant's second point was that the Chairman of the FINA Doping Panel exhibited substantial bias against the Appellant.

8. We did not find it necessary to consider the factual basis for this submission, given that the hearing was a hearing *de novo*. The virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance fade to the periphery (Pierre Moor, *Droit Administratif*, vol. II, Berne 1991, p. 19 citing Swiss Supreme Court cases ATF 114 Ia 307, ATF 110 Ia 81; see by analogy *Calvin v. Carr* 1980 AC 574 at pp. 592-593). The Appellant's entitlement, which she fully received, was to a system which allowed any defects in the hearing before the Doping Panel to be cured by the hearing before CAS (see CAS 98/208).

9. The Panel therefore finds it unnecessary to consider the charges made by the Appellant as to the alleged violation of due process and bias on the part of the FINA Doping Panel and/or its Chairman.

10. For the avoidance of doubt, however, the Panel stresses that its abstinence should not be taken as endorsement of those charges; on the contrary, it sees no reason to doubt the good faith of the Chairman.

11. The Panel does, however, suggest that it is always inadvisable, specifically because of the potential to create misunderstanding or confusion in the mind of the public, for members of a judicial or quasi-judicial body to discuss publicly their findings, in particular by way of media interviews.

12. The Appellant's ancillary point, i.e., that she was misled by the Chairman into believing that, before the Doping Panel's decision was reached, further evidence from Mr. and Mrs. G. would be heard, is based on a simple misconstruction of his words, which were:

"If the result of our considerations tomorrow afternoon is that we must do some more investigations, for example, call Mr. and Mrs. [G.] for a hearing, then we will contact with you again." [emphasis added]

(Transcript of the hearing held before the FINA Doping Control Panel, 24th July 1998, p. 69)

The Chairman was clearly indicating not that the Gs would be called, but that they might be – and then, only if the FINA Doping Panel considered itself unable otherwise to reach a conclusion.

13. The Appellant's third point was that Mr. and Mrs. G. lacked the authority to carry out unannounced doping tests, even if (which was contested, see para. 19 *et seq.* below) out-of-competition testing was itself permitted.

14. As to this, the key rule is FINA Doping Control Rule DC 6.1, cited above at para. 1.

15. It is clear, on the basis of DC 6.1, that FINA had the power to appoint a third party, such as IDTM to carry out doping tests. The agreement between FINA and IDTM dated 2 March 1995 (which was, we were advised, renewed in accordance with the provisions of its paragraph 5), expressly provided at paragraph 2.3 *"IDTM undertakes to assign one (or more) International Doping Officer(s) to the event, who are specifically trained to manage the doping control in accordance with FINA Procedural Guidelines"*. In context, the "event" in question refers to the assignment contemplated by paragraph 2.2 which provides: *"for each assignment FINA shall supply IDTM with particulars of the athlete to be tested, as well as the time and place for testing, etc."*

16. In our view, the FINA Rule DC 6.1 necessarily contemplates and permits the third party (which might be, as in the case of IDTM, a body corporate) itself to appoint servants or agents to perform the actual doping control sampling procedure; it is clear that FINA so interpreted it. Mr. and Mrs. G. were, for their part, duly appointed by IDTM (FINA's licence N° 980309-05) and, we were informed by Mr. Sahlström, FINA was aware that Mr. and Mrs. G. were appointed as doping control officers by IDTM.

17. It seems to us entirely inappropriate to construe a rule of this character with the technicality associated with, for example, a trust deed, when the rule is well capable of being given a purposive construction that respects the practicalities of its subject-matter. We also draw attention to the fact that the Appellant had previously been subjected to out-of-competition testing by Mr. and Mrs. G. on several occasions, without protesting their authority.

18. We conclude that Mr. and Mrs. G., singly or jointly, properly acted on the day in question as sampling officers within the contemplation of Rule DC 6.1.

19. The Appellant's fourth point was that unannounced testing *out-of-competition* is not permitted by the FINA Rules.

20. It is to be noted at the outset that the Appellant's construction makes a nonsense of Rule DC 6.2, which clearly contemplates that unannounced testing can take place both out-of-competition as well as during competition – see the clause beginning with the word *"including ..."*.

21. The Appellant sought to counter this by suggesting that such testing would be legitimate only if the person tested were a competitor in an actual event – but this construction only introduces a further nonsense into the rule. A person, while competing in a particular event, cannot simultaneously be tested outside such event.

22. The entirety of the Appellant's case pivots upon the fact that, at page 27 of the Guidelines, in a non-normative passage, it is stated that: "*The terminology used in unannounced/out-of-competition testing is "Athlete" whilst "Competitor" is reserved for in-competition controls"* (see above).

23. As to this, the Panel notes:

(i) it is also expressly provided in the Guidelines that any inconsistency between the Rules and the Guidelines must be resolved in favour of the Rules (FINA Guidelines for Doping control, Third edition, p. 5)

(ii) the passage on which reliance is placed is in the non-normative "question and answer" section of the Guidelines;

(iii) there are many junctures at which the Rules use "competitor" and "athlete" indifferently and identically; most notably, Rule DC 9.1, which refers to sanctions on competitors, is translated in the equivalent Guideline 8.3 into sanctions on athletes (see above).

24. It therefore appears to us that this single sentence is too fragile a platform on which to erect and support Appellant's contention.

25. The Panel is in no doubt that the burden of proof lay upon FINA to establish that an offence had been committed. This flows from the language of the doping control provisions as well as general principles of Swiss civil law (Article 8, Swiss Civil Code). The presumption of innocence operates in the Appellant's favour until FINA discharges that initial burden.

26. The Panel is equally in no doubt that the standard of proof required of FINA is high: less than the criminal standard, but more than the ordinary civil standard. The Panel is content to adopt the test set out in K. and G. v. IOC (see CAS OG 96/003-004) ("K."): "*ingredients must be established to the comfortable satisfaction of the Court having in mind the seriousness of the allegation which is made"*. To adopt a criminal standard (at any rate, where the disciplinary charge is not a criminal offence) is to confuse the public law of the state with the private law of an association (see CAS 98/208).

27. The Panel further accepts that, inasmuch as an allegation of manipulation includes an element of *mens rea* and attributes dishonesty to an athlete (whereas other doping offences may be ones of strict liability), such an allegation bespeaks an extremely high degree of seriousness.

28. Resolution of the twin questions of burden and standard of proof, however, does not *per se* answer the further question of what it is that has to be proved.

29. The Appellant (as was her entitlement) ran two main factual arguments in tandem (which were, it should be noted, inconsistent the one with the other). The first was that the chain of custody of Appellant's sample had not been established, and therefore the Panel ought to have sufficient doubt as to whether the sample tested at the Barcelona laboratory was in fact her sample. The second was that, if the sample tested was her sample, it had been manipulated by a person other than the athlete herself.

30. We shall examine these arguments in turn. We note, at the outset, that there were limited disputes between the Appellant and Mr. and Mrs. G. as to primary facts. As to these, we preferred the evidence offered by Mr. and Mrs. G., which impressed us as being both honest and useful. More importantly, we could discern no conceivable motive on their part to distort evidence or mislead the Panel. The attack on Mr. G., on the footing that he had said in a

television interview that he was opposed to the use of drugs by athletes, seemed to us to be entirely misjudged, not least because the Appellant herself proclaimed a similar philosophy before us.

31. As to chain of custody, it is necessary to bear in mind the various stages in the process of collecting, transporting and testing Appellant's sample.

32. The first stage, after Appellant provided the sample and (with the aid of her husband) herself sealed the containers, consisted in the transmission of the sample from the Appellant's house to the house of Mr. and Mrs. G. In this regard, Mr. and Mrs. G. told us that they placed the plastic bag containing the kit inside which was Appellant's sample into a carrying bag which they then loaded into their car; stopped once on a journey back to their own home where they took the bag out of the car and kept it in eyeshot; and, on arrival at their home, stored the containers with the sample in the refrigerator, whence they were removed only for the purpose of supply to DHL for onward transmission.

33. We find no break in the link of chain of custody at this first stage, and we accept the evidence of Mr. and Mrs. G. that the sample was at all times safely stored. It was suggested that to leave the sample in their refrigerator over a weekend was inappropriate practice. We do not see why. Who knew of the sample's whereabouts or could have had access to a private fridge other than the custodians themselves? Moreover, although Mr. and Mrs. G. could not recollect consistently the one with the other precisely on which shelf in the refrigerator the sample was placed, both assured us that, come Monday morning, it had not been moved from where it had been originally placed. We accept that evidence.

34. The second stage was the transport by DHL. It was asserted, on the basis of the fate of a previous sample, sent in November 1997, which for a fortnight had gone, in the Appellant's counsel's vivid phrase "on walkabout" (but which we prefer, more dispassionately, to refer to as 'not accounted for'), that we should regard the custody with DHL between 12 January, when Mr. and Mrs. G. consigned the sample to DHL, and 14 January, when the sample was received at the Barcelona laboratory, as suspect and insecure.

35. DHL is a carrier of international reputation. We see no reason to assume that the sample, which arrived timeously on this occasion, was not in DHL's custody throughout. IDTM has since enquired of DHL whether it could confirm that there was no departure from proper practice in relation to this sample; in response, a letter from DHL to this effect was supplied to us.

36. The third stage occurred when the sample was in the possession of the Barcelona laboratory. At this juncture, the Appellant faced the high hurdle of the presumption of regularity embodied in the FINA Rule DC 8.1. It seems to us that such presumption is not disturbed by the astute tactics, employed by Appellant, of first compelling the laboratory to produce documents which it is not normally obliged to produce, and then suggesting that not all documents evidencing the location of samples on a day-by-day and hour-by-hour basis had

been produced, thereby suggesting that there was – or may have been – a break in the chain of custody.

37. In our view, the Appellant signally failed to discharge the burden which lay upon her to dislodge the presumption of regularity. On the contrary, with the assistance of the interpretation of Professor Segura of the Barcelona laboratory, we are content to accept that the documentation which was produced showed that, except on occasions when the A and B samples were removed for testing, they remained properly in cold storage throughout. What transpired the testing of the B sample is, in any event, irrelevant.

38. The Appellant's first line of argument accordingly failed. We are convinced that the sample which was tested was in fact that of the Appellant.

39. In essence, the Appellant contended that the burden of proof lay upon the Respondent to eliminate all possibilities other than manipulation by the Appellant.

40. We do not believe that this position reflects a correct legal analysis. The Respondent's burden was only, but sufficiently, to make the Panel "comfortably satisfied" that the Appellant was the culprit. But even if the Appellant's contention were correct, we consider that the Respondent discharged its burden.

41. In summary, it does not appear to us that there is, or was, any person other than the Appellant who at any relevant time had the motive, opportunity, or technical skill to manipulate the sample in a manner that would be undetected, or indeed that the sample was in any way manipulated.

42. Although invited to do so, Appellant's counsel declined – and, in our view, was unable – to formulate any hypothesis that would point the finger at some such other person, whether identified or not. If and insofar as he invited us to consider in an abstract manner the possibility that either the Gs or some officer or employee of FINA were guilty of such manipulation, we utterly reject this suggestion.

43. Mr. and Mrs. G. struck us, we repeat, as truthful witnesses. They gave their evidence with care. Their integrity was not in serious question. Although on a previous occasion, more that a decade and a half ago, Mr. G. distorted an entry form to the advantage of a national athlete for the first World Athletic Championship in Helsinki, it is notable that the relevant athletic authorities did not see fit to penalise him nor, in the event, to disqualify or prevent the athlete from competing. Moreover, it is a quantum leap to suggest that those facts provide a legitimate basis for an inference that, over fifteen years later, Mr. G. might have penalised an athlete of the same country by manipulating a drug sample. As regards Mrs. G., there was not even the slightest challenge to her character.

44. As to FINA, we find it incredible that it should be suggested that the Federation was concerned to inculpate the Appellant, including by manipulating her samples, rather than to satisfy itself as to whether the rumours which swirled around the swimmer were well founded

or not – a wholly proper exercise for the governing body of an international sport. The fact that Appellant's counsel was constrained (on instructions) to fire off these volleys in all directions, of itself suggests that he had no single legitimate target for his accusations and implications.

45. It has to be borne in mind that it is not even proven that Versapaks can be opened and closed illicitly without detection. The report of the independent Institut concluded:

"It is therefore possible to answer the questions of the mission:

The container sample B074396 given to us as used by B. does not show any sign (in the ways we have been able to experiment with) that there was an attempt illicitly to open the container and to close it again prior to testing.

Within the limits of our experimentation, it is not possible to illicitly open the type of canisters tested without leaving any indication that it has been opened and closed.

Further marks could be found depending on the type of tool used (chemical detection of metal) and the heating procedure (tape remnants from the unused sample, etc). Potentially, further marks could be visible inside the closing mechanism due to the two way movements and forces applied to the sealing teeth."

(Report PFS 170-04.99, p. 47, Institut de Police Scientifique et de Criminologie, Lausanne).

46. Mrs. Bonfanti did acknowledge, with professional independence, that not all possible tests had been capable of being carried out in the available time; the fact remains that she carried out those tests which she determined were most useful, and they did not produce a result of any assistance to the Appellant. According to Mr. Hatton, Versapak also carried out its own tests, which equally led to the same conclusions. There was a suggestion in the newspapers that in the case of some other unrelated disciplinary proceedings an unidentified person in the Cologne laboratory had demonstrated that Versapaks could be illicitly opened without detection. But no details whatsoever were provided of the tests carried out; nor, indeed, was there any primary evidence that this rumour, referred to in a letter from Versapak to IDTM dated 1 July 1997, had any factual substance. We could not accept such a rumour or suggestion as sufficient basis for raising a reasonable possibility that Versapaks could be opened without detection.

47. We rejected an application by Appellant's counsel to call Dr. Brown, who (we assume on the basis of a newspaper article enclosed with the exhibits filed) might have sought to give evidence to contrary effect. Given:

(i) our procedural directions (15 March; 6, 14 and 20 April 1999);

(ii) the fact that the undetectability of any illicit opening of a Versapak was necessarily a key part of the Appellant's defence against the charge brought by FINA;

(iii) the fact that Appellant's counsel was notified on 6 April 1999 that the Panel wished the independent expert to investigate this very fact; and

(iv) the fact that the Appellant had included Dr. Brown in her original list of witnesses, but then subsequently failed to submit any witness statement by him or in any way to indicate that she still intended to call him as a witness.

We concluded that it would be wholly inequitable and unfair to allow the Appellant to spring such an ambush upon the Respondent.

48. We should add, however, that even had the Panel been provided unambiguous evidence that, in some ingenious way, a Versapak could be illicitly opened without detection, this would have constituted a necessary, but far from sufficient, basis for the Appellant's hypothesis of third-party manipulation in this case.

49. For such hypothesis to have any credence, one would have to assume a striking coincidence of factors, including:

(i) a person existed who wished to manipulate the Appellant's sample;

(ii) such a person would be aware of not only the unannounced test (of which only persons within IDTM should have been aware) but also of the location of the sample – which, it must be remembered, was anonymised in accordance with the usual procedures – at one or more of the various stages in the chain of custody;

(iii) that person had access to the sample at one or other of the various stages of custody, namely:

- the refrigerator of Mr. and Mrs. G. (only one of their daughters was at home that weekend),
- during the course of transit with DHL,
- in the laboratory where, according to Professor Segura, only he had knowledge of the whereabouts of the sample and the means of access to it;

(iv) such a person had carried out experiments that identified how Versapaks of the kind containing the Appellant's samples could be opened without detection.

50. It seems to us that when, in the criminal sphere, the law discriminates between reasonable and unreasonable doubt, it has precisely this kind of dividing line in mind, and we reiterate that, here, the burden on the Respondents is less than the criminal burden. In future, it may be desirable to store Versapaks (or other approved canisters) in a bag with a seal which would need to be broken before access could be gained to such canisters, but the absence in this case of that second element of security did not cast doubt upon the efficacy of the overall procedure.

51. Looking at the issue from another angle, if one accepts (as we do) the Gs' version of events – i.e., that the Appellant was absent between 4 to 6 minutes after they arrived (whereas she, significantly, claims – which we reject – that it was only 1 minute) – it is easy to envisage that she was considering, it may be with her husband, a contingency plan to contaminate the sample.

52. Given that,

(i) according to Mrs. G. (whose evidence we accept), that during the course of the sampling the Appellant's vagina was not visible, and that she was happy that the sample was properly provided by reason of sound rather than by sight;

(ii) while she candidly conceded that she was not able to say that she detected any manipulation in or around the vaginal region by B., Mrs. G. was not prepared to eliminate the possibility, because – again – she could not actually see under B.'s fleece.

It seems to us that the Appellant had the opportunity to manipulate the sample. Furthermore, she self-evidently had the motive to do so if she was in fact engaged in the use of illicit substances.

53. In this context, we draw attention again to the conclusion of the laboratory in respect of the "A" and the "B" samples:

"Unequivocal signs of adulteration have been found in sample coded A 074396. The content of alcohol of the sample (concentration higher than 100 mg/ml) is in no way compatible with human consumption and the sample shows a very strong whisky odour. Its very low specific gravity (0.983 g/ml) is also compatible with a physical manipulation.

Additional laboratory results obtained with the sample (especially, steroid profile and isotope ratio mass spectrometry measurements) suggest the administration of some metabolic precursor of testosterone. Longitudinal follow up is recommended."

As to the "B" sample, the laboratory concluded that the results of its analysis *"...are in agreement with those found in the corresponding A sample."*

It matters not, for present purposes, that the substance referred to could not be specifically identified until such time as subsequent tests were carried out in Barcelona in May, nor that the substance in question was not specifically listed as a banned substance until 31 January 1998, i.e., subsequent to both the 10 January sample and the 30 January report of the laboratory concerning Appellant's "A" sample. The fact remains that there is unchallenged evidence that what was, even at the date of the testing, a banned substance (because it fell within the general category of substances related to those specifically listed) was found in the Appellant's urine; there is, therefore, actual evidence before the Panel that there was something to conceal. Not only was the manipulation not wholly successful, but there was an obvious motive for it.

54. We reach this conclusion on the basis of the results that were disclosed to the Appellant at the material time, i.e. in the 30 January 1998 report concerning the "A" sample, without the need to fortify the results by reference to what was subsequently discovered, but not known to her, at the time of the "B" test.

55. In addition to the foregoing, we note that evidence was adduced before us which suggested that previous samples taken from the Appellant (subsequently analysed with the aid of new technology) contained traces of prohibited substances; but, since this evidence was not and

could not be (within the confines of the appeal) subject to detailed scrutiny or analysis, we declined to weigh it in the balance. It is sufficient to note that the Appellant could well have been aware of the growing sophistication of analytical techniques, which might have augmented a desire to manipulate the sample taken on 10 January 1998.

56. In short, the absence of direct evidence of manipulation (correctly stressed by Respondent's counsel) was in no way fatal to Appellant's case. The substantial circumstantial evidence clearly sufficed.

57. In an eloquent prologue to his final submission, the Counsel for the Appellant, reminded us of what is at stake for his client in this Appeal: B., a national heroine, faces notoriety and disgrace. It would be disingenuous of this Panel to pretend obliviousness to the rumours of drug use that have swirled around the Appellant during and since her signal Olympic triumphs, but we stress that we have, for the purpose of determining this Appeal, paid no heed whatsoever to these rumours. Our conclusions are based solely on the evidence before us – no more, no less. We should add, too, that our only function was to determine whether the charge of manipulation in relation to the sample taken on 10 January 1998 was made out; we neither can nor do adjudicate upon any matters relating to the Appellant's career prior to that time.

58. We therefore conclude, for the reasons hereinbefore set out, that the Appeal must be dismissed. Accordingly, there is no need for us to consider whether (which we doubt) we enjoy jurisdiction to award any consequential monetary relief to the Appellant, nor how to dispose of the Appellant's claim for such.

The Court of Arbitration for Sport hereby rules:

1. The Appeal filed by B. on 2 September 1998 is dismissed.

2. The decision issued by the FINA Doping Panel on 6 August 1998 is confirmed.

(...)