Arbitration CAS 2008/A/1607 Kaisa Varis v. International Biathlon Union (IBU), award of 13 March 2009

Panel: Mr. Graeme Mew (Canada), President; Mr. David W. Rivkin (USA); Mr. Dirk-Reiner Martens (Germany).

Biathlon
Doping (EPO)
Second violation of an anti-doping rule
Right to attend or have the athlete's representative attend the B' sample opening and analysis

An athlete's right to be given a reasonable opportunity to observe the opening and testing of a "B" sample is of sufficient importance that needs to be enforced even in situations where all of the other evidence available indicates that the Appellant committed an anti-doping rule violation. Especially in cases where the Athlete is facing a lifetime ban as the result of an alleged anti-doping rule violation and because of the significance of the consequences of such ban for the Athlete, it is important that procedures are followed correctly and that information concerning the rights and remedies of an athlete is communicated clearly.

This is an appeal by an athlete from a decision of the International Biathlon Union (IBU) Executive Board dated 11 February 2008 which found that the Appellant had committed a second anti-doping rule violation, for which a sanction of lifetime ineligibility was imposed.

The athlete asserts on appeal that the decision of the IBU Executive Board should be overruled and either (a) the Appellant's "B" sample taken in a doping test on 6 January 2008 in Oberhof, Germany, should be analysed in accordance with IBU Anti-Doping Rules section 7.2.3e (WADA Code, section 7.2) in the presence of the Appellant's "biochemical" representative; or (b) if that were not possible, the sanctions imposed by the IBU should be declared null and void. The Appellant also seeks costs.

The Appellant is an international level athlete in the sport of biathlon. She is a national of Finland. On 10 May 2003 the Appellant was banned from competition for a two year period for an anti-doping rule violation after testing positive for the banned substance erythropoietin ("EPO"). The Appellant resumed competition after her period of ineligibility concluded.

The IBU is the International Federation for the sport of biathlon and, as such, a competent Anti-Doping Organisation under the *World Anti-Doping Code* and its associated rules and regulations. The headquarters of the IBU are in Salzburg, Austria. The constitution of the IBU is subject to Austrian law.

On 6 January 2008 the Appellant provided a bodily sample as part of in-competition testing undertaken at the IBU Biathlon World Cup, Oberhof.

On 18 January 2008, the IBU was informed by Laboratoire Suisse d'Analyse du Dopage (the "Lausanne Laboratory") that the isoelectric profile of the "A" Sample provided by the Appellant showed the presence of recombinant EPO. According to the 2008 Prohibited List to the *World Anti-Doping Code*, EPO belongs to the S2 (hormones and related substances) class of Prohibited Substances .

Upon the request of the Appellant, her "B" Sample was opened and tested. This took place in the Appellant's absence at the Lausanne Laboratory on 29 January 2008. The analysis of the "B" Sample confirmed the result of the analysis of the "A" Sample.

A legal hearing was held before the IBU Executive Board on 11 February 2008 in Östersund, Sweden. The Appellant and her counsel did not participate in the hearing itself, but submitted several documents in writing.

In its decision dated 11 February 2008, the IBU Executive Board:

- imposed a lifetime ban on the athlete (for a second anti-doping rule violation) effective 6 January 2008;
- disqualified the Appellant from the Women's Mass Start event at the IBU World Cup, Oberhof;
- declared null and void all results obtained by the athlete on or after 6 January 2008 and ordered that all prizes obtained on or after that date be forfeited; and
- ordered the termination of all sport-related financial support or other sport-related benefits from the IBU and/or the Finnish Biathlon Association to the Appellant.

The *IBU Disciplinary Rules* together with the *IBU Anti-Doping Rules* provide the legal framework for the disciplinary proceedings taken against the Appellant as a result of her alleged anti-doping rule violation. According to article 1.2.2 of the *IBU Anti-Doping Rules*, the presence of a Prohibited Substance or its Metabolites or Markers in an athlete's bodily Specimen shall, subject to certain exceptions set out in the article, constitute an anti-doping rule violation.

Article 7 of the IBU Anti-Doping Rules sets out doping testing procedures. In accordance with the usual practice, where urine samples are collected as part of the doping control process, the sample provided by an athlete is divided into "A" and "B" samples. If the analysis of an athlete's "A" Sample results in an Adverse Analytical Finding, article 7.2.3(e) of the IBU Anti-Doping Rules require the athlete to be notified that he or she has the right:

> *"to promptly request the analysis of the B Sample or, failing such request, that the B Sample analysis may be deemed waived, the right of the athlete and/or his representatives to attend the B Sample opening and analysis if such analysis is requested, and the athlete's right to request copies of the A and B Samples laboratory*

documentation package which includes information as required by the current International Standard for Laboratory Analysis".

According to section 7.2.3 (f) of the IBU Anti-Doping Rules, in respect of the "B" Sample:

"The test analysis, if so requested, shall be conducted at the same Laboratory under the supervision of a member of the IBU MC within three weeks of the notification under article 7.2.3 d. above".

As will be discussed below, although the written record refers throughout to section 7.2.3 (f) of the IBU Anti-Doping Rules as the rule applicable to testing of the Appellant's "B" Sample, at the appeal hearing it was submitted that section 7.2.3 (f) had been superseded by certain revisions to the WADA International Standard for Laboratory Analysis, which had come into force on 1 January 2008. Section 5.2.4.3.2.deals with sample collection. Of particular application are the following paragraphs of the International Standard (2008 version):

5.2.4.3.2.1 *In those cases where confirmation of a Prohibited Substance, Metabolite(s) of a Prohibited Substance, or Prohibited Marker(s) of the Use of a Prohibited Substance or Prohibited Method is requested in the "B" Sample, the "B" Sample analysis should occur as soon as possible and shall take place no later than seven (7) working days of the notification of an "A" Sample Adverse Analytical Finding. If the Laboratory is unable to perform the "B" analysis within this time frame for technical or logistical reason(s), this shall not be considered as a deviation from the ISL susceptible to invalidate the analytical procedure and analytical results.*

5.2.4.3.2.6 *The Athlete and/or his/her representative, a representative of the entity responsible for Sample collection or results management, a representative of the National Olympic Committee, National Sport Federation, International Federation, and a translator shall be authorized to attend the "B" confirmation.*

If the Athlete declines to be present or the Athlete's representative does respond to the invitation or if the Athlete or the Athlete's representative continuously claim not to be available on the date of the opening, despite reasonable attempts by the Laboratory to accommodate their dates, over a period not to exceed 7 working days, the Testing Authority or the Laboratory shall proceed regardless and appoint an independent witness to verify that the "B" Sample container shows no signs of Tampering and that the identifying numbers match that on the collection documentation. At a minimum, the Laboratory Director or representative and the Athlete or his/her representative or the independent witness shall sign a Laboratory documentation attesting to the above".

The IBU Rules make reference to the International Standards in the following terms:

"6.1 Only Doping Control Laboratories accredited by WADA or otherwise approved by WADA and chosen by IBU are entitled to analyse samples taken at IBU Doping Controls. These laboratories are announced and updated by WADA on a continuous basis. These Laboratories will analyse Doping Control Samples and report results in conformity with the current International Standard for Laboratory Analysis (with revisions published by WADA on a continuous basis)".

As already noted, the Appellant asserts that:

- the decision of the IBU Executive Board should be overruled; and

(1) the B Sample provided by the Appellant on 6 January 2008 in Oberhof, Germany should be analysed in accordance with IBU Anti-Doping Rules article 7.2.3 e (WADA Code section 7.2), i.e., in the presence of the Appellant's nominated biochemical representative, Dr. Simon F. Vroemem, or (2) if that is not possible, the sanctions imposed on the Appellant by the IBU should be declared null and void; and

(2) the IBU shall be required to compensate all legal fees and expenses of the Appellant.

On 4 July 2008 the Appellant and the IBU entered into an arbitration agreement pursuant to which they agreed to waive a hearing of the Appellant's case by the IBU Court of Arbitration and to submit the appeal directly to the Court of Arbitration for Sport (CAS) for a final and binding decision as an appeal against the decision of the IBU Executive Board dated 11 February 2008, according to the special provisions applicable to the Appeal Arbitration Procedure (articles R47 *et seq* of the *Code of the Court of Arbitration for Sport*).

As already noted, the IBU Executive Board released its decision on 11 February 2008.

On 18 March 2008, the Appellant submitted an appeal to the IBU Court of Arbitration. On 29 May 2008 the IBU submitted its response.

As noted above, the parties entered into an arbitration agreement on 4 July 2008, following which this panel was constituted.

An oral hearing of the appeal took place in Lausanne, Switzerland on 21 November 2008.

The Appellant underwent in-competition drug testing on 6 January 2008 at an IBU World Cup event in Oberhof, Germany.

On 22 January 2008 (a Tuesday) the Appellant was notified by the IBU that an Adverse Analytical Finding had been made following the testing of her "A" Sample. This notification was made in the form of an e-mail sent to the Finnish Biathlon Association by Dr. Michael Geistlinger, the then Secretary General of the IBU, a copy of which was also forwarded by the IBU to the Appellant. The notification advised that the IBU had been informed by the Laboratoire Suisse d'Analyse du Dopage, a laboratory (the "Lausanne Laboratory") accredited by the World Anti-Doping Association (WADA) that the isoelectric profile of the Appellant's "A" Sample showed the presence of recombinant EPO. The e-mail notification continued:

> *"According to art 7.2.3 e. IBU Anti-Doping Rules, Ms. Kaisa Varis has the right to promptly request the analysis B-sample at the Suisse Laboratory. She and/or her representative has the right to attend the opening and analysis of the B-sample. Such analysis, if so required, shall take place within 3 weeks from this notification. The costs have to be borne by your NF. Failing such prompt request it will be assumed that the right to analyze the B-sample has been waived".*
>
> *The same day, on Tuesday 22 January 2008, the Appellant responded to the IBU by sending Dr. Geistlinger an e-mail which stated, inter alia, as follows:*
>
> *"…I ask to analyse my sample B.*
>
> *Before analysing sample B, please, I want to have all documents and results concerning analyse of sample A; Testraport and original report of chain of custody. Please, deliver these documents to me and mr. Janne Hakala as soon as possible".*

Later the same day, the Appellant sent Dr. Geistlinger a second e-mail which said:

> *"I am referring to my first e-mail to you and emphasising that I have right to get every documents of analysing of sample A before analysing sample B. My lawyer mr. Olli Rauste will start to handle this case beginning of next week. Please, give all information of this case also to mr. Rauste, his e-mail: (…)".*

On the evening of 23 January 2008 (21:56 Finnish time) Dr. Geistlinger e-mailed Ms. Varis and Dr. Martial Saugy, the director of the Lausanne Laboratory stating:

> *"This is to announce that the opening of the B-sample, you requested, following to a kind offer by Director Saugy, will take place on 29 January 2008, at 1 pm, in the Suisse laboratory, Chemin des Croisettes 22, CH-1066 Epalinges, Suisse. Please, address Mr. Saugy personally when arriving at the laboratory".*

The e-mail goes on to advise that the IBU had checked flight connections and available seats that the athlete would need to take from her place of residence in order to attend. Mr. Rauste was not copied on this e-mail.

Subsequent to the notification e-mail (paragraph 27 above) that Dr. Geistlinger sent to the Finnish Biathlon Federation and the athlete, he spoke to Dr. Saugy, the head of the Lausanne Laboratory. Whereas the IBU rule stated that "B" Sample testing had to take place within 3 weeks, the IBU rules also incorporated by reference the WADA Code and all international standards and bylaws. Both Dr. Saugy and Dr. Geistlinger testified that during the course of their conversation, Dr. Saugy had informed Dr. Geistlinger that the *International Standard for Laboratories* had changed on 1 January 2008 and that "B" Sample testing was now to be done within 7 days. Dr. Saugy also told Dr. Geistlinger that it would take up to 4 days to complete the laboratory documentation package of the "A" sample.

It appears to be common ground that on 24 January 2008 the Appellant and Dr. Geistlinger spoke by telephone. According to the Appellant's written submissions (which have not been tested by cross-examination) she informed Dr. Geistlinger that she was not interested in any flight schedules that he had proposed and pointed out that she required the documentation on the "A" Sample before the analysis of the "B" Sample could take place. Dr. Geistlinger asserted during the course of his evidence that during that conversation he explained to her at that time why the 3 week notification period had become 7 days. Dr. Geistlinger did not, however, confirm this in writing to the athlete.

On 25 January 2008 Dr. Geistlinger sent the Appellant an e-mail entitled "Legal Hearing" announcing that a hearing of the allegations against the Appellant would take place on Friday 1 February 2008 at 1:00 p.m. at Oslo Airport Gardemoen. The e-mail stated, *inter alia*:

> *"The documentation asked for from the laboratory will be provided to you well before the start of the hearing.*
>
> *In case the B sample analysis, which will be disclosed on Thursday, 31 January 2008, during the first half of the day, will not confirm the results of the A sample, the hearing will be cancelled immediately and not case of an adverse analytical finding will be given".*

On 26 January 2008, the Appellant's lawyer, Mr. Rauste, who was on vacation at the time, sent an e-mail to Dr. Geistlinger advising him that the Appellant intended to appeal to the CAS in order to get her "B" Sample analysis postponed until she had been delivered all of the documents that she

had requested in connection with her "A" Sample. Mr. Rauste also advised Dr. Geistlinger that the Appellant had decided to request a DNA analysis to be made on her "B" Sample.

Later on 26 January 2008, Dr. Geistlinger responded to Mr. Rauste's e-mail taking the position that CAS was not competent to deal with the matter and that the request for a DNA analysis should be dealt with during the legal hearing scheduled for Friday 1 February 2008.

On 27 January 2008 Dr. Geistlinger copied an e-mail addressed to "Pierre" (subsequently confirmed to be Dr. Pierre Jeannier) to the Appellant and Mr. Rauste entitled: "Opening of B sample Lausanne" which stated as follows:

> *"Dear Pierre,*
>
> *Thank you for having agreed to represent the IBU at the opening of the B sample of Ms. Kaisa Varis. Please, find attached the respective documents known to us so far.*
>
> *I have been informed by the Secretary General of the Finnish Biathlon Association that he also authorises you to represent the interests of this federation which are in full line with the IBU interests. Please, after the opening, be so kind and confirm by email also to the Finnish Biathlon Association whether the opening of the B sample took place correctly and whether it showed any deviations from normal procedure".*

On Monday 28 January 2008 (9:44 am Central European Time) Mr. Rauste sent to Dr. Geistlinger an e-mail message entitled: "Official request to postpone the B sample analysis". The message repeated the request made by the Appellant that the analysis of her "B" Sample should be postponed until she had received the documentation concerning her "A" Sample and until her biochemical expert would have the opportunity to be present to witness the analysis of her "B" Sample. Mr. Rauste indicated in his e-mail that that could take place on Tuesday 5 February 2008 and thereafter.

Meanwhile, on 28 January 2008 there is also e-mail traffic between Mr. Rauste and CAS culminating in a message from Mr. Rauste to CAS, copied to the IBU, indicating that the Appellant was withdrawing her request for interim relief from CAS.

Shortly after his e-mail to CAS, Mr. Rauste sent an e-mail to Dr. Geistlinger (at 3:49 p.m. Finnish time) which stated:

> *"Ms Varis is still confident about that IBU will observe the basic legal rights provided for all suspected athletes in WADA Anti Doping Code section 7.2, together with WADA International Standard for Laboratory Analysis section 5.2.6.1 and WADA International Standard for Testing 9.3.2, and agrees to postpone the B sample analysis voluntarily until the biochemical expert appointed by Ms Varis will have the possibility to attend the laboratory analysis and until the complete Analysis Report of the A sample (or, as the WADA rule stipulates, "A sample laboratory documentation package"), together with the Chain of Custody documentation maintained by IBU pursuant to the WADA rule, has been delivered to Ms Varis in due time.*
>
> *Should IBU not observe the basic procedural rules mentioned above, Ms Varis hereby notifies that she will not attend the analysis of the B sample scheduled unilaterally by IBU for tomorrow. Ms Varis personally knows very little about laboratory technics, and the biochemical expert from the Netherlands appointed by her is*

unable to attend the laboratory already tomorrow due to his other engagements. Ms Varis expects that IBU will have patience with regard to the B sample analysis at least until 5 February 2008 when the biochemical expert will be available.

Ms Varis is of the opinion that if the IBU still decides to proceed with the B sample analysis already tomorrow despite the above defects and severe rule violations in the proceeding, the whole B sample analysis shall be deemed null and void and the disciplinary proceeding against Ms Varis shall be immediately terminated without any sanctions imposed".

Also on 28 January 2008, at 4:13 p.m. (Finnish time) Dr. Geistlinger e-mailed Mr. Rauste informing him that the opening of the "B" Sample would go ahead the next day at 1:00 p.m. at the Lausanne Laboratory. The e-mail continues:

"I assure you that IBU certainly will respect all requirement enumerated in your fax today…in addition IBU will guarantee due process and a fair treatment of Mrs. Varis during the opening of the B sample tomorrow and in the further procedure if such will be necessary.

IBU is ready to search urgently for an expert in laboratory analysis which will be invited to follow the procedure of the opening of the B sample tomorrow, if at all possible, and if Mrs. Varis or you would like the IBU to do so. The expenses for such expert will have to be covered by your side. Please, inform me by reverse email immediately on such request.

As I already informed you by a previous email, the documentation package and all documents showing the chains of custody will be provided to you by Thursday evening this week.

Thus, full compliance with IBU rules and WADA requirements will be safeguarded".

Mr. Rauste responded to this e-mail emphasising the Appellant's position that she should be entitled to appoint her own expert and counsel independently and that if the "B" Sample analysis was undertaken in the absence of a laboratory specialist appointed by her (the Appellant having indicated that she wished such a specialist to be present) it would be a violation of a basic legal right of the Appellant. The e-mail continued:

"Could you please explain to me why is this 7 days (from tomorrow until 5 February) period so important for you that you (…) do not want to observe the very basic human rights principles (…). I have not heard any explanation from you on this very essential question".

The opening and testing of the Appellant's "B" Sample took place, as scheduled, on 29 January 2008.

On 1 February 2008 Dr. Geistlinger notified the Appellant and Mr. Rauste by e-mail that the results of the analysis of the "B" Sample also showed the presence of EPO. The "A" Sample laboratory package was included with this e-mail.

On 8 February 2008 a legal hearing of the IBU Executive Board took place in Östersund, Sweden. The Appellant did not appear in person, but her lawyer in her behalf submitted several statements in writing (the original hearing date, initially set for 1 February 2008, having been postponed to enable the Appellant and her lawyer to study the "B" Sample laboratory package which had been delivered to them by e-mail on 6 February).

Evidence of Dr. Douwe de Boer

Dr. de Boer is the former scientific and technical director of the WADA accredited laboratory in Lisbon. Since 2004 he has been working in the field of clinical chemistry. He continues to work as a consultant in anti-doping matters. He holds a degree in biochemistry from the University of Groningen and a PhD in pharmacy from the University of Utrecht.

During the year prior to giving his testimony, Dr. de Boer has been involved in three "B" Sample analyses for EPO.

Dr. de Boer expressed the view that it is important for an athlete to have insight into what is going to happen at the analysis stage. In Dr. de Boer's experience, laboratories do make mistakes. To discover these mistakes it is necessary not only to review the documentation but also to identify what Dr. de Boer described as "unpredictable mistakes" which are not disclosed by the documentation but which are observable through being present during the course of the sample opening and analysis.

When asked about the period of time, following testing, in which results for testing of EPO would remain valid, Dr. de Boer expressed the opinion that EPO is relatively stable in urine if certain precautions are taken. Dr. de Boer testified that he had been involved in "B" Sample analysis that was undertaken one to two months after the "A" Sample.

Dr. de Boer noted that the Lausanne Laboratory had used only one antibody as part of its testing protocol for EPO, whereas the use of two antibodies (as the French laboratory does) would be preferable. However, Dr. de Boer acknowledged that there was no requirement for using two antibodies and that the protocol followed by the Lausanne Laboratory met with the applicable International Standard.

Evidence of Dr. Michael Geistlinger

Dr. Geistlinger was, but is no longer, the Secretary General of the IBU. He explained that a fax from the Lausanne Laboratory had, in fact, come in to the IBU's office at 6:40 p.m. on Friday 18 January 2008. At the time Dr. Geistlinger was in Italy and his assistant was in Antwerp. It was, therefore, not until the morning of Tuesday 22 January that the fax, which contained the news of the Appellant's adverse analytical finding, came to Dr. Geistlinger's attention. He then set in place the process of notifying the athlete and her National Federation.

Dr. Geistlinger explained that in 2003 the IBU had adopted the *World Anti-Doping Code* and all related international standards and by-laws. Under article 1.1.1 of the *IBU Anti-Doping Rules*, the IBU rules are made subject to the *World Anti-Doping Code.*

At the time, the published provision of the *IBU Anti-Doping Rules* dealing with the time within which a test analysis of an athlete's "B" Sample would have to be conducted, provided that it should be

undertaken within three weeks of the athlete being notified of the anti-doping rule violation (section 7.2.3(f) of the *IBU Anti-Doping Rules*). However, when Dr. Geistlinger subsequently spoke to Dr. Saugy at the Lausanne Laboratory, he was informed that the *World Anti-Doping Code International Standard for Laboratories* had been revised effective 1 January 2008 and that under the revised provision "B" Sample analysis had to be done within 7 days of notification to the athlete. Dr. Saugy also told Dr. Geistlinger that it would take up to 14 days to complete the laboratory package documentation for the "A" sample. Dr. Geistlinger believes that this telephone call with Dr. Saugy took place on either the 22nd or 23rd of January. In a subsequent telephone conversation, Dr. Saugy told Dr. Geistlinger that he would be available to perform the testing of the "B" Sample on 29 January.

Dr. Geistlinger states that, on 23 January 2008, he spoke to the athlete and told her that the testing of the "B" Sample would take place on 29 January. He says that he explained to the Appellant why the three week period for testing and analysis of the "B" Sample had become 7 days. However, Dr. Geistlinger acknowledged that he did not confirm this in writing to the athlete.

Dr. Geistlinger also acknowledged that on the evening of 28 January 2008, after withdrawing an application to CAS, the Appellant's lawyer, Mr. Rauste, had asked for an adjournment of the testing of the "B" Sample until 6 February 2008 so that the Appellant's nominated observer could attend. In cross-examination Dr. Geistlinger acknowledged that he had mistakenly failed to copy Mr. Rauste on the e-mail of 23 January 2008 (21:56 Finnish time, paragraph 30 above) that had been sent to the Appellant.

Dr. Geistlinger testified that he felt that he and the IBU had made "reasonable efforts" to accommodate the athlete's desire to have a representative present at the opening and testing of the "B" Sample. Because it appeared that the athlete would be unable to make arrangements for a witness to be present within the 7 day window provided by the revised International Standard, Dr. Geistlinger spoke to Dr. Saugy and asked him what could be done. He subsequently took the advice of the Vice-Presidents of Medical and Legal of the IBU. This ultimately resulted in an offer being made to the Appellant to have an independent expert present when the "B" Sample was opened. Dr. Geistlinger said he was surprised when this offer was rejected.

Dr. Geistlinger acknowledged that he did not directly ask Dr. Saugy if the testing of the "B" Sample could be delayed. Nor did he consider any alternatives to the date which he had set and the date which the athlete was asking for.

Apparently there was considerable media interest at the time and, in particular, the press had been "bombarding" Dr. Geistlinger as to where and when the testing of the "B" Sample would take place.

The IBU Rules do not impose an automatic temporary suspension on an athlete who has recorded a positive "A" sample result. Dr. Geistlinger confirmed that there was a World Championship event scheduled for 7-8 February 2008 which the Appellant could theoretically have competed in if the testing of her "B" sample had not, by then, confirmed that an anti-doping rule violation had

occurred. He denied, however, that this fact in any way influenced the position taken by the IBU in respect of the scheduling of the opening and testing of the Appellant's "B" sample.

Dr. Geistlinger confirmed that he had prepared a draft of the IBU Executive Board's Decision of 11 February 2008. He said that did so under considerable pressures of time. Asked why there was no reference in the decision to the "seven day" rule in the new *International Standard*, Dr. Geistlinger acknowledged that it would have been better if the decision had provided more detail.

Evidence of Dr. Martial Saugy

Dr. Saugy is a biologist who has been working at the Lausanne Laboratory since 1990. The Lausanne Laboratory is a WADA accredited laboratory and is affiliated to Lausanne University. It is certified under ISO 17025. The laboratory's mission is to serve sports authorities and interested parties to the fight against doping.

Testing for EPO was introduced in 2000. The Lausanne Laboratory has undertaken approximately 5,000 EPO analyses. The laboratory is constantly working to improve its techniques and to validate its methods.

Dr. Saugy confirmed that, effective 1 January 2008, a revised International Standard for laboratories under the *World Anti-Doping Code* had come into effect. One of the changes was to reduce the period of time for testing of an athlete's "B" Sample from three weeks after notification to 7 working days. The aim of the 7 day rule was to improve the reliability of testing. Dr. Saugy explained that for some substances, time works against the reliability of samples due to degradation. Medical commissions had concluded that it was taking too long between testing of "A" and "B" Samples. There were also practical problems resulting from the delays, particularly during tournaments or seasons with many competitive events.

Dr. Saugy acknowledged that the time periods in the International Standards do have some tolerance built in. Actual degradation rates are dependent on many factors. Dr. Saugy acknowledged that if the Lausanne Laboratory had been asked by the IBU to undertake the testing of the athlete's "B" Sample on 5 February, rather than 29 January, the laboratory could have accommodated such a request. However, in this case, the laboratory had been under a lot of pressure from the media. There were also ongoing competitive events in the sport. Dr. Saugy said that he completely respected the IBU's request to having the testing done on 29 January.

Dr. Saugy acknowledged that there was no sign of degradation in the "A" Sample that was tested. He could not say whether there would have been a concern about degradation occurring between 29 January (the testing date nominated by the IBU) and 5 February (the testing date requested by the athlete). He confirmed that the athlete's "B" Sample would have been frozen immediately following receipt, which would minimise the effect of degradation. In short, Dr. Saugy felt that there was no scientific reason why testing of the Appellant's "B" sample as late as 5 February would be unacceptable.

Dr. Saugy was asked whether a second analysis of the "B" Sample could now be undertaken. He said that this would not be possible. A minimum volume – 25 ml – is required to undertake testing. After taking an aliquot from the "B" Sample, the remainder was refrozen, but only 3 – 5 ml remains. Dr. Saugy said that he would also be concerned about degradation were further testing to be undertaken at this stage.

With respect to the issue of documentation, Dr. Saugy stated that it is not usual to have a full documentation package immediately available after the testing of an "A" or "B" Sample. In the case of EPO, a second opinion is taken from another laboratory, to provide "insurance" to the Federation and the athlete that there has been no false interpretation.

Dr. Saugy stated that, based on the testing of the "A" Sample, this was a clear case of doping. There was almost no endogenous band in the analysis. The "B" test was not different. In fact, it was even clearer.

The testing of the "B" Sample was attended by Dr. Jeannier as an "independent" witness. He was present during the opening and the first steps of testing. Because testing began on a Tuesday and ended on a Thursday, Dr. Jeannier was not present throughout. On cross-examination, it was put to Dr. Saugy that Dr. Jeannier was, in fact, a member of the IBU Medical Commission.

Dr. Saugy said that, from his personal perspective, he saw no need for the rule which entitles an athlete to have a technical representative present during the opening and testing of a "B" Sample.

Dr. Saugy acknowledged that he had spoken with Dr. Geistlinger about "rapid assessment" of the "B" Sample because of an up-coming championship event. He was told that if the "B" Sample was negative, that the athlete would be able to compete in that championship.

Neither Dr. Saugy or anyone else at the Lausanne Laboratory spoke directly with the Appellant or her lawyer (or was asked to). All dealings were with the International Federation.

Dr. Saugy acknowledged that the laboratory had had cases where the "B" Sample has been analysed more than 7 working days after notification to the athlete.

With respect to the documentation packages, if documentation is required, the laboratory can usually get together an abbreviated version of the package in a shorter period of time. Dr. Saugy also stated that the laboratory knew that a documentation package is important in the cases going to a tribunal but less important for the purposes of a review which is based on an analytical report. It apparently physically takes about 1 ½ days to put all of the paper together. Dr. Saugy acknowledged that when Dr. Geistlinger had asked for the package that he was told what all Federations are told, which is that it will take approximately 14 days. With respect to the testing itself, it takes approximately 17 to 18 hours to fully test a urine sample going at full speed. The laboratory tries not to put itself under too much pressure so that more typically it will take 2 to 2 ½ days to complete testing.

Evidence of Dr. Jim Carrabre

Dr. Carrabre is the chairman of the medical committee for the IBU. He specialises in exercise physiology and sports medicine. He works for the IBU on a volunteer basis. He has been involved in biathlon since the late 70s. He was involved in the establishment of Biathlon Canada. His stated primary goal is the health of athletes. He is involved in results management and is consulted by the IBU in respect of matters of significance.

Dr. Carrabre was the medical delegate to the Oberhof event where the Appellant's testing was done. The testing of the Appellant was a targeted test.

Dr. Carrabre was asked about a subsequent test which the athlete had undertaken on 11 January 2008 which had been negative for the presence of any Prohibited Substance. He said that on that occasion testing did not include EPO analysis and no blood profile was done.

When Dr. Carrabre was contacted by Dr. Geistlinger and told that the Appellant had registered an Adverse Analytical Finding for EPO, Dr. Carrabre was concerned that the "B" Sample analysis should be proceeded with expeditiously. He had concerns about degradation. The Appellant had already gone to the press and there was a lot of media interest. There was also a World Championship event coming up on 7 – 8 February.

Dr. Carrabre acknowledged that he was not qualified to discuss the science of degradation. He wanted to have the analysis of the "B" Sample done within a week. He had been told that the rule was that testing should take place within 7 days of notification. He had not been told that the 7 day period was 7 working days. He did not specify the last date upon which the "B" Sample should be tested. However, he said that he did not feel like extending the time for the athlete to have the "B" Sample tested because of the pending World Championship event.

Dr. Carrabre acknowledged that he had been involved in a previous case where there had been a positive "A" Sample analysis followed by a negative "B" Sample analysis.

Parties' positions

The Appellant argues that her right to attend or have her representative attend the "B" Sample opening and analysis is a fundamental one. Section 7.2 of the *World Anti-Doping Code* (2003) provides for the prompt notification of an athlete of an anti-doping rule violation and, *inter alia*, "(c) the right of the *Athlete* and/or the *Athlete's* representative to attend the B *Sample* opening and analysis if such analysis is requested; and (d) the Athlete's right to request copies of the A and B *Sample* laboratory documentation package which includes information as requested by the *International Standard* for laboratory analysis".

According to the athlete her right to have a representative attend the opening and analysis of her "B" Sample was breached. The Appellant asserts that the IBU did not, in fact, inform the athlete or her legal representative of the change in the *International Standards* which reduced the window for

testing of the "B" Sample from three weeks to 7 working days. In any event, the Appellant was not even given 7 working days to make arrangements to have a representative to be present at the opening of the "B" Sample. The IBU made no attempt to accommodate the Appellant's request for a different arrangement than that established by the IBU.

It was also clear that there was some tolerance in the new *International Standards* and that there was no legitimate basis for concern that the results of testing would be any different if testing had occurred on 5 February, as requested by the Appellant, rather than the date of 29 January, which was unilaterally imposed by the IBU.

Although the lack of a complete documentation package prior to the "B" Sample analysis was not, strictly speaking, a breach of the *World Anti-Doping Code*, it would, nevertheless, have been possible for the package to have been put together on a more timely basis. The lack of urgency demonstrated by the IBU in responding to the Appellant's request for documentation was symptomatic of an attitude that had pre-judged the outcome of the post-infraction process.

The true reason for rushing through the testing of the "B" Sample was because of the upcoming World Championship event on 7 – 8 February.

When the concerns about delaying testing of the "B" Sample by a further 7 days were set against the consequences for the athlete, namely, a lifetime ban if the "B" Sample analysis confirmed the results of the testing of the "A" Sample, the failure of the IBU to reasonably accommodate the athlete's request should be seen as fatal to the validity of the "B" Sample analysis.

The IBU does not dispute the right of an athlete to have someone present to observe the opening and testing of the "B" Sample. However, this right is not an unlimited one.

The rules have changed. The testing window had been reduced to 7 working days. The IBU should not be criticised for sticking to the rules. The IBU has a legitimate interest to balance the integrity of the drug testing process against the tactics of an athlete who had a very hostile approach.

In all of the circumstances, the IBU's actions were reasonable. The formal request for a postponement of the testing that was scheduled to take place on 29 January was only received from the Appellant's lawyer the evening before. Even then, Dr. Geistlinger offered to try and find an additional expert to attend the opening and testing. This was laughed off. Dr. Jeannier was then put forward.

It was not necessary for the laboratory to breach or overstretch the rules on when testing should occur. Furthermore, there is no absolute right to get an "A" Sample documentation package before the "B" Sample is tested.

In this case, the athlete had already cheated before. The evidence of how clear the positive of both the "A" and "B" Sample analyses had been should not be ignored. The athlete should have the burden of proving that any alleged failure to precisely follow procedures impacted upon the outcome. The athlete had failed to discharge that burden.

LAW

CAS Jurisdiction

1. This case is about whether the Appellant should be sanctioned with lifetime ineligibility from participation in sport.

2. Because the consequences of anti-doping rule violations can be so significant for an athlete, the *World Anti-Doping Code* and its associated standards and rules necessarily include a number of checks and balances to ensure a fair outcome.

3. It is neither necessary nor appropriate for a tribunal to evaluate whether or not a particular rule or procedure is necessary.

4. Despite the views of Dr. Saugy and others that the ability of an athlete to have a representative present for the opening and testing of a "B" Sample is unnecessary, the world sport community has expressed its view, through the *World Anti-Doping Code*, that an athlete does, in fact, have such an entitlement.

5. An unusual feature of this case is that there was a change to the *International Standards for Laboratories* that came into effect a few days before the Appellant provided her bodily sample. Whereas under the previous International Standard, as reflected by s. 7.2.3(f) of the *IBU Anti-Doping Rules*, the test analysis of the "B" Sample, if so requested, fell to be conducted within 3 weeks of the Appellant being notified of the Adverse Analytical Finding resulting from the testing of the "A" Sample, that time frame was reduced by the 2008 version of the *International Standard* to 7 working days.

6. The written record and some of the testimony given at the appeal hearing concerning the IBU's knowledge of the revised *International Standards* and what was communicated to the Appellant concerning those revisions cannot be reconciled.

7. Despite the evidence of Dr. Geistlinger and Dr. Carabre that the IBU had become aware of the new International Standard by the time the Appellant's "B" sample was tested, there is no contemporaneous evidence in the extensive written record to reflect this.

8. The Appellant did not attend the appeal and did not give evidence at either the original hearing before the IBU Executive Board or at the appeal hearing. Accordingly, we do not have the benefit of her direct evidence as to the conversation which Dr. Geistlinger claimed to have had with the Appellant in which he explained that the *International Standard* had changed and that the "B" Sample testing window was 7 days rather than three weeks.

9. It is, however, clear from a review of the e-mail traffic that Dr. Geistlinger took care to ensure that a complete documentary record of dealings with the Appellant and her representative

were preserved. The lack of any reference in the e-mail traffic to the change in the *International Standard* is therefore puzzling.

10. There is, in fact, no reference to the changes in the 11 February 2008 decision of the IBU Executive Board either. Rather, paragraph 20 of the IBU Executive Board decision states as follows:

"The IBU Executive Board holds that the deadline of three weeks mentioned in art.7.2.3f) IBU Anti-Doping Rules specifies the time limited which must not be transgressed for the opening of the B sample. The deadline does, however, not mean that three weeks must be waited for until the opening of the B sample".

11. We have concluded that the IBU Executive Board, at the time of its hearing on 11 February 2008, was unaware of the changes to the *International Standard*. Rightly or wrongly, the IBU and the Appellant were proceeding on the basis that that section 7.2.3 (f) of the IBU Anti-Doping Rules still governed.

12. In fact, the *International Standard* had changed and a 7 working day testing window had been introduced. Section 5.2.4.3.2.6 provides that *"…if the Athlete or the Athlete's representative continuously claim not to be available on the date of the opening, despite reasonable attempts by the Laboratory to accommodate their dates, over a period not to exceed 7 working days, the Testing Authority or the Laboratory shall proceed regardless (…)"*. The rule therefore requires reasonable attempts to accommodate. Given that all of the Appellant's dealings were with the IBU rather than the laboratory, the responsibility for making reasonable attempts would fall on the IBU in this case.

13. The evidence shows that nothing was, in fact, done to accommodate the athlete's request for a different testing date. The IBU made no attempt to canvass alternative dates with the laboratory. The IBU did not ask the laboratory whether the Appellant's request for the testing to take place on 5 February could be accommodated (Dr. Saugy testified that such a request could have been accommodated and section 5.2.4.3.2.1 provides that a failure on the part of the laboratory to perform the "B" sample testing within the 7 working day window due to *"technical or logistical"* reasons will not invalidate the results). Dr. Saugy was not asked by the IBU whether opening and testing the "B" sample a few days outside the 7 working day window would compromise the results (but at the appeal hearing his evidence was that it would not have). The preponderance of evidence suggests that the Appellant did not, in fact, receive any explanation from the IBU as to why her request could not be accommodated.

14. The IBU did, however, offer to try and obtain an independent witness to attend in place of the unavailable witness designated by the Appellant, a gesture which the Appellant and her representative rejected. This might have been a reasonable response by the IBU had it already made reasonable efforts to accommodate the Appellant. In and of itself, however, this gesture was, in our view, insufficient.

15. Whether the applicable standard was as provided for in s. 7.2.3(f) of the *IBU Anti-Doping Rules*, or the 2008 *International Standard*, we would conclude that the IBU acted unreasonably in not attempting to accommodate the Appellant's request for the opening and testing of her

"B" sample to be undertaken on another date. If the *IBU Anti-Doping Rules* applied the Appellant's request to postpone the opening of the "B" sample until 5 February was well within the three week window provided for in s. 7.2.3(f) which had started on 22 January. On the other hand, the *International Standard* requires reasonable attempts to accommodate an athlete's preferred dates over a period not to exceed 7 working days after notification of the "A" sample result.

16. Because of the significance of the consequences for an athlete facing a lifetime ban as the result of an alleged anti-doping rule violation, it is important that procedures are followed correctly and that information concerning the rights and remedies of an athlete is communicated clearly. In this case, even if one accepts the evidence of Dr. Geistlinger, the information provided to the athlete was inaccurate. It appears that neither Dr. Geistlinger nor Dr. Carrabre appreciated that the 7 day window was 7 working days rather than 7 calendar days. Whether or not this would have ultimately made a difference in terms of what happened is pure speculation. However, the fact is that the opening of the "B" Sample occurred on the 5th working day after the athlete had been notified of the results of the "A" Sample testing.

17. In this case we are satisfied that neither the *IBU Anti-Doping Rules* or the *International Standard* were followed correctly. We also find that the IBU acted with unreasonable haste and lack of accommodation having regard to the legitimate requests by the Appellant and her lawyer for different arrangements to be made so that a representative of the athlete could be present for the opening and testing of her "B" Sample. No attempt was made to offer any alternative arrangement to that which the IBU had unilaterally decided upon. The IBU failed to explain to the Appellant why her request could not be accommodated. It is likely that the IBU's haste was influenced by its fear that the Appellant would try to compete at the World Championship event scheduled for 7-8 February. There is no indication that the IBU made this concern known to the Appellant or explored the possibility of securing a voluntary agreement from the Appellant not to compete.

18. Having so concluded, the question becomes what, if any, effect the IBU's non-compliance has on the outcome of the testing of the Appellant's sample.

19. The 2003 version of the *World Anti-Doping Code* addresses the "right" of an athlete to be present or to have an appropriate representative present for the opening and testing of the "B" Sample (Article 7.2). The principle is an important one, which the world sport community deemed appropriate to include in the *Code*.

20. Article 3.2.2 of the *World Anti-Doping Code* (2003) provides:

"Departures from the International Standard for Testing which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such results. If the Athlete establishes that departures from the International Standard occurred during Testing then the Anti-Doping Organization shall have the burden to establish that such departures did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation".

21. Accordingly, notwithstanding a breach of the *International Standard*, if the IBU is able to establish that the departure from the *International Standard* did not cause the adverse analytical finding or the factual basis for the anti-doping rule violation, then the departure from the *International Standard* will be of no effect.

22. The evidence of the IBU is that the testing of the "B" Sample confirmed the results of the "A" Sample testing. No evidence has been adduced to suggest that the approach taken during the "B" Sample testing in any way departed from the *International Standard* other than the fact that the athlete's representative was not present.

23. Dr. de Boer, in his evidence, suggested examples where the presence of a technical expert during the opening and testing of a "B" Sample could have an impact. We do not attach any weight to this evidence. Whether or not the presence of such a person at the opening and testing of the athlete's "B" Sample in this case would have made any difference is a matter of speculation.

24. In our view, the issue is not whether the IBU can prove that presence of the Appellant's representative would have made no difference to the outcome. The issue is whether the IBU's failure to follow the applicable rules by failing to make reasonable attempts to accommodate the Appellant's request for a different testing date invalidates the "B" sample result.

25. We were referred to the decision in CAS 2002/A/385 in which the Appellant submitted that the failure of an International Federation to invite the athlete to attend the opening of her "B" Sample deprived her of her right to be present or represented during the testing of the "B" Sample and, as such, that the testing procedure could not be regarded as complete due to the failure of the International Federation to strictly observe the rules relating to the testing of the "B" Sample. The panel accepted this submission but it did not, ultimately, uphold the athlete's appeal. The panel in CAS 2002/A/385 reviewed the applicable regulations, which preceded the 2003 *World Anti-Doping Code*, and concluded that the failure to notify the athlete of the right to attend the opening and analysis of the "B" Sample had compromised the "limited rights of an athlete to such an extent that the results of the analysis of the B-sample and thus the entire urine test must be disregarded". However, the panel was convinced that the other evidence presented by the International Federation established the objective requirements of a case of doping, notwithstanding the invalidity of the doping test evidence as a result of the breach of the athlete's right to attend the opening of the B Sample. In that case, the Appellant had admitted that she took nutritional supplements and the evidence before the Panel demonstrated to the Panel's apparent satisfaction that a particular prohibited substance was present in one of the supplements taken by the Appellant.

26. By contrast, the only evidence of doping before this panel is the analysis of the Appellant's "A" and "B" Samples. We agree with the following comments of the tribunal in the CAS 2002/A/385 case:

"As a matter of principle, the Panel is of the opinion that, even if a procedural error is unlikely to affect the result of a B-sample analysis, such error can be so serious as to lead to the invalidity of the entire testing procedure".

27. As the Panel goes on to note in CAS 2002/A/385, athletes' rights during the course of the sample collection and testing process are relatively limited. This makes it even more important that those rights are respected and adhered to[1].

28. In the circumstances of this case, the IBU failed to make reasonable efforts to accommodate the Appellant, and, as a result, the "B" sample analysis should not be accepted as part of the IBU's case against the Appellant. Because, according to Dr. Saugy the remainder of the "B" Sample is too small to be tested at this juncture (quite apart from concerns about possible degradation), the absence of any "B" Sample testing to corroborate the finding of the "A" Sample must result in the conclusion by us that the IBU has failed to establish an anti-doping rule violation on the part of the Appellant.

Conclusion

29. For the reasons stated, we conclude that by failing to make any efforts to reasonably accommodate the Appellant's request to have her "B" Sample opened and tested in the presence of her technical representative, the IBU failed to adhere to both the *IBU Anti-Doping Rules* and to the *International Standard* in force at the time of the alleged anti-doping rule violation and applicable to the opening and testing of the athlete's "B" Sample and, as a result, that the outcome of the "B" Sample testing cannot be accepted as part of the evidence of the Appellant's alleged anti-doping rule violation.

30. Because the Appellant expressly exercised her right to have the "B" Sample tested in the presence of a representative of her choosing, the absence of any admissible "B" Sample testing to corroborate the finding of the "A" Sample means that the IBU has failed to establish an anti-doping rule violation on the part of the Appellant.

31. This appeal is therefore allowed.

32. In coming to this conclusion we are of the view that an athlete's right to be given a reasonable opportunity to observe the opening and testing of a "B" sample is of sufficient importance that it needs to be enforced even in situations where all of the other evidence available indicates that the Appellant committed an anti-doping rule violation.

[1] This case arises under the 2003 Code, which provides for the "right" of the Athlete or the Athlete's representative to be present for the testing of the "B" sample. It is not necessary for this Panel to consider whether the language of the 2009 Code which provides for the "opportunity" to be present has changed the nature and quality of the Athlete's entitlement.

The Court of Arbitration for Sport rules:

1. The appeal filed by Ms Kaisa Varis on 15 July 2008 is allowed.

2. The decision rendered by the IBU Executive Board on 11 February 2008 is annulled.

(…)