CAS 2015/A/4163 Niksa Dobud v. Fédération Internationale de Natation (FINA)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	The Hon. Michael J **Beloff** Q.C., barrister in London, United Kingdom
Arbitrators:	Mr Jeffrey G. **Benz**, attorney-at-law in Los Angeles, USA, and in London, United Kingdom
	Mr Massimo **Coccia**, Professor and attorney-at-law in Rome, Italy
Ad hoc Clerk:	Mr Luca **Tarzia**, attorney-at-law in Zurich, Switzerland

in the arbitration between

Niksa Dobud, Dubrovnik, Croatia

Represented by Mr Claude Ramoni, Libra Law, Lausanne, Switzerland

Appellant

and

Fédération Internationale de Natation (FINA), Lausanne, Switzerland

Represented by Mr Jean-Pierre Morand, Kellerhals Carrard, Lausanne, Switzerland

Respondent

I. INTRODUCTION

1. The appeal is brought by the Athlete Mr Niksa Dobud (hereinafter the "Appellant'') against the decision of the FINA Doping Panel dated 15 July 2015 (hereinafter the "Decision"), which sanctioned the Appellant for the failure to submit to the doping test with a four year period of ineligibility, the disqualification of the results obtained after 21 March 2015, the date of the attempt to test him and the forfeit of any medals, points and prizes achieved from that date.

II. THE PARTIES

2. The Appellant is an international water polo player from Dubrovnik, Croatia. He was a member of the Croatian national team, which won the Olympic Gold medal at the 2012 London Olympic Games. He has won bronze medals in the FINA World Championships in Rome 2009, Shanghai 2011 and Barcelona 2013 and a gold medal at the 2010 European Water Polo Championships in Zagreb. He is included in the FINA Registered Testing Pool.

3. The Fédération Internationale de Natation (hereinafter the "Respondent" or "FINA") is the world governing body for aquatic sports, including the sport of water polo, with headquarters in Lausanne, Switzerland.

III. FACTUAL BACKGROUND

4. This section of the award sets out a brief summary of the main facts and allegations based on the parties' written submissions, the CAS file and the content of the hearing that took place in Lausanne on 9 December 2015. Additional facts and allegations found in the parties' submissions, pleadings and evidence may be set out, where relevant, in other parts of this award. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning. Since the outcome of the case is based on the credibility of the parties' testimony, only the undisputed facts will be presented in this section of the Award. The disputed facts will be mentioned as such or examined in a further part of the Award.

5. On 20 March 2015, the Appellant attended the FINA preliminary round VIII match in the Water Polo World League with his Croatian national team against the Montenegro national team in Budva, Montenegro, which the Croatian team won 12 to 11. It was the last game of a series of matches in the World League, during which the Appellant was away from his home in Dubrovnik for about 5 to 6 days.

6. After the match, at 19:10 pm the Appellant was notified that he had been selected to submit an in-competition doping sample. When he arrived at 19:40 pm at the Doping Control Station he realised that he would not be able to provide a urine sample right away. Accordingly, since the team bus was planned to leave Budva between 19:30 pm and 20:00 pm he had to stay behind in Budva. The team bus left without him at 20.00 pm.

7. The Appellant telephoned his wife, A., to inform her that he would stay in Budva for a doping test and not return with the team that night but come back to his hometown Dubrovnik (Croatia) only the next morning.

8. At 20:30 pm the Appellant finally provided the necessary urine sample. In the subsequent weeks, it came to be known that the sample provided at the event was tested negative.

9. After the test, the Athlete met with friends for dinner and drinks.

10. On 21 March 2015 after his celebratory night out the Appellant arrived by taxi at […], Croatia (hereinafter "the Address'') by taxi, between 5:30 am and 6:00 am.

11. The Appellant had filled in in his whereabouts for the entire month of March 2015 according to Article DC 5.4.3 FINA FINA Doping Control Rules, Edition of 29 November 2014 (hereinafter "FINA DCR") that he would be available for testing at the Address between 7:00 am and 8:00 am.

12. The Appellant's flat is located at the Address. The house number […] consists of four flats and business units. The flat of the Appellant is located on the first floor above the business units and underneath two other apartments. Next to Appellant's flat, occupied by him and his family, is a holiday apartment, which the Appellant is permitted by the landlord to use outside the tourist season. The Appellant's flat can be identified through the name on the post box.

13. On 21 March 2015, the Doping Control Officer, B. (hereinafter the "DCO") arrived at the Address with his assistant, X. (hereinafter the "assistant DCO") with a view to testing the Appellant and rang at the door at 6.44 am.

14. The first person to open the door was the Appellant's wife. After the DCO explained the purpose of his visit she went back indoors.

15. Shortly after the first encounter of the Appellant's wife with the DCO a male individual came to the door. Whether that individual was the Appellant or his brother in law, C., the brother of his wife is the issue central to this appeal.

16. The circumstances of these encounters and precisely what transpired thereafter are a matter of dispute between the parties.

17. It is, however, common ground that the DCO and his assistant DCO stayed in front of the Address until 9:00 am ringing and knocking at the door and seeking to gain entrance to administer the test and that during this time the DCO was in telephone and email contact with Mr Brian Castledine, Network Manager, and Ms Jasmina Glad-Schreven, Operations Manager, of the company International Doping Tests & Management (hereinafter "IDTM"), for which the DCO and his assistant were providing their services.

18. Around 8:00 am the Appellant's wife went again to the door and told the DCO that the Appellant was not at home and that the only other persons inside the flat were her brother and his wife, D. She did not allow the DCO to enter in the apartment.

19. Around 9:00 am the Appellant's wife opened the door again and told the DCO and his assistant DCO that unless they left she would call the police and her lawyer. Because of this threat, the DCO was advised by telephone by Mr Casteldine to cease to try to carry out a test collection.

20. Later that afternoon the Appellant contacted his national federation and discussed the situation with Mr Renato Zivkovic, Secretary General of the Croatian Water Polo Federation (hereinafter the "CWPF").

21. On 8 April 2015 the Appellant sent an email to the CWPF purporting to explain why he had missed the test. The text of that email is set out in the section on the *MERITS para 84* below.

IV. PROCEEDINGS BEFORE THE FINA DOPING PANEL

22. By letter, dated 30 March 2015, the Appellant was informed by the FINA Executive Director that the IDTM report of the testing mission of 21 March 2015 appeared to be an anti-doping rule violation pursuant to Article DC 2.3 FINA DCR and therefore the case would be forwarded to the FINA Doping Panel.

23. On 13 April 2015, the Appellant was informed by the FINA Executive Director of his provisional suspension with effect as of 13 April 2015 from participating in all competitions, events or other activities that are organised, convened authorised or recognised by FINA, the Croatia Water Polo or any other FINA Member Federation.

24. On 22 April 2015, the Appellant received a notification by the Chairman of the FINA Doping Panel about the opening of the procedure to give to the Appellant the opportunity to be interviewed in person.

25. By email of 27 April 2015 the Appellant confirmed his intention to take part at the hearing before the FINA Doping Panel.

26. On 29 May 2015 a hearing before the FINA Doping Panel was held in Lausanne, Switzerland.

27. On 15 July 2015, the FINA Doping Panel issued the grounds for the Decision holding that the Appellant had committed the following doping offences: Failure to submit to a doping test in violation of Article DC 2.3 FINA DCR, and imposing the sanctions set out in paragraph 1 above.

V. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

28. On 3 August 2015, pursuant to Article R47 of the Code of Sports-related Arbitration (hereinafter "CAS Code") and Article DC 13.2 and 13.2 of the FINA DCR, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter "CAS") to challenge the Decision adopted by the FINA Doping Control Panel on 15 July 2015

29. On 24 August 2015, pursuant to extensions earlier granted by the CAS Court Office the Appellant filed his Appeal Brief.

30. On 7 September 2015, the CAS notified the Parties of the formation of the Panel constituted by the Hon. Michael J Beloff Q.C., President, Mr. Jeffrey Benz, designated by the Appellant, and Prof Massimo Coccia LL.M., designated by the Respondent.

31. On 15 September 2015, the Respondent filed its answer.

32. On 18 November 2015, the CAS Court Office *(a)* informed the Appellant *(i)* about the importance of his and C.'s personal attendance at the hearing as requested by the Respondent; *(ii)* that notwithstanding concerns expressed by the Respondent about an incident that had allegedly taken place at the DCO's home on 1 October 2015, referred to in the *MERITS below at para 99*, the Panel would not issue an order preserving the anonymity of the assistant DCO and *(b)* advised the Appellant that any attempt to interfere with a witness is unacceptable.

33. On 3 December 2015, after further interchanges with the parties, the CAS Court Office informed the parties that the Panel would deal at the hearing with the question regarding admissibility of the testimony of the assistant DCO and the terms on which it could be admitted.

34. On 9 December 2015, a hearing was held at the CAS premises in Lausanne, Switzerland.

35. In attendance at the hearing were for the Appellant Mr Claude Ramoni, Ms Natalie St-Cyr Clarke, Mr Kruno Peronja, Mr Lucian Novacescu and Ms Antonela Pivac (Interpreter) and for the Respondente Mr Jean Pierre Morand, Ms Kataryna Jozwik, Mr Nicolas Zbinden and Ms Nada Buric (Interpreter).

36. The witnesses for the Appellant heard in person at the hearing were Mr Niksa Dobud, and C.; the witnesses who testified by video link were A., D., Mr Renato Zivkovic and via phone E.

37. The witnesses for the Respondent heard in person at the hearing were B. (DCO), X. (assistant DCO) it having been decided by the Panel that he would give evidence without the shield of anonymity) and Mrs Jasmina Glad-Schreven (IDTM Operations Manager).

38. At the outset of the hearing, the Parties confirmed that they did not have any objection to the constitution and composition of the Panel.

39. At the end of the hearing, the Parties acknowledged that the Panel had respected their right to be heard and their procedural rights.

VI. SUBMISSIONS OF THE PARTIES

40. The following is a summary of the Parties' submissions and does not purport to be comprehensive. However, the Panel has thoroughly considered in its discussion and deliberation all of the evidence and arguments submitted by the Parties, even if no specific or detailed reference has been made to those arguments in the following outline

of their positions and in the ensuing discussion on the MERITS, where, however, the main arguments of both sides are more amply addressed.

A. The Appellant: Mr Niksa Dobud

41. The Appellant asserts that this was a simple case of mistaken identity. The male who came to the door was not him, but C. The DCO and his assistant DCO had only previously tested him on a single occasion many months before and then in the company of other members of the team. The DCO had not been properly equipped by the IDTM with material to assist in the identification. It was dark, the location was ill lit and C. only came to the door once. When the Appellant came home from his night out in Montenegro and Dubrovnik early in the morning around 5:30 am and 6:30 am on 21 March 2015 he went not to his family flat but to the adjacent holiday flat so as not to wake his wife and sick baby. C. and his wife, a doctor, had been staying in the holiday flat to help the Appellant's wife with the baby during the Appellants' absence, but had moved into the family flat earlier that night when the Appellant's wife became concerned about the sick baby. When the DCO arrived, the Appellant was sleeping off the effect of the night before, but neither his wife nor C. and D. knew of his return so that when his wife said that the Appellant was not at home that was her genuine belief. Both his wife and C. were surprised at and suspicious of the DCO – hence the threat to call the police – and were distracted by the baby's illness, the family's first concern. The DCO and his assistant DCO had colluded in their evidence and could not admit the mistake for fear of losing their jobs. At the FINA anti-doping panel hearing the DCO had been hesitant in identifying the Appellant. The Appellant's only error had been in not advising FINA on account of his late change of mind of his precise whereabouts on his return to Dubrovnik or of where, after his return, he went to sleep. He had certainly not deliberately evaded a test; as a clean athlete, tested indeed the previous night he had no reason to do so. When he woke up he was told by members of his family what had happened earlier that morning, and that was why he made contact with Mr Zivkovic who understood him to say simply that he had not updated his whereabouts and therefore need fear no more than a reprimand. The Panel could not be comfortably satisfied that he had evaded rather than merely missed a test.

42. In light of the above, the Appellant requested in his prayers for relief that:

> "*[…] the Court of Arbitration for Sports rules as follow:*
>
> 1. *The decision issued by the FINA Doping Panel on 15 July 2015 in the matter of the water polo player Nikša Dobud is set aside.*
> 2. *No sanction is imposed on Nikša Dobud further to the attempted doping test by an IDTM Doping Control Officer on 21 March 2015.*
> 3. *FINA shall bear all the costs of this arbitration, if any, and shall reimburse any and all advances of costs paid by Nikša Dobud (if any), including the minimum Court office fee of CHF 1,000.*
> 4. *FINA shall be ordered to compensate Nikša Dobud for the legal and other costs incurred in connection with these proceedings, in an amount to be determined at the full discretion of the Panel."*

B. The Respondent: FINA

43. FINA asserts that the DCO, an experienced professional, and his assistant DCO correctly identified the man who came to the door as the Appellant, who was the same height as the DCO. They saw him twice, not once as the Appellant alleges and had indeed tested him previously. C. looked nothing like the Appellant or indeed like an athlete. The record of the DCO's contemporary conversations with IDTM, while outside the flat, showed that he was genuinely concerned to administer the test to the right man and was corroborative of the evidence he gave to the Panel. He used the time spent outside the flat to check the Appellants and C.'s identity on the internet. The developed degree of detail in his evidence to the FINA Doping Panel and to CAS was simply responsive to the challenge made to the identification, and the similarity between his and his assistant DCO's evidence was the result of their seeking to ensure accuracy and nothing more sinister. The family's evidence had undergone several self-serving adjustments and was contrived and unpersuasive. Neither the DCO nor his assistant DCO had any reason to misrepresent what had occurred, still less to frame the Appellant. The Appellant's email of 28 April 2015 provided an explanation (that he stayed overnight in Budva) inconsistent with his explanation to CAS (that he had returned but not gone to his own flat but to the adjacent flat, of which there is no trace, and its enhancement must have been his rather than an invention by F., employed at the Croatian Water Polo Federation. The Appellant's explanation that something had been lost in translation from Croatian into English was unacceptable. The Panel could be comfortably satisfied that he was guilty of test evasion.

44. In light of the above, the Respondent requested in its prayers for relief the CAS to rule that:

> 1. *"The appeal is dismissed;*
> 2. *The Appellant shall bear the entirety of the arbitration costs for these appeal proceedings; and*
> 3. *The Respondent shall be awarded a contribution to its legal fees and other costs in connection with these proceedings."*

VII. JURISDICTION

45. The jurisdiction of the CAS derives from Article R47 of the CAS Code, Article C 26 of the FINA Constitution from 25 July 2015 and Articles DC 13.2 and 13.2.1 FINA DCR.

46. Article R47 of the Code provides as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS 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-related body*."

47. Article C 26 (Arbitration) of the FINA Constitution states that *"[d]isputes between FINA and any of its Members or members of Members, individual members of Members*

or between Members of FINA that are not resolved by a FINA Bureau decision may be referred for arbitration by either of the involved parties to the Court of Arbitration for Sports (CAS), Lausanne. Any decision made by the Arbitration Court shall be final and binding on the parties concerned."

48. Article DC 13.2 FINA DCR provides that *"[a] decision that an anti-doping rule violation was committed, a decision imposing Consequences […] of an anti-doping rule […] may be appealed exclusively as provided in this DC 13.2 – 13.7."*

49. Article DC 13.2.1 states that *"[i]n cases arising from participation in an International Competition or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court."*

50. The Respondent did not raise any jurisdictional objection and both Parties confirmed the jurisdiction of the CAS by signing the Order of Procedure.

51. It follows that the CAS has jurisdiction to decide on the present dispute.

VIII. ADMISSIBILITY

52. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

53. Article DC 13.7.1 FINA DCR provides that *"[t]he deadline to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party. […]."*

54. The Decision was issued on 15 July 2015. The Appeal was filed on 3 August 2015.

55. It follows that the appeal is admissible.

56. The Appeal brief was sent on 24 August 2015 and was within the extended deadline of three additional days and therefore also filed in due time.

IX. SCOPE OF THE PANEL'S REVIEW

57. As regards the Panel's scope of review, Article R57 of the CAS Code so provides:

"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance […]."

58. Article DC 13.1.1 FINA DCR provides as follows:

"The scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker."

59. Article DC 13.1.2 FINA DCR states that:

"In making its decision, CAS need not give deference to the discretion exercised by the body whose decision is being appealed."

60. At the hearing the parties did not dispute that the Panel had jurisdiction to undertake a de novo determination of the decision under appeal from the FINA Doping Panel.

X. APPLICABLE LAW

61. Article R58 of the Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

62. According to Article DC 13.2.1 DCR, *"[…] the decisions may be appealed exclusively to CAS in accordance with the provisions applicable before such court"*.

63. Therefore, the applicable law under which the Panel will decide the present dispute is to be found in the FINA DCR and, subsidiarily, Swiss law.

XI. RELEVANT FINA DOPING REGULATIONS

64. The following provisions of the FINA DCR, based on the World Anti-doping Code (hereinafter "WADC") are material to this appeal:

65. Article DC 2.3 (Evading, Refusing or Failing to Submit to Sample Collection) provides:

"Evading Sample collection, or without compelling justification, refusing or failing to submit to Sample collection after notification as authorized in these Anti-Doping Rules or other applicable anti-doping rules."

66. Article DC 2.4 ("Whereabouts Failures") provides:

"Any combination of three missed tests and/or filing failures, as defined in the International Standard for Testing and Investigations, within a twelve-month period by an Athlete in a Registered Testing Pool."

67. Article DC 3.1 ("Burdens and Standards of Proof") provides:

"FINA and its Member-Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether FINA or the

Member Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability".

68. Article DC 10.2 ("Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or prohibited Method") provides:

"[…]

DC 10.2.3 As used in DC 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. […]."

69. Article DC 10.3 ("Ineligibility for other Anti-Doping Rule Violations") provides:

"The period Ineligibility for anti-doping rule violations other than as provided in DC 10.2 shall be as follows, unless DC 10.5 or 10.6 are applicable:

DC 10.3.1 For violations for DC 2.3 or DC 2.5, the Ineligibility period shall be four years unless, in the case of failing to submit to Sample collection the Athlete can establish that the commission of anti-doping rule violation was not intentional (as defined in DC 10.2.3), in which case the period of Ineligibility shall be two years.

[…]".

XII. MERITS

70. The key issue in this case can be simply stated. Was the male person the DCO and his assistant DCO saw on the morning of 21 March 2015 in the Appellants flat at the address indicated in the Athlete's whereabouts, the Appellant (the Respondent's version) or C. (the Appellant's version)? If it was the Appellant, then it follows from what transpired thereafter that he evaded a test. If it was C. then – at the highest – the Appellant missed a test.

71. It is common ground that *(i)* the burden of establishing that the Respondents version was correct lies upon the Respondent and *(ii)* the standard of proof is that of comfortable satisfaction.

72. The Panel accepts WADA's definition of "comfortable satisfaction" as less than beyond reasonable doubt and more than on a balance of probabilities (Article 3.1 of the WADA Code, Version 2015). The Panel recognises that the less probable the matter sought to be proved to that standard, the more cogent must be the evidence to prove it.

73. This is not a case where the witnesses on either side (including for this purpose the Appellant himself) were by reason of their character or previous conduct lacking in trustworthiness. The Panel considers that it can best assess the credibility of their respective and conflicting testimony by reference to certain indisputable facts from which inferences can properly be drawn.

74. The DCO during his stay of almost three hours outside the door of the Appellants flat was on the telephone to officials at the IDTM (Brian Castledine and Jasmina Glad-Schreven) in which he was giving a broadly contemporaneous account of what was happening. In the Panels view, it is vital to bear in mind that at that stage he had no reason at all to seek to provide material, which could be relied upon to inculpate the Appellant for evading a test; on the contrary his concern was to fulfil his own mission to test the Appellant. At the time he made the telephone calls he was seeking advice as to how to resolve the problem of a recalcitrant putative testee whom he obviously believed to be the Appellant. He had no motive, financial or other, to misstate the unfolding events nor is it easy to see why he should be in error in his contemporary description, nor did his superiors at IDTM who also testified.

75. The two emails sent by Mr. Brian Castledine to FINA on 21 March 2015 summarised what the DCO had told him.

a. The first email reads as follows:

"[…]

We currently have a DCO at Niksa Dobud's house and he answered the door and our DCO confirmed that it was him and notified him and he shut the door in his face and said "one minute"[…] He did not come back right away, but came back a little later and said our DCO needed to wait. Our DCO told him he needed to be under observation, but he refused to let our DCO in and closed the door.

Then a little later a woman came to the door and said that Niksa was not there and it was a misunderstanding and that was actually Niksa's brother, but it is Niksa.

Our DCO confirmed it with him when he answered the door and he looked at a picture of the athlete and it is him. Our DCO is still there trying to get the athlete to do the test. He has been talking through the door and letting him know the possible consequences of his actions, but so far no luck.

We have told our DCO to stay there and see if he tries to leave, but if you have any instructions or actions you would like our DCO to take please let me know asap. […]"

b. The second email reads as follows:

"[…] I spoke with our DCO again and the woman who was coming to the door now threatened to call the police and their lawyer so we have told our DCO that he has done all he can and to leave.

One clarification with my first email is that the man that came to the door did not acknowledge that he was Niksa, but just said "one minute" and closed the door. Came back later and then said to wait longer and refused to let our DCO in. The woman then came to the door and said that the man was Niksa's brother, but our DCO looked [at] pictures of his brother and the man at the door was the athlete. The man would not come to the door anymore and they would not give the phone number of the athlete so our DCO could call him. No phone number is provided in the ADAMS.

Our DCO will do a full report and I will send it to you as soon as we have it. […]"

c. The following facts appear from that account:

   i. The male who came to the door of the flat came twice;

   ii. On both occasions he asked the DCO to wait;

   iii. He never came back after the second encounter;

   iv. A woman came to the door after the second encounter and said that the male was the Appellants brother;

   v. The DCO had occasion to check the internet during his wait.

76. The Panel notes that the reference to the male being the Appellant's brother was mistaken; in fact C. was the brother of the Appellant's wife. The Panel cannot, however, attribute any significance to such easily understandable error or regard it as undermining the basic accuracy of the DCO's account as relayed in these emails. The important matter is that the woman – A. – was denying that the male was the Appellant, not who she said the male actually was.

77. The Panel also notes that in the second email Brian Castledine corrects a possible misunderstanding in the first i.e. that the male actually admitted to being the Appellant. This correction could only have come from the DCO himself and (i) underscores the care that the DCO was taking in his description of these critical occurrences and (ii) proves that the DCO was not biased at the time of the attempted test.

78. The Panel would further observe that the DCO must have – as he said – after providing proof of his own identity stated to those whom he encountered at the flat door that he was looking for the Appellant. It would have been a necessary (and regular) first step in making sure that he was to test the right person. The Panel notes that C. – on his own version – never stated to the DCO that he was not the Appellant; such omission would be highly peculiar if it was indeed C. who had been confronted by someone who said he was looking for the Appellant. In any event, had the male (whoever he was) denied that he was the Appellant, events would obviously have taken a quite different turn – for example the DCO would inevitably have required seeing some item of identification and would have asked whether the person (who denied that he was himself the Appellant) knew where the Appellant was. That such different turn of events **did not** on either version occur – and was at odds with what was reported by the DCO to ITDM as

what **did** in fact occur – is in the Panels view highly supportive of the Respondents version.

79. The Appellant's wife, on her own account (confirmed by the DCO), waited a considerable amount of time, measurable in hours not minutes, before going out for a last time to tell the DCO that her husband was not at home and threatening to call the police if the DCO and his assistant DCO did not leave. That this behaviour was prompted by her husband's actual absence lacks credibility; it would have been much easier, in order to make the DCO leave, to have brought her brother, C., to the door much earlier and pointed out that the latter was not the Appellant. Her explanation that she was not acting logically and in a state of panic because of the sickness of her child is unpersuasive, given, in particular, the presence on the spot of her brother's wife, a medically qualified doctor. The very fact of the illness of her baby, would have impelled her to take quickly the obvious step of showing to the DCO that C. was not the Appellant and so persuading him as early as possible to leave.

80. No cogent explanation has been given for the failure of C., when told by the DCO that he had to undergo a doping test, to respond immediately and instinctively that he was not the Appellant i.e., the athlete to whom the test was to be administered. The explanation actually proffered to the Panel that he was afraid of the DCO and stayed hidden for about three hours while the DCO was ringing and knocking is on the contrary utterly unpersuasive because, inter alia:

    a. The DCO, necessarily repeatedly said that he was there to perform a doping control on the Appellant. If the family (including C.) were afraid of the DCO because of his size or demeanour they could and would have called the police right away. There is no reason to doubt the alacrity with which the police would have responded to a genuine call for assistance from the family of a well-known sportsman.

    b. The obvious reason why they did not call the police is because they knew perfectly well why the DCO was there and that his presence and purpose were legitimate. Hence, there was no basis for calling the police.

    c. C. is a multiple club/bar owner, experienced in a profession where typically one has to deal with and confront humanity in all its various forms (including unpleasant and threatening persons).

    d. If the family was afraid, it would have been obviously safer for the Appellant's wife and her brother to go out and speak together to the DCO rather than leaving the Appellant's wife to deal with him alone.

81. The Panel also notes that it would have been a fortuitous coincidence for the Appellant to have had on the early morning in question when coming back from a sports match the key to the adjacent apartment where he had had not previously slept regularly, if indeed at all: undeniably, he told the Panel that he could not recollect ever having slept there before. It is also a fortuitous coincidence that on that same early morning his brother and sister in law had left the adjacent apartment where they were actually staying (on the Appellants current version) to prevent them witnessing his return.

82. By the afternoon of 21 March 2015 the Appellant was certainly aware (on either version) that the DCO had come to the flat and that he, the Appellant, had not been tested. It is not in issue that he telephoned Renato Zivkovic, General Secretary of the Croatian Water Polo Federation. Renato Zivkovic, both, in his written statement and in his oral evidence, said that the Appellant had told him that he was 'not at home' when the DCO called. Renato Zivkovic confirmed to the Panel that he understood the Appellant to be saying that he was not at that time at the whereabouts indicated on the Adams form i.e. at […], Dubrovnik. Hence, Renato Zivkovic said that he was unconcerned since for a single missed test the worst the Appellant could receive would have been a reprimand.

83. On 8 April 2015, the Appellant sent an email in Croatian to F., an employee at the Croatian Water Polo Federation Headquarters. The Appellant in his oral evidence seemed oddly uncertain as to the purpose of the email. The Panel is convinced that its purpose was to provide an explanation for the missed test; there is no other discernible purpose. It therefore, behooved the Appellant to give as full and truthful account as possible to the still recent events. The email is significant both for what it did and for what it did not say.

    a. The email (English version) reads as follows:

    "[…] At the beginning let me express regret of the whole situation that seems to be a big misunderstanding and let me explain what had actually happened.

    On the 20th March 2015 we played the FINA World league match against Montenegro in Budva, Montenegro. Since my name was drawn out for the doping control (in competition), I stayed in Budva after my team left because I wasn't able to provide the sample right away. That is also the reason why I hadn't changed the whereabouts data in ADAMS about the following morning because simply there was no time to do it. Since the control finished really late and I had no transportation to go back home, I decided to sleep over in my friend's house in Budva and return home the following day.

    When FINA doping control officer showed up at my doorstep the following morning, for the Out-of-competition control, my wife opened the door. She was at home with our 8 month old baby and her brother who came to help her while I was away. My wife told me she'd said to DCO that she'll try to reach me and after that her brother showed up at the doorstep as well. DCO obviously thought that was me. He told him to wait a few minutes, so they'll try to reach me and asked them to leave. They continued to ring the doorbell and after a while my wife said she would call the police because of harassment after which they went away.

    I can assure you that I would never try to avoid the doping control because I'm an athlete with deeply implanted anti-doping attitude. Moreover, after a providing a sample just few hours before, what reason would I have to avoid it few hours afterwards? I already had 3 doping controls this year.

    I have 4 eye witnesses who can confirm I was not at home on the morning in question.

    I also informed my Federation about the whole situation, so they are aware of what's going on.

[…]."

b. The Panel would highlight two passages.

   i. The first passage was:

   ''I stayed in Budva […]. This is also the reason why I hadn't changed the whereabouts data in ADAMS […]"

   However, his ADAMs form identified his whereabouts as […], Dubrovnik. On the Appellant's version **that is** where he was on 21 March 2015. As he agreed in responding to a question from the Panel there was therefore no need to change his whereabouts data. The clear impression from this first passage is that he was saying he remained overnight in Budva, which **would have** required such a change.

   ii. The impression was reinforced by the second passage:

   "I have 4 eye witnesses who can confirm I was not at home on the morning in question."

   That could only have been a reference to persons who were with him in Budva. There were only three persons who could have confirmed – if that were indeed the case – that he was in the flat adjacent to his own, and not his own flat. On that number i.e. of the members of his own family at the Address on 21 March 2015 the Appellant could not have been mistaken.

c. The email he personally sent in Croatian was enhanced in translation by two additions. The first: *"I stayed in Budva after my team left because I wasn't to provide the sample right away",* the second: *"I decided to sleep over in my friend's house in Budva and return home the following day."*

d. The Appellant argues that these were unauthorised additions by F. designed (ineptly) to fortify his defence to a charge of test evasion. The Panel is unable to accept this explanation. The first addition was on any view correct; the Appellant **had** been unable initially to provide a sample. The second addition was something F. could not herself have known or (absent inconceivable coincidence) have invented; she must have had a source and the obvious candidate for her informant was the Appellant himself. It was argued that the informant could have been another team member. But neither such member nor F. were produced as witnesses to undermine the inexorable presumption that the additions emanated from the Appellant himself and were indeed designed to fortify his then defence.

e. Moreover the email is entirely devoid of any explanation equivalent to the Appellant's version (the late return to the Address, the unannounced arrival, the decision to sleep in the adjacent flat, etc). In the Panel's view this omission, set against that version, is as inexplicable as it is unexplained.

84. The Panel notes that in an email of 27 April 2015 the Appellant described himself as an *"athlete whose biggest mistake was failing to report a change of residence for a period of 21.[03].15"*, again implying that he never came back to the Address that night.

85. The Appellant's version, on which he now relies, did not emerge until the family statements made on 25 May 2015 for the FINA Doping Panel hearing.

86. The Panel has anxiously considered whether the Appellant's actual mistake was loose use of language; and that in saying he was not at home, he meant only that he was not in his own flat, and not that he was not at the Address at all. It is compelled to conclude that the weight of the material analysed in paras 82 to 84 above does not allow such a benign conclusion. The Appellant was indeed saying in these emails that he was in Budva on the morning of 21 March 2015. In the Panels view that was his initial proposed defence. It was discarded because not only was it untrue but also to support it in the Appeal it would have involved others (not being members his family) in perjury.

87. The Panel now considers the identification evidence itself. There is, it was told, no specific Swiss law guidance on how to approach a case dependent upon visual identification. The Panel has found helpful the considerations alluded to in the English criminal case of *R v Turnbull*, 1977 QB 224 at p.228-231 which encourages caution against too ready acceptance of such identification when identity is in issue:

"In our judgment the danger of miscarriages of justice occurring can be much reduced if trial judges sum up to juries in the way indicated in this judgment. First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. If the quality is good and remains good at the

close of the accused's case, the danger of a mistaken identification is lessened, but the poorer the quality, the greater the danger."

The utility of such guidelines does not depend upon the tribunal of fact being a lay jury as distinct from an arbitral body such as the Panel.

88. The Panel considers that the context is important. The present is not a case of whether the identifier confused A with some other unknown person. It is whether the identifier confused A with B. In this case A is the Appellant and B is C. The Panel has had the advantage of seeing both the Appellant and C. together. The Panel witnessed first-hand at the hearing, when the Panel asked Mr. Dobud, C., and the DCO to stand side by side, the height and other physical differences between the door answerer, C., and Mr. Dobud. It found it difficult to imagine how one could be confused with the other even in a fleeting moment and in an ill lit environment. They are of manifestly different height, weight and build – unsurprisingly given that one is a professional athlete and the other not an athlete but an owner of several bars. Goliath could not be confused with David but even if the differences between the Appellant and C. were not of that order of magnitude, they were nonetheless significant. The Panel can take, in the English phrase, judicial notice of the fact that success at water polo at the level of first class international competition requires – like basketball and some other sports – a particular physique, which the Appellant undoubtedly possesses and C. does not. It is not like football where stars come in all shapes and sizes. Revealingly, the assistant DCO, in a throwaway line, said that he followed sport. When asked for the intended implications of that remark he explained that he knew the shape and size of an international water polo player when he saw one.

89. The Panel also takes into account the following matters:

a. Neither the DCO nor his assistant DCO were college students and subject of an experiment to show how the mind can play false tricks as to identification. They, in particular the DCO, were experienced persons conscious of the need correctly to identify the person to be tested.

b. Both had a visual image of the Appellant whom they had tested less than a year before in June 2014; in fact, according to what the DCO, which the Panel accepts, told to the IDTM people the very morning of the attempted control (see *supra* at para. 75), both had such visual image twice.

c. Both and not just one purported to identify the Appellant.

d. The DCO, while he had no internet image of the Appellant or C. when he first knocked at the door of the Appellant's apartment did access images of both while waiting at it, given the Appellant's wife claim to him as to which male had come to the door.

e. If, as the Panel finds, the male came twice to the door the opportunities for inspection would be greater than that provided by a single fleeting glance.

f. The Panel is not relying for its conclusions on the visual identification evidence alone, although application of the guidelines indicated in Turnbull vindicates the

Panel's conclusion that the identification was correct. The circumstantial evidence analysed elsewhere, however, supports rather than calls into question the accuracy of the visual identification.

90. The DCO's summary record evidenced in Brian Castledine's emails (and Jasmina Glad-Schreven's statement) was elaborated, not amended in his supplementary report and later statement. The fact, as he stated, that the man he encountered twice asked for five minutes grace must either be true recollection or false invention. That kind of detail could hardly be the product of a mistake, and the Appellant's wife's (late) threat to call the police was common ground.

91. At this juncture the Panel finds it useful to consider why the DCO or his assistant DCO should deliberately misrepresent what happened on the morning in question. It is not suggested – nor is there any evidence – that either nourished a pre-existing bias against the Appellant. These two eye witnesses were of Croatian nationality and would have no personal interest in excluding a gold medallist from the Croatian Olympic squad for the 2016 summer games in Rio in one of the few events in which that proudly nationalistic country has medal prospects, and would be unlikely to endear themselves to their fellow countrymen by their version.

92. It was suggested that, having made an initial mistake, both had to cover it up in order not to put in jeopardy their continued employment on remunerated testing missions. This seems to the Panel somewhat far-fetched; it might be thought that their possible exposure as liars by a FINA panel would have been a greater risk. More importantly the DCO was convinced that he had seen the Appellant and no one else as appears from his emails of the day in question. He could not have thought that he had any mistake to cover up.

93. By contrast, the family motive to cover up test evasion by the Appellant was far more obvious – the Appellant's reputation, his career, his ability to support his wife and child were all in jeopardy if his appeal failed. In the Panel's view, the family's evidence rings false, self-serving and coordinated.

94. The Panel recognizes the force of the point that there is no evidence that the Appellant had any motive to evade a test. Tested many times before, he had an unblemished record as a clean athlete. Furthermore, albeit unbeknown to him on the morning of 21 March 2015 his test the night before proved also to be negative, as he could have anticipated if then drug free. However, the regulations governing test evasion do not require the governing body to establish why an athlete may have evaded a test; only that he had in fact done so. A number of scenarios can be constructed as to why the Appellant rationally feared to be tested on the morning in question, the least hurtful of which is that after a prolonged celebration in which on his own admission much alcohol was consumed, he may have been apprehensive that he had inadvertently ingested some substance that would have involved breach of the anti-doping rules (of whose detail he appeared unhappily not well versed). So while his clean record undoubtedly weighs in his favour, it cannot by itself outweigh other inculpatory evidence.

95. The Panel has considered the Appellant's other arguments. As to these:

a. It does not consider that the DCO's initial hesitation in identifying before the FINA panel the Appellant on frozen Skype images undermines the strength of his evidence that he did correctly identify the Appellant on the day in question. The circumstances were not the same.

b. It recognizes that the DCO and the assistant had only once seen the Appellant at a previous test and had tested many other persons during the intervening period. This does not, however, mean that the identification must have been unsound. The Panel refers to its analysis to *paras* 87 to 89 above.

c. It makes the same point in response to the submission that both, the DCO and his assistant DCO, would have been predisposed to identify a male who responded to their knock at the ADAMS whereabouts address to be the man whose address it indeed was, a fortiori that a man who responded to a knock on the Appellant's door was indeed the Appellant.

d. It does not consider that there has been any material inconsistency in the DCO's version of events. For example the fact that he did not initially mention the height of the Appellant (he himself being of equivalent height though not bulk) is again inconsequential. He was confident from the start that he had correctly identified the Appellant. It was only when this identification was challenged that he needed to amplify the reasons for the identification.

e. The Panel detects no material inconsistency between the evidence of the DCO and of his assistant DCO; and notes that the Appellant's advocate deployed a favourite forensic tactic of arguing that any difference betrayed uncertainty and any consistency betrayed collaboration and concoction. The Panel was content, having seen and heard both, that each was telling the truth as he saw it.

96. The Panel was urged not to discard a plausible version of events advanced by the family, which could only be discarded if the Panel found they were all lying. Much of the background evidence was, it was argued either unimpeachable or unimpeached; the presence of C. and his wife at the Address, the baby's illness etc. While it was accepted by the Appellant that the reaction of those in the flat to the DCO might have been discourteous and unhelpful, this was to be explained by stress caused by the sick baby and the oddity of a dawn call after a test of the Appellant only the night before. The Panel has assessed all these arguments but is constrained to prefer the evidence of the DCO and his assistant DCO for reasons already adumbrated.

97. The Panel is acutely conscious of the grave consequences to the Appellant of dismissal of the Appeal, especially in an Olympic year. But while this obliges it to consider the evidence with special care, it does not entitle, still less obliges it, to ignore that evidence or its implications. If, as the Respondent suggested, the Appellant had, for whatever reason panicked when confronted with the DCO and in consequence evaded a test that objectively he had no reason to fear the mandatory four-year sanction might appear disproportionate, especially if he had had after further reflection made a prompt and full admission and apology. But that is not this case. The Panel has found that the Appellant twice sought to evade the consequences of his test evasion in a deceitful way by providing in sequence two inconsistent explanations and in his later version of events involving members of his family in the deceit. Having said this, the Panel is bound by the provisions

of the World Anti-Doping Code as embodied in the FINA regulations and there is no applicable provision for reducing a penalty for evasion of doping controls; the Panel is bound by to apply the code requirements if it finds that the standards for the violation have been met.

98. For these reasons the Panel is comfortably satisfied that the Appellant was in breach of Article DC 2.3 FINA DCR and the Appeal is dismissed.

99. There is a troublesome postscript to this case. It is in principle unacceptable that persons should seek to persuade witnesses in forthcoming proceedings in whatever forum to alter their evidence whether by promises or by threats, even if – as could be the case – they genuinely believe that the witnesses proposed evidence would be inaccurate or false. In the present case, the DCO made a complaint that persons acting in the Appellant's interest with a view to encouraging him to alter his anticipated testimony had harassed him. The report of the Croatian body who investigated after setting out their understanding of the evidence before it, stated: "*[…] it is concluded that the waterpolo player Nikša Dobud after being reported for test refusal by the authorized doping controller B., either in person through his acquaintances, and also through the relatives of the doping controller B. tried to make contact with him, possibly aimed at B.'s altercation of his report or statement, and remove from him /Dobud/ any liability in the sports arbitration proceedings, and there is no doubt that any influence over on authorized doping controller is amoral and unacceptable because in such way an attempt is being made to influence his professional impartiality, objectivity and autonomy in proceeding,"* but added that in order to *"commit a criminal offense of prevention of evidence collection, as stated above, it is necessary to use coercion, threat, some other form of coercion, or make promises, offer or give a gift or any other benefit to the witness,"* and that *"it is necessary for them to be instigated by the secondary suspect Nikša Dobud and that these persons undertook dangerous, i.e. the listed incriminating acts to prevent the presentation of evidence",* neither of which conditions were fulfilled, hence leading to dismissal of the criminal complaint.

100. In the light of the Panel's findings it is impossible to avoid the conclusion that there was an unwarranted – and mercifully unsuccessful – attempt to interfere with justice in the Appellant's interest.

XIII. COSTS

101. (…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 3 August 2015 by Mr Niksa Dobud against the decision rendered by the FINA Doping Panel on 15 July 2015 is dismissed.

2. The decision rendered by the FINA Doping Panel on 15 July 2015 is confirmed.

3. The present arbitration procedure shall be free, except for the CAS Court Office fee of CHF 1,000 (one thousand Swiss francs), which has already been paid by Mr Niksa Dobud and is retained by the CAS.

4. (…).

5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Operative part of the award notified on 15 January 2016
Date: 15 March 2016

COURT OF ARBITRATION FOR SPORT

Michael J Beloff Q.C.
President of the Panel

Jeffrey G. Benz
Arbitrator

Massimo Coccia
Arbitrator

Luca Tarzia
Ad hoc Clerk