



**Arbitration CAS 2015/A/4189 British Swimming, Adam Peaty, Francesca Halsall, Jemma Lowe and Chris Walker-Hebborn v. Fédération Internationale de Natation (FINA), award of 17 March 2016**

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Michele Bernasconi (Switzerland); Mr Dirk Reiner Martens (Germany)

*Aquatics (swimming)*

*Recognition of world records*

*Discretion of the Honorary Secretary of FINA in the evaluation of an application for a world record recognition  
CAS power of review*

1. The “discretion” granted to the Honorary Secretary of FINA in the evaluation of an application for a world record recognition can only be exercised in light of the circumstances of the case, as properly investigated, and on the basis of a proper justification: in other words, the decision to be rendered must not be based on the exercise of a capricious and unlimited discretion, but has to be proper and reasonable.
2. Pursuant to the applicable FINA regulations, CAS has jurisdiction to hear “*disputes between FINA and any of its Members*”: in the absence of an express limitation in the arbitration clause, such disputes can also regard a decision rendered by the Honorary Secretary of FINA and therefore also the exercise of the discretion provided by such rule. Pursuant to Article R57 of the CAS Code, a CAS Panel hears *de novo* the case leading to the decision appealed from, and, in the exercise of its *de novo* review of the case, it can issue a new decision replacing the decision challenged, or annul the challenged decision and refer back the case for a new decision by the entity which rendered the decision set aside. In other words, under the CAS rules, a Panel has the power to review the discretion exercised by the Honorary Secretary of FINA and can issue an award replacing the decision issued by the Honorary Secretary of FINA. The fact that the Honorary Secretary of FINA enjoys some discretion is not *per se* an obstacle. Far from excluding or limiting the power of a CAS Panel to review the facts and the law involved in the dispute heard, the CAS jurisprudence according to which the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence, only means that a CAS Panel “*would not easily ‘tinker’ with a well-reasoned sanction, i.e. to substitute a sanction of 17 or 19 months’ suspension for one of 18*”.

## 1. BACKGROUND

### 1.1 The Parties

1. British Swimming is the national governing body in the United Kingdom for the aquatic sports, which include the sports of swimming, water polo, synchronised swimming, diving and open water swimming. British Swimming is a member of the Fédération Internationale de Natation (FINA), of the British Olympic Association and of the British Paralympic Association.
2. Mr Adam Peaty, Ms Francesca Halsall, Ms Jemma Lowe and Mr Chris Walker-Hebborn (the “Swimmers”) are English competitive swimmers who represented British Swimming at major international events (British Swimming and the Swimmers are jointly referred to as the “Appellants”).
3. The Fédération Internationale de Natation (“FINA” or the “Respondent”) is the world governing body for the aquatic sports. FINA is an association pursuant to Article 60ff of the Swiss Civil Code, and has its headquarters in Lausanne, Switzerland.

### 1.2 The Dispute between the Parties

4. The circumstances stated below are a summary of the main relevant facts concerning such dispute, as submitted by the parties in their written pleadings or in the evidence offered in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.
5. In the period between 18 and 24 August 2014, the 32nd European Swimming Championships were held in Berlin (the “Championships”). The Championships were organized by the Ligue Européenne de Natation (the “LEN”), which is the continental swimming organization for Europe recognized by FINA. The Swimmers were entered into the Championships by British Swimming.
6. On 19 August 2014, the British relay team composed of the Swimmers won the 4x100m Mixed Medley Relay swimming event (the “Relay Competition”) with the time of 3:44.02, i.e. the best time that far achieved in the world.
7. After the Relay Competition<sup>1</sup>, the Swimmers underwent doping controls. More exactly, samples were collected:

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<sup>1</sup> It is common ground between the parties that the doping controls on Mr Peaty and on Mr Walker-Hebborn were performed following a notification requiring them to undergo testing in connection with other competitions in which they swam on 19 August 2014, but in any case after the Relay Competition. On the other hand, the tests on Ms Lowe and on Ms Halsall took place without a notification, but were performed upon their presentation at the doping control station at the Championships and at their request, as indicated in the relevant box (‘No notification’).

- i. on 19 August 2014, from Mr Peaty and Mr Walker-Hebborn; and
  - ii. on 20 August 2014, from Ms Lowe and Ms Halsall.
8. On 20 August 2014, Ms Dawn Peart, Senior Team Manager of British Swimming, submitted to LEN a FINA World Record Application Form for the recognition as a world record of the time achieved by the Swimmers at the Relay Competition.
  9. On 22 August 2014, Mr Peaty won the semi-final of the 50m Breaststroke swimming event (the "Individual Competition") with the time of 26.62, i.e. the best time that far achieved in the world.
  10. On 22 August 2014, Mr Peaty, therefore, underwent a second doping control<sup>2</sup>.
  11. On 23 August 2014, Ms Peart submitted to LEN a second World Record Application Form with regard to the time achieved by Mr Peaty at the Individual Event.
  12. On 22 October 2014, Ms Tricia Walker (British Swimming) sent an email to "FINA Rankings", inquiring as to the status of the recognition as a world record of the result achieved by Mr Peaty at the Championships, as follows:

*Could you please help me. Who do I need to contact re a new World record that one of our swimmers has achieved. The record is for Adam Peaty who broke the 50 Breaststroke record in the time of 26.62 at the European Championships in Berlin in August this year. All the necessary paperwork I have been informed was completed at the competition.*

13. On 28 October 2014, X. (FINA) replied as follows:

*Please note that as of today we have not received any paper work regarding a record broken by Mr. Peaty. Can you please send all documents to me so that we can review the situation?*

14. On the same 28 October 2014, Ms Walker (British Swimming) sent the following message in answer:

*All the paperwork was completed at the competition (European Long Course Championships). They were given to Len via Craig Hunter. Is it possible for you to contact the Len Office regarding this and asking them to forward the paperwork to you. So your World Records can be brought up to date.*

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- WR') of the doping control forms.

<sup>2</sup> This second doping control on Mr Peaty took place without a prior notification, but was performed upon his presentation at the doping control station at the Championships and at his request, as indicated in the relevant box ("No notification - WR") of the doping control form.

15. On 30 October 2014, X. (FINA) reverted to British Swimming as follows:

*I received documents from LEN some time ago regarding WR but nothing for GBR. Please contact them in this respect as the deadline for applications is 2 weeks after the WR was established.*

16. On the same day, 30 October 2014, Mr Adam Clarke (British Swimming) sent another email to X. (FINA) as follows:

*I'm concerned that Adam Peaty's Word Record is still not formalized. We believe all the paperwork was completed and submitted at the time during the European Championships. Can you advise what needs to be completed?*

17. On 3 November 2014, Ms Peart (British Swimming) sent an email to Mr Craig Hunter (LEN) as follows:

*Not sure if you can help in terms of a contact in LEN or FINA to help us get recognition of Adams WR (I appreciate it will be subject to drug test results).*

18. On 3 November 2014, Mr Hunter (LEN) sent a message to Ms Katharina Haue (LEN), copied to Ms Peart (British Swimming), in the following terms:

*My colleague at British Swimming Dawn Peart, has been following up with FINA on the World Record application for Adam Peaty – 50m Breaststroke during the LEN Championships in Berlin. I know that the paperwork was completed so just wanted to check that it was forwarded to FINA so we can put pressure on them to confirm ratification, subject to the outcome of the anti-doing testing.*

19. On 4 November 2014, X. (FINA) requested information from LEN as follows:

*I have a query related to a World Record that has been established at the 2014 European Championships in August: Adam Peaty – 50m Breaststroke – 26.62*

*We have not got any paper work on this. Great Britain says it has been sent to us. Can you please check and resend me the documents if necessary?*

20. On 7 November 2014, Ms Lucie Lapierre (LEN) replied as follows:

*Following your request, please find attached a scan of the document regarding the World Record of Adam Peaty and 4x100 Medley Mixed Relay.*

*Please note that we will send the scan of the anti-doping collection form upon reception of the results.*

*Hope to have informed you satisfactorily.*

21. Such message had attached the World Record Application form regarding Mr Peaty.

22. On 11 November 2014, following an inquiry made by X. (FINA) on 10 November 2014 with respect to the document received on 7 November 2014, Ms Lapierre (LEN) indicated that:

*This document was never sent by us to the FINA Office as usually it is the National Federation which are in charge to contact the FINA Office in that regard. Therefore I do not know if British Swimming has done it on its side.*

23. On 18 November 2014, Mr David Sparkes (British Swimming, Chief Executive) sent an email to Mr Paulo Frischknecht (LEN, Executive Director) as follows:

*I had to speak to Cornel [Mr Cornel Marculescu, FINA Executive Director] on another matter today... I took the opportunity to ask what the problem was with Adam's World Record he confirmed they now had the formal application and were simply awaiting the doping control data from yourselves. Let me know if I can help.*

24. On the same 18 November 2014, Mr Frischknecht (LEN) replied as follows:

*I know ... I've also talked to him, earlier on ... and, he told me everything was OK.*

*I already told Paolo [Mr Paolo Barelli, FINA Honorary Secretary and President of LEN] this.*

*We just have to wait for the Berlin Lab to forward the anti-doping result, for FINA to validate the WR.*

25. On 19 November 2014, LEN forwarded to FINA copies of the "collection forms" and of the "results of the anti-doping controls" at the Championships regarding the Swimmers.

26. On 28 January 2015, Mr Byron Vaughan (British Swimming) addressed FINA with respect to the registration as a world record of the time achieved by Mr Peaty at the Championships in the following message:

*I am just following up on behalf of our stakeholders regarding the World Record application for Adam Peaty – 50m Breaststroke during the LEN Championships in Berlin last summer. I know that the paperwork was completed and submitted so just wanted to check that it was forwarded to yourselves (FINA) and you're not waiting on any further information from ourselves for the record to be acknowledged?*

27. On 5 February 2015, X. (FINA) contacted again Ms Lapierre (LEN) as follows:

*I am looking into the GBR Word Records and we do not have the EPO tests results. Please send them as soon as possible so that we may proceed with these World Records.*

28. On 9 February 2015, Ms Lapierre (LEN) answered in the following email:

*Thank you for your email. After having cross-checked our files, it appears that EPO tests were conducted on some athletes in Berlin (GER) on the occasion of the European Swimming Championships.*

*The sample numbers indicated for EPO tests do not correspond to any of the anti-doping collection forms of the British Swimmers having swum the World Record Performance.*

29. On 10 February 2015, X. (FINA) reacted with a message as follows:

*Does this mean that these swimmers were not tested for EPO?*

*Thank you for confirming.*

30. On 23 February 2015, Ms Lapierre (LEN) confirmed that:

*According to my files, the sample numbers corresponding to the British swimmers who established a World Record are not listed amongst the EPO tests.*

31. On the same 23 February 2015, X. (FINA) asked Ms Lapierre (LEN) whether there was “*any way of having EPO tests done on the samples*”.
32. On 13 April 2015, Ms Lapierre (LEN) contacted the anti-doping laboratory which had performed the analyses of the samples collected from the Swimmers at the Championships (the “Laboratory”) asking in an email whether “*the samples are still accessible and if EPO test can be done on specific samples (5)*”.
33. On 21 April 2015, Ms Lapierre (LEN) received a message from the Laboratory, which reads as follows:

*In response to your phone call yesterday I tried to locate your e-mail and found it. Yes, the analysis of the samples taken during the European Swimming Championships in Berlin last year were performed in our laboratory. Altogether 20 samples were tested for EPO. Because there was no request for long-term storage of samples all of them were regularly discarded after the three month period as stipulated in the International Standard for Laboratories.*

34. On 22 April 2015, Ms Lapierre (LEN) sent the answer received from the Laboratory to X. (FINA).
35. On 4 May 2015, Mr Cornel Marculescu (FINA, Executive Director) sent a letter to Mr David Sparkes (British Swimming), which reads as follows:

*Reference is made to the World Records established by British swimmers at the 32nd LEN European Swimming Championships in 50m Breaststroke and 4x100m mixed medley relay.*

*Please kindly note that there was no EPO screening on the samples and that the laboratory has now confirmed that “Because there was no request for long-term storage of samples all of them were regularly discarded after the three month period as stipulated in the International Standard for Laboratories”.*

*According to the FINA Rule DC 5.3.3.2 “(...) No World Record shall be recognized without a negative doping test certificate for all Prohibited Substances or Prohibited Methods identified on the Prohibited List for which an analytical technique is available”.*

*In addition, please find attached the correspondence that was sent out in July 2002 clarifying that EPO screening is mandatory for us to approve World Records.*

*It is regretful that the usual procedure of asking for EPO screening after world records was not applied in this case.*

*Therefore we are sorry that unfortunately we cannot consider the above mentioned World Records.*

36. On 3 June 2015, Mr Sparkes (British Swimming) wrote to Mr Paolo Barelli (FINA, Honorary Secretary) a letter asking him to exercise the power given to him by Article 12.18 of the FINA Technical Swimming Rules in force in 2014 (the “2014 SWR”). Such application reads as follows:

*I write further to correspondence received from Mr Marculescu ... dated 4th May 2015 regarding the World Records established at the 32nd LEN European Swimming Championships, Berlin, Germany, held between 18 – 24 August 2014 (“the Event”).*

*British Swimming is seeking recognition by FINA, on behalf of the 4x100m Mixed Medley Relay Team and Mr Adam Peaty (50m Breaststroke), of the times achieved, which are, if recognized, World Records.*

*We would ask you to carefully consider our detailed submissions below with a view to recognizing the times as World Records in accordance with the powers afforded to the FINA Honorary Secretary under FINA Rule SW 12.18.*

#### Governing Rules

1. *The Event was, as stated above, held on 18 – 24 August 2014. Therefore, the effective FINA Rules governing this Event are those FINA Rules in place prior to the subsequent FINA Rule changes approved by FINA Congress on 29th November 2014.*
2. *This means that the applicable FINA Doping Control Rule is DC 5.3.2 and not DC 5.3.3.2. However, they are manifestly the same.*
3. *The Anti-Doping Organization responsible for testing at the Event was the German National Anti-Doping Agency (“GNADA”) appointed by LEN (or the German National Federation (Deutscher Schwimm-Verband e.v.) under a hosting/ event agreement).*

*This accords with the World Anti-Doping Code (“WADC”) and specifically Article 5.3.1 ...*

*In light of the above and given that this was a European Event the responsibility for conducting and directing Anti-Doping Testing (“Testing”), including Testing “for which an analytical technique is available”, is LEN and/or the GNADA.*

*As Testing is the responsibility of LEN, it follows that LEN would be aware of the Testing required to recognize a World Record.*

### The Event

*The Medical Delegate at the Event was Cees-Rein Van Den Hoogenband, the LEN Medical Committee Chairman and the FINA Medical Committee Chairman. The British Swimming Medical Delegate, Dr Jon Greenwell, was present everyday during the Event and at no time does he recall seeing any LEN representatives in the Testing area nor did anyone hold themselves out to be a representative of the LEN Medical Committee.*

*However, given Mr Van Den Hoogenband's position with both FINA and LEN we would suggest that it is more likely than not that LEN would have been aware of the Testing requirements when Testing for a World Record. When British Swimming's competitors reported for Testing the testers were advised that the competitors had achieved World Records and there was an expectation and reliance on LEN that the correct Testing would be requested by the ruling body.*

*To further substantiate this point control was exercised over the process by LEN as EPO is not a part of the standard testing procedure as EPO requires (along with another substances on the prohibited list) an additional analytical technique to be performed by the testing laboratory, on request, which comes at an additional cost to the organisers. This additional screening would have to be signed off and requested by the ruling body LEN/GNADA.*

*Effectively, British Swimming and its competitors are entirely in the hands of LEN in ensuring that the additional Testing is conducted.*

### Administration and Timetable

*The FINA World Record Application Form, was handed in by British Swimming to members of the LEN Technical Swimming Committee for forwarding to the FINA Honorary Secretary on 20th August 2014 in relation to the 4x100m Mixed Medley Relay and on 23rd August 2014 for Adam Peaty (50m Breaststroke) in accordance with FINA Rule SW12.13.*

*FINA Rule SW12.13 places responsibility for completing (not signing) of the FINA World Record Application Form on the responsible authority of the organizing or management committee, in this case LEN.*

*Following the Event it came to our attention, on 17/18th October 2014 that the World Records had not yet been recognized by FINA. At this point we started to make enquiries both internally and with LEN in an attempt to identify the reasons why.*

*In order to give a clear understanding of the process and administrative difficulties and delays experienced I have attached at Appendix 1 and Appendix 2 British Swimming's and LEN's timetable of events identifying the steps taken to try to resolve the issue.*

*As you will see, it is clear on review that there was some confusion surrounding the status of documentation submitted for the World Record claims. Most disappointing was the lack of urgency given to this issue in light of the fact that EPO tests could only be conducted on samples up to 3 months after the Event due to the laboratories storage policy. This left a small window once it should have become apparent to FINA that EPO had not been tested for on 19 November 2014 when LEN sent the documents they had received to FINA.*

*Had FINA identified, once the documentation was received from LEN, which we say FINA should, that there was no EPO screening conducted on the samples then it would have enabled LEN to contact the laboratory and request the samples to be stored for longer until the issue had been resolved. As it was, FINA confirmed the lack tests for EPO some 11 weeks later by which time the samples had been destroyed.*

*Summary and Application under SW12.18*

*Once the competitors had provided their samples they were not in control of the Testing process and once British Swimming had signed the FINA World Record Application Form and handed them to LEN British Swimming had no control over the process.*

*LEN was the responsible organization for the purposes of Testing and the responsible authority for competing the FINA World Record Application Form.*

*We have identified a systematic breakdown in communications between LEN and FINA together with clear administrative errors, which were compounded when it should have been apparent that the documentation LEN sent to FINA was insufficient, resulting in the athletes, through no fault of their own, or any fault of British Swimming, not being able to claim World Records, which they have all worked extremely hard for.*

*We would submit that we, as British Swimming, on behalf of the athletes have accorded to the relevant FINA Rules, completed the relevant paperwork and met any and all of our obligations for the World Record to be recognized by FINA.*

*We believe that we have clearly established that FINA Rule 12.13 has not been followed and accordingly, I would invite the FINA Honorary Secretary to formally exercise his powers under FINA Rule 12.18 and recognize the competitors World Records in default thereof.*

*As it stands the athletes are being unfairly penalized for a failure of a ruling body to follow its own procedure and those of the International Federation, which, on any view, cannot be a reasonable position to maintain.*

37. On 17 June 2015, Dr Cees-Rein Van Den Hoogenband (LEN, Chairman of the Medical Committee), sent an email to Mr Frischknecht (LEN), as follows:

*It is clear that the German Doping control officer did not make a request for EPO testing. Only a small bar (-) is put in the box which has been interpreted by the LAB as: no EPO testing.*

*At the form it is clearly mentioned that it concerned a World Record so it must be a mistake of the DCO. I do not know when Len was informed, but apparently after three months, the period the samples are destroyed. Is that correct?*

*May I use this information to answer Cornel and the DCRB? I will put an attempt to decide to recognize the world record. During the EC two other tests on Peaty were done too (without epo testing) and showed to be negative. There is another reason to make an exemption: Epo is only working in longer distances. please your opinion.*

38. On the same 17 June 2015, Mr Frischknecht (LEN) answered as follows:

*Correct Cees.*

*Of course, you may.*

*As LEN's MedC Chairman and BLN 2014 Expert on site, you're fully empowered to do so.*

*My opinion is that, considering all the facts – apparently, no one played any deliberate foul in the whole process ... and as such, the Athlete (above all) should be completely exonerated of the (wrong) 'interpretation' consequences.*

39. In reply, Dr Van Den Hoogenband (LEN) wrote:

*Fully agree, I will inform Cornel and make a plea for that.*

40. As a result, Dr Van Den Hoogenband (LEN) sent a message to Mr Marculescu (FINA) which reads as follows:

*As I promised I did investigations concerning the Anti-doping matters during the EC in Berlin, in relation to the testing of Adam Peaty. As you can see in the testing forms, attached. He was tested two times, regularly after the 50 and 100 breast. In the second form you can see that he was tested after his World Record on the 50 breast. On that form the reason for testing was given: World record, but the Doping Control Officer failed to request for EPO testing. In the box EPO testing a small strip is visible(-). this has been interpreted by the Lab that EPO testing should not be done!*

*I understand that in a late phase after the EC this failure was found out and because the samples were destroyed already it could not be corrected. As I told you my help was asked just recently.*

*May I come to the conclusion:*

*1. The DCO at the EC Berlin made a mistake by not asking for EPO testing after a World Record. Doping testing in Berlin was done by the German Anti Doping Agency under supervision of LEN. So we, the Medical Commission of LEN likes to apologise too.*

*2. The athlete had two other tests during the EC which showed no abnormalities (no EPO testing done)*

*May I give you in consideration to ask advice of the DCRB on this matter, taking into account that EPO will not help in short distances and that a mistake of the authorities must not have negative consequences for the athlete, in my view.*

41. On 18 June 2015, Mr Marculescu (FINA) sent an email to Mr Barelli (FINA) asking for directions.
42. On 16 July 2015, Mr Marculescu (FINA) sent another email to Mr Barelli (FINA), forwarding the "recommendation of the FINA DCRB on the matter of WR of Adam Peaty" announcing that the document would be presented by the FINA Bureau at its next meeting. The text of the

recommendation, prepared by Dr Andrew Pipe, Chairman of the Doping Control Review Board of FINA (the “DCRB”), reads as follows:

*I note that while a WR was obtained during the course of the LEN Championships the organizing body failed to ensure that the doping controls applied at the time included an analysis for EPO.*

*It is my view that to penalize a swimmer for an administrative oversight by an organizing committee is unfair. On the other hand the protection of other competitors mandates that appropriate action be taken to ensure that no doping has taken place.*

*As Chair of the DCRB I would therefore recommend the following approach:*

*The record be recognized provisionally. Two additional, unannounced doping controls (to include both blood and urine analyses) be performed in the next 6-8 weeks. The development of an ABP profile to be facilitated by the collection of the blood samples. Urinary analyses to include tests for the presence of rEPO. The results of all tests to be forwarded to the DCRB for their review. Further testing to be considered in the course of the World Championships. The record to be withdrawn if any of the tests result in an adverse analytical finding leading to the determination of a doping offence.*

*It would seem reasonable for LEN to assume the costs of such testing but I will leave that matter in your hands.*

43. On 22 July 2015, British Swimming forwarded to FINA the anti-doping test results for the Swimmers in the period January 2015 to June 2015.
44. On 22 July 2015, the Bureau of FINA met in Kazan, Russian Federation, to discuss, inter alia, the issue of the recognition as world records of the results achieved by the Swimmers at the Championships. The minutes of the meeting read, in the pertinent portions, as follows:

*Details of these two World Records – an individual and a relay during the European Championships in Berlin (GER) were presented to the FINA Bureau by the FINA Honorary Secretary, recalling that the EPO tests were not performed. It appears that the athletes have completed all the procedure and acted in good faith.*

*Based on the information received, the Bureau recommended, in accordance with the FINA rules, not to recognize these two World Records.*

45. On 9 August 2015, FINA sent a letter to British Swimming containing the answer to the application of British Swimming dated 3 June 2015 (the “Decision”) as follows:

*Reference is made to the World Record established by British swimmers at the 32nd LEN European Swimming Championships in 50m Breaststroke and 4x100 mixed medley relay.*

*Please kindly note that FINA Rule DC 5.3.3.2 “(...) No World Record shall be recognized without a negative doping test certificate for all Prohibited Substances or Prohibited Methods identified on the Prohibited List for which an analytical technique is available”.*

*According to FINA Rule SW 12 the FINA Honorary Secretary presented the case to the FINA Bureau during its meeting on 22nd July 2015 in Kazan (RUS), and after an exchange of opinions with the Bureau, the Honorary Secretary confirmed that the FINA rule will be followed in this case.*

*Consequently, due to the lack of EPO screening for the doping tests performed following these World Records we regret to inform you that the above-mentioned World Record Applications have not been approved.*

46. At the FINA World Championships held in Kazan in the period between 24 July and 9 August 2015 (the “2015 WC”), world records were established in the 50m Breaststroke and in the 4x100m Mixed Medley Relay competitions, as follows:
  - i. in the 50m Breaststroke competition:
    - on 4 August 2015, Mr Cameron van der Burg set the time of 26.62<sup>3</sup>;
    - on 4 August 2015, Mr Peaty set the time of 26.42<sup>4</sup>;
  - ii. in the 4x100m Mixed Medley Relay competition:
    - on 5 August 2015, the team of Russia set the time of 3:45.875;
    - on 5 August 2015, the team of USA set the time of 3:42.33<sup>6</sup>;
    - on 5 August 2015, the team of Great Britain set the time of 3:41.71<sup>7</sup>.

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<sup>3</sup> I.e., the same time achieved by Mr Peaty at the Championships. Mr van der Burg set the mentioned time while swimming Heat 7. The heats for the Individual Competition started at 9:30.

<sup>4</sup> This time was swum in the first semi-final, at 17:48.

<sup>5</sup> I.e., a time higher than the time set by the Swimmers at the Championships. The team of Russia set the mentioned time while swimming Heat 2. The heats for the Relay Competition started at 9:30.

<sup>6</sup> This time was swum in Heat 3.

<sup>7</sup> The British team was composed by Mr Adam Peaty, Ms Francesca Halsall, Ms Siobane Marie O’Connor and Mr Chris Walker-Hebborn. In other words, Ms Jemma Lowe was not a component of the British team at the 2015 WC. This time was swum in the first final, which took place at 19:19.

## 2. THE ARBITRAL PROCEEDINGS

### 2.1 The CAS Proceedings

47. On 28 August 2015, British Swimming and the Swimmers filed a statement of appeal with the Court of Arbitration for Sport (the “CAS”), pursuant to Article R48 of the Code of Sports-related Arbitration (the “Code”), to challenge the Decision.
48. The statement of appeal contained the designation of Mr Michele A.R. Bernasconi as an arbitrator.
49. On 31 August 2015, the CAS Court Office forwarded to FINA the Appellants’ statement of appeal.
50. In a letter of 4 September 2015, the Respondent expressed its preference for the case to be submitted for decision to a Sole Arbitrator appointed by CAS. At the same time, however, the Respondent designated Mr Dirk-Reiner Martens as an arbitrator in the event a Panel of three arbitrators would be constituted.
51. On 7 September 2015, the Appellants submitted their appeal brief, in accordance with Article R51 of the Code, together with 34 exhibits, which included witness statements signed by each of the Swimmers, by Ms Dawn Peart, by Mr Jonathan Greenwell and by Mr Craig Hunter and a declaration rendered by Dr Cees-Rein Van Den Hoogenband. In the letter transmitting the appeal brief, the Appellants confirmed that *“British Swimming is no longer pursuing a claim for damages as was previously set out in our Statement of Appeal”*.
52. On 8 September 2015, the Appellants confirmed their request that the case be heard by a Panel of three arbitrators.
53. On 9 September 2015, the CAS Court Office informed the parties that the President of the CAS Appeals Arbitration Division had decided to submit the case to a Panel composed of three arbitrators in accordance with Article R50 of the Code.
54. On 5 October 2015, the Respondent submitted its answer, in accordance with Article R55 of the Code, together with 25 exhibits.
55. By communication dated 5 October 2015, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr Michele A.R. Bernasconi and Mr Dirk-Reiner Martens, arbitrators.
56. On 3 November 2015, the CAS Court Office, writing on behalf of the Panel, drew the Respondent’s attention to a request for production of documents contained in the appeal brief, concerning the minutes of the FINA Bureau meeting of 22 July 2015, which had remained unanswered. The Respondent was therefore invited to produce that document or, within the same deadline, to state the basis of its objection, if any, to that production.

57. On 4 November 2015, FINA produced the requested relevant parts of the minutes of the FINA Bureau meeting of 22 July 2015.
58. On 13 November 2015, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure, which was accepted and countersigned by the parties.
59. A hearing was held in Lausanne on 15 December 2015, as per a notice in a letter of 27 October 2015. The Panel was assisted by Mr Brent J. Nowicki, Counsel to CAS. The following persons attended the hearing:
  - i. for the Appellants: Mr Ash Cox, Head of Legal Affairs of British Swimming, and Mr Christopher Stoner, QC, counsel;
  - ii. for FINA: Ms Katarzyna Jozwik, FINA Legal Adviser.
60. At the hearing, in the opening statements and in their respective pleadings, the parties, *inter alia*, specified their arguments in support of their respective petitions.
61. At the conclusion of the hearing, after making closing submissions summarizing their respective cases, the parties expressly stated that they did not have any objection in respect of their right to be heard and to be treated equally in the arbitration proceedings.

## 2.2 The Position of the Parties

62. The following outline of the parties' positions is illustrative only and does not necessarily comprise every contention put forward by the parties. The Panel, indeed, has carefully considered, for the purposes of the legal analysis which follows, all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.
  - a. *The Position of the Appellants*
63. In their Statement of Appeal, the Appellants asked the CAS:
  - (1) *That the decision communicated by letter dated 9th August 2015 refusing British Swimming's application pursuant to Swimming Rule SW12.19 be set aside.*
  - (2) *That the World Record of Adam Peaty in the individual 50m Breaststroke set at the 32nd European Championships in August 2014 be ratified.*
  - (3) *That the World Record of the 4 x 100m Mixed Medley Relay team of Adam Peaty, Chris Walker-Hebborn, Jemma Lowe and Francesca Halsall set at the 32nd European Championships in August 2014 be ratified.*

- (4) *Alternatively to the foregoing that CAS direct FINA and/or the Honorary Secretary of FINA to ratify the above stated World Records.*
  - (5) *That in the event of the World Records not being ratified, then pursuant to the administrative breaches and/or failure of governance each of Adam Peaty, Chris Walker-Hebborn, Jemma Lowe and Francesca Halsall be awarded damages for breach of contract and/or breach of duty and/or for loss of personality.*
  - (6) *That provision be made for the payment by FINA of the costs of each of British Swimming, Adam Peaty, Chris Walker-Hebborn, Jemma Lowe and Francesca Halsall.*
64. In their appeal brief, then, the Appellants requested the CAS Panel to issue an award:
- (1) *Setting aside the Decision;*
  - (2) *Granting the World Record Application of Adam Peaty in the individual 50m Breaststroke set at the Championships in August 2014 and ratifying the World Record of 26.62 seconds;*
  - (3) *Granting the World Record Application of the 4 x 100m Mixed Medley Relay team of Adam Peaty, Francesca Halsall, Jemma Lowe and Chris Walker-Hebborn set at the Championships in August 2014 and ratifying the World Record of 3:44.02;*
  - (4) *In the alternative to sub-paragraphs (2) and (3) Ordering that FINA grant the World Record Applications and ratify the World Records of Adam Peaty in the individual 50m Breaststroke of 26.62 seconds and the 4 x 100m Mixed Medley Relay team of Adam Peaty, Francesca Halsall, Jemma Lowe and Chris Walker-Hebborn of 3:44.02;*
  - (5) *Ordering FINA to take all appropriate measures to register and publish the World Records of Adam Peaty in the individual 50m Breaststroke and the 4 x 100m Mixed Medley Relay team of Adam Peaty, Francesca Halsall, Jemma Lowe and Chris Walker-Hebborn set at the Championships; and*
  - (6) *Ordering FINA to pay all the costs related to the present proceedings and compensate the Appellants for the legal fees incurred.*
65. In other words, the Appellants seek the ratification as world records of the times achieved by the Swimmers at the Championships in the Relay Competition and in the Individual Competition (the “Potential World Records”), which, in the Appellants’ opinion, have not been recognized *“due to no fault of the Appellants, but rather due to a systematic failure of administration and governance”*. On the other hand, the Appellants are no longer pursuing before the CAS a claim for damages (see § 51 above), although the Appellants reserved their right to claim damages in different proceedings in the event the Potential World Records are not ratified.
66. The Appellants recognize that, since the Championships, the Potential World Records they established on that occasion have been beaten. However, the Swimmers underline that they are still entitled to the *“Historical recognition of their achievements”*, and the benefits that would derive therefrom, also to avoid any rumour as to the reasons of the non recognition as world records of their Potential World Records.

67. For such purposes, the Appellants refer to Rule SW 12.18 of the 2014 SWR, authorizing the Honorary Secretary of FINA to accept a world record, if the claim is found to be correct, when the procedure set by Rule 12.13 has not been followed and therefore also notwithstanding the lack of a negative doping certificate. In the Appellant's opinion, this CAS Panel has the power, under Article R57 of the Code, to issue an award replacing the Decision and accepting the times achieved by the Swimmers at the Championships as world records. According to the Appellants:
- i. *"the [FINA] Honorary Secretary has no particular advantage over CAS when considering whether the World Records in question should be ratified. There were no witnesses and he has not produced a reasoned decision. CAS is well placed as was the Honorary Secretary, when considering the matter de novo, to determine the matter";*
  - ii. *"the present case is one where CAS should consider the Appellant's request afresh", in light of the fact that "the errors that prevented a negative EPO test cannot in any sense be attributed to the [Swimmers], who after hard training and superb performance are entitled for the record books to show the result of their endeavours".*
68. In connection with this latter point of view, the Appellants contend that a number of points strongly weigh in favour of the ratification of the Potential World Records in issue, even though no EPO test was conducted and therefore no negative doping certificate covering EPO were issued. Such factors are the following:
- i. the Swimmers complied with each and every requirement imposed upon them and did all they could, in conjunction with British Swimming, to ensure ratification as world records of the time they swam;
  - ii. the "*root cause*" of the problem was that the doping control officers in charge of the control on the Swimmers made a "*simple but crucial*" mistake in the doping control forms in not requesting EPO tests, for unknown reasons outside of the control of the Appellants;
  - iii. the FINA World Record Application forms, timely completed by British Swimming and delivered to LEN, were not forwarded to FINA until mid-November 2014, notwithstanding Rule SW 12.13 of the 2014 SWR, providing a deadline of 14 days for their transmission;
  - iv. the timeline adopted by FINA and LEN "*was inappropriately and wrongly lax*", so that the possibility to remedy the error of the doping control officer was forever lost. In fact, when British Swimming contacted LEN and FINA, on 22 October 2014, the samples had not been destroyed yet. However, the reaction was so slow that the identification of the problem occurred when the samples had been already destroyed. In addition, when, at the beginning of November 2014, LEN indicated that it was still awaiting the doping control results, those results were already available, as confirmed by the dates on the Laboratory's reports. Therefore, the lack of EPO test could be identified when the samples were still available for additional testing;

- v. the Chairman of the DCRB was of the opinion that the Swimmers should not be prejudiced by an administrative oversight by the organizing committee;
  - vi. the Chairman of the LEN Medical Committee was also of the opinion that the Swimmers should be completely exonerated;
  - vii. not one of the administrative and/or governance failures was in any way attributable to the Swimmers, who only had the obligation to submit to doping control (under Rule DC 5.1 of the 2014 DCR), while the responsibility for the doping control, including its conduct, at the Championships rested with LEN (pursuant to Rule DC 5.2.5 of the 2014 DCR);
  - viii. the failure to ratify the Potential World Records as world records may cause financial loss, and loss of reputation or personality. In the case of Ms Lowe she would be deprived of the possibility of even stating that she had been a world record holder, since she was not a member of the team who broke again the world record in the Relay Competition at the 2015 WC.
69. In the Appellants' opinion, all those factors and the Appellants' legitimate interests clearly prevail over the (rather unclear) interests of FINA of having the EPO test performed as an absolute necessity. A different conclusion would imply a consequence for the Swimmers wholly disproportionate to their condition.
70. Finally, the Appellants criticize the Decision under some additional points of view:
- i. notwithstanding the clear wording of the relevant provisions, the Decision was not taken by the FINA Honorary Secretary, who simply agreed with the decision of the FINA Bureau, as also evidenced by the declarations of Mr Barelli to the Associated Press (mentioned in one of the exhibits filed by the Respondent in this arbitration), who, in August 2015, confirmed that the lack of EPO testing "*was an administrative error*";
  - ii. the FINA Honorary Secretary did not take into account all relevant information;
  - iii. the FINA Honorary Secretary simply refused to exercise the discretion granted him by Rule SW 12.18 of the 2014 SWR, by taking a decision "*so unreasonable and unfair [that] it can only be described as irrational*".
- b. *The Position of the Respondent*
71. In its answer, FINA submitted the following request for relief, asking the CAS Panel to rule that:
- a) *The appeal is dismissed;*
  - b) *The Appellant shall bear the entirety of the arbitration costs for these appeal proceedings;*

- c) *The Respondent shall be awarded a contribution to its legal fees and other costs in connection with these proceedings.*
72. In essence, therefore, it is the Respondent's position that the Decision should stand and that the Potential World Records should not be recognized as world records.
73. In support of such position, FINA refers to the "*non-compliance with mandatory deadlines*", the lack of the "*mandatory EPO test*", the "*athlete's responsibility for doping control*", the "*omissions by British Swimming*", the "*world records established in Kazan*", the "*discretion of the FINA Honorary Secretary*", and to some other "*miscellaneous*" issues, as follows:
- i. as to the "*non-compliance with mandatory deadlines*", FINA underlines that it was informed of the Potential World Records only 2 months after the Championships, notwithstanding the deadlines indicated in rules SW 12.13 and SW 12.14 and the possibility for British Swimming and the Swimmers themselves to report to FINA the results at the Championships. Therefore, FINA could have rejected the applications at their initial stage, as they had not been timely filed. However, FINA decided to proceed and (as confirmed at the hearing) does not invoke such failure to comply with the deadlines to discard the Appellants' applications, as it did not prejudice any other athlete and/or member of the aquatic sports community;
  - ii. the EPO test is mandatory for a world record recognition. The point is well known to all members of FINA and is not disputed. When FINA discovered that no EPO test had been conducted on the Swimmers, it did what it could do to remedy the problem, but without success, since the samples had been destroyed. Even admitting that "*there was a lapse of time before FINA discovered the missing EPO analyses*", the primary responsibility for doping control in relation with a world record performance remains with the athletes;
  - iii. it was the Swimmers' ultimate responsibility, in accordance with Rule DC 5.3.2, to ensure a doping control in accordance with the applicable rules. Therefore, the Appellants should have requested the doping control officer at the time of testing that the EPO screening be included in the analyses to be performed;
  - iv. British Swimming is responsible for several omissions: it did not report a claim for the registration of a world record in accordance with the rules; it acted only when requested by a coach; only on 22 October 2014 it addressed the wrong office of FINA; at no point British Swimming contacted the FINA office in order to clarify the procedures for a world record recognition;
  - v. in light of the world records set at the 2015 WC, if the CAS Panel decides to ratify the disputed Potential World Records, then FINA would be forced to cancel the world records achieved by Mr van der Burgh and by the team of Russia in 2015: "*this would cause an unprecedented damage and prejudice to those athletes who acted in good-faith and who complied with all the requirements for approval of World Records*";

- vi. the FINA Honorary Secretary exercised his discretion under Rule SW 12.18 after a due investigation, having in mind the protection of other swimmers and the interest of the aquatic sports community. CAS should not interfere with such exercise of discretion;
  - vii. other “*miscellaneous*” issues can be mentioned;
    - the reasons for the non-ratification of the Potential World Records are widely known to the public. Therefore, there is no “*ill-informed*” rumour within the sport community in that regard;
    - previous and subsequent tests are irrelevant, as they cannot provide any indication with respect to the samples collected at the Championships;
    - the internal and confidential information contained in FINA documents filed by the Appellants represent only some personal opinions expressed by the individuals concerned;
    - no financial loss can be incurred, since financial benefits can be claimed only upon recognition of a world record;
    - FINA had no power to request the long term storage of the samples collected at the Championships under the authority of LEN.
74. In summary, it is the Respondent’s contention that the FINA rules regarding the approval of world records were set to provide equal guarantees for all athletes: they ensure a level-playing field. In this case, approving the Potential World Records without valid EPO analyses would be arbitrary and biased, as the legitimate interests of the aquatic sports community clearly prevail over the interests of the Appellants.

### 3. LEGAL ANALYSIS

#### 3.1 Jurisdiction

75. CAS has jurisdiction according to Article R47 of the Code, under which:

*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 ....*

76. More specifically, the jurisdiction of CAS, which is not challenged by the parties, is based on Article C26 [“*Arbitration*”] of the FINA Constitution in force since 23 July 2015 (the “2015 Constitution”), which reads as follows:

*Disputes 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.*

### **3.2 Appeal Proceedings**

77. As these proceedings involve an appeal against a decision rendered by FINA, brought on the basis of provisions contained in the statutes of an international federation, they are considered and treated as appeal arbitration proceedings in a non-disciplinary case, within the meaning and for the purposes of the Code.

### **3.3 Admissibility**

78. The statement of appeal was filed within the deadline set in Article R49 of the Code, counted from the date of the Decision. No further internal recourse against such Decision was available to the Appellants within the structure of FINA. Accordingly, the appeal is admissible.

### **3.4 Scope of the Panel's Review**

79. According to Article R57 of the Code:

*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....*

### **3.5 Applicable Law**

80. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.
81. Pursuant to Article R58 of the Code, the Panel is required to decide the dispute:

*... according to the applicable regulations and, subsidiarily, to 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.*

82. The applicable regulations are, for the purposes of Article R58 of the Code, the rules and regulations of FINA. Pursuant to Article R58 of the Code, Swiss law also applies.
83. The FINA provisions which the parties agree to be relevant in this arbitration include the following:
  - i. from the FINA Doping Control Rules in force in 2014 (the “2014 DCR”), at the time of the Championships:

***DC 5.3.2 Any swimmers establishing or breaking a World Record shall submit to Doping Control following the race. When a relay team breaks or equals a World Record, all Competitors swimming the relay shall be tested. If no Doping Control is conducted at the Competition, Competitors shall submit to Doping Control no later than 24 hours after the race. No World Record shall be recognized without a negative doping test certificate for all Prohibited Substances or Prohibited Methods identified on the Prohibited List for which an analytical technique is available. It shall be the responsibility of any Competitor anticipating a possible World Record to ensure that Doping Control is available;***

- ii. from the 2014 SWR, which were in force at the time of the Championships:

***SW 12.13 Applications for World Records must be made on the FINA official forms (see next page) by the responsible authority of the organizing or management committee of the competition and signed by an authorized representative of the Member in the country of the swimmer, certifying that all regulations have been observed including a negative doping test certification (DC 5.3.2). The application form shall be forwarded to the Honorary Secretary of FINA within fourteen (14) days after the performance.***

***SW 12.14 A claim of a World Record performance shall be provisionally reported by telegram, telex or facsimile to the Honorary Secretary of FINA within seven (7) days of the performance.***

***SW 12.15 The Member in the country of the swimmer should report this performance by letter to the Honorary Secretary of FINA for information and action, if necessary, to assure that the official application has been properly submitted by the appropriate authority.***

***SW 12.16 On receipt of the official application, and upon satisfaction that the information contained in the application, including a negative doping control test certificate, is accurate, the Honorary Secretary of FINA shall declare the new World Record, see that such information is published, and see that certificates are provided to those persons whose applications have been accepted. ...***

***SW 12.18 If the procedure of SW 12.13 has not been followed, the Member in the country of a swimmer can apply for a World Record in default thereof. After due investigation, the Honorary Secretary of FINA is authorized to accept such record if the claim is found to be correct.***

***SW 12.19 If the application for a World Record is accepted by FINA, a diploma, signed by the President and the Honorary Secretary of FINA shall be forwarded by the Honorary Secretary to the Member in the country of the swimmer for presentation to the swimmer in recognition of the performance. A fifth World Record diploma will be issued to all Members whose relay teams establish a World Record. This diploma is to be retained by the Member.***

### 3.6 The Dispute

84. The object of the dispute is the Decision, issued by the FINA Honorary Secretary on 9 August 2015, not to recognize the Potential World Records as world records for the Individual Competition and the Relay Competition. In essence, the Appellants submit that the FINA Honorary Secretary, in issuing the Decision, failed to exercise properly the power granted him by Article SW 12.18 of the 2014 SWR, which, in the circumstances, should have led to the recognition of the Potential World Records as world records. The Respondent, on its side, defends the Decision, found to be proper.
85. It is indeed common ground between the parties that, for the recognition of the Potential World Records as world records, only one condition which, according to FINA, prevented recognition, was not satisfied: the existence of a negative doping test certificate for all prohibited substances or prohibited methods identified on the list of prohibited substances and prohibited methods for which an analytical technique was available, as required by Article 5.3.2 of the 2014 DCR and by Article 12.13 of the SWR 2014. In fact, no EPO test (*i.e.*, for a prohibited substance for which an analytical technique was available) was performed on any of the samples provided by the Swimmers. A possible issue regarding compliance with deadlines for the submission of a world recognition request has been mentioned by FINA in these proceedings, but was not raised as a reason preventing the recognition of the Potential World Records.
86. Since one of the conditions for the recognition of the Potential World Records as world records was not satisfied, it is also common ground between the parties that the only possibility for the Swimmers to have their Potential World Records recognized as world records consists in the application of Article SW 12.18 of the 2014 SWR, as in force at the relevant time. Under such provision, in fact, the Honorary Secretary of FINA is authorized to accept a world record, “*after due investigation ... if the claim is found to be correct*”, even if the procedure of SW 12.13 has not been followed. The parties agree that such power can be exercised also in the event the procedure which has not been followed, results in the absence of a negative doping test certificate. In other words, it is agreed that the Honorary Secretary of FINA has the power to recognize a world record even without a negative doping test certificate for all prohibited substances or prohibited methods identified on the list of prohibited substances and prohibited methods for which an analytical technique was available.
87. In respect of such provision, the Panel preliminarily notes two points: the power of the Honorary Secretary of FINA can be exercised only “*after due investigation*” and “*if the claim is found to be correct*”. In the Panel’s opinion, such indications underline that the “discretion” granted by Article SW 12.18 of the 2014 SWR in the evaluation of an application for a world record recognition can only be exercised by the Honorary Secretary of FINA in light of the circumstances of the case, as properly investigated, and on the basis of a proper justification: in other words, the decision to be rendered under Article SW 12.18 of the 2014 SWR must not be based on the exercise of a capricious and unlimited discretion, but has to be proper and reasonable.

88. The Appellants now request this Panel to review the exercise of such discretion by the Honorary Secretary of FINA, as it resulted in the Decision which denied the recognition of the Potential World Records as world records.
89. Two questions arise in that context: the first is whether a CAS Panel has the power to review the discretion exercised by the Honorary Secretary of FINA pursuant to Article SW 12.18 of the 2014 SWR; the second is whether this Panel, having that power, has to exercise it in the present case.
90. These two issues will be examined separately.
  - i. *Has a CAS Panel the power to review the discretion exercised by the Honorary Secretary of FINA under Article SW 12.18 of the 2014 SWR? If so, what power has a CAS Panel in that respect: can a CAS Panel issue an award replacing the decision issued by the Honorary Secretary of FINA?*
91. The Panel first notes that no limit can be found in the arbitration clause as to the power of review of a decision rendered by the Honorary Secretary of FINA under Article SW 12.18 of the SWR 2014. And in fact no objection was raised by the Respondent under the point of view of CAS jurisdiction.
92. In that respect, this Panel notes that CAS has jurisdiction, pursuant to Article C26 of the 2015 Constitution, to hear "*disputes between FINA and any of its Members*" (or individual members of members): in the absence of an express limitation, such disputes can also regard a decision rendered by the Honorary Secretary of FINA under Article SW 12.18 of the SWR 2014 and therefore also the exercise of the discretion provided by such rule.
93. The Panel, then, underlines the broad power of review that, under the Code, it can exercise within the scope of its jurisdiction: as already mentioned (§ 79 above), in fact, pursuant to Article R57 of the Code, a CAS Panel hears *de novo* the case leading to the decision appealed from, and, in the exercise of its *de novo* review of the case, it can issue a new decision replacing the decision challenged, or annul the challenged decision and refer back the case for a new decision by the entity which rendered the decision set aside. In other words, under the CAS rules, a Panel has the power to review the discretion exercised by the Honorary Secretary of FINA under Article SW 12.18 of the 2014 SWR and can issue an award replacing the decision issued by the Honorary Secretary of FINA. The fact that in the adoption of a decision under Article SW 12.18 of the 2014 SWR the Honorary Secretary of FINA enjoys some discretion is not *per se* an obstacle.
94. In that regard, this CAS Panel, however, notes and accepts the *dictum* in the award of 21 May 2010, CAS 2009/A/1870, at para. 125, under which "*the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (see TAS 2004/A/547, §§ 66, 124; CAS 2004/A/690, § 86; CAS 2005/A/830, § 10.26; CAS 2005/C/976 & 986, § 143; 2006/A/1175, § 90; CAS 2007/A/1217, § 12.4)*". However, such jurisprudence, confirmed in several other

CAS awards, far from excluding or limiting the power of a CAS Panel to review the facts and the law involved in the dispute heard (pursuant to Article R57 of the Code), only means that a CAS Panel “*would not easily ‘tinker’ with a well-reasoned sanction, i.e. to substitute a sanction of 17 or 19 months’ suspension for one of 18*” (award of 10 November 2011, CAS 2011/A/2518, § 10.7, with reference to CAS 2010/A/2283, § 14.36).

95. In light of such jurisprudence, the fact that this Panel would not lightly interfere with the Decision rendered by FINA challenged by the Appellants does not mean that there is in principle any inhibition to its power to do so. As a result, in the exercise of the power granted by Article R57 of the Code, and within the scope of its jurisdiction, this Panel is entitled to fully review the Decision, within the limits described above.
- ii. *Is the discretion exercised by the Honorary Secretary of FINA in the Decision to be reviewed by this Panel? Is a new decision replacing the Decision to be issued?*
96. The Honorary Secretary of FINA, in his Decision, declined to exercise his discretion to recognize the Potential World Records as world records “*due to the lack of EPO screening for the doping tests performed following these World Records*”.
97. The Panel notes that by so doing the Honorary Secretary of FINA simply referred to one of the conditions for the recognition of the Potential World Records as world records, and more exactly to the only missing condition for such recognition (see § 85 above). No other explanation was offered: the Honorary Secretary of FINA found in the case an EPO test to be so important that its absence precluded any possible recognition of the Potential World Records as world records even on the basis of Article SW 12.18 of the 2014 SWR.
98. The Panel is not convinced by such reasoning and finds that, contrary to the conclusions of the Honorary Secretary of FINA, the Potential World Records had to be recognized as world records.
99. This Panel is led to such conclusion by a number of reasons:
- i. the absence of a negative doping test certificate for all prohibited substances or prohibited methods identified on the list of prohibited substances and prohibited methods for which an analytical technique was available does not per se justify a denial of an application under Article SW 12.18 of the 2014 SWR. In fact, “*the lack of EPO screening for the doping tests performed following these World Records*” creates in itself a situation that might justify a decision pursuant to Article SW 12.18 of the 2014 SWR to recognize a world record, despite such lack of EPO screening. In fact, if an EPO test had been performed, no question of application of Article SW 12.18 of the 2014 SWR would have arisen, and no need to resort to the exercise of a discretion by the Honorary Secretary of FINA would have existed, since all conditions – except the formal requirements not invoked by FINA – would have been satisfied and the Potential World Records could be recognized as

world records on the basis of the ordinary procedure governed by Article SW 12.13 of the 2014 SWR;

- ii. no fault can be found on the Appellants' side, which prevents the recognition of the Potential World Records as world records. Obviously, if the entire sequence of events were seen with hindsight, one could identify points or moments in which the Swimmers and/or British Swimming could have taken a different attitude, that would have resulted in the timely performance of the EPO tests and therefore in the recognition of the Potential World Records as world records on the basis of the ordinary procedure governed by Article SW 12.13 of the 2014 SWR: for instance, the Swimmers could have immediately checked whether in the relevant doping control forms a proper indication of the need to have EPO screening was marked or not; and British Swimming could have immediately and diligently followed up its application for world record recognition to verify whether all steps were properly made. However, the Panel finds the attitude of the Appellants to be reasonable and compliant with the applicable rules. In fact:
  - the Swimmers' obligation was to submit to doping control under Article DC 5.1 of the 2014 DCR, while the responsibility for the conduct of the doping controls at the Championships rested with LEN, pursuant to Article DC 5.2.5 of the 2014 DCR, and not with the Swimmers and/or British Swimming. In other words, it was the responsibility of LEN to ensure the conduct of tests for all prohibited substances or prohibited methods identified on the list of prohibited substances and prohibited methods for which an analytical technique was available: chiefly so when in such doping control forms the Swimmers had indicated that they were submitting to doping control because a world record had been set, or when the tests were performed after world records had been set;
  - contrary to such conclusion, it is not possible to invoke the final sentence of Article DC 5.3.2 of the 2014 DCR (*"It shall be the responsibility of any Competitor anticipating a possible World Record to ensure that Doping Control is available"*): in fact, at the Championships, doping control was available, as it had been organized by LEN, and the Swimmers' responsibility does not extend to the way the doping control organized by LEN were conducted;
  - the Swimmers, in fact, could rely on a high-level organization (the European continental swimming organization) for the proper conduct of such tests at a major international competition (the Championships) at which, considering the participation of top competitors, the setting of new world records could be reasonably expected;
  - the fact that the Swimmers "*completed all the procedure and acted in good faith*" was recognized by the FINA Bureau in its meeting of 22 July 2015 (§ 44 above); the Panel has not been provided with any element that would justify that the good faith of the Swimmers is put in question;

- substantial delays were caused by LEN, and not by the Swimmers. In fact, when LEN was finally contacted, by British Swimming and FINA, at the beginning of November 2014, it mentioned that it was still waiting for the results of the analyses performed on the samples provided by the Swimmers at the Championships, while the Laboratory reports filed in this arbitration, which would have allowed the detection of the missing EPO analyses, are dated August-September 2014. At that time (i.e., when the samples had not yet been destroyed), in other words, LEN could have realized the problem and requested that EPO tests be made;
  - substantial delays were caused also by FINA, that received the mentioned documents from the Laboratory on 19 November 2014, at a time when the samples had not yet been destroyed and the EPO tests could still have been performed: that notwithstanding, only in February 2015, following a new request from British Swimming, did FINA take the initiative to verify whether EPO tests had been made;
- iii. the interest of the Swimmers to have the Potential Word Records recognized prevails in the specific case over the interest of FINA not to recognize them. In that respect, the Panel wishes to underline the importance of the performance of EPO tests (whatever the kind of competition – short or long distance) as a condition for the recognition of world records: it is in the interest of the swimming movements, as well as of every individual competitor, that historical achievements are recorded free of any suspicion. In this case, however, the absence of the Swimmers' fault, and the possible stigma that could fall on them, however deserving no blame, if the Potential Word Records were not recognized, leads to the mentioned conclusion;
- iv. the impact of the recognition of the Potential Word Records on the world records subsequently set by other athletes at the 2015 WC appears to be no reason to deny that the Potential Word Records, at the time they were achieved, constituted the new world records. In any case, the Panel has no power to decide on the fate of the world records subsequently set. The Honorary Secretary of FINA can identify, in its discretion, ways to satisfy the historical expectations of all athletes involved.
100. In summary, it is this Panel's opinion that in the present case the absence of the EPO tests should not fall to the detriment of the Swimmers and lead to the non-recognition of the Potential Word Records. For such conclusion, the Panel finds comfort in the statements of high ranking LEN and FINA officers, who, contrary to what now the Respondent maintains, were writing in such capacity: both Dr Van Den Hoogenband (see § 40 above) and Dr Pipe (§ 42 above) recommended the recognition of the Potential Word Records as world records. As Dr Pipe put it "*penalize a swimmer for an administrative oversight by an organizing committee is unfair*". This Panel agrees with such conclusion.
101. As a result, the Panel finds that an award setting aside and replacing the Decision is to be issued to recognize the Potential World Records as world records.

### 3.7 Conclusion

102. In light of the foregoing, the Panel holds that the appeal brought by British Swimming and the Swimmers is to be granted: the Decision is set aside and the Potential World Records are recognized as world records. All other motions or prayers for relief are dismissed.

## ON THESE GROUNDS

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

1. The appeal filed on 28 August 2015 by British Swimming, Mr Adam Peaty, Ms Francesca Halsall, Ms Jemma Lowe and Mr Chris Walker-Hebborn against the decision issued on 9 August 2015 by the Honorary Secretary of the Fédération Internationale de Natation is granted.
2. The decision issued on 9 August 2015 by the Honorary Secretary of the Fédération Internationale de Natation is set aside.
3. The time of 3:44.02 set on 19 August 2014 by Mr Adam Peaty, Ms Francesca Halsall, Ms Jemma Lowe and Mr Chris Walker-Hebborn in the 4x100m Mixed Medley Relay swimming event at the 32<sup>nd</sup> European Swimming Championships is recognized to constitute the world record at the time it was set.
4. The time of 26.62 set on 22 August 2014 by Mr Adam Peaty in the 50m Breaststroke swimming event at the 32<sup>nd</sup> European Swimming Championships is recognized to constitute the world record at the time it was set.
5. (...).
6. (...).
7. All other motions or prayers for relief are dismissed.