Arbitration CAS 2001/A/343 Union Cycliste Internationale (UCI) / H., award of 28 January 2002

Panel: Dirk-Reiner Martens (Germany), President; Stephan Netzle (Switzerland); Olivier Carrard (Switzerland)

Cycling
Doping (rEPO)
Reliability of the analysis method
Objective criteria to identify rEPO
Timeliness of the appeal

1. **There is no UCI rule or regulation whereby the existence of rEPO can be concluded only from a combined blood and urine test. The UCI's rules do not contain any provision whereby a sample can be considered positive only if the rEPO exceeds a certain threshold. Evidence of even only minimal quantities of rEPO is sufficient for it to constitute a violation of the UCI's Antidoping Regulations. The UCI has laid down that exogenously administered rEPO must be established using the direct test method (urine test without a blood test).**

2. **A sample cannot be declared positive or negative depending on the subjective opinion and/or experience of the laboratory staff according to the maxim "I know it when I see it". Rather it is imperative that the laboratory applies reliable and verifiable criteria, making it possible for third parties to objectively understand the conclusions reached.**

3. **It is not acceptable for the B sample to be subjected to different standards from the A sample. The whole purpose of the B sample is to confirm the A sample. However, such confirmation only makes sense if the same test method has been applied to both samples and if the test results are evaluated pursuant to the same principles. If the test results of the B sample have not been measured using the same standards as in the A sample, the A sample is not confirmed, rather a new analysis has been carried out pursuant to a different method of evaluation.**

On 19 April 2001 the Respondent underwent an out-of-competition doping test. His urine was tested by the Institut Universitaire de Médecine Legale (hereinafter referred to as "IUML") in Lausanne. The analysis of the A sample, which was begun on 23 April 2001, resulted in a finding of 82.3 % for recombinant erythropoietin (rEPO), as shown in the laboratory report of 7 May 2001.

By letter of 8 May 2001 the Appellant informed the Danish Cycling Union (hereinafter referred to as "DCU") of the positive result of the A sample.

By letter of 16 May 2001 the DCU requested that the B sample be tested. The analysis of the B sample began on 5 June 2001 at the IUML. It was divided into two parts for testing. These resulted in levels of 82.4% and 78.6% rEPO respectively. By letter of 8 June 2001 IUML informed the Appellant that the results of the B sample were positive and therefore confirmed the results of the A sample. The complete laboratory report was sent to the Appellant by normal post on 22 June 2001.

On 9 August 2001 the Doping Tribunal of the National Olympic Committee and Sports Confederation of Denmark acquitted the Respondent of doping. The decision was faxed to the Appellant on 17 August 2001.

By fax of 20 August 2001 the Appellant requested that the files on the Respondent's doping case be sent to the Appellant, which they were. They were received by the Appellant on 24 August 2001.

The Appellant filed an appeal with the Court of Arbitration for Sport (hereinafter referred to as "the CAS") by letter of 24 August 2001, which was received by the CAS on 25 August 2001.

The Appellant is appealing against the decision of the National Olympic Committee and Sports Confederation of Denmark 9 August 2001 whereby the Respondent was acquitted from an accusation of doping.

Furthermore, the Appellant claims that an appeal against a first-instance decision on a national level can only be made to the CAS. It claims that an appeal on a national level is allowed as an exception only in cases where the statutory provisions of a country stipulate, as a matter of mandatory law, that any appeal must be made to a national instance. In every other case both the athlete concerned and the UCI have recourse to appeal only to the CAS.

The Appellant claims that, according to the laboratory, the results of both the A sample and the B sample were positive for the substance rEPO. Since this is a prohibited substance under the UCI's doping regulations, the Respondent ought to have been convicted of a doping offence.

In support of this, the Appellant pleads that there is no rule whereby a sample can be considered positive only if the result is more than 80%; a finding of 80% is not a customary cut-off limit. The only deciding factor was whether it could be proven that the Respondent's urine contained rEPO. Such proof could be furnished with every means available. Since the required finding was merely qualitative in nature rather than quantitative, criteria other than the threshold of 80% could also be used for the evaluation.

The Appellant is of the opinion that the levels found far exceed any levels which have ever been established in a person who has not been treated with rEPO. This was even true if one increased these levels by the standard deviation multiplied by a factor of three. Finally, the Appellant points out that, in any event, the average of both of the individual samples of the B sample also lay above 80%.

The Appellant therefore moves the court:

"- To annul the contested decision

- To sanction H. as follows:
  1. suspension for six months to one year maximum
  2. fine of CHF 2,000 minimum to CHF 4,000 maximum

- Order H. to reimburse to UCI the Court Office fee of CHF 500 and to pay all other costs".

The Respondent moves the court:

"To confirm the decision from the Doping Tribunal of the National Olympic Committee and Sports Confederation in Denmark from August 9, 2001".

In support of his motion the Respondent claims that the appeal was filed out of time and is therefore time-barred and that the results found do not constitute unequivocal evidence of rEPO being present in the Respondent's urine.

Furthermore, the Respondent claims that the CAS does not have jurisdiction because not all of the internal possibilities for redress had been exhausted. Pursuant to the rules applicable in Denmark, an appeal could still have been filed against the decision of 9 August 2001 with another Danish instance. Moreover, the Appellant could easily have caused the DCU to file such an appeal.

On a substantive note, the Respondent points out that he did not undergo a blood test in connection with his urine test, despite the fact that the IOC works on the presumption that only a combined blood and urine test allow definite conclusions to be drawn about the presence of rEPO.

The Respondent is of the opinion that both the testing method chosen and the method of analysis have not yet been sufficiently proven scientifically. The documents available particularly do not indicate the studies upon which this test is based. It is therefore not possible to assess whether the results derived from the method applied could be considered sufficiently definite.

Moreover, as the report shows, the laboratory itself assumed that a urine sample could be classified as positive only if the level found lay above 80 %. Any interpretation whereby levels under this limit were also to be considered positive had to be considered as a biased attempt to defend the method of measuring used and therefore had to be ignored.

By letter of 24 September 2001 the Appellant filed a Statement of Appeal with the CAS against the decision of the National Olympic Committee and Sports Confederation of Denmark of 9 August 2001 and gave its reasons in the same document. Said Statement of Appeal was received by the CAS on 25 September 2001, as is shown by the receipt stamp.

The Respondent filed his Answer on 24 October 2001.

On 12 November 2001 the CAS issued an Order of Procedure which was signed by both parties.

Upon the request of the Respondent and by decision of 22 November 2001, the President of the Panel allowed the parties to supplement their pleadings. The Appellant filed additional pleadings on 3 December 2001 with new evidence. On 13 December 2001 the Respondent also filed supplementary pleadings with new evidence.

LAW

1. The CAS's jurisdiction derives from Article 84 of the UCI's Antidoping Examination Regulations:

   "Art. 84: The person sentenced and the UCI may enter an appeal against the decision before the National Federation of the rider or license-holder by taking the matter to arbitration before an arbitration tribunal constituted in accordance with the statutes and regulations of the CAS in Lausanne.

   No other recourses shall be permitted.

   Art. 86 […]

   On pain of being declared unacceptable, the declaration of appeal of the UCI shall be lodged with the CAS within a period of one month from reception of the file of the competent body of the National Federation. If UCI has not asked the file within ten days from reception of the decision, the term of appeal shall expire one month from reception of the decision."

2. Pursuant to Article R58 of the CAS Code, in the event that the parties have not chosen other applicable regulations or rules of law, the Panel is under an obligation to decide the dispute according to the law of the country in which the federation, association or sports body which has issued the challenged decision is domiciled.

3. The instant case is an atypical CAS case in that the Appellant is the international federation itself moving to have an athlete found guilty. Since the international federation is seeking a conviction based on its own rules, the Panel will apply the rules of the international federation when assessing the facts and not those of the organisation which had issued the challenged decision. Furthermore, in the instant case, it was the appealing federation itself which initiated and carried out the doping test (on the general application of the UCI Rules see: CAS 98/192 S. v/ UCI, award of 21 October 1998 p. 14 *et seq.*; CAS 98/181 N. v/ UCI, award of 26 November 1998, p. 13 and CAS 99/A/239 M. v/UCI, award of 14 April 2000, p. 7).

4. As the parties have not expressly chosen the applicable law and the UCI is domiciled in Switzerland, the Panel shall also apply Swiss law.

5. The instant case is therefore to be decided on the basis of the UCI Rules, more particularly on the basis of the UCI Antidoping Examination Regulations (hereinafter referred to as "UCI's Antidoping Regulations"). In so doing the Panel will essentially draw upon the UCI's

Antidoping Regulations which were applicable at the time the urine sample was taken.

6. The Respondent has raised the objection that the appeal was not filed in time because the Respondent's file had already been sent to the Appellant on 24 August 2001 but the Request for Appeal was not received by the CAS until 25 September 2001. Furthermore, the Respondent points out that, before an appeal is filed with the CAS, all of the national appeal possibilities must have been exhausted. This was, however, not the case here.

7. The Panel does not agree with these objections.

8. It is correct that the period for filing an appeal is one month according to Article 86(2) of the UCI's Antidoping Regulations. Time starts to run upon receipt of the file sent by the national federation concerned. This deadline takes precedence over the deadline of 21 days provided for in Article R49 of the CAS Code.

9. If, the decisive factor were the date upon which the Statement of Appeal was received, receipt on 25 September 2001 would make the Request inadmissible for being out of time. However, what is decisive is that the written pleadings are handed over to a Swiss postal office before the deadline has expired because a plaintiff/appellant has no possibility of influencing the time it takes for a postal delivery to be made. This is a firm principle in Swiss procedural law (cf. e.g. *Bundesgesetz über die Organisation der Bundesrechtspflege* (Federal Act on the Organisation of the Federal Justice System), SR 173, Art. 32(3), *Schweizerisches Bundesgesetz über Schuldbetreibung und Konkurs* (Swiss Federal Act on the Enforcement of Debts and Bankruptcy), Art. 32). These rules also apply to time-limits stipulated in the CAS Code (cf. first paragraph of Article R32 of the CAS Code). Since both the Appellant and the CAS have their seat in Switzerland, these principles also apply in the instant case and the Appellant was entitled to rely on them.

10. Furthermore, the Panel rejects the objection that recourse to the courts has not been exhausted. Pursuant to Article 81(1) of the UCI's Antidoping Regulations a further appeal on a national level against the first instance decision of a national federation is, at most, possible if such an appeal is prescribed by statute as a mandatory provision.

11. The Panel has no indication that an internal appeal, which is generally possible, is mandatorily prescribed by Danish statute law (see also CAS 98/181 N. v/UCI, award of 26 November 1998, p. 13). What is more, the Appellant was not a party to the national proceedings. The Panel therefore assumes that the Appellant would not even have had any such right to appeal. The Respondent also seems to be of this opinion as he submits that the Appellant would, at most, have been able to request the Danish federation to appeal. This, however, does not give the Appellant in the instant case any right of its own to appeal. The Panel is therefore of the opinion that in the instant case the only option open was to appeal to the CAS.

12. In the Panel's opinion, the evidence heard does not sufficiently prove that the Respondent's urine contained the substance rEPO prohibited by the UCI's Antidoping Regulations when the urine sample was taken.

13. The Panel is constrained by Article R58 of the CAS Code to apply only the rules and regulations of the respective federation. If said rules and regulations do not refer to the rules and regulations of other sports organisations (e.g. the IOC), no account can be taken of the latter when reviewing a particular case. However, the Panel is of the opinion that the actual findings upon which the rules and regulations of another organisation are based can be taken into account, even when assessing the facts of the instant case.

14. As has already been established above, only the UCI's rules and regulations apply to the question of whether a doping offence has been committed. The UCI's Antidoping Regulations also apply to out-of-competition doping tests (Arts. 115, 123, 124 UCI's Antidoping Regulations). They are based on the idea that the national federations are in charge of imposing doping suspensions applying the UCI's rules, the UCI itself and the athlete concerned having a right to appeal to the CAS.

15. As regards doping offences discovered in out-of-competition-tests the UCI's Antidoping Regulations contain the following provisions:

"Art. 2 *The use of the pharmaceutical categories of substances and of the doping methods appearing on the list of doping agents and methods adopted by the UCI president shall be prohibited.*

Participants in cycling races are required to undertake not to avail themselves of the forbidden agents and methods even if they consider that neither their sporting performance nor their health would be affected. Such considerations shall not be open to discussion.

Should a doping method be found to have been used or should the analysis or other evidence reveal the presence or administration of a doping agent or any substance likely to influence the result of the analysis, the rider shall be punished.

[...]

Art. 3 *The list of doping agents and methods shall be complied by the UCI Antidoping Commission and submitted to the President of the UCI for approval. Once adopted and published in the "information" bulletin, that list shall form an integral part of these regulations.*

That list shall not be exhaustive. It shall merely contain the names of examples of each category of doping agents for information purposes.

The list of doping agents and methods of doping may include a special section on agents and, possibly, their modes of administration, in respect of which the disciplinary measures as referred to in Art. 90(2) of the present regulations, shall apply.

Each list shall remain in force until the publication of a new list.

Art. 4 *These regulations […] shall be binding on all national federations which may neither deviate therefrom nor add thereto.*

If a drug test is organised in another race of the international calendar other than cycle touring events, that test shall also be governed by the present regulations.

Art. 115 *Riders shall also submit to UCI out of competition tests.*

Art. 123 *The substances forbidden at out of competition tests shall be those contained in a special section of the list of classes of doping agents and doping methods.*

The laboratory shall send its analysis report to the UCI which shall, where appropriate, inform the National Federation of the rider of the positive result and the National Federation shall proceed pursuant to Articles 60 et seq. above.

Art. 124 *Disciplinary sanctions shall be taken in accordance with the provisions of Chapter VIII."*

16. In Part V.B of the list of "prohibited classes of substances and prohibited methods" issued pursuant to Article 2 of the UCI's Antidoping Regulations, which entered into force on 15 March 2001, certain peptide hormones are prohibited. Pursuant to the notes in Part E6 these include the substance erythropoietine ("EPO"). The following explanation is given:

"… the presence of an abnormal concentration of an endogenous hormone in class E or its diagnostic marker(s) in the urine of a competitor constitutes an offence unless it has been proven to be due to a physiological or pathological condition".

17. The above provisions are interpreted by the Panel to mean that the finding of recombinant EPO ("rEPO") in an athlete's urine means that a doping offence has been committed. The body always contains certain concentrations of natural EPO ("nEPO") which is a human hormone and is also found in human urine.

18. The CAS has repeatedly interpreted the regulations of federations such that it is proper to allocate the burden of proof, taking into account what is reasonable, so that in the event of a dispute the federation imposing the sanction must prove the objective elements of the doping offence. If these elements are proven, then the athlete is presumed to be guilty. It is then up to the athlete to rebut this presumption by bringing counter-evidence (CAS 2001/A/317 A. v/ FILA, award of 9 July 2001, p. 18; CAS 2001/A/312 L. v/FILA, award of 22 October 2001, p. 13; CAS 2001/A/310 L. v/ IOC, award of 22 October 2001, p. 28). The Panel agrees with these precedents also for the instant case. At the same time it is irrelevant which of the parties is the appellant and which is the respondent (VOGEL, *Grundriss des Zivilprozessrechts* (Outline of Civil Procedure), chapter 10, margin no. 37).

19. Here, it should first be pointed out that criminal principles do not generally apply when reviewing the penalties imposed by associations (cf. Swiss Federal Tribunal, ASA Bull. 1993, p. 398, 409 *et seq.* [G. v/FEI]; Swiss Federal Tribunal, judgement of 31 March 1999 [5P. 83/1999], unreported, p. 12; CAS 2001/A/317 A. v/FILA, award of 9 July 2001, p. 17). If an association imposes a penalty, this is a matter of civil law. Consequently only civil law and civil procedural standards can apply to any review of penalties imposed by associations, which include doping sanctions.

20. The Panel appreciates, however, that because of the drastic consequences of a doping suspension on the athlete's exercise of his/her trade (Article 28 Swiss Civil Code (*ZGB)*) it is appropriate to apply a higher standard than the general standard required in civil procedure, namely having to convince the court on the balance of probabilities. Following an earlier

decision of the CAS the disputed facts therefore have to be "established to the comfortable satisfaction of the court having in mind the seriousness of the allegation" (cf. CAS OG/96/003, CAS OG/96/004 K. & G. v/ IOC; CAS 98/208 N. *et al.* v/ FINA, award of 22 December 1998, p. 23; confirmed by the Swiss Federal Tribunal, judgement of 31 March 1999 [5P.83/1999], unpublished).

21. Having heard the evidence the Panel is not "comfortably satisfied" that the Respondent's urine contained the substance rEPO.

22. There is no UCI rule or regulation whereby the existence of rEPO can be concluded only from a combined blood and urine test, as was, for example, the case with the doping tests at the Olympic Games in Sydney. The UCI's rules also do not contain any provision whereby a sample can be considered positive only if the rEPO exceeds a certain threshold.

23. Erythropoietin (EPO) is a natural human hormone which is produced in the kidney and stimulates the production of red blood corpuscles, which are responsible for transporting oxygen to the muscles. The production of red blood corpuscles can be disturbed or prevented, for example in people with defective kidneys. The consequences are treated by administering EPO obtained by genetic engineering (recombinant EPO = rEPO). EPO and rEPO are practically identical which meant that, until recently, it was not possible to distinguish between the two substances.

24. From the evidence heard it was established that there are currently two methods which are supposed to allow rEPO to be detected. One is an indirect test, where one can conclude from certain parameters in the blood that EPO is present in an unnatural concentration. However, in this method it is not possible to distinguish precisely whether and, if so, what proportion of the EPO concentration in the body is due to the presence of recombinant (artificial) EPO. The second test method tries to directly detect the presence of rEPO in the urine of the person being tested. This "direct method" combines an isoelectrical focussing with a double immunal blotting. The method is based on the finding that artificially produced rEPO behaves differently in an electrical field than human nEPO so the two types of EPO can be distinguished from one another. The test method is also based on a second basic assumption that, as is the case with many steroids, the production of natural hormones is reduced when an artificial hormone is administered exogenously.

25. The Panel is aware that in the run-up to the Sydney Olympic Games of 2000 and again in the run-up to the Salt Lake City Olympic Games of 2002, the IOC decided to acknowledge only those tests as positive in which the results of a blood sample and cumulatively the results of a urine sample indicated the presence of rEPO.

26. It must be made quite clear that every federation is free to lay down its method of testing for the presence of a prohibited substance, provided the test method is reliable. The Panel is not aware that the IOC method of combining a blood and urine sample has been prescribed as the general standard which has to be applied by every international federation for their test methods or for evaluating a test result, even though the expert witnesses heard in the instant

case all confirmed that the levels found quickly and cost-effectively in a blood test (the test is made on the spot with mobile equipment and there is no "B sample"), especially a higher level of haematocrit or a significant increase in the number of reticulocytes, are reliable indications of abnormal EPO levels. The blood test thus serves, on the one hand, as a way of screening the person being tested, i.e. it determines whether certain blood parameters justify a suspicion of rEPO having been administered exogenously and therefore justify an additional urine test, which is time consuming and costly, being carried out. On the other hand the blood test can be used as a plausibility check, i.e. to confirm a finding, based on a urine sample, that rEPO is present.

27. As long as there is no single, uniform test method accepted by every federation, it is at the discretion of each federation to lay down whichever (reliable) test method it sees fit to determine the presence of rEPO. The UCI has used this discretion by laying down that exogenously administered rEPO must be established using the direct test method (urine test without a blood test). The UCI published this decision in its press release of 31 March 2001. The IOC-accredited doping laboratory in Lausanne was instructed to carry out the test.

28. Following the evidence heard, the Panel is convinced that the method used in the Lausanne laboratory is suitable for proving the presence of rEPO. Dr. Saugy, a witness called by the Appellant, explained the method used to the Panel in detail with the aid of diagrams. Even the witness called by the Respondent did not generally question the test method.

29. The witness, Dr. Pieraccini, did, however, point out numerous possible sources of error. The witness Dr. Saugy also admitted that the method must be carried out with great care in order to avoid any wrongful manipulation or any contamination of the samples. However, the Panel is not aware of any laboratory errors which might have interfered with the Respondent's test results.

30. It is correct that it is only relatively recently that the method of analysis used has been applied for detecting rEPO and that currently not all of the IOC-accredited laboratories are able to carry out this method of analysis. On the other hand, it cannot be said that this method is still at a trial stage. There are already extensive laboratory instructions in place which fully list the steps to be performed. Moreover, it is a fact that validation studies have taken place for proving the presence of rEPO and the results of these validation tests were successful.

31. As a consequence, the Panel is therefore convinced that the test method described by the witnesses is, in principle, sufficiently developed to allow a conclusion that rEPO is present.

32. Unlike the evidence required for certain substances such as nandrolone or caffeine, the UCI's rules do not provide that a result is positive only if the rEPO in the urine of a person who is tested exceeds a certain threshold. Rather, evidence of even only minimal quantities of rEPO is sufficient for it to constitute a violation of the UCI's Antidoping Regulations. The methods used by the IOC at the Sydney Olympic Games ultimately had the same objective.

33. However, unlike the IOC, the UCI decided not to make an additional blood test obligatory.

Similarly, the UCI's rules do not lay down any thresholds for the laboratory analysis. In particular, the threshold prescribed by the IOC, whereby a sample cannot be found to be positive unless more than 80% of the EPO findings are in what is called the "basic range" of the test results, does not apply within the scope of application of the UCI's rules.

34. There is, in principle, no objection to this. However, it does not mean that a sample can be declared positive or negative depending only on the subjective opinion and/or experience of the laboratory staff according to the maxim "I know it when I see it". Rather the Panel is convinced that it is imperative that the laboratory applies reliable and verifiable criteria, making it possible for third parties to objectively understand the conclusions reached.

35. The evidence heard demonstrated that the laboratory in Lausanne in fact applies such criteria. According to the witness, Dr. Saugy, rEPO is identified on the basis of three characteristics:

    1. In the basic range of the test results there must be more strong (i.e. dark) bands than in the acidic range. Dr. Saugy stated more concretely that the three strongest bands of evidence must, in any event, be in the basic range of the results. The boundary between the "basic" and "acidic" ranges is determined by the signal given by a control substance consisting of pure rEPO.

    2. An additional characteristic of a positive result for rEPO is that there is a significantly lower concentration of EPO (i.e. weaker and therefore lighter bands) in the acidic range of the results, whereby the concentration of EPO will reduce the further one is in the acidic range.

    3. Finally, one could definitely assume that rEPO was present in the athlete's urine if more than 80% of the evidence of EPO was in the basic range of the results. The witness, Dr. Saugy, also explained that the value of 80% already includes a safety margin of more than 3 standard deviations from a mean value, calculated from the validation studies for persons who tested negative.

36. Dr. Saugy advocates a qualitative approach. In his opinion not all of the criteria have to be fulfilled cumulatively. The laboratory could also be convinced that rEPO was present if only some of the criteria were met. That is why he does not see any reason to move away from the assessment of the instant case as a doping offence, even if one of the B analyses only reached a level of 78.6% of EPO in the basic range. However, Dr. Saugy could not give a precise definition of how many criteria have to be fulfilled to what extent and where the limit would have to be drawn. It is precisely this which would crucial in a quantitative approach.

37. As regards the so-called 80% threshold, Dr. Saugy contradicts his own the laboratory report to a certain extent. The laboratory report provides that an A sample is to be considered positive if the results of the analysis exceed a level of 80%. This is the threshold which the IOC, unlike the UCI, has made the requisite level for a positive finding.

38. In view of the great complexity of the laboratory's method of analysis, the Panel cannot itself opine on whether the figure of 80% is scientifically the "correct" level or whether this figure should perhaps be higher or lower. However, having heard the evidence, the Panel is

"comfortably satisfied" that a level of 80% can, in any event, prove the presence of rEPO, especially since this level is a statistical level established from the highest level found in a negative test plus three standard deviations and one additional precautionary extra allowance of 10%. In the end, according to the evidence available to the Panel, this level only says that the chances of a wrong positive result are 1:15,000. In this connection the Panel learned with surprise that the IOC-accredited laboratory in Paris has, apparently, sometimes required a level of 85%. The Panel would greatly welcome it if, where reliable and verifiable criteria are not already contained in a federation's rules and regulations for establishing positive results, as they are in the IOC's rules, not only such reliable and verifiable criteria were laid down for laboratories to establish positive results, but also if such criteria were to be uniform for all laboratories. This is particularly desirable so that all athletes are treated equally. In any event, so long as the deviations from the criteria laid down by the laboratory itself have not been defined, the Panel has no choice but to use these criteria as the yardstick.

39. If the laboratory in Lausanne has laid down criteria for a positive finding, then it is imperative for the purposes of reliability and also for the results to be generally accepted that such criteria are applied in the same way to the A sample as they are to the B sample. This appears not to have been so in the case of the Respondent.

40. It is not acceptable for the B sample to be subjected to different standards from the A sample. The whole purpose of the B sample is to confirm the A sample. However, such confirmation only makes sense if the same test method has been applied to both samples and if the test results are evaluated pursuant to the same principles. If the test results of the B sample have not been measured using the same standards as in the A sample, the A sample is not confirmed, rather a new analysis has been carried out pursuant to a different method of evaluation.

41. In the instant case one of the two B samples showed a level of 78.6% and thus lay below the 80% threshold. Nevertheless the laboratory found the Respondent's sample to be positive. The witness, Dr. Saugy, tried to explain this by saying that, in his opinion, there was no scientific justification for an 80% threshold and that a level marginally below 80% was reliable enough to allow one to assume a positive result. This may be correct but it does not change the fact that the criteria which have already been used by the laboratory must be used consistently. What was interesting in this connection was Dr. Saugy's comment that he would have found the Respondent's sample to be negative, had the A sample already been only 78.6%, even if all of the other above-mentioned criteria had been met.

42. The evidence heard did not give any clear answer to the question why, in the case of the Respondent, two B samples were analysed. If there are two different results then one must, in favour of him, apply the level which is most favourable to the Respondent. This has nothing to do with the principle of "*in dubio pro reo*". In this context it must be remembered that it is up to the federation to prove the presence of a prohibited substance in the athlete's body regardless of whether the federation is the plaintiff/appellant or the defendant/respondent. If the evidence includes conflicting results which do not support the submissions of the federation, the Panel must take these circumstances into consideration. The Panel is therefore

not willing to follow the Appellant's opinion that the average of both results should apply, particularly since this average would in any event also lie above 80%.

43. The result is that the B sample did not confirm the A sample because one of the B samples did not attain the level of 80% laid down by the laboratory itself for the A sample.

44. For the reasons set forth above the Panel does not consider the conditions to be met for a penalty to be imposed because of a contravention of the UCI's Antidoping Regulations.

The Court of Arbitration for Sport rules that:

1. The appeal is dismissed.

2. The decision of the Doping Tribunal of the National Olympic Committee and Sports Confederation in Denmark of 9 August 2001 (case 6/2001) is upheld.

3. (…)