Arbitration CAS 2008/A/1471 Fédération Internationale de Natation (FINA) v. Marco Tagliaferri & Federazione Italiana Nuoto (FIN) and CAS 2008/A/1486 World Anti-Doping Agency (WADA) v. Comitato Olimpico Nazionale Italiano (CONI) & Marco Tagliaferri, award of 5 February 2009

Panel: Prof. Ulrich Haas (Germany); Mr Michele Bernasconi (Switzerland); Mr Guido Valori (Italy)

Aquatics (water polo)
Doping (stanozolol)
Legitimate interest to have a decision reviewed by the CAS
Mitigation of the penalty due to the fact that the athlete was minor
Principle of lex mitior in a doping case

1. **The applicable regulations provide that every "interested party" has the right to appeal against decisions by the highest national decision-making body in doping disputes irrespective of whether said "interested party" was a party to the proceedings, in which the decision appealed against was pronounced. Nor does the provision stipulate any limitation to the right to appeal in terms of the "kind" of decision. Whether or not the decision issued deals with procedural issues only is, therefore, irrelevant for the right of appeal. However, not only the wording, but also the intent and purpose of the relevant provision, are a reason for interpreting the right of appeal broadly. The broad right of appeal is supposed to allow all doping-related decisions to be reviewed in order to help harmonize the decisions and to contribute to an equal treatment of all athletes. Even if the decision-making body decided not to punish an athlete for procedural reasons, this does not alter the "nature of the dispute". It is and remains a doping matter with the consequence that the International Federation and the World Anti-Doping Agency have a legitimate interest to also have this decision reviewed by the CAS.**

2. **In order to apply mitigating grounds, the athlete has to establish how and because of which surrounding circumstances the prohibited substance was present to the athlete's body. Whether and how often the athlete ingested the prohibited substance is irrelevant for the extent of the penalty. The fact that the athlete was a minor at the time of the positive doping sample is, in itself, no reason to mitigate the penalty.**

3. **Because of the principle of *lex mitior*, the rule that is more favourable to the athlete can be resorted to, even if it was not in force at the time the offence was committed.**

Marco Tagliaferri ("Athlete" or "First Respondent"), born on 11 November 1989, is a water-polo player, who plays for the club Muri Antichi. The club Muri Antichi is affiliated to the Federazione Italiana Nuoto and plays in the national championship series A2 ("campionato nazionale serie A2").

The Federazione Italiana Nuoto ("FIN" or "Second Respondent") is the national umbrella federation for the sport of swimming in Italy. It is a member of the Comitato Olimpico Nazionale Italiano (CONI or "Third Respondent"). CONI is a public body, which has the task of organizing and promoting sport in Italy and of coordinating and organizing the fight against doping at national level. CONI is the national anti-doping organization in Italy recognized by the World Anti-Doping Agency.

FIN is also a member of the Fédération Internationale de Natation (FINA or "First Appellant"), which governs and promotes the sport of swimming at international level.

The World Anti-Doping Agency (WADA or "Second Appellant") is a foundation under Swiss law, which has its seat in Lausanne and headquarters in Montreal, Canada. The purpose of the foundation is to promote and coordinate the fight against doping in sport internationally.

Following a competition in Catania on 18 March 2006 the Athlete (who at the time was still a minor) underwent a doping control. The result of the analysis of the A sample was that it contained metabolites of the substance stanozolol. This is an anabolic steroid, which has been on the WADA List of Prohibited Substances for many years. The Athlete did not challenge this finding nor did he request the B sample to be analysed.

Doping proceedings were then instituted against the Athlete before the Disciplinary Commission of the FIN ("DC FIN"). In the proceedings the Athlete submitted, *inter alia*, that he had unknowingly received the prohibited substance from his father (Luigi Tagliaferri). His father had bought tablets containing the active substance stanozolol on the internet and used them himself. Then, the father shall have administered tablets to the Athlete without the latter being aware of it. In addition the Athlete submitted an expert opinion by Prof. Matera, Head of the Pharmacological Department of the University of Catania, to the DC FIN, which is supposed to demonstrate that the Athlete showed no signs of having taken anabolic steroids systematically or persistently over a lengthy period of time.

Thereupon the DC FIN resolved on 21 July 2006, on the basis of Art. 17.4 Norme Sportive Antidoping 2005 ("NSA 2005"):

> *"L'archiviazione nei confronti del Sig. Tagliaferri Marco, la revoca della sospensione cautelativa con effetto immediato a carico dello stesso Tagliaferri Marco e squalifica a vita del Sig. Tagliaferri Luigi".*

Art. 17.4 NSA 2005 reads as follows:

> *"Completata l'indagine, l'UPA [Ufficio di Procura Antidoping] trasmette alla Segretaria della FSN [Federazione Sportiva Nazionale] … interessata copia degli atti dell'istruttoria, con motivato e argomentato provvedimento di deferimento dell'indagato ovvero di richiesta di archiviazione al competente Organo di Giustizia federale di primo grado. … La FSN … ricevuti gli atti dall'UPA, li inoltrano al proprio Organo di giustizia di primo grado ai fini dell'applicazione di eventuali sanzioni ovvero per l'archiviazione. Ove il regolamento federale di giustizia proveda in primo grado il contradditorio in udienza, la stessa deve essere fissata nel più breve tempo possible e communiqué entro e non oltre quarantacinque giorni dalla data del provvedimento di deferimento*

dell'UPA, con preavviso agli interessati di almeno sette giorni. Eventuali memorie depositate all'Organo di giustizia di primo grado devono essere contestualmente notificate alla controparte. …".

The DC FIN's decision was delivered to FINA on 2 April 2007. FINA filed an "appeal" in English against this decision with the Appeals Commission of FIN ("CAF") on 10 April 2007. An Italian translation of the appeal was communicated to the CAF on 13 April 2007. In its decision of 6 November 2007 the CAF allowed the appeal and suspended the Athlete for one year. The Athlete filed an appeal against this decision to the Giudice di Ultima Istanza in Materia di Doping ("GUI"). The GUI is the highest national decision-making body in doping disputes in Italy. The GUI is organized under the umbrella of the legal entity CONI. The object of the GUI is to achieve greater harmonization in doping decisions at national level (see Art. 4.1 NSA 2005).

In its decision of 10 January 2008, GUI set aside the decision by CAF and declared FINA's appeal against the decision by DC FIN to be inadmissible. As its reasons for this GUI stated that a decision by DC FIN, in which *"archiviazione"* is ordered, is not "appealable". The reasons for this decision, which were rendered on 16 January 2008, read, *inter alia*, as follows in this regard:

"L'Art. 20 delle Norme Sportive Antidoping 2005 … ribadisce testualmente: ‚È possibile appellare esclusivamente le sentenze di condanna per violazione del Regolamento, le sentenze con sanzioni ritenute di entità non idonea, le sentenze di assoluzione, le sentenze per incompetenza dell'Organo che le ha emesse, le sentenze per sospensione cautelare'. Il sistema delle impugnazioni regolato dal Codice Antidoping non prevede alcun mezzo di impugnazione avverso le decisioni di archiviazione. … La mancata previsione di un mezzo di impugnazione dei provvedimenti di archiviazione emessi, su richiesta della Procura Antidoping, dall'Organo di Giustizia Federale competente costituisce indubbiamente un vuoto normativo, che sarebbe opportuno colmare con apposita, specifica previsione normativa. …il provvedimento di archiviazione e la sentenza sono atti distinti, formalmente e sostanzialmente diversi, aventi natura e funzioni diverse nel procedimento disciplinare : L'archiviazione chiude, senza il contradditorio delle parti, in modo definitivo, la fase delle indagini e pone fine al procedimento disciplinare, impedendo il passaggio al dibattimento ; la sentenza viene emessa in seguito ad un equo dibattimento nel contraddittorio delle parti e conclude una fase del procedimento, che potrà prosequire in seguito ad appello delle parti. Il Legislatore, in conclusionem ha voluto che, in mancanza di prove sufficienti all esito dell'istruttoria svolta dalla Procura, il procedimento sia immediatamente chiuso, evitando il ricorso inutile ad ulteriori fasi. … Esso presenta certamente un difetto perchè non consente … di correggere un provvedimento di archviazione ingiusto. Non è consentito, però, al Giudice di colmare un vuoto normativo con l'arbitraria equiparazione del provvedimento di archiviazione ad una sentenza".

The decision by the GUI with its reasons was delivered to FINA and to WADA on 16 January 2008.

FINA filed an appeal against GUI's decision with the CAS by written pleadings of 31 January 2008. The appeal is directed against the Athlete and against FIN. FINA understands the written pleadings to be both an Appeal Statement as well as an Appeal Brief.

By letter of 13 February 2008 WADA likewise filed an appeal against GUI's decision. The appeal is directed against the Athlete and against CONI.

By letter of 19 February 2008 the parties were asked whether, in the light of Art. R50(2) of the Code of Sports-related Arbitration ("the Code"), they were in agreement that both cases be referred to one and the same Panel for simultaneous decision. By letter of 20 February 2008 FINA declared its agreement to this. By letter of 22 February 2008 WADA also declared its agreement.

By letter of 26 February 2008 CONI notified the CAS Court Office: *"… we inform the CAS that CONI hereby waives its right to be a party in the CAS proceedings and will fully accept and respect the upcoming CAS award"*.

By letter of 29 February 2008 the CAS Court Office advised the CONI that it could renounce its right to take part in the hearing but not *"its right to be a party"* and, hence, CONI will remain a party to the arbitration proceedings

By letter of 05 March 2008 the Athlete declared his agreement to the two cases being consolidated.

By letter of 12 March 2008 the CAS Court Office asked FIN to comment on the question of the cases being consolidated by 17 March 2008 and pointed out that silence would be deemed to constitute agreement. The CAS Court Office did not receive any comments from FIN within the deadline.

By letter of 19 March 2008 the CAS Court Office confirmed the consolidation of both proceedings (CAS 2008/A/1471 FINA v. Tagliaferri & FIN and CAS 2008/A/1486 WADA v. CONI & Tagliaferri).

On 25 February 2008 WADA filed its Appeal Brief with the CAS Court Office.

On 28 March 2008 the CAS Court Office received the First Respondent's Answer in accordance with R55 of the Code.

The order of procedure, issued by the CAS Court Office on 3 September 2008, was signed by the First Respondent, the First Appellant and the Second Appellant.

A first hearing was held on 8 September 2008 at the premises of the CAS, in Lausanne. The Panel held a second hearing on 1 December 2008 in Rome.

In its Statement of Appeal the First Appellant requests the CAS – *inter alia* – to,

(1) *"Cancel the Gui decision";*

(2) *"Find that the Athlete committed an anti-doping violation"* and

(3) *"declare the Athlete ineligible for a period of two years and in any event not inferior to one year, starting from the date of the decision";*

Subsidiarily the First Appellant requests the CAS to,

(1) *"Cancel the GUI decision"* and

(2) "Refer the case to the GUI for a decision on the merits in accordance with the Panel's decision".

Very susbsidiarily the First Appellant request the CAS to,

"Refer the case to the Commissione Disciplinare della FIN, respectively the Procura Antidoping del CONI for new proceedings/decision".

In its Appeal Brief the Second Appellant requests the CAS – *inter alia* – to rule that,

(1) "the Appeal of WADA is admissible";

(2) "the decision of the Judge on doping matter of the CONI (GUI) rendered on January 10, 2008 … is set aside";

(3) "Mr Marco Tagliaferri is suspended in accordance with the article 10.2 of the 2007 CONI Rules (or 19.2 of the 2005 CONI Rules) for two years, starting on the date on which the CAS award enters into force";

(4) "any period of ineligibility (whether imposed to or voluntarily accepted by Mr Marco Tagliaferri) before the entry into force of the CAS award shall be credited against the total period of suspension to be served" and that

(5) "all competitive results obtained by Mr Marco Tagliaferri from March 18, 2006, through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes".

In his Answer the First Respondent requests– *inter alia* –,

(1) "the rejection of the appeal of the WADA and the appeal of FINA" and

(2) "the confirmation of the GUI's decision".

The Second Respondent did not file any express request, rather it stated the following in its letter of 10 April 2008:

"Concerning the case of Tagliaferri the Italian Swimming Federation things to be no more connected with this case. This is the Appeal of the FINA and of the WADA about the decision of the judge of the last appeal (GUI) of CONI. The GUI is the last grade of sport's judgement that cancelled the decision of the CAF …. This is the sentence subjected to the judgment of the TAS (Court of Arbitral of the Sport). The Italian Swimming Federation, in accordance with the decision of the CAF with the reason of the impugnment of the FINA and of the WADA, considered useless its establishment independing judgement in front of you, even for the fault of the passive legitimation".

The Third Respondent did not file any request or written pleadings, rather it only stated the following by letter of 26 February 2008:

"… we inform the CAS that CONI hereby waives its right to be a party in the CAS proceedings and will fully accept and respect the upcoming CAS award".

LAW

CAS Jurisdiction

1. Whether, and the extent to which, the Panel is competent to decide the present dispute is governed by Art. R47 of the Code. The provision stipulates three prerequisites (cf. CAS 2004/A/748, no. 83), namely:

   - there must be a *"decision"* of a federation, association or another sports-related body,
   - *"the (internal) legal remedies available"* must have been exhausted prior to appealing to the CAS and
   - the parties must have submitted to the competence of the CAS.

2. In the present case the decision by the GUI of 10 January 2008 forms the subject matter of the case before the CAS. Since GUI is a judicial organ of CONI, the decision is a *"decision of an association"* in the sense of Art. R47 of the Code. In any event, it does not follow from the applicable procedural rules that the decision by GUI cannot be appealed against before the CAS. Consequently, the first prerequisite of Art. R47 of the Code is fulfilled in the present case. The GUI is also the highest decision-making body in the organisation's internal instances of legal process. The second prerequisite of Art. R47 is therefore also met; for the parties have obviously exhausted all possible internal legal remedies. In the present case, the third prerequisite of Art. R47 of the Code is also met, firstly because the submission to the competence of CAS ensues from the applicable rules (see also below), which provide that CAS has jurisdiction to hear an appeal against decisions by the GUI. Secondly, CAS' jurisdiction for the present dispute ensues – at least in the relationship between the First Appellant, Second Appellant and the First Respondent – from the Order of Procedure signed by said parties. In its letter of 10 April 2008 the Second Respondent entered an appearance in the matter without reservation and did not dispute the CAS' jurisdiction for the present dispute. The same applies to the Third Respondent with its letter of 26 February 2008. To summarize therefore, the CAS has jurisdiction to decide the dispute in the present case.

Mission of the Panel

3. The mission of the Panel follows, in principle, from Art. R57 of the Code, according to which the Panel has full power to review the facts and the law of the case. Furthermore, Art. R57 of the Code provides that the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

Admissibility

4. There are three questions at the heart of whether the appeal is admissible, namely whether the Appellants filed their appeal in time, whether they were even authorized to file an appeal against the decision by the GUI and whether they filed the appeal against the correct party.

a) Were the appeals filed in time?

5. The First Appellant filed its appeal against the decision by the GUI on 31 January 2008. The decision by the GUI together with its reasons was forwarded to the First Appellant on 16 January 2008. According to Art. R49 of the Code the time limit for filing an appeal with CAS is 21 days unless the rules of the sports association concerned provide for a different time limit. Whether the latter is the case is questionable. The NSA 2005 do not contain any time limit that derogates from Art. R49 of the Code. By contrast, the case would appear different under the "new" NSA, which the CONI adopted on 21 August 2007 ("NSA 2007"). Said rules stipulate in the section *"Istruzioni operative del Giudice di Ultima Istanza in materia di doping"* under Art. 2 no. 26, that a period for filing an appeal with the CAS is 30 days with effect from delivery of the decision substantiated by reasons. The NSA 2007 do not expressly stipulate to which proceedings the new appeal period applies. In the *"libro primo"* of the NSA 2007 it is merely stated that the new rules will apply immediately with effect from the moment they are published on the internet site (www.coni.it). If one follows this then the NSA 2007 were applicable at the time when the First Appellant filed its appeal to the CAS. Since the said provision in Art. 2 no. 26 NSA 2007 is a procedural rule, no prohibition of retroactivity (if any) prevents the application of this provision in the present case. Consequently the First Appellant filed the appeal in time.

6. The Second Appellant filed its appeal against the decision by the GUI on 13 February 2008. The reasoned decision by the GUI was forwarded to the Second Appellant on 16 January 2008. Hence, the Second Appellant's appeal to the CAS was also lodged in time.

b) Are the Appellants entitled to appeal?

7. In the present case both the First Appellant and the Second Appellant are authorized to file an appeal against the decision by GUI with the CAS. This follows from Art. 2 no. 26 *istruzioni operative del Giudice di Ultima Istanza in materia di doping* in the NSA 2007, pursuant to which every "interested party" has the right to appeal against decisions by GUI irrespective of whether said "interested party" was a party to the proceedings, in which the decision appealed against was pronounced. Nor does the provision stipulate any limitation to the right to appeal in terms of the "kind" of decision. Whether or not the GUI issued a decision which deals with procedural issues only is, therefore, irrelevant for the Appellants' right of appeal. However, not only the wording of the NSA 2007, but also the intent and purpose thereof, are a reason for interpreting the right of appeal broadly. The Appellants' right of appeal is supposed to allow all doping-

related decisions to be reviewed in order to help harmonize the decisions and to contribute to an equal treatment of all athletes. Even if GUI decided not to punish the First Appellant in the present case for procedural reasons, this does not alter the "nature of the dispute". It is and remains a doping matter with the consequence that the two Appellants have a legitimate interest to also have this decision reviewed by the CAS. The Panel feels endorsed in its legal opinion by the decision CAS 2006/A/1153. Said decision states (margin no. 49):

"On 9 June 2006, the Disciplinary Commission of the FPF imposed upon Mr Nuno Assis Lopes de Almeida a 6-month suspension for the doping offence. This is indisputably a doping decision as set forth in Article 61 of the FIFA Statutes. The fact that the higher judicial body of the FPF acquitted him exclusively on procedural grounds rather than entering into the substance does not change the nature or the cause of the proceedings initially opened, which remains the doping offence. At first, Mr Nuno Assis Lopes Alemeida was found guilty of a doping offence then he was acquitted of a doping offence. How the Judicial Board of the FPF achieved this last result does not change the fact that its decision is a doping decision, the result of which is that the charge on the player was lifted".

c) Did the Appellants file the appeal against the correct Respondents?

8. The First Appellant directed its appeal, by which it is appealing against the decision by the GUI, against the Athlete and against the FIN. What is questionable is whether it has thereby taken action against the "correct parties", i.e. whether they even have standing to be sued in the present case. Neither the NSA 2005 nor the NSA 2007 expressly stipulate against whom the appeal to the CAS must be filed in cases in which a decision by the GUI forms the subject matter of the dispute. Art. R47 of the Code does not stipulate this expressly either. The Panel is of the opinion that an appeal by a third party against a disciplinary measure must first and foremost be directed against the person directly affected by the measure, i.e. here the First Respondent. Furthermore, in such cases the appeal must also be directed against the organization to whom the "appealed decision" is attributed, i.e. here the organization whose organ the GUI is. In the Panel's opinion this is CONI in the present case, not the FIN. Circumstances from which one could conclude that CONI exercised the sovereignty in deciding the case at hand not in its own name but "on behalf of the FIN", as claimed by the First Appellant in its written pleadings of 15 April 2008, are not apparent and have not been substantiated by the First Appellant. The fact that the decision is attributable to CONI, not to the FIN, follows also from a formal aspect, namely the fact that the "appealed decision" bears the Third Respondent's emblem. This impression is also supported by the cover letter, with which CONI notified the Appellants of the decision by GUI. For, said letter states that the decision is of the *"Giudice di ultima istanza in materia di doping del*[1] *CONI"*. Therefore, insofar as the appeal is directed against the FIN, it must be dismissed as unfounded because the FIN lacks standing to be sued.

[1] Emphasis by the Panel.

9. The question, however, remains as to how to proceed with the remainder of the appeal if – as is the case here – the First Appellant has partially failed to file the appeal against all the "correct" respondents. This question can remain unanswered because, due to the special circumstances of the present case, this "defect" is, by way of exception, non-prejudicial. Firstly, the appeal by the First Appellant was joined with the appeal by the Second Appellant in accordance with Art. R50(2) of the Code with the consequence that CONI is also – formally – the respondent party in this action. Secondly, CONI made it clear in its letter of 26 February that it would in any event recognize the decision by the present Panel, without taking part in the substance of the proceedings.

10. To summarize therefore, both appeals, directed jointly against the decision of the GUI, are admissible.

Applicable Law

11. Art. R58 of the Code provides the following:

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

12. In the present case, the applicable regulations for the purposes of Art. R58 of the Code are the NSA 2005 insofar as law governing the merits is concerned because, as far as this is concerned, the law that was applicable at the time of the – alleged – anti-doping rule violation is – as a general rule – the governing law. Since the parties did not make any choice of law beyond this, the law of CONI's seat, and therefore Italian law, applies subsidiarily.

As to the Merits

a) The lawfulness of GUI's decision

13. The appeal by both Appellants has merit if GUI's decision is erroneous.

14. GUI set aside the decision by CAF upon the ground that the DC FIN's decision *("decisione di achiviazione")* was not appealable and therefore the CAF was not permitted to make a decision that derogated from the initial instance.

15. GUI bases its legal opinion firstly on the wording of Art. 20.2 NSA 2005. According to GUI, said provision exhaustively lists the decisions which can be appealed against. The decision to archive the case *("decisione di archiviazione")* is – according to GUI – not listed in Art. 20.2 NSA

2005 and could therefore also not be reviewed by CAF. The Panel does not agree with this line of argument. Art. 20.2 NSA 2005 reads as follows:

"E' possibile appellare esclusivamente le sentenze di condanna per violazione del Regolamento, le sentenze con sanzioni ritenute di entità non ideonea, le sentenze di assoluzione, le sentenze per incompetenza dell'Organo che le ha emesse".

16. The purpose of the rule is to implement Art. 13.2 WADC 2003, which stipulates:

"A decision that an anti-doping rule violation was committed, a decision imposing Consequences for an anti-doping rule violation, a decision that no anti-doping rule violation was committed, a decision that an Anti-Doping Organization lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences … may be appealed exclusively as provided in this Article 13.2".

17. Art. 20.2 NSA 2005 and Art. 13.2 WADC 2003 are not worded completely identically. This is particularly so as regards the meaning of the word "exclusively" or *"esclusivamente"*. While in Art. 20.2 NSA 2005 this term means that only those types of decisions exhaustively listed in the rule are subject to appeal, the word "exclusively" in Art. 13.2 WADC 2003 refers to something completely different. There, the word expresses that the types of decision listed in the rule can be challenged not before the state courts, but only, i.e. "exclusively" before the instance stipulated in this provision. No reasons are evident as to why CONI derogated from the template in Art. 13.2 WADC. Rather the Panel is satisfied that this is a translation mistake. This is supported by, inter alia, the fact that Art. 13.2 WADC 2003 is a provision which – according to the Introduction to the WADC 2003 – *"must be incorporated into the rules of each Anti-Doping Organization without any substantive changes (allowing for necessary non-substantive editing changes to the language in order to refer to the organization's name, sport, section numbers, etc.)"*. CONI therefore had no leeway to derogate in substance from Art. 13.2 WADC 2003. However, since said derogation is in this case an unintentional, not a deliberate, derogation from the template, it is in the Panel's opinion only fair to interpret Art. 20.2 NSA 2005 in the light of Art. 13. 2 WADC 2003. This is all the more so given that Art. 22.7 NSA 2005 itself provides that in the event of any ambiguity the provisions in NSA 2005 are to be interpreted in the light of the WADC 2003. However, if one interprets Art. 20.2 NSA 2005 in the light of Art. 13.2 WADC 2003, then the wording of Art. 20.2 NSA 2005 does not prevent the *"decisioni di archiviazione"* from being included in the group of appealable doping-related decisions.

18. However, a consideration of the function or purpose is also a reason classing a *"decisione di archiviazione"* the same as the types of decisions expressly mentioned in Art. 20.2 NSA 2005. Such considerations are also not alien to Italian procedural law. Thus, for example, a decision by the Corte di Cassazione of 23 May 2003 states the following:

"Al fine di stabilire se un determinato provvedimento abbia carattere di sentenza ovvero di semplice ordinanza, e sia, pertanto, soggetto ai mezzi di impugnazione previsti per le sentenze, è necessario aver riguardo non già alla forma esteriore e alla denomionazione adottata dal giudice che lo abbia pronunciato, bensì al contenuto sostanziale del provvedimento stesso e conseguentemente, all'effetto giuridico che esso è destinato a produrre, sicché si è in presenza di un ordinanza quando il provvedimento disponga circa il contenuto formale delle attività consentite

alle parti, di una sentenza quando, viceversa, il giudice, nell'esercizio del suo potere giurisdizionale, si sia pronunciato, in via definitiva o non definitiva, sul merito della controversia e/o su presupposti e condizioni processuali di questa'[2].

19. In the light of these criteria, the *"decisione di archiviazione"* is to be considered classed the same as an acquittal. This is so firstly in relation to the First Respondent. For him the decision by the DC FIN has the effect of an acquittal *("decisione di assoluzione")*. However, the latter is expressly listed in Art. 20.2 NSA 2005 as a decision, which is appealable. The present *"decisione di archiviazione"* is also classed the same as an acquittal in the reasons for the decision; for the DC FIN ordered the *"archiviazione"* because the First Respondent was – allegedly – not at fault for the anti-doping rule violation. However, on the merits this equates to an acquittal, for the decision not to impose a sanction is, in the present case, based solely on legal considerations. Finally, another reason for focusing in the present case less on the form but rather on the content of the decision is that otherwise the rights of the Appellants would be severely interfered with because the DC FIN could – merely by choosing a particular form of decision – deprive the Appellants of the right to appeal, no matter what the content of the decision is.

20. Unlike GUI, the Panel is also not of the opinion that the *"decisione di archiviazione"* and the *"decisione di assoluzione"* are fundamentally different in terms of their legal nature. The same deciding body is responsible for both decisions. Furthermore, the effect of the *"decisione di archiviazione"* is, at least in the present case, the same as the one of a *"decisione di assoluzione"*. Finally, the *"decisione di archiviazione"* in the present case was rendered only after the First Respondent had been heard. Finally, it should be noted that the DC FIN combined the *"decisione di archiviazione"* with a lifelong suspension of the First Respondent's father, Mr. Luigi Tagliaferri. The linking of these two statements in one and the same document suggests that the decision is accorded a uniform legal nature. Even just the external appearance of the decision is a reason for not holding that the decision is appealable only in part (namely only in relation to Mr. Luigi Tagliaferri), but not in whole.

21. The erroneous decision by GUI cannot be upheld for other reasons.

22. The First Respondent is arguing that FINA's appeal against the decision by the DC FIN was filed late and that therefore the CAF ought, for this reason alone, not to have amended the decision by the initial instance. However, the Panel does not agree with this. The First Appellant filed an appeal against the decision by the DC FIN on 10 April 2007. Under Art. 20.9 NSA 2005 the time limit for filing an appeal against decisions by the first instance (here the DC FIN) is 10 days following receipt of the decision with reasons. The First Appellant indisputably did not receive the decision by the DC FIN until 2 April 2007. It therefore filed the appeal in time. This is not altered by the fact that it initially submitted the appeal to the CAF in English and did not submit it in Italian until 13 April 2007. For, with the (timely) filing of the appeal in English on 10 April 2007, the First Appellant made it perfectly clear that it did not wish to accept the decision by the DC FIN. This is also what FIN understood. The fact that the First

[2] Massimario Annotato della Cassazione, sentenza 8190, 2003, II.

Appellant subsequently submitted an Italian translation of the appeal a few days later – namely after the expiry of the time limit under Art. 20.9 NSA 2005 – is non-prejudicial in the Panel's opinion.

23. The First Respondent is also claiming that – notwithstanding the time limit under Art. 20.9 NSA 2005 – the appeal by the First Appellant to the CAF was filed late because more than eight months had elapsed since the DC FIN had delivered its decision of *"archiviazione"*. Although Art. 17.4 NSA 2005 provides that the FIN is to deliver the decision to the First Appellant within a maximum of 7 days following the oral hearing, the FIN clearly breached this duty. However, this breach of duty cannot be attributed to the First Appellant. Furthermore, the First Respondent has not submitted any facts as to why the First Appellant's conduct is in bad faith if it invokes the wording of Art. 20.9 NSA 2005.

24. To summarize, the decision by GUI is erroneous and must therefore be set aside.

b) Issuance of New Decision

25. The question now is what further legal consequences ensue from the quashing of the GUI's decision. Often in cases, in which the appealed decision only deals with procedural issues of the case, the CAS panels remit the dispute back to the initial instance for disposal so as not to deprive the parties of a decision-making instance on the merits. However, in the present case the Panel does not consider this appropriate because both the Appellants as well as the First Respondent expressly authorized the Panel in the oral hearing on 1 December 2008 to, in any event, render a decision on the merits.

26. In the present case the prerequisites for an anti-doping rule violation within the meaning of Art. 1.2 NSA 2005 by the First Respondent are clearly met. The analysis of the First Respondent's urine sample detected a metabolite of stanozolol. This is an anabolic androgenic steroid included in the 2006 WADA prohibited list. The First Respondent has not claimed that there were any procedural irregularities regarding the analysis of the urine sample. He also waived his right to have the B sample analyzed.

27. As a general rule the NSA 2005 provide a suspension of two years for such an anti-doping rule violation (Art. 19.2 NSA 2005).

28. However, said penalty can be reduced to zero pursuant to Art. 19.5.1 NSA 2005 if the First Respondent has not been negligent or reduced to one year according to Art. 19.5.2 NSA 2005 if the First Respondent has not been significantly negligent. The First Respondent has the burden of submitting and proving this (Art. 2 NSA 2005). In the Panel's opinion no facts have been established to its comfortable satisfaction that would justify the elimination or the reduction of the period of ineligibility.

29. In the oral hearing the First Respondent's father, Mr. Luigi Tagliaferri, described the sequence of events relating to the offence as follows: He, Mr. Luigi Tagliaferri, had for a long time already been suffering personal and psychological problems. He therefore started to try out various medications and substances to improve his well-being. This was particularly so during the winter time, when he felt particularly dejected and depressed. It was for this purpose that he took ephedrine and caffeine. He also noticed that by taking the medication "Winstrol", which contains the substance stanozolol, his general physical well-being improved. In February 2006 he then observed similar symptoms in his son, the First Respondent, as he himself had. At the time his son had been through a difficult time. For example, his son had had to repeat a year at school. Also his son did not really feel happy at training and at the new club. He therefore wanted to help his son in this difficult situation. He therefore mixed tablets with the brand name "Winstrol" amongst the vitamin preparations, which he gave his son every day. The son then took these without being able to know that they were not vitamin preparations. However, after two days already he stopped giving this medication to his son for moral and health reasons and he thought that this was the end of the matter. A short time later, namely on 18 March 2006, the son was then subjected to a doping control at a water-polo game in Catania. The same evening he, in tears, confessed the events to his son. His son learned of the facts on 18 March 2008 for the first time.

30. The Panel is of the opinion that the facts described by Mr. Luigi Tagliaferri are basically inconsistent. The First Respondent's written pleadings, and also GUI's decision, state that Mr. Luigi Tagliaferri administered a "Stanabol" tablet to his son. However, in the oral hearing Mr. Luigi Tagliaferri stated that he bought a tablet with the brand name "Winstrol", which he gave to his son. Both Stanabol and Winstrol are medications, which contain the substance stanozolol. However, the two medications are produced by different manufacturers. It is also surprising that Mr. Luigi Tagliaferri stated in the oral hearing that he has been buying the medication "Winstrol" via the Internet for his own use for approximately 10 years. Nevertheless, he was not sure how to spell the brand name "Winstrol". It is therefore not clear to the Panel whether, and which, medication Mr. Luigi Tagliaferri bought.

31. Mr. Luigi Tagliaferri further admitted that the medication "Winstrol" is not suitable for treating depression. It is therefore of course surprising why he used this medication for this in the case of his son. It would appear to the Panel that the medication was not used to treat symptoms, for which it was obviously unsuitable, rather it was used for such "unsportsmanlike" purposes, for which the medication is expressly procured on the appropriate Internet pages and from dubious "experts", namely to build up muscles. The pursuance of such a purpose is also not completely abstruse in the type of sport practised by Mr. Marco Tagliaferri. There are also other reasons in support of the argument that, in this case, the medication was not used for "therapeutic" purposes. Thus, Mr. Luigi Tagliaferri stated in the oral hearing that he had administered vitamin preparations to all of his children, but that he has done so to the First Respondent's younger sisters only after having previously consulted a doctor. However, if Mr. Tagliaferri consults a doctor in order to administer vitamin preparations, it would seem rather

unlikely that he would – allegedly – use much more dangerous medications on his son for therapeutic purposes without consulting a doctor at all.

32. It is not only the reason why Mr. Luigi Tagliaferri is supposed to have administered the medication that appears to be not very plausible; the description of the sequence of events relating to the offence also raises several questions. For example, it appears rather unlikely to the Panel that the tablets "Winstrol" and/or "Stanabol" – coincidentally – happened to have exactly the same shape and colour as the vitamin preparations, which the son is allegedly supposed to have taken every day. Both products are, on the Internet at least, presented as having quite different shapes and colours. It was at least very noticeable that both father and son had difficulty in precisely describing the colour and shape of both the vitamin preparations and the medication "Winstrol" in detail. Also, the First Respondent did not submit a sample of either the medication or of the vitamin preparations taken in order to allow the Panel to inspect them. It is also not clear how many tablets Mr. Luigi Tagliaferri – allegedly – administered to his son. Thus, it is stated in the complaint by the "Ufficio di Procura Antidoping" that Mr. Luigi Tagliaferri administered only one tablet. The expert opinion by Prof. Matera likewise states that the father had said he gave his son a tablet of 20mg. However, in the oral hearing Mr. Luigi Tagliaferri stated that he did not discontinue the treatment until after two days. Finally, the Panel also does not consider it proven that the First Respondent took the medication only once or twice. At most the expert opinion by Prof. Materia supports the argument that the First Respondent did not show any signs of having taken stanozolol systematically over a lengthy period of time.

33. The reasons why Mr. Luigi Tagliaferri – suddenly – broke off the treatment of his son also do not make proper sense. The father stated that he was plagued by pangs of conscience. That does not tally with the impression, which the Panel gained of the father in the oral hearing. He appeared to be very self-determined and on no account did he appear to be a person, who questions his own decisions. Finally, the relationship between father and son after the doping control was carried out, does not appear very plausible to the Panel. The son did undergo an examination by Prof. Matera a few days after the control, but although the analysis resulted in a finding that the First Respondent had taken the prohibited substance stanozolol, neither the son nor the father opened up to the competent sports instances immediately. Rather, they first waited and initially did not help to explain the facts of their own accord. However, one could have expected this if the father – as stated by him in the oral hearing – was plagued by deep pangs of conscience because of the alleged events and if the son was keen in keeping his reputation toward the sporting authorities.

34. As a result of all these inconsistencies in the presentation of the facts, it has not been established to the Panel's comfortable satisfaction how, and because of what surrounding circumstances, stanozolol came to be present in the First Respondent's body. However, this is a prerequisite for being able to apply the mitigating grounds in Art. 19.5.1 and 19.5.2 NSA 2005. Whether and how often the First Respondent ingested the prohibited substance is irrelevant for the extent of the penalty. The fact that the First Respondent was a minor at the time of the positive doping

sample is, in itself, no reason to mitigate the penalty. To summarize therefore, there has been an anti-doping rule violation in the present case, which is to be punished with a suspension of two years in accordance with Art. 19.2 NSA 2005. Furthermore, pursuant to Art. 19.7 NSA 2005, all competitive results obtained by the First Respondent from 18 March 2006 through the commencement of the applicable period of ineligibility must be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.

35. Pursuant to Art. 19.8 the suspension from competition begins, as a general rule, with the day of the oral hearing, in which the suspension was imposed. As far as this is concerned, the relevant date is – in the Panel's opinion – the last oral hearing and therefore 1 December 2008.

36. Art. 10.8 WADC 2003 provides a possibility for the suspension to commence earlier where so required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the Athlete. Although the NSA 2005 do not adopt this provision in the WADC 2003 verbatim, there is a corresponding provision in Art. 10.8 of the NSA 2007. The Panel is of the opinion that because of the principle of *lex mitior* (see in this regard CAS 2002/A/378; CAS 2001/A/318; CAS 2000/A/289) the rule that is more favourable to the First Respondent can be resorted to, even if it was not in force at the time the offence was committed. The Panel, therefore, considers it appropriate, for reasons of fairness, to consider the possibility for the suspension to commence earlier. The present proceedings have lasted more than two years. This delay is largely due to a breach of duty by FIN, which at the time did not deliver the decision by DC FIN to the First Appellant within the time limit provided for such delivery. Due to this fact the Panel is of the opinion that fairness requires that the First Respondent is given some compensation for that. As a consequence of that the Panel believes it is fair that the present two-year suspension should start to run not on 1 December 2008, but seven months previous thereto, namely on 1 May 2008. The early start of the period of ineligibility requires, however, that all competitive results obtained by the First Respondent until the effective start of the period of ineligibility, i.e. 19 December 2008 (which is the date of the present decision) must be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.

37. Pursuant to Art. 19.8 NSA 2008, any periods of a provisional suspension that have already been served must be offset against the two-year suspension commencing on 1 May 2008. In the present case the First Respondent was initially provisionally suspended pursuant to Art. 16.1 NSA 2005 until the decision by the DC FIN and then again after the decision by the CAF until the decision by GUI. In the Panel's opinion this equates to approximately 5 months that must be taken into account in the case of the First Respondent. The suspension therefore expires with effect not on 30 April 2010, but on 30 November 2009 already.

38. This conclusion, finally, makes it not necessary for the Panel to consider the other requests submitted by the Parties to the Panel. Accordingly, all other prayers for relief are rejected.

The Court of Arbitration for Sport rules:

1. The appeal of the World Anti-Doping Agency against the decision of the Giudice di Ultima Istanza in Materia di Doping (GUI) dated 10 January 2008 is admissible.

2. The appeal of the Fédération Internationale de Natation against the decision of the Giudice di Ultima Istanza in Materia di Doping (GUI) dated 10 January 2008 is admissible inasmuch as it is directed against Mr Marco Tagliaferri. Insofar as the appeal is directed against the Federazione Italiana Nuoto (FIN) it is dismissed.

3. The decision issued by the Giudice di Ultima Istanza in Materia di Doping (GUI) is set aside.

4. The Player, Mr Marco Tagliaferri, is declared ineligible from 1 May 2008 until 30 November 2009.

5. All competitive results obtained by Marco Tagliaferri from 16 March 2006 through 19 December 2008 shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.

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

7. (…).