Arbitration CAS 2012/A/2797 Attila Ungvári v. International Judo Federation (IJF), award of 18 October 2012

Panel: Prof. Michael Geistlinger (Austria), President; Mr Gyula Dávid (Hungary); Mr Hans Nater (Switzerland)

Judo
Doping (stanozolol; furosemide; mesterolone)
New evidence justifying revision of the challenged decision
Admissibility of new evidence
Assessment of evidence under No Fault or Negligence or No Significant Fault or Negligence

1. **According to the Swiss Federal Tribunal, revision of a decision may be justified only as to facts or evidence which were not known to the petitioner at the time of the proceedings despite all due diligence. The new facts must be significant which means that they must be appropriate to change the factual basis of the award under review in such a way that their accurate legal assessment could lead to a different decision.**

2. **The only way of finding whether a witness statement may be true or not is to hear the witness testifying under the obligation to say the truth. Therefore, the statements or summary record of a witness who allegedly admitted sabotage but at no stage of the proceedings did appear before the international federation, or before the CAS are not admissible as means of evidence. However, a Police Investigations Department' decision as an official document of a state authority establishing an act of sabotage by a sport fan to improve the athlete's performance – which was not known to the athlete when the decision imposing a ban had been rendered by the IJF – should be considered as new evidence and admitted.**

3. **When the burden of proof is upon the athlete to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a *"balance of probability"*. In this regard, a decision of a national police investigations department and the respective investigations necessarily have to be done in the context of the applicable provision of the national Criminal Code. Therefore, the police cannot not focus on the establishment how the prohibited substances entered the athlete's system and that he did not bear No Fault and No Negligence or at least No Significant Fault or Negligence. Therefore, such a document does not meet the requirements of articles 10.5.1 and 10.5.2 to establish whether there was No Fault or Negligence or No Significant Fault or Negligence on the side of the athlete.**

I. THE PARTIES

1. Mr Attila Ungvári (the "Appellant") is a judoka and member of the Hungarian Judo Federation. He is a world top class athlete in Judo.

2. The International Judo Federation (hereinafter referred to as "IJF") is a (not for profit) association according to article 60 et seq. of the Swiss Civil Code with its seat in Lausanne, Switzerland. The IJF is responsible to lead and organize judo events throughout the world and to establish rules for practicing judo and to rule on international competitions organized or recognized by the IJF. The IJF is committed to a doping-free sport and has adopted IJF Anti Doping Rules 2009 which according to its scope *"apply to the IJF and each Participant in the activities of the IJF by virtue of the Participant's membership, accreditation, or participation in the IJF or their activities or Events".*

II. FACTS

3. On 15 January 2011, on the occasion of the World Judo Master in Baku, Azerbaijan, the Appellant was ranked third and selected for an in-competition doping test. The urine sample provided by the Appellant tested positive for stanozol metabolites, i.e. 3-hydroxystanozolol and 16b-hydroxy-stanozol.

4. Stanozolol is an anabolic agent, which appears on the WADA 2011 Prohibited List under class S1.a exogenous anabolic androgenic steroids.

5. The B sample, reported by the WADA Accredited Laboratory Antidoping Center Moscow, on 29 March 2011, confirmed the result of the A sample.

6. On 12 February 2011, during the Judo World Cup in Budapest, Hungary, a European Judo Union (EJU) event, the Appellant won Gold and was tested another time. The urine sample provided by the Appellant tested positive for furosemide, a diuretic agent class S5 WADA 2011 Prohibited List, mesterolone, an exogenous anabolic androgenic steroid class S1.a WADA 2011 Prohibited List, as well as for stanzolol metabolites.

7. The B sample, reported by the WADA Accredited Laboratory Seibersdorf Labor GmbH Doping Control Laboratory, confirmed the result of the A sample.

8. On 14 May 2011, EJU agreed that both above mentioned Adverse Analytical samples would be treated as one case by the IJF, which had already started a process due to the first Adverse Analytical samples registered in Baku. In the light of the later, the IJF Executive Committee adopted the following decision:

   "1. Disqualification of the result obtained in the World Judo Master AZE, Baku, 15th January 2011, including forfeiture of medal, points and prizes (according to Article 9 – WADA Code and IJF Antidoping Rules).

2. Disqualification of the result obtained in the Judo World Cup HUN, Budapest, 12th February 2011, including forfeiture of medal, points and prizes (according to Article 9 – WADA Code and IJF Antidoping Rules).

3. Disqualification of the result obtained in the Judo Grand Slam FRA, Paris, 5th February 2011, including forfeiture of medal, points and prizes (according to Article 10.8 – WADA Code and IJF Antidoping Rules).

4. An ineligibility of two years (according to Article 10.2 of the WADA Code and IJF Antidoping Rules".

9. Considering the fact that the Appellant was under provisional suspension since 7 March 2011, the two years' penalty was determined to run from 7 March 2011 to 7 March 2013.

10. Further to new elements put forward by the Appellant, the Respondent reopened the case and organized a hearing on 5 April 2012. The Appellant asked for application of article 10.5.1 WADA Code based on the fact that a person, named Gergely Kalmár, a combat sport fan, had stated at a hearing before the Investigations Department of the Criminal Division of the Budapest Police Headquarters in a procedure initiated against an unknown perpetrator upon a report filed on 11 August 2011 by the Appellant's trainer Tamás Bíró, that Mr Kalmár has put the prohibited substances in the isotonic food supplement drink of the Appellant. The Investigations Department terminated the investigation, irrespective of the fact that it stated that it *"has been found during the data collection that the substances qualifying as doping were put in the isotonic food supplement drink of Attila Ungvári in both cases by Gergely Kalmár combat sport fan"* in its report of 19 January 2012. However, the Investigations Department terminated the investigation, because *"it was not undoubtedly proven on the basis of the data available that life and good health were jeopardized. Neither new data, nor personal or palpable evidence have arisen in the course of examination, and therefore the particular health damaging impact may not be proven, consequently criminal act was not committed …".* At the hearing before IJF the Appellant, his trainer and his legal representative, as well as the legal representative of Mr Gergely Kalmár were present.

11. On 19 April 2012, the IJF Executive Committee decided to dismiss the request of the Appellant and to uphold its decision of 14 May 2011. It argued as follows:

"- Mr. Ungvari Attila did not produce corroborating evidence in addition to his word to the comfortable satisfaction of the IJF Executive Committee how the Prohibited Substances entered in his body and that these Prohibited Substances were not intended to enhance the Athlete's sport performance and mask the use of a performance-enhancing substance.

- The Decision of the Budapest Police Headquarters Criminal Division Investigations Department since 19th January 2012 which established that "a criminal act was not committed and therefore the Police terminates the investigation" but it does not establish that Mr. Gergely Kalmar is guilty (only a court of law can do it).

- On 5th April 2012, in the hearing process (pg. 4, 6 and 7 – Minutes of the hearing), Mr. Ungvari Attila and his lawyer Mr. Ruttner declared that they will not go in a Civil Court of Law against Mr. Gergely Kalmar for moral and financial damages even "the athlete practically lost his life" (pg. 3 – Minutes of the hearing)".

III. SUBMISSIONS OF THE PARTIES

12. The Appellant submitted the same arguments he had submitted before the IJF Executive Committee by which the Appellant stated that there was no negligence on the Appellant's side on 12 February 2011 *"because the perpetrator, who was wearing the select team's sweat suit, when he went in to the closed locker room of the competitors, opened the cap of the refreshment bottle in Attila Ungvari's bag and injected the prohibited substance with a single movement into his drink"*. The Appellant left his bag in the closed locker room in good faith, because he had no reason to believe that an unauthorized person would enter that room.

13. The Appellant emphasized that he and his brother, who was a top Hungarian judoka too, were responsible to raise a family with a handicapped father and eight other children. Four of those were still totally dependent on their mother and the brothers engaged in Judo. The two judoka brothers *"would never broke their family down with cheating and they would never hurt each other"*.

14. At the Hungarian World Cup Miklós, the elder brother stepped down in favour of his younger brother, when both had chances to win. If they had been aware of the doping of the younger brother, this would not have happened, as it was known that the winner would have to undergo a doping test.

15. The Appellant pointed at the fact that he, his coach and his brother upon request of the Hungarian Judo Federation made a polygraph test which confirmed that they stated the truth. He filed a declaration, the test results as well as a number of statements of coaches, team-mates, his brother, staff and friends which were supporting the Appellant's credibility.

16. The Appellant attached the decision of the Budapest Police Headquarters Criminal Division Investigations Department. He added a notary declaration of Mr Gergely Kalmár dated 24 February 2012, explaining how he acquired the prohibited substances and how and when he injected them into the Appellant's drinking bottle. Furthermore, he enclosed a summary record of Mr Gergely Kalmár dated 17 November 2011, describing his motives and more extensively when and how he injected the prohibited substances.

17. On 26 July 2012, the Appellant submitted a further, notarized declaration of Mr Gergely Kalmár dated 12 April 2012, in which he explained that he could not appear in person before the IJF, because he had been notified too late of the hearing date.

18. The Appellant brought forward that furosemide, stanozolol and mesterolone are somehow outdated substances, which have been replaced by more modern substances guaranteeing a sport enhancing effect. Besides, the Appellant had no need to use furosemide since he had no weight problems. In addition, according to *"professional's opinion"*, these substances are used in enduring sports and have the best effects there.

19. The Appellant raised the Panel's attention to the fact that he had indicated to the doctor performing the doping test at the World Cup in Budapest on 12 February 2011 that he had micturition problems and could not urinate for quite a while.

20. Finally the Appellant submitted that at the World Judo Master only stanozolol was found which corresponds to the notary declaration of Mr Gergely Kalmár. The doses of prohibited substances at the World Cup in Budapest were much higher than needed to dope.

21. The Appellant asked the Panel to eliminate the IJF Executive Committee's decision of 19 April 2012, apply article 10.5.1 of the WADA Code and return to the Appellant the results and points for the competitions he was disqualified so that he was qualified for the London Olympic Games 2012.

22. The Respondent challenges and rebuts all submissions of the Appellant. Whether the substances are outdated or not, does not matter, since they are included in the WADA Prohibited List which pursuant to article 4.3 IJF Antidoping Rules is decisive also for the IJF and not subject to any challenge.

23. The Respondent emphasizes that furosemide is not only a diuretic, but also a masking agent. The Appellant failed to prove how this substance entered his system.

24. The Respondent underlines that, in order to establish an anti-doping violation, the use of a prohibited substance is not material. According to article 2.1 IJF Antidoping Rules it is enough for constituting an anti-doping rule violation that the substances are present in an athlete's system.

25. According to the Respondent the fact that the Appellant at one occasion was tested positive for one prohibited substance only cannot be considered a mitigating circumstance. Also, the dose of three prohibited substances found in the Athlete's body after the Judo World Cup in Budapest is not relevant and the Appellant's respective submission highly speculative. It might as well be that the Appellant was not tested positive on 19 November 2010 during the European Judo Championship in Sarajevo. This does not affect, however, the two positive test results in January and February 2011.

26. According to the Respondent the scenario submitted by the Appellant on how his drinks had been spiked, has not been established. The Appellant, therefore, being suspended until 7 March 2013, cannot participate at the London Olympic Games 2012.

27. The Respondent submits that the decision of 14 May 2011 is final and binding. The Appellant may be fortunate that the IJF Executive Committee did not find aggravating circumstances in the fact that multiple anti-doping rule violations involving multiple substances have been committed by the Appellant. The Appellant has not challenged the adverse analytical findings.

28. The Respondent affirms that the central issue of the case is whether to confirm the decision of 14 May 2001 or not, notwithstanding the allegedly new elements filed by the Appellant.

29. The Respondent finds that the polygraph tests were performed on 9 March 2011 and, therefore, before the decision of 14 May 2011. The results of the polygraph tests were already known and

considered by the IJF for this decision and do not constitute *"new elements"*. Besides, under Swiss law, a polygraph test is inadmissible as evidence per se, but can be considered as a mere personal statement. The Respondent refers to CAS 2008/A/1515, para. 119.

30. The Respondent points to the fact that the written statement of Mr Gergely Kalmar dated 17 November 2011 is unsigned and supposedly an excerpt from the records of the police investigations. The Respondent refers to the second written statement of Mr Gergely Kalmar before a notary public on 24 February 2012, where Mr Kalmar confesses, that on 11 January 2011 he poured a water solution "Winstrol Depot" into the Appellant's soft drink bottle at a training session in Budapest. On 12 February 2012, Mr Kalmar allegedly entered the locker room of the competitors and injected a mixture of the same water solution plus furosemide and progesterone into a refreshment bottle, which was in the Appellant's bag. The Respondent considers these confessions not credible and submits that the scenario *"of a fan who would try to help an athlete to improve his sport performance by adding prohibited substances to his drinks is highly unlikely. The admission of Mr Gergely Kalmar is tailored to fit the adverse analytical findings reported by the laboratory"*. The Respondent, therefore, was correct not to accept this admission, but to confirm its decision of 14 May 2011.

31. The Respondent submits that the Budapest Police headquarters' decision of 19 January 2012 is irrelevant, since it did not focus on doping practices, but on whether the supposed behaviour of Mr Kalmar could damage someone's health.

32. To sum up, the Respondent submits that on a balance of probability *"it is far more probable that the Appellant tested positive for prohibited substances because of forbidden doping practices, rather than because of supposedly spiked drinks"*. Mr Kalmar is a fan of the Appellant and could have been prepared to provide a false testimony in order to help the Appellant to compete at the London Olympic Games 2012. The Respondent sees the danger of the misuse of a friend or fan for constructing the administration of a prohibited substance. The Appellant was unable to provide compelling and independent evidence.

33. The Respondent requests the CAS Panel to find as follows:

"I. The Appeal filed by Mr Attila Ungvári is dismissed.

II. The International Judo Federation is granted an award for costs".

IV. PROCEEDINGS BEFORE THE CAS

34. On 10 May 2012, the Appellant submitted his Appeal to CAS.

35. On 18 May 2012, the Appellant informed the CAS that his Statement of Appeal is to be considered as his Appeal Brief.

36. On 20 June 2012, the Respondent submitted its Answer.

37. The hearing took place on 25 July 2012. The athlete and Mr. Ruttner, Attorney-at-law in

Budapest, Hungary took part on behalf of the Appellant. The Respondent was represented by Dr. Max Jung, member of the IJF Medical Commission, and Mr Henzer, Attorney-at-Law in Lausanne, Switzerland. The Panel was assisted by Ms Andrea Zimmermann, CAS Counsel. The parties have confirmed at the end of the hearing that they had no objection to the composition of the Panel and were satisfied of the way it conducted the hearing.

38. The parties highlighted their written submissions. The Appellant emphasized in particular that the IJF did not take into consideration the results of the polygraph tests which were performed on 9 March 2012, immediately after the fact of an adverse analytical finding had become known to the Appellant (7 March 2012). The Respondent underlined that Mr Kalmár did not appear before the IJF and could not be cross-examined. The Respondent raised the issue why Mr Kalmár was not called as witness by the Appellant before CAS. The Appellant answered that the legal representative of Mr Kalmár, Ms Beata Koch, could not convince Mr Kalmár to appear before CAS. The Appellant declared that he had no contact with Mr Kalmár and, therefore, no possibility to call him.

39. Mr Attila Ungvári described his habits of drinking. He testified that he uses a favourite bottle as one of 2 – 3 drinking bottles during a competition. His favourite bottle, containing one liter, has an orange colour. Its content is not visible from outside. It is not possible to close the locker rooms in Judo competitions. All bags and bottles are in one room accessible for everybody present. IJF does not particularly educate in anti-doping matters. Whenever using a medication the Appellant approaches his team doctor for clarifying whether a prohibited substance was involved. He uses only own drinks, never met Mr Kalmár, had no knowledge about him. He never tried to contact Mr Kalmár, because this was not his task. Two times a week (every Tuesday and every Thursday between 4 – 6 pm) he uses a training center in Budapest where other athletes such as bodybuilders, are practicing. It was possible that Mr Kalmár was there without his knowledge. His favourite drink is Verofit, a powder offered by IJF, mixed with water and shaken. It has various flavours, he prefers lemon flavour. His favourite bottle has been shown to the police when he was involved in the investigations as witness, but the contents of the bottle were not analysed. The Appellant reported that during the Budapest World Cup he needed to use the toilet 4 times instead of once as usual. He could not remember whether he informed his team doctor on this issue. There arose a controversy between Mr Jung and Mr Ruttner as whether or not the prohibited substances could be added without changing the flavour of the drink.

40. The Respondent refers to CAS jurisprudence with regard to sabotage according to article 10.5.1 WADA Code. CAS, in all three relevant cases, rejected the appeals for lack of proof. The Respondent, in its closing statement, submitted that the witness statement of Mr Kalmár must be disregarded, because the witness could not be heard, neither confirm his statement, nor being cross-examined. He could have been called in with the help of CAS. The Respondent pointed at CAS jurisprudence as to a witness who did not appear before CAS. The Appellant objected and asked for consideration at least of the police decision, but underlined that also other statements were signed and certified by a public notary and, therefore, should be considered.

V. CAS JURISDICTION

41. The jurisdiction of the CAS, which is not disputed, derives from articles 13.1, 13.2 and 13.2.1 IJF Antidoping Rules. These provisions read as follows:

"13.1 Decisions Subject to Appeal

Decisions made under these Anti-Doping Rules may be appealed as set forth below in Article 13.2 through 13.4 or as otherwise provided in these Anti-Doping Rules. ... Before an appeal is commenced, any post-decision review authorized in these rules must be exhausted. ...

...

13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, and Provisional Suspensions

A decision that an anti-doping rule violation was committed, a decision imposing Consequences for an anti-doping rule violation, ... may be appealed exclusively as provided in Article 13.2.

...

13.2.1 Appeals Involving International-Level Athletes

In cases arising from competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court".

42. Article 13.5 IJF Antidoping Rules sets a deadline of 21 days from the date of the receipt of the decision by the appealing party. The decision appealed from was issued on 19 April 2012, but it was not indicated when it was received by the Appellant. The appeal was filed on 10 May 2012, and, therefore, met the deadline. The Panel affirms its jurisdiction.

VI. APPLICABLE LAW

43. Article 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".

44. It follows that the IJF Antidoping Rules and, subsidiarily, Swiss law are applicable to the present case.

45. The following provisions of the IJF Antidoping Rules are to be taken into consideration to adjudicate the merits of this case:

"Article 2 ANTI-DOPING RULE VIOLATIONS

The following constitute anti-doping rule violations:

Athletes and other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.

The following constitute anti-doping rule violations:

2.1 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Specimen

...

Article 4 THE PROHIBITED LIST

4.1 Incorporation of the Prohibited List

These Anti-Doping Rules incorporate the Prohibited List which is published and revised by WADA as described in Article 4.1 of the Code. The Prohibited List in force is available on WADA's website at www.wada-ama.org.

...

Article 9 AUTOMATIC DISQUALIFICATION OF INDIVIDUAL RESULTS

A violation of these Anti-Doping Rules in connection with an In-Competition test automatically leads to Disqualification of the individual result obtained in that Competition with all resulting consequences, including forfeiture of any medals, points and prizes.

Article 10 SANCTIONS ON INDIVIDUALS

10.1 Disqualification of Results in Event during which an Anti-Doping Rules Violation Occurs

An Anti-Doping Rule violation occurring during or in connection with an Event may lead to disqualification of all of the Athlete's individual results obtained in that Event with all consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.

10.1.1 If the Athlete establishes that he bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competition shall not be Disqualified unless the Athlete's results in Competition other than the Competition in which the anti-doping rule violations occurred were likely to have been affected by the Athlete's anti-doping rule violation.

10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods

The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers) ... shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met: First violation: Two (2) years' Ineligibility.

...

10.5 Reduction of Period of Ineligibility Based on Exceptional Circumstances

10.5.1 No Fault or Negligence

If an Athlete establishes in an individual case that he bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility eliminated.

In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.

10.5.2 No Significant Fault or Negligence

If an Athlete establishes in an individual case that he bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. ... When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility reduced.

...

10.6 Aggravating Circumstances Which May Increase the Period of Ineligibility

If the IJF establishes in an individual case involving an anti-doping rule violation other than violations under Article 2.7 (Trafficking) and 2.8 (Administration) that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four years unless the Athlete or other Person can prove to the comfortable satisfaction of the IJF Medical Commission that he did not knowingly violate the anti-doping rule.

...

10.7. Multiple Violations

...

10.7.4 Additional Rules for Certain Potential Multiple Violations

For purposes of imposing sanctions under Article 10.7, an anti-doping rule violation will only be considered a second violation if the IJF can establish that the Athlete or other Person committed the second anti-doping rule violation after the Athlete or other Person received notice pursuant to Article 7 (Results Management), or after IJF made reasonable efforts to give notice, of the first anti-doping rule violation; if the IJF cannot establish this, the violations shall be considered together as one single first violation, and the sanction imposed shall be based on the violation that carries the more severe sanction; however, the occurrence of multiple violations may be considered as a factor determining Aggravating Circumstances (Article 10.6)'.

...

10.9 Commencement of Ineligibility Period

Except as provided below, the period of Ineligibility shall start on the date of the IJF EC decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed.

...

10.9.3 If a Provisional Suspension is imposed and respected by the Athlete, then the Athlete shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed".

VII. THE MERITS

1. Question of New Evidence

46. The Panel wishes to start its findings by pointing to the fact that it has not been asked to review the decision of the IJF Executive Committee of 14 May 2011 sanctioning the Appellant for violating doping rules. This Appeal has been directed against the IJF Executive Board's decision of 19 April 2012 dealing with re-opening the original case for alleged new evidence. In its presentation of arguments before CAS the Appellant, to a certain extent, changed his strategy by using evidence that was to be considered only if the Appellant subsequently had learned of facts or conclusive evidence, which he could not bring into the previous proceedings, excluding facts and evidence which originated after the decision in order to support conclusions from new evidence in the above understanding.

47. The Panel refers to the Judgement of the Swiss Federal Tribunal of 8 October 2010 (X ... v. Union Cycliste Internationale, 4A_237/2010, available on www.bger.ch), where the Tribunal at para 2.1.2, second paragraph, held as follows:

"Revision may be justified only as to facts or evidence which were not known to the Petitioner at the time of the proceedings despite all due diligence. The new facts must be significant which means that they must be appropriate to change the factual basis of the award under review in such a way that their accurate legal assessment could lead to a different decision…".

48. Thus, the Panel needs to focus on the facts and evidence unknown at the time of the proceedings which ended in the decision of 14 May 2011 and disregard other evidence. The Panel finds that the following facts were known or could have been known by the Appellant on 14 April 2011, when he made his declaration before the IJF: (i) furosemide, stanozolol and mesterolone do not belong to the new generation prohibited substances, (ii) Mr Ungvári never uses furosemide, (iii) these substances are best for *"a long running course"*, (iv) not all prohibited substances were found at all occasions, (v) the dose was too high and Mr Ungvári was not tested positive on 19 November 2010.

49. The polygraph-tests of the Appellant, his brother and his trainer, were performed on 9 March 2011 and filed to the IJF before the IJF decision of 14 May 2011 was taken. The discussions of the IJF Medical Committee that was in charge of preparing the Executive Committee's decision, took place between 26 April 2011 and 6 May 2011, the voting of the IJF Executive Committee was organised between 11 May 2011 and 13 May 2011. Thus, the results and the respective conclusions of the Appellant from the polygraph-tests are not relevant for the present proceedings.

50. Finally, the same conclusion has to be drawn regarding the evidence pertaining to the Appellant's family ties and argument that his brother would not have stepped down in his favour in the Budapest World Cup if they knew that the Appellant was doped. The statements of friends, team mates, staff and the brother of the Appellant submitted to the Panel and supporting the good character and honesty of the Appellant originated from dates after the relevant decision and, therefore, also do not meet the criteria of "new evidence". They could

have been organised by the Appellant prior to or during the initial proceedings and, therefore, are not to be considered by the Panel in the present proceedings.

51. As a consequence of the Panel's view, there is only one element in the Appellant's presentation of the case which comply with the requirements for revision according to the Swiss Federal Tribunal, i.e. the admission of Mr Gergely Kalmár, that he, as a fan of the Appellant and in order to improve the latter's performance, injected the prohibited substances at two occasions.

2. Admission of Evidence

52. Consequently, the Panel has to consider the following new evidence:

- The unsigned Summary Record (*"Record abstract"*) of Mr Kalmár dated 17 November 2011;
- The written statement made by Mr Kalmár before a notary public on 24 February 2012;
- The decision of the Budapest Police Headquarters Criminal Division Investigations Department of 19 January 2012;
- The written statement made by Mr Kalmár on 5 April 2012 and submitted to CAS on 26 July 2012.

53. At the hearing, the Appellant testified that he had never had any contact with Mr Gergely Kalmár and, therefore, was unable to call him as a witness. The Respondent objected to the statements of Mr Gergely Kalmár on the admitting grounds that the witness was not offered for oral testimony.

54. The only way of finding whether a witness statement may be true or not is to hear the witness testifying under the obligation to say the truth. The Appellant could have used the support of CAS in calling Mr Gergely Kalmár as witness. He did not ask the Panel for leave to hear the witness on the telephone. Since Mr Gergely Kalmár at no stage of the proceedings did appear before the IJF, or before the CAS, the Panel decided not to admit the Summary Record and the Statements of Mr Gergely Kalmár of 24 February 2012 and 5 April 2012 as means of evidence.

55. Thus, the Panel's focus is on the only remaining means of evidence, the decision of the Budapest Police Headquarters Criminal Division Investigations Department of 19 January 2012. The Panel considers this decision as an official document of a state authority and as new evidence, which was not known to the Appellant before or on 14 May 2011, when the decision imposing a ban on the Appellant had been rendered by the IJF Executive Committee.

56. The Police Investigations Department decided to terminate the investigation *"conducted against an unknown perpetrator for the well-founded suspicion of the felony of slight bodily harm contravening Section 122, subsection (1) of the Criminal Code"* (of Hungary), *"because the act is not a criminal act"*.

57. At the hearing, the Appellant emphasized the following two considerations of the reasons given by the authority for its decision: *"It has been found during the data collection that the substances qualifying*

as doping were put in the isotonic food supplement drink of Attila Ungvári in both cases by Gergely Kalmár combat sport fan. He made a revealing confession in the course of his hearing as suspect and stated that he is engaged in body building in his free time and gathered information on the performance enhancing drugs on the Internet. …" and *"It has been proven in the course of the examination that another person got the drugs qualifying as dopes into the organism of Attila Ungvári, but it was not undoubtedly proven on the basis of the data available that life and good health were jeopardized. …"*

58. Regarding the available legal remedies and reasons the decision reads as follows:

"An appeal lies against this Decision pursuant to Section 195, subsection (1) of the Code of Criminal Procedure, which shall be submitted to the investigative authority within eight days of notification.

REASONS

In the case bearing the above number Támás Bíró judo trainer filed a report on 11 August 2011 because the suspicion of a criminal act has arisen in connection with the doping examination result of Attila Ungvári, judo competitor. The polygraph examination result of ANIMA POLIGRAPH Pszichológiai Tanácsadó Kft. was attached to the report. The Investigations Department of the Criminal Division of the Budapest Police Headquarters conducted an investigation against an unknown perpetrator for the well-founded suspicion of the felony of slight bodily injury contravening Section 122, subsection (1) of the Criminal Code.

According to the information by Tamás Bíró, on 15 January 2011 at the Baku World Cup competition and on 12 February 2011 at the Hungaria World Cup organized in Budapest, the result of the doping test of Attila Ungvári was positive in both cases. The examination result established the presence of Stanozolol, Mesterolone and Furosemide in the organism of the competitor. Attila Ungvári and his trainer Tamás Bíró stated in their declaration made to the Hungarian Judo Association that they had no idea how the substance qualifying as doping got into the organism of Attila Ungvári. The declaration is supported by the result of the polygraph examination.

The witnesses who had information in connection with the investigation have been heard. It has been found during the data collection that the substances qualifying as doping were put in the isotonic food supplement drink of Attila Ungvári in both cases by Gergely Kalmár combat sport fan. He made a revealing confession in the course of his hearing as suspect and stated that he is engaged in body building in his free time and gathered information on the performance enhancing drugs on the Internet. According to his statement he received the water-based suspensions containing Stanozolol, Mesterolone and Furosemide also with the help of the Internet. On the first occasion, on 11 January 2011, during the training of the Judo national team held in the Klapka utca Training Hall of Budapest Honvéd between 4 and 6 p.m., he mixed the food supplementing drink of Attila Ungvári with one vile of the water-based solution designated as Winstrol Depot containing 50mg Stanozol. Thereafter, on 12 February 2011 in Budapest Körcsarnok, he got into the locker room of the competitors and he mixed the isotonic drink of Attila Ungvári with one vile of the substance designated as Winstrol Depot containing 50 mg Stanozol, one vile of the substance containing 50 mg Furosemide and one vile Mesterolone substance containing 50 mg Progesteron. Based on his statement, he committed the above act for personal reasons. His aim was to increase performance in the interest of achieving successful sports results. He did not intend to jeopardize health or damage health even to the slightest extent. He did not assess the possible consequences of his actions.

The forensic medical expert appointed in the course of the proceedings established that the drugs introduced into the organism of Attila Ungvári and the water-based solutions thereof may be introduced into the human organism mixed with refreshing drinks. This way the anabolic steroid, the diuretic and the metabolites of the anabolic steroid can be detected through urine test which may lead to a positive doping test result.

In the opinion of the expert, the given dosages of the above mentioned drugs may not have life and good health jeopardizing impact. Consequently, over-dosage may not be proved from the medical point of view in relation with the drugs in question.

It has been proven in the course of the examination that another person got the drugs qualifying as dopes into the organism of Attila Ungvári, but it was not undoubtedly proven on the basis of the data available that life and good health were jeopardized. Neither new data, nor personal or palpable evidence have arisen in the course of the examination, and therefore the particular health damaging impact may not be proven, consequently criminal act was not committed and I therefore terminate the investigation. …".

3. Evaluation of the evidence

59. The Police Investigations Department's document needs to be evaluated in the context of articles 10.5.1 and 10.5.2 IJF Antidoping Rules whose text corresponds word for word to articles 10.5.1 and 10.5.2 WADA Code. The Panel has to consider the commentary to these articles as far as allegedly sabotage is concerned and the respective jurisprudence of CAS in similar cases (see CAS 2006/A/1067, paras 6.8 – 6.17; CAS 2007/A/1399, paras 99 – 113; CAS 2008/A/1515, paras 114 – 126).

60. The WADA commentary makes clear that both articles consider truly exceptional circumstances which are not given in the vast majority of cases and illustrates this with some examples. WADA adduces the example of sabotage by a competitor despite due care of the athlete concerned as fulfilling the requirements of article 10.5.1 WADA Code. On the other hand article 10.5.2 might be applicable under particular circumstances in cases of administration of a prohibited substance by the athlete's personal physician or trainer without disclosure to the athlete, because *"athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance"*. The same goes for sabotage of the athlete's food or drink by a spouse, coach or another Person within the Athlete's circle of associates, because *"Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink"*.

61. The fact that the IJF Antidoping Rules strictly adhere to the wording of the WADA Code has an impact also for the rules of evidence to be observed by the athlete in proving in an individual case that he bears No Fault or Negligence (article 10.5.1) or No Significant Fault or Negligence (article 10.5.2). When the burden of proof is upon the athlete to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a *"balance of probability"*. The balance of probability standard is set forth by the WADA Code and by the CAS jurisprudence and means that the athlete alleged to have committed a doping violation bears the burden of persuading the judging body that the occurrence of a specified circumstance is more probable than its non-occurrence (see eg CAS 2006/A/1067 at para 6.4).

62. Seen in the light of the above standard of proof to be met by the Appellant the decision of the Police Investigations Department and the statements of the Appellant in writing and during the hearing do not convince the Panel on the basis of a balance of probability to its comfortable satisfaction. The decision of the Police Investigations Department and the respective investigations necessarily had to be done in the context of the applicable provision of the

Hungarian Criminal Code. The police could not focus on the establishment how the prohibited substances entered the athlete's system and that he did not bear No Fault and No Negligence or at least No Significant Fault or Negligence.

63. As to the first case of alleged sabotage, the police document does not describe the facility in Budapest and does not indicate, whether there is a locker room, whether this room was locked, whether anybody had access to a key, how the judo team was separated from bodybuilders, weight lifters and other persons being present in the same facility and room and how the training of the Appellant took place, where the bag and the favorite drinking bottle of the Appellant were exactly situated, whether the athlete or anybody on his behalf took care of the bottle etc. The Panel tried to receive information on facts and circumstances from the Appellant during the hearing in order to fill the gaps in the police document. However, all this information was not precise enough in order to allow the Panel to determine whether there was No Fault or Negligence or No Significant Fault or Negligence on the side of the athlete.

64. As to the second case of alleged sabotage on 12 February 2011, the Panel does not find any corroborating evidence in addition to the Appellant's statement that a certain Mr Gergely Kalmár wore *"the select team's sweat suit"* and could so find access to the allegedly closed locker room. The police document does not confirm this detail. However, this and other details are decisive in order to determine whether the athlete took sufficient care of his bag and drinking bottles. Such and other information would have been necessary to determine if there was No Fault or Negligence or No Significant Fault or Negligence.

65. Since the Appellant could not give evidence to the Panel's comfortable satisfaction on the basis of probability that he acted with No Fault or Negligence or No Significant Fault or Negligence the requirements of articles 10.5.1 and 10.5.2 have not been met by the Appellant on the basis of new evidence. The Appellant also did not explain why his trainer filed the report to the police only on 11 August 2011 and not already in March 2011. Thus, the Panel decides to dismiss the appeal and to confirm the IJF decision of 19 April 2012.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 10 May 2012 by Mr Attila Ungvári against the decision of the Executive Committee of the International Judo Federation issued on 19 April 2012 is dismissed;

2. The decision of the Executive Committee of the International Judo Federation of 19 April 2012 is confirmed;

(…)

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