



**Arbitration CAS 2015/A/4200 Nikola Radjen v. Fédération Internationale de Natation (FINA), award of 17 June 2016**

Panel: Prof. Michael Geistlinger (Austria), President; Prof. Massimo Coccia (Italy); Mr Ken Lalo (Israel)

*Aquatics (water polo)*

*Doping (benzoyllecgonine; ecgonine methylester)*

*Intent in cases of out of competition ingestion of Prohibited Substance prohibited only in competition*

*No Significant Fault or Negligence beyond the application of Article 10.5.1 WADA Code*

1. **“Cheating” is a key element of the notion of “intent” as contained in the World Anti-Doping Code (WADA Code). By using a Prohibited Substance, an athlete wishes to obtain an advantage in comparison to other athletes. The athlete’s will is directed to achieve this advantage not only based on the own physical and/or psychical abilities as an athlete, but on additionally taking the Prohibited Substance; the will of an athlete using a Prohibited Substance, which is prohibited only in competition, out of competition in a context unrelated to sport performance is not directed to achieve such unfair competitive advantage and, thus does not mean “cheating”. In such case, there is no “intent” to be found.**
2. **An athlete who committed an anti-doping rule violation and who pleads for the application of No Significant Fault or Negligence beyond the application of Article 10.5.1 WADA Code based on the fact that at the time he consumed the Prohibited Substance he was suffering from depressions, caused by his father’s death, has to provide e.g. evidence of medical diagnosis for such disease, or testimony of an expert, that he suffered from an illness that would have excluded or reduced his ability of cognizance.**

**I. THE PARTIES**

- 1.1. Mr Nikola Radjen (the “Appellant”) is an international-level Serbian water polo player, affiliated to the Water Polo Federation of Serbia, 31 years old, who was selected for the Serbian National Team that won the World Championship in Rome and represented Serbia at the 2008 and 2012 Olympic Games. The Water Polo Federation of Serbia is member of the international swimming federation, Fédération Internationale de Natation.
- 1.2. The Fédération Internationale de Natation (the “FINA” or the “Respondent”) is the international governing body for the sport of Aquatics, including water polo. The FINA is a signatory to the World Anti-Doping Agency (“WADA”) and its World Anti-Doping Code (the “WADC”).

## **II. FACTS**

### **A. Facts Relating to a First Adverse Analytical Finding**

- 2.1. On 17 February 2015, the Appellant was selected for an in-competition doping control test at the occasion of the match between the senior national teams of Serbia and Spain held in Madrid (Spain) for the FINA Water Polo World League. The sample provided by the Appellant was tested by the WADA accredited laboratory in Madrid and revealed the presence of cocaine metabolites: benzoylecgonine and ecgonine methylester belonging to the Class S6.a Non-Specified Stimulants of the 2015 WADA Prohibited-List.
- 2.2. On 5 May 2015, the FINA Executive Director advised the Appellant and the Water Polo Federation of Serbia about the Adverse Analytical Finding and provided the Appellant with the possibility of opening the B Sample.
- 2.3. On 7 May 2015, the Appellant was provisionally suspended by FINA based on Article 7.9.1 of the FINA Doping Control Rules ("FINA DC"). The provisional suspension entered into force on the same day. The Appellant was advised by the same letter that he was still subject to testing.
- 2.4. On 15 May 2015, the Appellant communicated to FINA that he waived his right to the opening of the B Sample.
- 2.5. On 19 May 2015, the FINA Executive Director informed the Appellant that his matter was to be transferred to the FINA Doping Panel for further consideration. On 20 May 2015, through an open letter, the Appellant admitted the anti-doping rule violation and apologized to family, friends and water polo fans.
- 2.6. On 27 May 2015, the Chairman of the FINA Doping Panel informed the Appellant of his right to request a hearing before the FINA Doping Panel and/or to send a statement of defense in writing to this body.
- 2.7. On 10 June 2015, the Appellant informed the Chairman of the FINA Doping Panel that he waived his right to a hearing and that he preferred to send a statement of defense in writing instead.
- 2.8. On the same day, the Chairman of the FINA Doping Panel set a deadline for the filing of such statement of defense on 25 June 2015.

### **B. Facts Relating to a Second Adverse Analytical Finding**

- 2.9. On 14 April 2015, the Appellant was selected for an in-competition doping control test at the occasion of another World League match between the national teams of Serbia and Russia, held in Krusevac (Serbia). The sample provided by the Appellant was tested by the WADA accredited laboratory in Seibersdorf (Austria) and revealed the presence of cocaine and its metabolites belonging to Class S6.a Non-Specified Stimulants of the 2015 WADA Prohibited List.

- 2.10. On 11 May 2015, the Anti-Doping Agency of Serbia (“ADAS”) forwarded to FINA the Doping Control Form related to the sample, which contained a typing error as to the date. The Doping Control Officer wrote 15 April 2015, whereas the correct date would have been 14 April 2015. This was clarified between FINA and ADAS accordingly.
- 2.11. On 11 June 2015, the FINA Executive Director informed the Appellant and the Water Polo Federation of Serbia about the second Adverse Analytical Finding, involving the same Substance as the first one and regarding Article 10.7.4.1 FINA DC, which reads as follows:

*“DC 10.7.4 Additional Rules for Certain Potential Multiple Violations*

*DC 10.7.4.1 For purposes of imposing sanctions under DC 10.7, an anti-doping rule violation will only be considered a second violation if FINA or a Member Federation 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 DC 7, or after FINA or a Member Federation made reasonable efforts to give notice of the first anti-doping rule violation; if FINA or a Member Federation 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”.*

- 2.12. The FINA Executive Director also advised the Appellant on his right to have the B Sample opened. However, on 23 June 2015, the Appellant waived his right to have the B Sample opened.
- 2.13. On 24 June 2015, the FINA Executive Director informed the Appellant that this matter was to be transferred to the FINA Doping Panel for further consideration.

**C. Facts Relating to the Further Proceedings before the FINA Doping Panel**

- 2.14. On 29 June 2015, ADAS, on behalf of the Appellant, requested the Chairman of the FINA Doping Panel to extend the deadline for filing a statement of defense in writing until 10 July 2015. ADAS gave the reason that the Appellant wanted to address the 1st Congress on the Prevention of Doping in Sport in Belgrade on 7 July 2015.
- 2.15. On 1 July 2015, the Chairman of the FINA Doping Panel informed the Appellant that both Adverse Analytical Findings will be dealt with by the FINA Doping Panel in one decision and set 13 July 2015 as the final deadline for a statement of defense in writing.
- 2.16. On 7 July 2015, the Appellant gave an interview at the Congress in Belgrade and publicly regretted his doping offences. He explained to the audience that he had taken the substance because of private psychic problems linked to the sudden death of his father at the age of 54 and the low performance of the professional team at which he played, Olympiacos in Athens. A video and transcripts of this interview were sent to the Chairman of the FINA Doping Panel on 13 July 2015.
- 2.17. On 6 August 2015, the Appellant sent to the Chairman of the FINA Doping Panel another video and transcripts of a talk with junior water polo players on his doping offence.

2.18. On 7 August 2015, the Chairman of the FINA Doping Panel advised the Appellant on the composition of the FINA Doping Panel and requested him *“to provide the Panel with the concrete circumstances of”* his *“taking illegal substances, i.e. the persons who were with you, the amount of time, dates, etc”*.

2.19. On 11 August 2015, the Appellant answered as follows:

*“Dear Sir,*

*Thank you for your e-mail and correspondence regarding this matter.*

*I have no comments regarding this panel and I have full confidence in their work.*

*Regarding your opportunity to provide the Panel with the additional concrete circumstances of my case, I can tell that I wrote everything in my defense and I can only repeat here all relevant information.*

*I would like to underline that used substance was taken only out of competition without any idea to improve my sport skills and in a context unrelated to sport performance. Forbidden substance I took in a specific life situation with a lot of private problems (I explain everything in my video and written defense already sent to FINA). As a professional athlete, I am aware of anti-doping rules and that the responsibility is solely mine. However, I have no intention to cheat nor to enhance my sports performance. I have no intention to commit anti-doping rule violation.*

*Thank you for cooperation and understanding.*

*Best regards*

*Nikola Radjen”.*

2.20. On 24 August 2015, the Appellant was provided with the decision of the FINA Panel and was sanctioned as follows:

*“VII. Sanction*

*7.1 According to DC 10.2.1, the period of Ineligibility shall be four years where*

*DC 10.2.1.1 the anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.*

*DC 10.2.1.2 the anti-doping rule violation involves a Specified Substance and FINA or the Member federation can establish that the anti-doping rule violation was intentional.*

*Even though the Athlete was honest in admitting that he had taken Cocaine, Mr. Radjen fulfils the provisions as set forth above in DC 10.2.1 and is therefore sanctioned with 4 (four) years Ineligibility period.*

*The period of suspension runs in terms of Rule 10.11.3 from 7 May 2015.*

*VIII. Summary of Decisions*

*8.1 Mr. Radjen receives a 4 (four) year period of Ineligibility commencing on 7 May 2015, and ending at the conclusion of 5 May 2019, for the first anti-doping rule violation.*

*8.2 All results obtained by Mr. Radjen on or after 17 February 2015 are disqualified. Any medals, points and prizes achieved during that period shall be forfeited.*

*8.3 All costs of this case shall be borne by the Water Polo Federation of Serbia in accordance with FINA DC 12.3.*

8.4 *Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland not later than twenty one (21) days after receipt of this judgement (FINA rule C 12.11.4)".*

2.21. The FINA Doping Panel gave the following reasons for applying Articles 2.1.1, 10.1, and 10.2.1 FINA DC:

- "6.9. In this matter, the Athlete provided no specific explanation of the manner nor the circumstances in which he took any substance which would yield an adverse analytical finding. Hence, there is no room for a defense based on no fault or negligence, nor no significant fault or negligence.*
- 6.10. In addition, the Panel noted that the Athlete spontaneously took steps to render public his anti-doping violation and appears willing to use his misfortune as an educational example for youngsters and other athletes to take lessons from. The FINA Doping Panel finds this commendable and can only encourage the Athlete to pursue in any way possible educating and informing both young and experienced athletes of the advantages of keeping sport clean and having healthy and responsible habits to avoid violating Anti-Doping regulations. This however does not allow for the Panel to envisage a reduction of the sanction imposed by the rules, as the scope within which the Panel may levy sanctions or depending on circumstances alleviate them are clearly set forth in the regulations.*
- 6.11. The Panel considered applying the rules applicable to Substantial Assistance pursuant to FINA DC 10.6. This rule[s] provides that the FINA Doping Panel or other Anti-Doping Organisation with results management responsibility may, prior to a final appellate decision under DC 13 or the expiration of the time to appeal, suspend a part of the period of Ineligibility imposed in an individual case in which it has results management authority where the Athlete or other person has provided Substantial Assistance to FINA, a criminal authority or professional disciplinary body which results in: (i) FINA's discovering or bringing forward an anti-doping rule violation by another Person, or (ii) which results in a criminal or disciplinary body discovering or bringing forward a criminal offence or the breach of professional rules committed by another Person and the information provided by the Person providing Substantial Assistance is made available to FINA.*
- 6.12. Such is not the case in this matter. The comments of FINA DC 10.6.1 state: "The cooperation of Athletes, Athlete Support Personnel and other Persons who acknowledge their mistakes and are willing to bring other anti-doping rule violations to light is important to clean sport. This is the only circumstance under the Code and DC Rules where the suspension of an otherwise applicable period of Ineligibility is authorized" (underlined by the Panel). Undoubtedly, the Athlete's actions after the fact point to a willingness to acknowledge his mistake but he has failed to bring any other anti-doping rule violation to light.*
- 6.13. Finally, the Panel considered that in light of the second analytical finding, it could have considered whether this matter should be decided based on two adverse analytical finding[s] and as such would have applied the rules for multiple violations. However, after hesitation, in light of the fact that FINA communicated to the Athlete that this matter would be considered as a first violation, and taking into account the public efforts made by the Athlete to atone his mistake, the Panel will refrain from applying the sanctions contemplated in FINA DC 10.7".*

### III. PROCEEDINGS BEFORE THE CAS

- 3.1. In accordance with Articles R47 and R48 of the CAS Code, the Appellant filed his statement of appeal on 11 September 2015.
- 3.2. In accordance with Article R51 of the CAS Code, the Appellant filed his appeal brief on 23 September 2015.
- 3.3. On 13 October 2015, the Secretary General of the CAS recorded the Panel to resolve the dispute as composed by Mr Michael Geistlinger, professor in Salzburg, Austria, Mr Lucio Colantuoni, professor and attorney-at-law in Savona, Italy, and Mr Ken Lalo, attorney-at-law in Gan-Yoshiyya, Israel.
- 3.4. In accordance with Article R55 of the CAS Code, the Respondent filed its answer on 21 October 2015.
- 3.5. On 13 November 2015, a hearing at the CAS Court Office in Lausanne was set for 11 January 2016.
- 3.6. On 24 November 2015, the Appellant, and on 30 November 2015, the Respondent signed an Order of Procedure.
- 3.7. On 8 January 2016, the CAS Counsel had to sadly inform the Panel and the parties that, on the day before, Prof. Lucio Colantuoni had passed away in a car accident. The hearing, thus, had to be cancelled. The Appellant informed the CAS that he nominated Mr Massimo Coccia, professor and attorney-at-law in Rome, Italy, as a new arbitrator in this matter.
- 3.8. On 11 January 2016, the CAS Counsel forwarded the Arbitrator's acceptance and statement of independence signed by Prof. Coccia, where he disclosed that in the last three years he had been appointed once by the Respondent and twice by the Appellant's law firm. The parties were set seven days for raising objections to Prof. Coccia's appointment. No objections were raised by the parties within the given deadline.
- 3.9. On 9 February 2016, the CAS Counsel confirmed a new hearing date at the CAS headquarters for 24 February 2016.
- 3.10. On 16 February 2016, the Appellant, and on 18 February 2016, the Respondent signed a new Order of Procedure.
- 3.11. The hearing was held on 24 February 2016. The Appellant was present in person, assisted by his counsel Mr Toni Garcia and Mr Borja Osés and his interpreter Mr Nikola Kuljaca. The Respondent was represented by its internal counsel, Ms Katarzyna Jozwik. The Panel heard Mr Branislav Mitrovic, nominated as witness by the Appellant, by phone.
- 3.12. At the beginning of the hearing, the parties confirmed that they had no objections as to the composition of the Panel. The Appellant submitted a press release of UCI dated 9 February 2016 with regard to a decision of the UCI Disciplinary Commission concerning the UCI World

Team Katusha. The Respondent invoked Article R57 of the CAS Code and objected to its inclusion into the file. The Panel decided to accept the press release, but considered it irrelevant for deciding the case. In their opening statements and closing remarks, the parties confirmed and highlighted the arguments already presented in their written submissions.

- 3.13. The hearing focused on listening to the testimony of Mr Mitrovic, a member of the Serbian water polo team and the roommate of the Appellant during the preparatory and competition period at the two matches in which the Appellant was found to have taken a Prohibited Substance, and on questioning Mr Nikola Radjen himself. Mr Mitrovic, who is a long-time friend of Mr Radjen and played together with him since 1994, first in two clubs and then at the national team of Serbia, confirmed to the comfortable satisfaction of the Panel that Mr Radjen could not have taken the Prohibited Substance during the in-competition period. The Respondent confirmed that the in-competition period starts 12 hours before a match. Mr Mitrovic also confirmed that the Appellant suffered from the sudden death of his father, who died at the relative young age of 54. Mr Mitrovic (who plays professionally in Hungary) testified that he always met and stayed with Mr Radjen (who plays in Athens) one day before a match when they played in Serbia or two days before a match when they played elsewhere. He testified that during these periods with the national team the athletes were under a rigid system of control, which did not offer any opportunity to acquire or take cocaine. Mr Mitrovic, who habitually is Mr Radjen's roommate, explained that he would have noticed had Mr Radjen taken such a substance during these periods with the Serbian national team, as they spend the whole time together.
- 3.14. Mr Radjen stated to the Panel that he had taken cocaine twice because of a depressive mood primarily caused by the death of his father. Although his father and mother divorced when he was 11 years old, he had a good and close relationship with his father, in particular during the last two years preceding his father's sudden death. Mr Radjen told the Panel that he had never used a social drug before. Mr Radjen explained that he did not consult a medical doctor in an effort to overcome his depression, because, as a champion, he thought that he would be able to fight his illness without such help. He knew that he suffered from a depression, because his wife and children, who lived with him in Athens, told him that his behaviour had changed. He claims that he is not suffering from this illness any longer. Mr Radjen explained that he took cocaine only twice, on 13 February 2015 and on 11 April 2015, both times in Belgrade. He did not buy the substance, but received it from a friend as part of a bad company he had surrounded himself during this period. Mr Radjen stated that in the meanwhile he is no longer in contact with this group of people. He did not take the substance for enhancing his sport performance, but for defeating his depressive mood. His bad mood was re-enforced by the bad results of his team Olympiacos in Athens. He used cocaine, because the person who gave him the substance, advised him that cocaine would help him to solve his problems. The person gave him the drug for the first time at a café in Belgrade and for the second time in a night club in Belgrade. On both occasions it was the same person that provided the cocaine. He knew that he took a Prohibited Substance, did not know how long the substance would be detectable in his body, but did not care anyhow. This goes, in particular, for the second intake before the match with Spain. Mr Radjen stated that he did not inform anybody from his team, but talked to Mr Mitrovic about it only after the results of the analysis of the sample had been communicated to him.

- 3.15. The Panel questioned Mr Radjen in particular as to why he did not provide any of these details to the FINA Doping Panel, even when he had explicitly been asked to do so. Mr Radjen responded that he relied on the advice of ADAS and thought that the videos provided by him to the Doping Panel would contain the explanation requested by them. He had no legal counsel at that time. Mr Radjen explained to the Panel when the matches of his club in Greece took place during the respective periods, so that the Panel could set up a time-line for the periods preceding the two matches at which Mr Radjen was tested. Mr Radjen explained that he was depressed when his club did not qualify to play at the Champions League Finals. As for the first case of Adverse Analytical Finding, he played at home and lost against the Spanish club Atlètic Barceloneta on 11 February 2015, which was a Wednesday. After the match, he left his team and took the drug on Friday of the same week. On 17 February 2015, there was the national team's match against Spain in Madrid. As for the second case, he played in the Champions League on 8 April 2015 and lost against the Italian club Pro Recco. The intake of cocaine happened on 11 April 2015. At the match in the World League on 15 April 2015, he did not play. He played at the subsequent national team's match, which was held in Krusevac on 18 April 2015.
- 3.16. At the end of the hearing, the parties confirmed that they had no objections to the manner in which the Panel ran the hearing. The Appellant underlined that he had relied on ADAS as to advices with regard to the hearing and his submissions before the FINA Doping Panel. The Respondent emphasized that the Appellant should have delivered all information provided to the CAS Panel already in the proceedings before FINA, because the information was available at that time, was specifically requested and there was no evidence that could not have been readily available at that time. The parties confirmed their Prayers for Relief. FINA added in the alternative, as a subsidiary motion for relief, that if the CAS Panel, based on its *de novo* authority, decided to reduce the sanction, no sanction below 2 years could anyway be imposed, because the Appellant was an experienced water polo player and continued taking the Prohibited Substance even after he had already been tested once. There is no legitimate reason for applying Articles 10.5 or 10.6 FINA DC. The cases referred to by the Appellant are very different from the Appellant's case and cannot serve as precedents.

#### IV. SUBMISSIONS OF THE PARTIES

- 4.1. The parties agree as to the jurisdiction of the CAS, based on Article R47 *et seq.* of the CAS Code, Article 12.11.4 of the FINA Constitution and point 8.4 of the decision of the FINA Doping Panel. The applicable rules are the FINA rules, particularly the FINA DC and the FINA Constitution. Subsidiarily, Swiss law shall apply in accordance with Article R58 of the CAS Code. The 21-day deadline for the statement of appeal (Articles C 12.11.3 and 4 FINA Constitution read together) and the 10-day deadline for the appeal brief (Article R51 CAS Code) have been met. As to the costs Article R65 of the CAS Code applies.
- 4.2. The parties also agree that, although it was established that the Appellant committed twice an anti-doping rule violation, pursuant to Article 10.7.4.1 FINA DC it must be considered as a single first violation, given that Mr Radjen received notice of the second adverse analytical finding only after both anti-doping tests had occurred. The only disputed issues in this case thus



concern the imposition and length of the applicable ineligibility period, the starting date of the ineligibility period and other consequences resulting from the anti-doping rule violation, such as disqualification, forfeiture of medals, points, prizes and the like.

- 4.3. Both parties further agree that the legal analysis starts with Article 10.2.1 FINA DC, which rules that a period of 4 years ineligibility has to be imposed where the anti-doping rule violation does not involve a Specified Substance, unless the athlete can establish that the anti-doping rule violation was not intentional. According to the WADA Prohibited List incorporated by FINA through Article 4.1 FINA DC, cocaine is a non-specified stimulant according to the Class S6.a., prohibited only in-competition.
- 4.4. The parties disagree as to the application of Article 10.2.3, last sentence, FINA DC in the present case. This sentence, the application of which would result in a period of 2 years ineligibility, reads as follows:

*“An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance”.*

#### **A. The Appellant**

- 4.5. The Appellant submits that he has the burden of proving that the substance is only prohibited in-competition, that the substance was used out-of-competition and in a context unrelated to sport performance. Referring to the video of the Congress organized on 7 July 2015, the Appellant claims to have given sufficient evidence that the substance was used out-of-competition in order to overcome a depression caused by the sudden death of his father and bad sporting results with his club Olympiacos Athens, where he played from 2014 onwards. The Appellant points at his earlier own statements indicating that he used the substance not with the intention to enhance sport performance. The Athlete indicated that he used cocaine in Belgrade a few days before the match in Spain and not in relation to this match, trying to support this position by claiming that he would not have risked legal prosecution by importing cocaine to Spain from Serbia. He emphasized that cocaine is commonly consumed in discotheques, parties, etc. At the relevant time, the time of its ingestion, the Appellant used the substance not for enhancing his sport performance and out-of-competition. As a consequence, Article 10.2.2 FINA DC and a period of 2 years ineligibility apply.
- 4.6. The Appellant argues, however, that this 2 years period of ineligibility is subject to further reduction, if not elimination, based on Article 10.5.2 FINA DC. With reference to the CAS award CAS 2012/A/2804 the Appellant finds that there are exceptional circumstances which afflicted him and prevented him from being aware of the sporting consequences of the use of such social drug. These circumstances were his depression, which the CAS in the case CAS 2005/A/873 and the American Arbitration Association in the case USADA v. Cosby (5 May 2010) found as allowing the assertion of No Significant Fault or Negligence or of a lesser responsibility.

- 4.7. Besides, the Appellant argues that the inclusion of cocaine on the WADA List of Prohibited Substances gave rise to confusion. The Appellant drew the conclusion from the list that the use of cocaine was only forbidden and punishable when taking place on the same day of the match. In the opinion of the Appellant, such confusion was accepted by CAS in the award 2008/A/1490 as a reason for assuming No Significant Fault or Negligence. The same conclusion has been drawn by the Regulatory Commission of the Football Association with regard to Mr Jake Livermore (8 September 2015) who, after having lost his son, had turned to cocaine. Based on similar circumstances and the respective jurisprudence, the Appellant is of the view that Article 10.5.2 FINA DC has to be applied and the period of ineligibility, therefore, reduced to 12 months.
- 4.8. Then, the Appellant points at established CAS jurisprudence (CAS 2011/A/330; CAS 95/141; CAS 92/73 and CAS 96/156) for stating that the sanction imposed must not be disproportionate to the offence and must always reflect the extent of the athlete's guilt. The "bouts of depression" suffered by the Appellant prevented him from being aware of the disciplinary consequences of his actions. Compared to 15 prior tests of the Appellant, the adverse analytical finding for the intake of cocaine "was a one-off incident in respect of the use of cocaine". The case of depression suffered by the Appellant resembles, in his opinion, the case of Mr Livermore referred to above, where the Panel, based on the principle of proportionality, did not apply any period of ineligibility. The Appellant argues that the same should apply to him.
- 4.9. As to the commencement of the period of ineligibility, the Appellant refers to Articles 10.11.1 and 10.11.2 of the FINA DC for asserting that the period of ineligibility should start at the date of the sample collection, which was 17 February 2015. The Appellant gives as reasons therefore his public admission and cooperation with the ADAS. The Appellant argues that, in case the Panel decides to impose a period of ineligibility, such period should start on 17 February 2015.
- 4.10. In case the Panel decides to set aside the decision of the FINA Doping Panel, the Appellant, referring to CAS 2010/A/2161, CAS 2004/A/726 and CAS 2013/A/3274, contends that all medals, points and prizes he achieved on or after 17 February 2015 should be reinstated.
- 4.11. The Appellant submits the following Prayers for Relief:
  - "1. Consider this appeal admissible.
  2. Set aside the Decision of the Fédération Internationale de Natation (FINA) dated 24th August 2015.
  3. Impose no Period of Ineligibility upon Mr. Radjen in accordance with the facts and grounds foreseen and the application of principle of proportionality.
  4. – Failing this, impose the shortest possible Period of Ineligibility between 0 and 24 months upon Mr. Radjen in accordance with the facts and grounds foreseen herein; and  
 – Set 17th February 2015 as the starting date at any Period of Ineligibility.
  5. Reinstatement all medals, points and prizes achieved by the Athlete on or after 17th February 2015.
  6. Grant this party a contribution towards its legal fees and other expenses incurred in connection with the proceedings in the amount the Panel deemed appropriate".

## **B. The Respondent**

- 4.12. The Respondent emphasizes that there are two adverse analytical findings involving a Non-Specified Substance. According to Article 10.7.4.1, for purposes of imposing sanctions, both violations are to be considered together as one single (first) violation, and the sanction imposed shall be based on the violation that carries the more severe sanction. As a consequence, the Respondent must establish for both adverse analytical findings that the Prohibited Substance was used out-of-competition in a context unrelated to sport performance in order to apply Article 10.2.2 FINA DC.
- 4.13. The Respondent underlines that in the proceedings before the FINA Doping Panel the only evidence the Appellant presented in favour of the application of Article 10.2.2 FINA DC was his personal statement related to the death of his father and bad results of his club. Upon request of the FINA Doping Panel dated 7 August 2015 to provide the concrete circumstances relating to the use of the Prohibited Substance, the Appellant just reiterated that he took cocaine out-of-competition without any intent to improve his sport performance and in a context unrelated to sport performance. As a consequence, in the proceedings before the FINA Doping Panel the Appellant failed to establish the conditions which must be met for the application of Article 10.2.2 FINA DC. The Appellant should have provided evidence in addition to his own statement.
- 4.14. The Respondent acknowledges that in the present proceedings before the CAS, the Appellant provided some additional evidence, not presented to the FINA Doping Panel, which included the death certificate of his father, various articles and website screenshots where the Appellant was cited saying that he did not take cocaine for improving his sport performance, the testimony of Mr Branislav Mitrovic and the Appellant's testimony.
- 4.15. The Respondent holds that this additional evidence brings little clarification on the manner and circumstances of ingestion of the Prohibited Substance by the Appellant. The statements are general and the testimony of Mr Mitrovic refers vaguely to the positive test of February 2015 and does not mention the positive test of April 2015 and the circumstances which led to the adverse analytical finding. As a result, the Appellant did not establish that in both cases of adverse analytical finding the Prohibited Substance was used out-of-competition in a context unrelated to sport performance and that, as a consequence, the anti-doping rule violation was not intentional. Thus, Articles 10.7.4.1 and 10.2.1 FINA DC apply and the sanction to be imposed is a period of 4 years ineligibility.
- 4.16. Analysing whether Article 10.4 FINA DC (Elimination of the Period of Ineligibility where there is No Fault or Negligence) can be applied, the Respondent argues that only exceptional circumstances are relevant. In the present case, the Appellant, being an experienced water polo player familiar with his anti-doping obligations, took cocaine voluntarily, on his own initiative, and at least twice. The Appellant himself has stated publicly that he was aware of taking a Prohibited Substance. Irrespective of that fact, he continued to take cocaine after having been selected for doping control in February 2015 and, thus, in the opinion of the Respondent, showed a significantly negligent behaviour. According to the Respondent, the provisions of Article 10.4 FINA DC, therefore, are not applicable.

- 4.17. The Respondent underlines that a depressive disorder is a serious illness, which requires medical treatment. The Respondent admits that a death of a father can lead to a depressive episode, but, unlike the cases Vlasov, Cosby and Livermore, the Appellant did not provide any evidence of medical diagnosis for such disease. He also did not offer the testimony of an expert, as has been done in the case of Mr Livermore. The case of Mr Livermore was a unique, particularly tragic case, which fact had been underlined by the deciding panel. The facts of the present case do not allow, in the opinion of the Respondent, to apply Article 10.5.2 (application of No Significant Fault or Negligence beyond the application of DC 10.5.1). According to the comment to this provision, it may be applied only where intent is not an element of the anti-doping rule violation. Since the Appellant could not establish that the anti-doping rule violation was not intentional, Article 10.5.2 FINA DC does not apply.
- 4.18. The Respondent holds further that the Appellant did not provide Substantial Assistance within the meaning of the FINA DC. This excludes the application of Article 10.6 FINA DC.
- 4.19. The Respondent argues that one may not raise in this context arguments of proportionality or human rights outside the framework of the WADC and the FINA DC, because, as has been shown by the expert opinion of the former president of the ECtHR, Jean-Paul Costa, these rules themselves incorporate requirements based on the principle of proportionality and respect of human rights of athletes.
- 4.20. The Respondent points at the fact that a period of 4 years ineligibility does not automatically apply to any case of using cocaine. In the present case, the Appellant, however, did not fulfill and establish the necessary conditions set by the rules for a reduction of this period. The Respondent appreciates that the Appellant admitted his wrongdoing and shared his misfortune with anti-doping education of young sportsmen, but these activities are not a sufficient ground for a reduction of the sanction.
- 4.21. Referring to CAS 2005/A/830, the Respondent mentions that there is no general discretion to depart from sanctions set out in the WADC. Besides, all cases referred to by the Appellant relate to the previous WADA Code, when the increased regular sanction had not yet been in place.
- 4.22. With regard to the starting date of the ineligibility period, the Respondent acknowledges that the Appellant had promptly admitted the anti-doping rule violation and had not challenged the laboratory result. The Respondent, thus, appeared ready to agree to have a sanction of 4 years ineligibility commencing as of 17 February 2015.
- 4.23. The Respondent refers to Articles 9 and 10.8 FINA DC, which provide for automatic disqualification of results, medals, points and prizes obtained at the date of sample collection and, unless fairness requires otherwise, also for disqualification of all competitive results achieved since that date. Due to the fact that the Appellant intentionally ingested cocaine more than once, fairness with regard to the other athletes requires such disqualification. In case of retroactive start of the ineligibility period, the disqualification of competitive results should also be applied from 17 February 2015 onwards.

4.24. The Respondent admits that CAS has the full power to examine all facts and legal issues at stake and to hold a trial *de novo*, but requests that it be considered that the FINA Doping Panel has carefully examined the case, has offered to the Appellant all applicable rights, and has requested him to complete his statement of defense but that the Athlete has failed to do so before the FINA Doping Panel.

4.25. The Respondent submits the following Prayers for Relief:

- a) The appeal is dismissed;*
- b) The Appellant shall bear the entirety of the arbitration costs for these appeal proceedings;*
- c) The Respondent shall be awarded a contribution to its legal fees and other costs in connection with these proceedings”.*

## **V. CAS JURISDICTION AND ADMISSIBILITY**

5.1. The jurisdiction of the CAS follows from Article C 12.11.4 of the FINA Constitution, which reads as follows:

*“An appeal against a decision by the Bureau, the FINA Doping Panel, the Disciplinary Panel or the Ethics Panel shall be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland, within the same term as in C 12.11.3. The only appeal from a decision of the Doping Panel, the Disciplinary Panel or the Ethics Panel shall be to the CAS. ...”.*

5.2. In accordance with Article C 12.11.3 of the FINA Constitution, the decision of the FINA Doping Panel of 24 August 2015 advised the Appellant to submit such appeal to the CAS within 21 days from receipt of that decision.

5.3. The jurisdiction of the CAS and the admissibility of the appeal have not been contested by the Respondent and have been confirmed by both parties by the signing of the Order of Procedure.

5.4. It follows that the CAS has jurisdiction to decide the present case and that the case is admissible.

## **VI. APPLICABLE LAW**

6.1. Article R58 of the CAS Code provides as follows:

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

6.2. In the present matter, the parties have agreed that the FINA DC are primarily applicable to this matter. Subsidiarily, Swiss law, as the law of the seat of FINA, applies.

## VII. MERITS

7.1. The Panel wishes to emphasize that the FINA Doping Panel, in its decision of 24 August 2015, applied all applicable rules of the FINA DC correctly and properly (see the decision and its reasoning at paras 2.20 and 2.21 above), based on the evidence submitted to it. Based on the same evidence, the CAS Panel would have come to exactly the same conclusions and would have imposed the same sanctions.

7.2. In the hearing before CAS, the Appellant submitted, however, additional evidence and gave more details as to the circumstances of the intake of the Prohibited Substance. The Panel, therefore, holds that the fundamental initial requirement for the application of the last sentence of Article 10.2.3 FINA DC is being met.

7.3. The complete rule of Article 10.2.3 FINA DC reads as follows:

*“As used in DC 10.2 and 10.3, the term “intentional” is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An Anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance” (emphasis by the CAS Panel).*

7.4. At the hearing, the parties agreed that “cheating” is a key element of “intent”. By using a Prohibited Substance, an athlete wishes to obtain an advantage in comparison to other athletes. The athlete’s will is directed to achieve this advantage not only based on the own physical and/or psychical abilities as an athlete, but on additionally taking the Prohibited Substance; the will of an athlete using a Prohibited Substance, which is prohibited only in competition, out of competition in a context unrelated to sport performance is not directed to achieve such unfair competitive advantage and, thus, according to Article 10.2.3 FINA DC does not mean “cheating”. In such case, there is no “intent” to be found.

7.5. Having heard and questioned Mr Mitrovic, who during his oral testimony considerably and credibly expanded on his written witness statement, and having questioned and heard the Appellant to an extent which goes far beyond the transcripts of the videos and other previous statements which the Appellant had submitted to the FINA Doping Panel and to this Panel in writing and by videos, the Panel is convinced that the purpose of taking cocaine was not to cheat. The Appellant wanted to overcome a bad mood and tried to achieve this in a bad company with the help of cocaine. He did not consider the sporting competitions ahead of him in a few days and his performance in comparison to the expected performance of other athletes. At the moment when the Appellant took the drug, he was totally absorbed by his depressive mood, by the social atmosphere around him, which had no context to sport, and by his

company. Given such conviction, the Panel explored with the Appellant why he failed to produce all this evidence to the FINA Doping Panel. The Panel laid particular emphasis on the letter sent by the Chairman of the FINA Doping Panel to the Appellant on 7 August 2015. At that moment, the FINA Doping Panel had already received the videos from the Appellant and had made clear to him that they were not sufficient in order to clarify the concrete circumstances related to the intake of the Prohibited Substance. The Chairman of the FINA Doping Panel even raised particular questions (“... *the persons who were with you, the amount of time, dates, etc.*”). Nevertheless, by answer dated 11 August 2015, the Appellant merely repeated the text of his videos and previous statements, none of which had given any answer to the quoted questions.

- 7.6. At the hearing, the Appellant confirmed that he had relied on the assistance and advice of ADAS instead of taking a professional lawyer’s advice. The Panel also saw from a letter of ADAS, in which it had asked the FINA Doping Panel for prolonging the deadline for the Appellant’s written statement of defense (see para 2.14 above), and from the video during the 1<sup>st</sup> Congress on the Prevention of Doping in Sport in Belgrade on 7 July 2015 that ADAS acted in a manner not appropriate for a National Anti-Doping Organization (“NADO”), both because it is not the role of a NADO to assist an athlete who has committed an anti-doping rule violation and because its purported assistance to the Athlete, besides triggering a conflict of interests (given NADOs’ institutional responsibility of acting against anti-doping rule violations), cannot have the same effectiveness as a proper legal counsel in protecting an athlete’s rights. Even the organisation of the Congress left the Panel with the impression of an anomalous cooperation of a NADO with an athlete who had given rise to an adverse analytical finding and was still under trial. The Panel wishes to underline that ADAS should have referred the Athlete to professional lawyers for advice, rather than aiming to assist the Appellant’s defense. Seeing this particular background of the facts in the case at hand, and having come to the conclusion that the Athlete did not cheat, the Panel feels bound to apply its *de novo* powers deriving from Article R57 of the CAS Code.
- 7.7. The Panel, by the oral statement of the witness and by the answers of the Appellant upon questions of the Respondent and of the Panel, finds on a balance of probability that the Appellant took cocaine in a private social context in Belgrade at the dates indicated by the Appellant (see para 3.14 above), even if the Panel is not convinced that those two occasions were the only times when the Athlete used the drug. The Panel finds that the Appellant, through the oral evidence presented at the hearing, could establish to the required level of persuasion that the cocaine was taken outside the in-competition period, which as confirmed by the Respondent started 12 hours before each of the relevant competitions. Cocaine is not a Specified Substance and it is only prohibited in-competition. Thus, all requirements for the application of the last sentence of Article 10.2.3 FINA DC are fulfilled. The Appellant could establish on a balance of probability that the anti-doping rule violation was not intentional. Thus, Article 10.2.1 FINA DC does not apply and “*the period of Ineligibility shall be two years*” according to Article 10.2.2 FINA DC.
- 7.8. The Panel holds, that the Respondent is right in finding that the Appellant could not give sufficient evidence that he suffered from the disease of depression. The Appellant may well have been in a depressive mood caused by the sudden death of his father and the bad results of his club, as he submitted. He could, however, not sufficiently explain to the Panel why he did

not consult a physician or a psychologist, but relied on himself and arguably his family for diagnosing a depression and for finally successfully overcoming such state without professional help. This circumstance, indeed, substantially differentiates the facts of the case at hand from all the cases referred to by the Appellant in the given context in order to assume No Fault or Negligence (Article 10.4 FINA DC) or No Significant Fault or Negligence (Article 10.5 FINA DC). The Appellant publicly and before the Panel confirmed that he had taken cocaine deliberately and knowingly. He was also aware that cocaine was on the WADA List of Prohibited Substances. Since the Appellant could not present reliable expert evidence to the Panel that he suffered from an illness that would have excluded or reduced his ability of cognizance and, thus, his fault, the Panel finds that there has clearly been significant fault or significant negligence of the Athlete. The Appellant knew that he used a Prohibited Substance and he did it deliberately.

- 7.9. The Panel holds that the argument of the Appellant, set forth in his written submission, that the WADA Prohibited List has been drafted in a misleading manner as to the insertion of cocaine among the Prohibited Substances and has thus confused him, contradicts his public statements shown by the videos and could not be substantiated during the hearing.
- 7.10. As a consequence of the above findings, the Panel does not see any reason why the application of a period of two years ineligibility on the Appellant could be considered not to be proportional. The Athlete did not give evidence for the existence of any mitigating or exculpating reason. The Panel, while using the option offered by the rules, under the principle of proportionality, to apply a two years sanction instead of a four years sanction sees, however, no legitimation to go below or to apply Article 10.6 FINA DC, because the Appellant has not *“provided Substantial Assistance to FINA ..., which results in (i) FINA’s discovering or bringing forward an anti-doping rule violation by another Person, or (ii) which results in a criminal or disciplinary body discovering or bringing forward a criminal offence ... committed by another Person and the information provided by the Person providing Substantial Assistance is made available to FINA”* as required by Article 10.6.1.1 para 1 FINA DC. The Appellant did not name the person from whom he received the cocaine twice.
- 7.11. The Panel, thus, holds that the sanction of two years of ineligibility is not disproportionate to the offence and reflects the extent of the Athlete’s fault.
- 7.12. As to the commencing date of the sanction, the Panel, as suggested by the parties in their submissions in writing and at the hearing, considered to apply Article 10.11.2 FINA DC which reads as follows:

*“Timely Admission*

*Where the Athlete or other Person promptly (which, in all events, means for an Athlete before the Athlete competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by FINA or a Member Federation, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this rule is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person accepted the imposition of a sanction, the date of the hearing decision imposing a sanction, or date the sanction is otherwise imposed. ...”.*



- 7.13. The Panel takes note that the Appellant was notified of the first anti-doping rule violation on 5 May 2015, was provisionally suspended on 7 May 2015 and admitted his anti-doping rule violation on 20 May 2015. The second anti-doping rule violation, committed on 14 April 2015, was notified to the Athlete on 11 June 2015, he admitted this offence on 1 July 2015 and he remained suspended between these dates. The further requirement, that at least one-half of the sanction shall lay after the date of the hearing, when the sanction is imposed, is, however, not fulfilled, if the sanction will be considered as having started on 17 February 2015, the first date of sample collection. This requirement would have been fulfilled if the hearing had taken place as originally scheduled on 11 January 2016. The delay caused by the sudden and sad death of the arbitrator Prof. Colantuoni was not attributable to the Appellant. Thus, the Panel applies Article 10.11.1 DC FINA read together with Articles 10.11.2 and 10.11.3 FINA DC. These provisions read as follows:

*“DC 10.11.1 Delays not attributable to the Athlete or other Person*

*Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified.*

*DC 10.11.3*

*If a Provisional Suspension is imposed and respected by the Athlete or the other Person, then the Athlete or the other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal”.*

- 7.14. The Panel rules, accordingly, that the period of ineligibility of the Appellant shall commence on 17 February 2015 and end two years thereafter. As the period of provisional suspension entirely occurred after 17 February 2015, there is no need to credit such provisional suspension against the period of two years of ineligibility ultimately imposed. All his competitive results achieved on or since 17 February 2015 until the end of the period of ineligibility shall be disqualified.
- 7.15. The Panel states that in accordance with the comment to Article 9 FINA DC *“for Team Sports, any awards received by individual players will be Disqualified”* for the events where the samples leading to the two adverse analytical findings were collected. Accordingly, all individual awards and prizes obtained by Mr Radjen on the occasion of the two matches when his samples were collected are disqualified and must be given back, if any. For the sake of clarity, the Panel observes that, pursuant to Article 11.1 of the FINA DC, the results of the Serbian national team are not affected because no other player committed an anti-doping rule violation in connection with the two matches which yielded the adverse analytical findings of the Appellant.

## ON THESE GROUNDS

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

1. The appeal filed on 11 September 2015 by Mr Nikola Radjen against the decision of the FINA Doping Panel of 24 August 2015 is partially upheld.
2. The decision of the FINA Doping Panel of 24 August 2015 is set aside.
3. Mr Nikola Radjen is sanctioned with 2 (two) years of ineligibility commencing on 17 February 2015.
4. All competitive results obtained by Mr Nikola Radjen on or after 17 February 2015 until the end of the period of ineligibility are disqualified. All awards and prizes achieved by Mr Nikola Radjen on 17 February 2015 and 14 April 2015 shall be forfeited.

(...)

7. All other or further motions or prayers for relief are dismissed.