

FEDERATION INTERNATIONALE DE GYMNASTIQUE



Doc # 72

DECISION

rendered August 15, 2013

by the FIG Appeal Tribunal

The Tribunal

President - George C. Stewart (Canada)
Members - Thore Brolin (Sweden)
Renata Loss Campana (Switzerland)

Appellant

Federation Internationale de Gymnastique (FIG)
Represented by Stephan Netzle, LL.M., and Dr. Karsten Hofmann

Respondents

1. Viktoriia Anikina, Russia
2. Elena Arays, Russia
3. Natalia Gorbulina, Russia
4. Natalia Lashchinskaya, Russia
5. Elena Nefedova, Russia
6. Vera Shatalina, Russia
Respondents Nr 1-6 represented by Dr Xavier Favre-Bulle
7. Irina Berek, Hungary
8. Natalya Bulanova, Azerbaijan
Assisted by the Azerbaijan Gymnastics Federation
9. Monica Guzman, Mexico
10. Nataliya Melkumova, Kazakhstan
11. Tatiana Miltchakova, Sweden
Represented by Lars Nilsson, Attorney-At-Law, and assisted by the Swedish Gymnastics Federation
12. Kurumi Oka, Japan
Assisted by the Japan Gymnastics Association
13. Ella Samofalov, Israel
14. Evangelia Trikomiti, Cyprus
Represented by Christos Konstantinou, LL.M.



15. Fira Voronov, Israel

Represented by Amir Rosenberg and Lydia Mandelbaum, Attorneys-at-law

16. Ying Xie, China

In the matter of appeal of the decision by the FIG Disciplinary Commission on May 30, 2013, rendering an Order of Dismissal of Proceedings “Nolle-Prosequi” by which it refused to proceed further against all of the 56 Judges named in a submission of the FIG to the FIG Disciplinary Commission on December 12 and 18, 2012. The proceedings regarded alleged irregularities at the Intercontinental Rhythmic Gymnastics Course in Bucharest, Romania, on November 19 to 24, 2012 (119 participants), the International Rhythmic Gymnastics Judges Course in Moscow, Russia, on November 28 to December 2, 2012 (90 participants), and the International Rhythmic Gymnastics Judges Course in Alicante, Spain, on December 5 to 9, 2012 (68 participants). The proceedings against the members of the FIG Rhythmic Gymnastics Technical Committee and an Expert were to continue.

1. Facts of the Case

1.1. The Appellant

The FIG has the object a.o. to govern the sport of gymnastics internationally, to organise the official events of the FIG, to fight against all forms of sports injustice and to further the ideas of the Olympic movement. The FIG has organized the courses and exams for Rhythmic Gymnastics Judges mentioned above.

1.2. The Respondents

The Respondents are all Judges in Rhythmic Gymnastics. They participated in the above mentioned courses in Bucharest or Moscow. They all passed the exam and got their brevets.

1.3. The Opening of Disciplinary Proceedings

The FIG on December 12 and 18, 2012 opened a disciplinary procedure against 56 Judges who participated in the above mentioned courses as well as against the members of the FIG Rhythmic Gymnastics Technical Committee and an expert. The brevets and Judges categories assigned at the three courses were considered as provisional by the FIG until the FIG Disciplinary Commission came down with a decision. The Commission during its investigation sent a questionnaire to be answered by involved persons.

1.4. The Appealed Decision

The FIG Disciplinary Commission – Marc Schoenmaekers as President and Paul Engelmann and Rached Gharbi as Members – on May 30, 2013, unanimously decided: As per Article 25 of the FIG Code of Discipline, the Commission orders the dismissal of proceedings against the 56 Judges named in the decision. Only the FIG can appeal as foreseen in Article 25 of the FIG Code of Discipline. As per Article 28, first paragraph, of the FIG Code of Discipline, the Commission decides that costs incurred by the disciplinary proceedings shall be born in principle by the FIG. The parties shall bear their own expenses and costs.



1.5. The Appeal

The FIG has appealed the decision for the 16 Respondents and requested in short the FIG Appeal Tribunal to cancel the Order of Dismissal of Proceedings, to sanction the Judges, to cancel the brevets and impose the Judges to bear the costs of these appeal proceedings. The FIG also requested the Tribunal to provisionally suspend the Judges with immediate effect and not to be eligible to judge any competition in Rhythmic Gymnastics until a final decision has been rendered.

The FIG requests and arguments will be mentioned below. The FIG in its appeal also said that the entire case file of the proceedings before the FIG Disciplinary Commission should be part of the appeal proceedings. The FIG required a hearing to be held before the FIG Appeal Tribunal.

1.6. The Formation of a Panel

The FIG Executive Committee appointed Renata Loss Campana, Thore Brolin and George C. Stewart to handle the appeal. The Panel appointed George C. Stewart as President of the Panel.

1.7. The FIG Appeal Tribunal Decision regarding suspensive effect

The President of the FIG Appeal Tribunal has in a decision on June 27, 2013 ruled that the provisional request by the FIG was dismissed.

1.8. The FIG Disciplinary Commission Decision Final

The FIG Disciplinary Commission has in a decision on July 8, 2013, suspended members of the FIG Rhythmic Gymnastics Technical Committee and declared the results of the examinations at the courses in Bucharest, Moscow and Alicante void and therefore cancelled. The validity of the Judges brevets was declared to end on July 31, 2013. That was the final decision from the FIG Disciplinary Commission regarding the disciplinary proceedings opened by FIG in December 2012. That decision has also been appealed and the appeal is pending.

1.9. The Frankfurt re-test

As a consequence of that decision the FIG Presidential Commission decided on July 9, 2013 to repeat the given Intercontinental Judges' Course to take place in Frankfurt, Germany, July 20, 2013. The FIG Appeal Tribunal has been advised by the FIG that 9 of the Respondents attended the re-test. The FIG has on July 30, 2013, published a list of Rhythmic Gymnastics Judges Certificates in the 12th Cycle (2013-2016). The Judges who got their brevets in Bucharest, Moscow or Alicante are not mentioned in the list, although their brevets were valid until July 31, 2013. As the FIG Appeal Tribunal understands the list, the Judges who got brevets at the re-test in Frankfurt are in the list. It can be seen that all 9 Respondents who made the re-test got brevets.

Viktoriia Anikina obtained brevet category 1 in Frankfurt (category 3 in Bucharest, category 2 in Moscow), Elena Nefedova category 2 (category 1 in Bucharest), Irina Berek category 2 (category 1 in Bucharest), Natalya Bulanova category 3 (category 1 in Bucharest), Monica Guzman category 4 (category 2 in Bucharest), Nataliya Melkumova category 4 (category 1 in Bucharest), Ella Samofalov category 3 (category 1 in Bucharest), Fira Voronov category 2 (category 1 in Bucharest) and Evangelia Trikomiti category 2 (category 2 in Bucharest).

1.10. The Opening of the Procedure by the FIG Appeal Tribunal

The President of the FIG Appeal Tribunal has invited the parties to present their case and invoke evidence. The Respondents were directed to submit their answers not later than July 19, the FIG its reply not later than July 26 and a hearing was offered the parties on July 30 and 31, 2013. The parties were directed to send all submissions directly to the other parties by emails. The Tribunal also via links opened the FIG Disciplinary Commission case file and another case file for the Tribunal.



1.11. The FIG Requests and Arguments

The FIG has requested the FIG Appeal Tribunal to 1) cancel the Order of Dismissal of Proceedings – Nolle Prosequi in respect to the Judges, 2) sanction the Judges for cheating at the exams of the Judges courses in Bucharest or Moscow. The sanctions to be imposed should be at the minimum as follows: a. exclusion of any participation in FIG activities and other international events in Rhythmic Gymnastics for two years (Article 43.2 e) of the FIG Statutes) and b. cancellation of the brevets or diplomas awarded to the Judges (Article 43.2 g) of the FIG Statutes), and 3) impose the Judges to bear the costs of these appeal proceedings and impose them to contribute an amount to the legal costs of the FIG according to Article 28 of the FIG Code of Discipline.

The FIG has in its reply under 2) b. requested the cancellation of “any” brevets or diplomas instead of the cancellation of “the” brevets or diplomas and argued that the brevets from the re-test in Frankfurt shall be cancelled.

The FIG argues that the Respondents cheated on the practical exams held in Bucharest and Moscow. The Rhythmic Gymnastics Judges exam consists of two parts, a theory exam to be answered in writing and a practical exam in which the participants had to evaluate 7 exercises presented on a video screen and give a “difficulty” score for each of them and an evaluation of another 7 exercises for which the participants must give an “execution” score. Before the exam all 14 exercises are evaluated by members of the Rhythmic Gymnastics Technical Committee who sets the expert scores which serve as a reference for the scores of the participants. The participants are then shown the exercises on video and must evaluate each of them. Their results are compared with the expert scores.

The analysis of the exam results shows in Bucharest 11 of the Judges evaluated all 14 exercises identically with a total of 119 Judges taking the course. 13 out of 14 of the scores provided by these 11 Judges are identical with the expert scores. The 14th score deviates by 0.10 from the expert score and the same “mistake” was made by all 11 Judges. Those 11 Judges are Natalia Lashchinskaya, Elena Nefedova, Irina Berek, Monica Guzman, Nataliya Melkumova, Tatiana Miltchakova, Kurumi Oka, Ella Samofalov, Evangelia Trikomiti, Fira Voronov and Ying Xie.

Natalya Bulanova also took the course in Bucharest. She also judged 13 out of 14 exercises identically with the expert score while her only deviation score was of a different on that of the other Judges but the deviation was also just 0.10.

Viktorii Anikina, Elena Arays, Natalia Gorbulina, and Vera Shatalina took the same course in Moscow. Their practical results are identical with the exam results of the 11 Respondents who took the course in Bucharest and include the same mistake.

It is not possible in Gymnastics for the Respondents to have the identical scores with the experts at two different courses. These results could only have occurred by cheating by the Respondents. It is not statistically possible and is not consistent with experience at other championships or in other courses. It does not matter that the courses used the new FIG Code of Points or that very competent and experienced Judges took the courses as there are always variations in Judges scores at competitions and courses.

In the re-test in Frankfurt, which was taken by 9 of the Respondents out of a total of 92 Judges, there is not even one Judge who had 13 out of 14 scores identical with the expert scores. Even the FIG experts who took the same exam did not have identical scores.

Egle Abruzzini and Tamara Bompá, both with extensive experience as international Rhythmic Gymnastics Judges, claim that the results of the Respondents in the two courses could only have



occurred if the Respondents had the information on the expert scores when they completed the scores.

The FIG Disciplinary Commission decision of July 8, 2013 stated on page 25 concerning the course in Bucharest "But, it became clear during the procedure that not the scores but the percentages and categories were changed". In the Order of Dismissal of Proceedings the Commission assumed that the same scores and percentages of many Judges could have been the result of manipulation of the scores and percentages by members of the FIG Rhythmic Technical Committee afterwards. This was a concern for the Commission because the actual exam papers from Bucharest were missing after the exam. But now it is clear that the scores of the Respondents for the two courses are the actual scores of the Respondents and were not altered by other persons.

1.12. The Respondents Requests and Arguments – Irina Berek, Natalya Melkumova and Ying Xie

Irina Berek, Natalya Melkumova and Ying Xie have not filed an answer in this case. The other Respondents have filed submissions and argue as follows.

1.13. The Respondents Requests and Arguments – the Russian Respondents

The Russian Respondents have requested the FIG Appeal Tribunal to make a decision to declare that it has no jurisdiction to decide on the present case, alternatively dismiss the appeal filed by the FIG in its entirety, confirm the FIG Disciplinary Commission's Order of Dismissal of Proceedings against them, order the FIG to pay any and all costs of the disciplinary and appeal proceedings, including a participation towards the legal costs incurred by them, and dismiss any other relief sought by the FIG.

The Russian Respondents argue that the FIG must prove that a specific Judge cheated, i.e. Which Judge received the scores?, Who provided the scores?, How did a Judge get the scores? etc. Fault must be determined specifically and individually and there can be no collective liability. The FIG must also prove intent and fault to impose a sanction.

The FIG has failed to show any specific proof that a Judge cheated. There is no evidence, even from the FIG Vice President Michel Léglise or the FIG Sports Manager Sylvie Martinet, both of whom attended the courses did not see or know of any cheating by them. The only proof the FIG has are its charts containing the results of the exams. These charts of suspicious similar figures are not statistical proof. The exam sheets from Bucharest course are still missing and it is therefore impossible to know the scores obtained in Bucharest, irrespectively of what was said during the hearing before the FIG Disciplinary Commission on July 2 and 3, 2013.

They provide expert statements from Professor V.A Tarmiajov and R.N. Terekhina. These experts discuss statistical methodology and show that no validated method was used by the FIG to support the FIG's interpretation of the exam results. The Russian Respondents reject the FIG's statement the results are "out of any statistical option". The FIG has instead "cherry picked" or only chosen certain Judges scores when other Judges had scores similar to the experts and the FIG has arbitrarily selected only a few of the Judges. Therefore, the FIG has failed to fulfil its burden of proof.

Comparison with former Judges courses or recent competitions are irrelevant because of the new Code of Points which was revised to give a less subjective basis for judging and to make changes for that purpose. The Russian Respondents would not be responsible for mistakes in the course organisation or other irregularities in the preparation or conduct of the courses. The re-test in Frankfurt was done without translations in German or Russian, without lectures or technical



explanations, with too many questions on Rope exercises, with videos shown only once and of poor quality, with no real experts and done under the February 2013 version of the Code of Point. The light was switched on and off each time before playing the videos.

Also recent competitions are irrelevant because at competitions the exercise is only seen once while in the exam it was seen 2 times and many gymnasts are seen at competitions while at the exam only 14 exercises were presented. At exams, Judges are not under the same pressure that goes with important competitions and are focusing on the Code of Points. And at competitions Judges are watching line performances while videos for the exams show specific prepared exercises.

1.14. The Respondents Requests and Arguments – Natalya Bulanova

Natalya Bulanova has said that the retest in Frankfurt is the most objective decision under the current circumstances and existence of different positions and opinions. She had the FIG Judging brevet category 2 for several years.

1.15. The Respondents Requests and Arguments – Monica Guzman

Monica Guzman has on July 26, 2013, i.e. after the time limit for a written submission, requested the FIG Appeal Tribunal to reject the allegations as unfair, groundless and unproven. She says there is another explanation for the identical results – her excellent and hard work for many years, sweat and blood and excellent preparations and states she did not receive any tips or hints or cheat. The new FIG Code of Points was designed to simplify the work of Judges and be more objective. As a result there will be more Judges with the same scores. The course in Bucharest cannot be compared with the other courses and competitions because of the new FIG Code of Points.

1.16. The Respondents Requests and Arguments – Tatiana Miltchakova

Tatiana Miltchakova requests the FIG Appeal Tribunal in the first place to declare that it is not competent to try the appeal and consequently dismiss the appeal and in the second place to reject the appeal in its entirety. She also requests the Tribunal to order the FIG to pay any and all costs relating to the disciplinary and appeal proceedings and to contribute to the legal costs incurred by her. For the question of jurisdiction she refers to what has been said by the Russian Respondents.

Regarding the matter of the case she argues that she is totally innocent of the accusations. She had no knowledge of the expert scores prior or during the exam in Bucharest. She is a highly qualified and experienced judge and coach in Rhythmic Gymnastics. She has been upgraded in three courses in a row and got the brevet category 1 in Bucharest due to hard preparation work and a high quality of the lectures and the teachers. The FIG has the burden of proof that there was a cheating by obtaining the results in advance and that each individual Judge has used these results in the exam. The standard of proof must be set on a very high level, as the allegations are very serious. The accusation has caused her health problems of such severity that she could not participate in the re-test in Frankfurt. The FIG has not been able to present any evidence of the required standard to support its case.

1.17. The Respondents Requests and Arguments – Kurumi Oka

Kurumi Oka has opposed the appeal. She argues that she prepared herself for three month before the course in Bucharest, having difficulties using the English version of “RG Questions of the Examination” posted on the FIG website. In Bucharest she discussed some dubious points with Judges from other countries. She had only pencil and eraser at the exam and sat at the front row at the execution examination. Her writing became like scribble sometimes, but she does not remember her answers since all papers from the examination were submitted. She received the



answers four month later from the FIG Disciplinary Committee. Her honour is significantly hurt and she did not cheat in the examination.

1.18. The Respondents Requests and Arguments – Ella Samofalov

Ella Samofalov has requested the appeal to be dismissed and to impose the costs of these proceedings on the FIG. She joins the objection to the jurisdiction of the FIG Appeal Tribunal and mentions that she or her national federation does not have the financial means to obtain the services of a qualified and experienced lawyer in the field of sport. She received her brevet category 1 already in Minsk 2008 under the supervision of Egle Abruzzini. She did not receive results a priori nor during the examination. If this would have happened, she would immediately and totally have rejected them. The exam was with the new Code of Points which was made to be more objective and make the work of the Judges easier, and therefore it is normal that senior and experienced Judges gave identical or almost identical scores as experts. The comparison with courses made under the old Code of Points is therefore not relevant. And you cannot compare scores given in a “laboratory environment”, such as in an exam in a program, to scores actually given in real time in competitions, such as the European Championships in Vienna. She gave true answers in the questionnaire. The FIG Disciplinary Commission did in its decision on July 8, 2013, not reach the conclusion that the experts or any of them gave her or any other Judge a priori. As there is no new evidence, there is no reason to continue these proceedings.

1.19. The Respondents Requests and Arguments – Evangelia Trikomiti

Evangelina Trikomiti has said that she agrees with the Russian Respondents regarding the competence of the FIG Appeal Tribunal. In the matter and arguments she is of the opinion that the appeal shall be dismissed. The question to be answered is “Do the results prove on the balance of probabilities that any individual Judge cheated?” The similar scores and deviation cannot per se prove that she cheated. It merely indicates an irregular pattern which may or may not be random. Nothing short of a finding of a clear breach will suffice. And the cardinal rule of evidence is that “he who alleges must prove”.

1.20. The Respondents Requests and Arguments – Fira Voronov

Fira Voronov asks the FIG Appeal Tribunal to deny the appeal and any and all requests for relief asked by the FIG. She also asks the Tribunal to instruct the FIG to contribute to the expenses and costs that were and will be borne by her at full.

Fira Voronov argues that there is no concrete evidence against her. Statistics alone are insufficient to implicate any specific person. She is entitled to the benefit of doubt. One Judge could have got the same score as the expert score without cheating. The FIG Appeal Tribunal cannot hear the matter “de novo”. Since the FIG Disciplinary Commission made its decision on July 8, 2013, the Order of Dismissal of Proceedings is no longer relevant. The Commission decision is therefore the final rulings in this case regarding the Judges. Otherwise she has been placed in Double Jeopardy. The standard of proof should be quasi-criminal, i.e. “beyond any reasonable doubt”. Proceeding to use circumstantial evidence will infringe the basic rights of her as it affects her livelihood. She advances several other procedural arguments which are not repeated here but have been considered by the FIG Appeal Tribunal.

She also argues that she participated in the re-test with the result “Very-Good” (85.70 %) and the brevet category 2.



2. Reasons for the Decisions

2.1. The Time for an Appeal

Firstly, the Tribunal finds that the appeal has been made on time.

2.2. The Jurisdiction of the FIG Appeal Tribunal

In the appeal filed by the FIG, the FIG refers to Article 29 of the FIG Code of Discipline which permits appeals to the FIG Appeal Tribunal of decisions of the FIG Disciplinary Commission.

The Russian Respondents with assent of some of the other Respondents object to the jurisdiction of the Tribunal and request that the Tribunal dismiss the appeal as being inadmissible. They argue that Article 20 of the FIG Statutes lists the situations in which the FIG Appeal Tribunal has jurisdiction. Decisions made by the FIG Disciplinary Commission are not mentioned and the decision is not taken within the framework of a competition. And Article 20 does not refer to the FIG Code of Discipline, so Article 25 of the FIG Code of Discipline contradicts the FIG Statutes. The principle of hierarchy of norms is enshrined in Article 44 in the FIG Statutes. Also, Article 20 of the FIG Statutes governs the specific subject matter of the jurisdiction and takes priority over Article 43.1 according to the transnational law principle of *lex specialis derogate legi generali*.

The Tribunal notes that Article 43.1 in the FIG Statutes paragraph 1 establishes the FIG Code of Discipline and the disciplinary procedure. The Tribunal finds that the FIG Code of Discipline specifically concerns the appeal procedure including the right of the FIG to appeal a decision of Nolle Prosequi in Article 25, which is recognized by the FIG Statutes. Therefore, the Tribunal finds that it has the jurisdiction to decide in this case. The CAS has also in many previous cases accepted that the Tribunal has this jurisdiction.

2.3. Request for a Hearing

There was early an issue about whether this matter would proceed by a formal hearing or by written submissions. The FIG initially requested a hearing however the Russian Respondents argued that a hearing was not necessary due to expense, shortage of time to arrange transportation, holiday schedules etc. The FIG advised that it was prepared to have the matter proceed by written submissions if it could provide a witness statement for witnesses it had referred to in the appeal. The FIG Appeal Tribunal then directed that the matter could proceed by written submissions provided that all Respondents agree in light of the Tribunal's initial direction.

Agreements were received before the hearing date by all Respondents to proceeding by written submissions apart from Nataliya Melkumova. Accordingly, the possibility of a hearing had to be maintained until the time for a hearing occurred. On July 30, 2013, no one appearing at 09.00 A.M., the starting time for the hearing, it was finally directed that the matter proceed by written submission – all parties were so advised. The Tribunal apologies to all parties for any inconvenience this may have occurred.

2.4. The Respondents' Request to have the last Word

Concerns were raised by certain Respondents that the FIG was able to fill a reply to the answers from the Respondents but the Respondents were not supposed to give any rejoinder. The FIG Appeal Tribunal directed such a procedure due to the fact that the Respondents were able to get the last word at the hearing. With such a procedure, the Respondents would at the hearing know all requests and all arguments from the Appellant, which in fact is a benefit for them. When the procedure was changed to only written submissions the Respondents were given time to fill in a rejoinder to the reply from the FIG. The Respondents are therefore given the last word in this case.



2.5. Requests for Time Extension

Several requests for time extension were made for filing submissions and the hearing dates. The FIG Appeal Tribunal understands that making a decision on this matter well before the Rhythmic Gymnastics competition schedule began was urgent and important for all parties. Due to the complexity of the documents and the issues, the Tribunal had to schedule dates for it to meet and due to scheduling, the dates of July 30, 31 and August 1, 2013, had to be maintained. Unfortunately, this has caused considerable inconvenience to the parties and their lawyers and this is regretted by the Tribunal.

2.6. Access to the Case File

The Russian Respondents state that they have not had access to the materials from the proceedings of the FIG Disciplinary Commission. The FIG Appeal Tribunal have understood that the all the documents in the Commission case file have been sent to the Respondents by emails and made available to them also via a specific link for downloading the documents, except for the actual exam sheets from Moscow. The exam sheets have been available to all Respondents at the FIG Office, which have been communicated to them.

2.7. Double Jeopardy. The Impact of the FIG Disciplinary Commission Decision to cancel the brevets

Fira Voronov argues that because of the decision of the FIG Disciplinary Commission dated July 8, 2013, which a.o. cancelled the brevets of all the Judges who took the Bucharest, Moscow and Alicante courses including her, that she has been placed in a Double Jeopardy.

In this appeal the FIG is asking a.o. for the cancellation of the brevets of the Respondents obtained in Bucharest and Moscow. The FIG Appeal Tribunal finds that because the FIG Disciplinary Commission in its decision of July 8, 2013 cancelled the brevets of all the Judges who took the courses, there is no decision to be made by the Tribunal on this issue.

The FIG Appeal Tribunal notices that this appeal involves allegations that the Respondents cheated in the practical exams at Bucharest and Moscow. These allegations were not part of the FIG Disciplinary Commission hearing of July 2 and 3, 2013, nor part of the decision of July 8, 2013. In this appeal the FIG is also asking that the Respondents receive a sanction, i.e. exclusion of any participation in FIG activities and other international events in the Rhythmic Gymnastics for two years (Article 43.2 e) of the FIG Statutes.

There has been no other decision, except for the FIG Disciplinary Commission's Order of Dismissal of Proceedings concerning the allegations of the cheating by the Respondents and the principle of Double Jeopardy does not apply in this case.

2.8. The Investigation carried out by the FIG Disciplinary Commission

The FIG argues that the FIG Disciplinary Commission did not carry out its investigation properly and dismissed the case. The FIG argues that the Commission did not hold a hearing. The Commission concluded its investigation without giving the FIG any chance to comment on investigation results and used only a questionnaire completed by the Respondents to investigate the conduct of the Respondents. The Commission dismissed the case due to the "benefit of doubt" and used the wrong standard of proof as it felt no charges could be proved against the Respondents and there was no breach.

The Respondents argue that the Commission carried its investigation properly, and that the FIG was not entitled to comment on the Commission investigation results and the Commission used the correct standard of proof.



The FIG Appeal Tribunal will deal with the standard of proof required in a case of this nature later in these reasons.

The Tribunal finds that the FIG Disciplinary Commission is entitled to carry out its investigation in the manner it deems appropriate in the circumstances. The Commission may or may not hold hearings based on whether it decides the matter should proceed further.

The Tribunal can quite independently of the FIG decide if it needs more information from the FIG for its investigation. The FIG started the proceedings and provided information to the Commission. The Commission was not required to report back to the FIG with the results of its investigations before making its decision.

The FIG has the right under the FIG Code of Discipline Article 25 to appeal the Order of Dismissal of Proceedings which it has done. The FIG has a full right to be heard and provide evidence to the FIG Appeal Tribunal in this appeal. The Tribunal therefore finds that the Commission has made no formal mistakes in how the investigation was carried out.

2.9. The Authority to review “de novo”

From the Order of Dismissal of Proceedings follows that the FIG Disciplinary Commission has not fully investigated the suspicions and that the FIG Appeal Tribunal has to act as a first instance, if the Tribunal does not send the allegations back to the Commission for further investigation. The FIG argues that the Tribunal has the full power and authority to review the facts and law on a “de novo” basis.

Fira Voronov argues that the Tribunal does not have the authority to hear the appeal on a “de novo” basis and argues there is nothing in the FIG Code of Discipline or FIG Statutes indicates so.

The FIG Code of Discipline in Article 29 paragraph 5 provides: “If the Appellant wishes to call witnesses or experts a hearing shall be held”. And paragraph 6 in the same Article states that the FIG Appeal Tribunal automatically conducts the necessary investigations. The paragraph does not mention that the possibility to investigate is limited. Such an investigation can lead to new evidence in the case. The Tribunal finds that because it can hold a hearing with witnesses and also conduct investigations, it must be in a position to hear a case on a “de novo” basis. The matter will be decided “de novo” whether the submissions are oral or in writing.

2.10. Late Submission, New Requests and New Evidence

Monica Guzman has submitted her answer later than required, on July 26 instead of July 19, 2013. It was however done before the time for her rejoinder, which was August 2, 2013, and the FIG has not opposed on her answer. The Tribunal therefore accepts the answer as part of the proceedings.

In the reply, the FIG requests that “any” brevet shall be cancelled and mentions specially the brevets obtained at the re-test in Frankfurt. This is a request not mentioned in the appeal. It is however a consequence of what has happened after the time limit for the appeal. It can also be seen as a part of the original request to suspend the Respondents for two years; if suspended, they would not be able to use their brevets. The Respondents have had an opportunity to answer the request in their rejoinders. The extended request from the FIG is therefore accepted.

The FIG also makes reference to the decision of the FIG Disciplinary Commission dated July 8, 2013 and the results of the re-test held July 20, 2013 in Frankfurt. These references are new evidence in the meaning they were not mentioned in the appeal. Article 29 of the FIG Code of Discipline provides appeals of the FIG Disciplinary Commission decisions. It says in paragraph 6 that “Once his/her statement of the case is submitted, the Appellant shall not be authorised to



produce new means of proof unless he/she justifies that he/she has not been able to do so for reasons beyond his/her control or his/her behest”.

The Commission decision, the hearing and the re-test have all happened after the time limit for the appeal. This evidence was therefore not available to be mentioned in the appeal. The decision was foreseen by the Russian Respondents in the letter to the FIG Appeal Tribunal on June 26, 2013, and in their answer. Arguments have also been made by both the FIG and some of the Respondents about the use of the exam results from other FIG brevet courses. Some of the results relate to courses before and after the current Code of Points. The new evidence must therefore be allowed in the case. The Tribunal acknowledges that this evidence comes very late in the case. However, the Respondents have had the opportunity to respond as previously directed. The Russian Respondents argues that they agreed to a hearing being replaced by a second exchange of written submissions only provided that the FIG was not allowed to file new inadmissible evidence. The second submission from the FIG was however directed even before the discussion of not having a hearing started.

It must be noticed that the Respondents were not part of the proceedings before the FIG Disciplinary Commission at the hearing on July 2 and 3, 2013. They were therefore not able to cross exam the parties or the witnesses. They have not been able to read the Commission case file regarding that process after May 30, 2013. For these reasons, the evidence brought forward in the continuing process at the Commission after May 30, 2013 and at the hearing must have a limited value in the actual process.

The FIG has in its reply made an offer to decode the result tests and provide the specific data of the 9 Respondents who participated at the re-test, if the FIG Appeal Tribunal so decides. The Tribunal do not find it necessary to have these specific data.

2.11. The Merits of the Case – Burden of Proof and Standard of Proof

When it comes to the merits of the case the burden of proof is on the FIG in accordance with Swiss law as set out in Article 8 in the Swiss Civil Code.

About the standard of proof the Russian Respondents with support of some other Respondents suggests that it should be high.

According to a well-established jurisprudence by the Court of Arbitration for Sport (CAS), the standard of proof to be applied in disciplinary cases is that of “comfortable satisfaction” of the hearing panel. According to this standard of proof, the sanctioning authority must establish the disciplinary violation to the comfortable satisfaction of the judging body bearing in mind the seriousness of the allegation. It is a standard that is higher than the civil standard of “balance of probability” but lower than the criminal standard of “proof beyond a reasonable doubt” (cf. CAS 2010/A/2172 Oriekhov v. UEFA, para. 53; CAS 2009/A/1920 FK Pobeda v. UEFA, para. 85).

The next question is what should be proven in this case. The FIG has in its reply said that the issue to be determined by the FIG Appeal Tribunal is whether the exam results of the Respondents at the Judges courses in Bucharest and Moscow were achieved by regular or irregular means. The Russian Respondents and some of the other Respondents have argued that the specific acts of cheating must be proved, i.e. who had the expert scores before the test, where did they get them from etc.

The Tribunal is of the opinion that it might be sufficient reason for cancellation of the brevets if there were any severe irregularities at the exams. But as the validity of the brevets has already been cancelled the question now is to decide if the Respondents should be suspended. And to put



a sanction on a Respondent the Tribunal must be comfortably satisfied that every Respondent had received the expert scores in an illegal way before the actual exam.

2.12. The Statistics about the Exam Results. Circumstantial Evidence

The Respondents have pointed out that the evidence relied on by the FIG is circumstantial evidence and that no direct evidence of cheating has been referred to by the FIG. Whether the evidence can be categorised in one way or the other is however of minor importance and statistics are a part of almost all evidence presented before panels and in courts. DNA test results, fingerprint analysis and handwriting examinations all depend on the statistical expectation that the sample, fingerprint or signature could come from someone else.

The FIG has relied on the exam results from Bucharest and Moscow regarding the Respondents. The FIG has also argued in the same way for all of the Respondents although there are differences in their exam results. Viktoriia Anikina was first in Bucharest and then in Moscow making the same exam again, which could explain some of her progress; she has got an even higher category of her brevet at the re-test in Frankfurt. And Natalya Bulanova has not made the same “mistake” as the other Respondents. And the FIG has not argued as to how big an impact it might have had, the fact that the results of the Bucharest exam were given to the participants already at a dinner on site and before the Moscow exam.

When statistical evidence is presented in court or before an arbitration panel it is normally followed by a mathematical calculation with the result of how possible it is that e.g. the DNA sample comes from another person. The expectation can be said to be 1 in 1000 or 1 in 3 million. These calculations clearly shows how the math is done, what figures has been chosen and why. The expectation for a DNA sample can e.g. be given due to that the unknown person comes from the same part of the world. The importance of a proper mathematical concept shall be discussed further below. The FIG Appeal Tribunal will already at this stage point out that it is not the work of a court or panel to make its own mathematical calculations when a party presents only the background data. The calculation is evidence that must be produced by the parties and they shall have a possibility to review each other's contentions.

2.13. The FIG has not fulfilled its Burden of Proof

Evidence presented by the FIG shows that the Respondents have identical or almost identical results in the exams. The possibility of this is by the FIG said to be “not statistical possible”, but no figures of the expectation has been mentioned. The FIG Appeal Tribunal agrees with the FIG that the possibility to have these results without knowing the experts score before the exam is low. The same “mistake” mentioned by FIG makes the possibility even lower, even if the mistake-score seems to be common also by other participants in the exams. The question for the Panel is however not *if* the possibility is low, rather *how low* it is.

Regarding the possibility the mathematical calculation cannot be made from a total random background since the participants were experienced Judges and the variation between all participants were quite small. The scores do not vary much for each execution but rather from 7.1 to 7.5 or something likely in every execution, which also influences the expectation of identical scores.

It is, as mentioned above, important to do a proper application of mathematical concepts to get a reliable result. An improper application can lead to non-valid results, which is shown by the mathematicians Leila Schneps and Coralie Colmez in their book *Math on Trial: How Numbers Get Used and Abused in the Courtroom*. The application is as important in civil as in criminal cases and is independent of the standard of proof. The case with the Dutch nurse Lucia de Berk is an



example of how the fact that the selection of alleged incidents was biased can lead to wrong conclusions.

In this case none of the parties has offered the FIG Appeal Tribunal evidence that shows how possible it was for one of the Respondents to get the identical or almost identical exam results as the expert score without knowing the expert score before the exam. The Tribunal also notice that there are differences between the Respondents that have not been explained or calculated. An aggregative assessment in this case must therefore come to the conclusion that it is not proven to a comfortable satisfaction that all Judges have committed the alleged breaches. As it is possible that at least one of them have not cheated, the consequence is that none of them can be sanctioned at this stage. Even with the new evidence concerning the July 20, 2013 testing in Frankfurt, the Appeal Tribunal is not satisfied that one of the Respondents in either Bucharest or Moscow could not have achieved the same scores as the experts.

As mentioned above, the Tribunal has the authority to send the case back to the FIG Disciplinary Commission for further investigations. In this case, the Commission in its decision has mentioned the possibility to go on with the investigation at a later stage; if the Tribunal now decides to dismiss the appeal that decision will be final, if no appeal to CAS will make it impossible to come back in the future. And making an investigation “de novo” at an appeal stage means that the parties miss one instance to adjudicate the allegations. However, no party is arguing for further investigation or mentions the possibility to send the case back. And as the parties seem to have accepted that the Tribunal shall rule on the matter of the case, the FIG appeal must be dismissed in its entirety.

3. Costs before the FIG Appeal Tribunal

The FIG Code of Discipline, Article 28, states that the costs incurred by the disciplinary proceedings shall be borne in principle by the FIG. However, the Disciplinary Authority may direct that whole or part of the costs of the proceedings be borne by the sanctioned party. The Article also states that the parties shall bear their own costs. The unsuccessful party may have to pay to the successful party a fair contribution to the expenses (costs of the party and the lawyer) incurred by the successful party.

The Tribunal finds that the costs of the proceedings shall be borne by the FIG.

The FIG requests that the FIG Appeal Tribunal shall impose the Respondents to bear the costs of these appeal proceedings and impose them to contribute an amount to the legal costs of the FIG according to Article 28 of the FIG Code of Discipline. As the FIG is the unsuccessful party, this request cannot be granted.

The Russian Respondents and some of the other Respondents request that the Tribunal shall order the FIG to pay any and all costs of the disciplinary and appeal proceedings, including participation towards the legal costs incurred by them. As the FIG is the losing party, the Tribunal finds it fair and reasonable that the FIG contribute to each of the Respondents who have engaged a lawyer. The amount of CHF 1'000 for each lawyer is reasonable. This means that the FIG shall pay CHF 1'000 for each of Xavier Favre-Bulle, Lars Nilsson, Christos Konstantinou and Amir Rosenberg or Lydia Mandelbaum, totally CHF 4'000.




4. Conclusion

On these Grounds

The FIG Appeal Tribunal rules unanimously that:

1. **The FIG appeal is dismissed.**
2. **The FIG shall pay CHF 4'000 to the Respondents for their costs and expenses.**
3. **All other requests are dismissed.**

Decisions of the FIG Appeal Tribunal may be appealed within 21 days to the Court of Arbitration for Sports in Lausanne (FIG Statutes Articles 21 and 42.1 and the FIG Code of Discipline Article 31).



George C. Stewart
President



Renata Loss Campana
Member



Thore Brodin
Member