SPORT RESOLUTIONS (UK)

SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/Adhocsport/64/2018

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF THE INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS.

Before:

Michael Beloff QC (Chair)

Maidie Oliveau

Patrick Grandjean

BETWEEN:

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS ("IAAF")

Anti-Doping Organisation

- and -

ASBEL KIPROP

Respondent

Decision of the Disciplinary Tribunal

A. INTRODUCTION

1. Mr Asbel Kiprop, a Kenyan athlete ("the Athlete") is an Olympic gold medallist in the 1500 metres (Beijing 2008) and a triple world champion in the same event, Daegu (2011), Moscow (2013) and Beijing (2015). He holds the third fastest time ever over that distance.

2. The Athlete has been charged by the Athletics Integrity Unit ("AIU") acting on behalf of the IAAF[1], with violations of the IAAF Anti-Doping Rules ("ADR") as described below.

B. CHRONOLOGY

3. On 27 November 2017, the Athlete underwent an Out-of-Competition doping control in Iten, Kenya and provided a urine sample numbered 3099705 ("**the Sample**").

4. Between 5 and 22 December 2017, the Sample was analysed by the WADA accredited laboratory in Stockholm, Sweden (the "**Laboratory**") and revealed the presence of "*S2. Peptide Hormones, Growth Factors, Related Substances and Mimetics/erythropoietin (EPO)"* ("EPO") (the "**Adverse Analytical Finding**").

5. EPO is included in section 2 of the WADA 2017 Prohibited List, Peptide Hormones Growth Factors, Related Substances, and Mimetics[2]. It is a prohibited non-specified substance, which accordingly an athlete may take neither in nor Out-of-Competition. It is administered by injection and artificially increases red blood cells so enhancing stamina and assisting recovery.

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[1] The international federation governing the sport of Athletics worldwide. which has its registered seat in Monaco.

[2] https://www.wada-ama.org/sites/default/files/resources/files/2016-09-29_-_wada_prohibited_list_2017_eng_final.pdf

6. On 3 February 2018, representatives of the AIU provided the Athlete by hand with a copy of a letter dated 24 January 2018 which notified the Athlete of the Adverse Analytical Finding, informed him of his right to have the B Sample analysed, and invited him to provide an explanation within the next ten days. In addition, the Athlete was provisionally suspended pending resolution of the case.

7. On 4 February 2018, the Athlete contacted the AIU by e-mail requesting analysis of the B Sample. The Athlete confirmed that he would not be present for the opening or analysis of the B Sample but was content for the process to proceed in the presence of an independently appointed witness.

8. On 20 February 2018, the AIU informed the Athlete that the B Sample analysis had confirmed the Adverse Analytical Finding and invited him to attend a meeting with representatives from the AIU in London to discuss the matter.

9. On 12 and 13 March 2018, the Athlete attended a meeting with representatives of the AIU in London, when he was again asked to provide his explanation for the Adverse Analytical Finding.

10. The Athlete stated that he had never injected EPO and denied that he had committed any anti-doping rule violations. He confirmed that he could not explain the Adverse Analytical Finding.

11. On 16 March 2018, the Athlete was issued with a Notice of Charge pursuant to Art 8.4.1 ADR for committing the following anti-doping rule violations: a) presence of a prohibited substance or its metabolites or markers in an athlete's sample, pursuant to Art 2.1 ADR, and b) use of a prohibited substance pursuant to Art 2.2 ADR.

12. Between 16 and 23 March 2018, the Athlete (and latterly Mr Joseph Kipchumba Kigen Katwa of his appointed lawyers, Katwa & Kemboy - "Mr Katwa Kigen") provided the Athlete's response to the Notice of Charge in a number of e-mails to the AIU; which repeated his denial that he had committed the anti-doping rule violations set out in the Notice of Charge.

13. The Athlete alleged more particularly that the Sample was not his sample and/or was tampered with or adulterated and/or that the analysis of the Sample was in some way flawed. The Athlete also alleged that he had been provided with advanced notice of testing, including of the testing that took place on 27 November 2017 that produced the Adverse Analytical Finding.

14. On 12 April 2018, a Preliminary Meeting was convened before the Chair of the Panel Michael J Beloff QC ("the Chair") in accordance with Art 8.7 ADR and directions issued to the parties (the "**Directions**").

15. On 26 April 2018, the AIU filed its brief on behalf of the IAAF.

16. On 10 May 2018, the Athlete filed his Answer brief.

17. On 1 June 2018, the AIU filed its reply brief.

18. On 18 July 2018, the Chair ruled on certain interlocutory applications made by the Athlete. A copy of that ruling is annexed to this award as Annex A.

19. On 20 September 2018, the Panel granted the AIU an adjournment of the hearing then fixed for 25 September 2018.

20. On 26 February 2019, the Panel refused the AIU a further adjournment of the hearing now fixed for 21 March 2019.

21. On 21 March 2019, a hearing was held before this Panell (Michael Beloff QC (Chair), Maidie Oliveau and Patrick Grandjean) at the offices of Sport Resolutions in London. The AIU was represented by Messrs Ross Wenzel and Huw Roberts, legal counsel assisted by Ms Laura Gallo and Mr Tony Jackson (Athletics Integrity Unit). The Athlete was present and assisted by his legal counsel, Mr Katwa Kigen. The Athlete gave evidence and at the conclusion of the hearing made a personal statement.

22. The following witnesses and expert gave evidence before the Panel:
    - Mr Kelvin Kipkorir ("Mr Kipkorir");
    - Mr Alfonce Kiplimo Kiplagat ("Mr Kiplagat");
    - Mr Paul Scott ("Mr Scott");
    - Mrs Elizabeth Scott (Mrs Scott"), and;
    - Dr. Jean-François Naud.

23. On 4 April 2019, the Athlete filed his Skeleton Summary of his case.

C. JURISDICTION AND APPLICABLE RULES

I. Jurisdiction

24. Art 1.2 ADR states as follows:

> *In accordance with Article 16.1 of the IAAF Constitution, the IAAF has established an Athletics Integrity Unit ("**Integrity Unit**") with effect from 3 April 2017 whose role is to protect the Integrity of Athletics, including fulfilling the IAAF's obligations as a Signatory to the Code. The IAAF has delegated implementation of these Anti-Doping Rules to the Integrity Unit, including, but not limited to the following activities in respect of International-Level Athletes and Athlete Support Personnel: Education, Testing, Investigations, Results Management, Hearings,*

Sanction and Appeals. The references in these Anti-Doping Rules to the IAAF shall, where applicable, be references to the Integrity Unit (or to the relevant person, body or functional area within the Unit)

25. The application of the ADR to athletes, athlete support personnel and other persons is set out in Art 1.7 ADR, including:

1.7 These Anti-Doping Rules also apply to the following Athletes, Athlete Support Personnel and other Persons, each of whom is deemed, by condition of his membership, accreditation and/or participation in the sport, to have agreed to be bound by these Anti-Doping Rules, and to have submitted to the authority of the Integrity Unit to enforce these Anti-Doping Rules:

a) all Athletes Athlete Support Personnel and other Persons who are members of a National Federation or of any affiliate organisation of a National Federation (including any clubs, teams associations or leagues);

b) all Athletes, Athlete Support Personnel and other Persons participating in such capacity in Competitions and other activities organized, convened, authorized or recognized by (i) the IAAF (ii) any National Federation or any member or affiliate organization of any National Federation (including any clubs, teams, associations or leagues) or (iii) any Area Association, wherever held;

c) all Athlete Support Personnel and other Persons working with, treating or assisting an Athlete participating in his sporting capacity; and

d) any other Athlete, Athlete Support Person or other Person who, by virtue of an accreditation, licence or other contractual arrangement, or otherwise, is subject to the jurisdiction of the IAAF, of any National Federation (or any member or affiliate organization of any National Federation, including any clubs, teams, associations or leagues) or of

any Area Association, for purposes of anti-doping.

26. The applicable rules are the ADR, which apply to all athletes who are members of a National Federation and to all athletes participating in competitions organised, convened, authorised or recognised by the IAAF.

27. The Athlete is a member of Athletics Kenya. He has represented his country in international competitions including the Olympic Games in 2008 and 2016, in five consecutive editions of the IAAF World Championships since 2007 and the Diamond League series since 2010. The Athlete is therefore subject to the ADR pursuant to *inter alia* Art 1.7(a) ADR and 1.7(b) ADR.

28. Art 7.2 ADR confers jurisdiction for results management on the AIU in certain circumstances, including:

> *7.2 The Integrity Unit shall have results management responsibility under these Anti-Doping Rules in the following circumstances:*
>
> *7.2.1 For potential violations arising in connection with any Testing conducted under these Anti-Doping Rules by the Integrity Unit, including investigations conducted by the Integrity Unit against Athlete Support Personnel or other Persons potentially involved in such violations.*

29. The Sample was collected pursuant to Testing undertaken by the AIU on behalf of the IAAF. The AIU therefore has jurisdiction for results management in this matter.

30. The IAAF has established the Disciplinary Tribunal in accordance with Art 1.5 ADR, which provides that the Tribunal shall determine anti-doping rule violations committed under the ADR.

31. Art 8.2(a) ADR sets out that the Tribunal shall have jurisdiction over all matters in which:

(a) An Anti-Doping Rule Violation is asserted by the Integrity Unit against an International-Level Athlete or Athlete Support Person in accordance with these Anti-Doping Rules;

32. Art 1.9 ADR specifies those athletes that are classified as international-level athletes for the purpose of the ADR as follows:

> *1.9 Within the overall pool of Athletes set out above who are bound by and required to comply with these Anti-Doping Rules, each of the following Athletes shall be considered to be an International-Level Athlete ("**International-Level Athlete**") for the purposes of these Anti-Doping Rules and therefore the specific provisions in these Anti-Doping Rules applicable to International-Level Athletes shall apply to such Athletes:*
>
> *(a) An Athlete who is in the International Registered Testing Pool;*

33. The Athlete was in the International Registered Testing Pool on 27 November 2017. It follows, therefore, that the Athlete is an International-Level Athlete pursuant to Art 1.9(a) ADR.

34. For the above reasons the Tribunal, and this duly constituted Panel, have the requisite jurisdiction to hear and determine anti-doping rule violations alleged against the Athlete.[3]

II. Applicable Rules

35. Art 2 ADR specifies the circumstances and conduct that constitute anti-doping rule violations.

[3] An earlier challenge to jurisdiction was dismissed. see Annex A para 2.

36. Art 2.1 ADR, specifies:

> ***2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample***
>
> *2.1.1 It is each Athlete's duty to ensure that no Prohibited Substance enters his body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence, or knowing Use on the Athlete's part be demonstrated in order to establish an Anti-Doping Rule Violation under Article 2.1.*

37. Art 2.2 ADR specifies:

> ***2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method***
>
> *2.2.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his body and that no Prohibited Substance is Used. Accordingly, it is not necessary that intent, Fault, negligence, or knowing Use on the Athlete's part be demonstrated in order to establish an Anti-Doping Rule Violation under Article 2.1.*

38. With regard to the presence of a prohibited substance or its metabolites or markers in an athlete's sample, Art 2.1.2 ADR states:

> *2.1.2 Sufficient proof of an Anti-Doping Rule Violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or, where the Athlete's B Sample is split into two bottles and the analysis of the second bottle*

confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

39. With regard to an athlete's use of a prohibited substance or prohibited method, Art 2.2.2 ADR provides:

> *2.2.2 The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an Anti-Doping Rule Violation to be committed.*

40. The presence of a prohibited substance or its metabolites or markers in an athlete's sample is therefore sufficient to establish that an athlete has committed an anti-doping rule violation pursuant to Art 2.1 ADR. Additionally, the use of a prohibited substance or a prohibited method is sufficient to establish that an Athlete has committed an anti-doping rule violation pursuant to Art 2.2 ADR.

41. Art 3.1 ADR provides that the IAAF shall have the burden of establishing that an anti-doping rule violation has occurred to the comfortable satisfaction of the Panel:

> *3.1 The IAAF or other Anti-Doping Organisation shall have the burden of establishing that an Anti-Doping Rule Violation has been committed. The standard of proof shall be whether the IAAF has established the commission of the alleged Anti-Doping Rule Violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.*

42. Art 3.2 ADR states that facts relating to anti-doping rule violations may be established by any reliable means.

43. In that regard, Art 3.2 ADR also states:

> *3.2.2 Compliance with an International Standard (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the International Standard were performed properly.*
>
> *3.2.3 WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in compliance with the International Standard for Laboratories. The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred that could reasonably have caused the Adverse Analytical Finding. In such an event, the IAAF shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.*
>
> *3.2.4 Departures from any other International Standard, or other anti-doping rule or policy set out in the Code or these Anti-Doping Rules that did not cause the facts alleged or evidence cited in support of a charge (e.g., an Adverse Analytical Finding) shall not invalidate such facts or evidence. If the Athlete or other Person establishes the occurrence of a departure from an International Standard or other anti-doping rule or policy set out in the Code or these Anti-Doping Rules that could reasonably have caused the Adverse Analytical Finding or other facts alleged to constitute an Anti-Doping Rule Violation, then the IAAF or other Anti-Doping Organisation shall have the burden to establish that such departure did not cause such Adverse Analytical Finding or the factual basis for the Anti-Doping Rule Violation.*

44. The AIU may therefore rely on the results from analysis of the Sample by the Laboratory, which is presumed to have conducted analysis and custodial procedures in accordance with the International Standard for Laboratories ("**ISL**"), in order to satisfy the burden and standard of proof placed upon it according to the ADR.

D. THE ATHLETE'S CASE

45. As already noted the Athlete denies the anti-doping rule violations with which he has been charged. At various times and in various formats he has proposed a number of possible explanations for the Adverse Analytical Finding including that:

(a) The EPO detected was naturally produced due to intense exercise at altitude (2400m a.s.l and 2700m a.s.l) in November 2017, following a rest period of approximately six weeks ("Natural EPO?");

(b) Medication taken in the seven days before collection of the Sample and disclosed on the Doping Control Form (DCF), including Zithromax 500, Piriton and Panadol caused the Adverse Analytical Finding; ("Medication")

(c) The Sample collection procedures were not conducted properly ("Irregular Sample Collection");

(d) He was the victim of spiking or substitution of his sample ("Spiking/substitution"?);

(e) The chain of custody may have been broken ("Breach of Chain of Custody");

(f) The analytical procedures were incorrect ("Analytical errors").

46. Mr Katwa Kigen, for the Athlete accordingly presented the Panel with an à la carte menu of reasons why the charges should be dismissed; rather than a table d'hôte of one. He did so with tenacity, ingenuity and charm. Mr Wenzel for the IAAF with his, as always, focussed advocacy argued that none of the various reasons proposed by Mr Katwa Kigen, when subjected to strict scrutiny, had any plausibility.

47. The Panel will consider each reason advanced by the Athlete in order.

Natural EPO?

48. Professor Yorck Olaf Schumacher, the expert for the AIU, in his report dated 25 April 2018, acknowledges that intense exercise at high altitude might result in an increased level of natural EPO in the blood but cannot explain the presence of recombinant EPO in the Athlete's Sample. Recombinant EPO and natural EPO have distinctively different glycosylation properties which result in differences in the electrical charge of the EPO molecules detectable by the analysing laboratory. The laboratory is therefore able to distinguish in its analysis between recombinant EPO and natural EPO. It is uncontested in this case that the analysis conducted by the Laboratory detected recombinant EPO in the Athlete's Sample.

49. No challenge to his evidence on this point was advanced by the Athlete. The two experts relied on by him, Dr Alberto Dolci and MrSammy Rotich, dealt with other aspects of the analysis. Their evidence, also adduced in the form of reports, will be considered later.

50. The Panel is therefore comfortably satisfied that the Sample analysed by the Laboratory contained recombinant, and not natural EPO.

Medication

51. No evidence was adduced to suggest that any of the medications taken by the Athlete contain recombinant EPO; and their advertised components would be inconsistent with such suggestion.

52. The Panel is therefore comfortably satisfied that none of them could have caused the Adverse Analytical Finding.

Irregular Sample Collection

53. It is common ground between the parties that there was at least one irregularity in the sample collection, namely the advance notice given to the Athlete by Mr Simon Karugu Mburu ("Mr Mburu"), the assistant doping control officer ("ADCO").

54. Art 4.6.2 of the International Standard for Testing and Investigations 2017[4] ("**ISTI**") provides as follows:

> *Save in exceptional and justifiable circumstances, all Testing shall be No Advance Notice Testing:*
>
> *a) For In-Competition Testing placeholder selection may be known in advance. However, random Athlete/placeholder selection shall not be revealed to the Athlete until notification;*
>
> *b) All Out-of-Competition Testing shall be No Advance Notice Testing save in exceptional and justifiable circumstances*

55. In his Witness Statement dated 25 April 2018, Mr Mburu admitted that on 21 November 2017, 26 November 2017 and 23 January 2018, he provided the Athlete with advance notice of testing that was to take place on 22 November 2017, 27 November 2017 and on 24 January 2018 respectively. While Mr Mburu was withdrawn from the roster of witnesses to be called by the AIU, his allegation on this issue was corroborated by the Athlete.

[4] https://www.wada-ama.org/sites/default/files/resources/files/2016-09-30_-_isti_final_january_2017.pdf

56. Such advance notice of testing to the Athlete on, inter alia, 26 November 2017, in the Panel's view constituted a clear departure from the requirements of the ISTI. This was a precondition necessary to impugn the Adverse Analytical Finding; but it was not, under the ADR, a sufficient one.

57. Art 3.2.4 of the ADR provides that a departure that does not cause the facts alleged or evidence cited in support of a charge (in this case, the presence of EPO in the Sample) shall not invalidate such facts or evidence. It also provides that, where an athlete establishes a departure that could reasonably have caused the Adverse Analytical Finding, then the IAAF shall have the burden to establish that such departure did not cause such Adverse Analytical Finding.

58. The Athlete must therefore establish that the advance notice provided to him by Mr Mburu on 26 November 2017 could reasonably have caused the presence of EPO in the Sample. Only in those circumstances would the burden then shift to the IAAF to show that the advance notice did **not** cause the Adverse Analytical Finding.

59. In the Panel's view, advance notice of an Out-of-Competition test might work to the advantage of an athlete who had been using prohibited substances by prompting him either to make use of masking agents or to avoid such test by absenting himself from his designated whereabouts. The Panel was, however, unable to conceive of any link between such advance notice and the Adverse Analytical Finding in this (or any other advance notice) case.

60. In short the Panel is comfortably satisfied that the advance notice departure from the ISTI requirements did not cause, and could not reasonably have caused, the presence of EPO in the Sample. There is no discernible link between the two phenomena.

61. There is undisputed evidence that at 8.11am on 27 November 2017, i.e. shortly after provision of the Sample, the Athlete paid Mr Mburu the sum of Ksh 3,200 by use of MPESA transfer. If that payment had been a quid pro quo for the advance notice, that would, in the Panel's view, have compounded the irregularity, but even on this hypothesis, there would be no discernible link between the payment and the Adverse Analytical Finding.

62. In any event the circumstances surrounding the payment were somewhat obscure. According to the Athlete (the only witness to the incident once the AIU decided not to call Mr Mburu), Mr Mburu simply asked him for money without naming an amount or explaining why he needed it. The Athlete for his part simply assumed that Mr Mburu needed it for tea, fuel "or some other thing" and never made any inquiry as to what he needed it for. The Athlete further said that it was not until after his meeting in London with the AIU in March 2018 that he took note of the chronological connection between Mr Mburu's demand for money and the doping control which led to the Adverse Analytical Finding and surmised for the first time that this might be more than mere coincidence.

63. However, although the Panel expressly invited the Athlete to explain how the demand for payment (and its satisfaction) could have caused the Adverse Analytical Finding, he was unable to provide such explanation and again the Panel was unable itself to conceive of one. The link remained missing.

64. Mr Katwa Kigen made a submission that, even if no causative link could be established between the irregularities so far discussed and the Adverse Analytical Finding, nonetheless the doping control process was corrupted from its inception and the Panel should dismiss the charges in limine as an abuse of process. This bold and novel submission had no identifiable foundation in principle or the relevant regulations (ADR and ISTI); indeed it was inconsistent with the latter.

65. There were, however, further matters raised under this heading in relation to which there was a conflict of evidence which had to be resolved.

66. It was not in issue between the parties that:

(i) The Athlete's whereabouts information for 27 November 2017, according to the ADAMS database indicated 7am-8am at a house in Iten;

(ii) The Athlete presented himself at the due time for the Out-of-Competition test and, once formally notified by Mr Scott, the DCO, at 7.54am that he was to be subject to such test, went to the latrines outside the house with Mr Mburu to provide a urine sample;

(iii) The Athlete returned to the sitting room followed by Mr Mburu;

(iv) The Athlete was carrying the urine collection vessel;

(v) The Athlete divided the urine between the A and B Sample bottles himself and sealed them;

(vi) Mr Scott checked that the bottles were sealed in full view of the Athlete.

67. However the Athlete, supported by Mr Kevin Kipkorir, one of his house-mates and Mr Alfonce Kiplimo Kiplagat, a neighbour, claimed he had been in the house at Iten overnight, whereas Mr Scott and Mrs Scott, his wife (and DCO in another test involving a female athlete scheduled for later that morning), declared that the Athlete arrived at Iten only shortly before final point in time when the test was due to be carried out. There was also a collision of testimony between the same persons as to when the Scotts themselves arrived and whether Mrs Scott went inside the Athlete's house on 27 November 2017 at all. ("the disputed peripheral points'')

68. Resolution of the disputed peripheral points went to credit rather than to any substantive issue. It was relevant to the regularity of the doping control that the Athlete did present himself timeously for the test, and that the DCO was himself present at that time. However where the Athlete slept the night before and when the DCO arrived were equally irrelevant to that matter and Mrs Scott's presence or absence had no bearing whatsoever upon it. Nonetheless it was argued that, if in error or deceitful on collateral matters, the key witnesses might not be reliable on core matters, in particular whether at any time after provision of the sample the Athlete left the room where it had been placed so disabling himself from checking that it had been subject to no untoward activity, spiking or substitution, by some other person ("the key disputed issue'').

69. The Panel prefers, where there was division between the parties, the evidence of the Scotts on the key disputed issue for the following main reasons:

(i) In the Panel's view the sequence of submission of statements is important. Mr Scott's first statement was dated 25 April 2018. It described an orthodox unfolding of events in an Out-of-Competition test. It was corroborated by the electronic DCF which verified the timings of the notification at 7.54 am and the sealing at 8.20 am. It was not suggested that Mr Scott was privy to the advance notice given by Mr Mburu. Critically in that statement Mr Scott stated that the Athlete never left the sitting room where the sample was ultimately sealed (and therefore both would have been aware of any spiking or substitution). Such, albeit temporary, exit from the place where the sample was being held prior to sealing would have been itself irregular, and to the Athlete's disadvantage.

(ii) According to Mr Scott and the Athlete, the Athlete was afforded the opportunity to comment on the accuracy of the DCF (an opportunity which was as available on an electronic as on a paper version) and made no comment that there had been any irregularity at all. Indeed the DCF itself confirms that the Athlete signed it as accurate without any reservation.

(iii) The Panel can envisage reasons why the Athlete forbore to comment on the advance notice or request for payment by Mr Mburu but since those two facts are common ground, it does not need to explore what those reasons were or might have been. However if the Athlete had left the sitting room to make a money transfer (a matter on which there was a dispute) he could usefully have commented on it on the DCF.

(iv) Be that as it may, it was, however, only in his responsive witness statement dated 10 May 2018 that the Athlete raised for the first time that he did leave the sitting room and go into the bedroom to charge his mobile telephone so as to make an electronic money transfer while his unsealed Sample was in the sitting room. Why he did so by that method rather than cash and why he felt the need to do so urgently was not a matter fully explored before or by the Panel since it was irrelevant to the issue of how the Athlete's Sample was dealt with.

(v) The credibility of the Athlete on the question of whether and for whatever reason he deprived himself of unbroken sight of the Sample prior to its sealing, was damaged by the fact that in a note of his conversation with the AIU on 5 April 2018 that he himself approved and in some parts amended, he left untouched an unequivocal statement that he was "in the sitting room" at the material time as indeed he ought to have been.

70. In the light of the above points the Panel concludes that the Athlete did remain continuously in the sitting room at the material period because:

(i) that was his own initial evidence, and no cogent reason was given as to why he allowed it to remain on the record;

(ii) it would have been a dereliction of duty for Mr Scott to permit him to leave.[5] The Panel could see no good reason why Mr Scott on this occasion should have chosen to commit such a breach;

(iii) with benefit of the testimony of both Scotts, albeit by video conference, and taking account of their previous profession as teachers as well as their long experience as DCOs, the Panel accepted their evidence on that point as set out in both Mr Scott's initial witness statement as well as his further statement dated 23 May 2018, and Mrs Scott's statement dated 23 May 2018, both responsive to the Athlete's belated raising of this point;

(iv) further to (iii) if the Athlete made the money transfer from the sitting room (as distinct from elsewhere) at 8.11 am, it is odd that neither of the Scotts noticed any activity by him on his mobile telephone and were so positive that there was none (and no interchange between the Athlete and Mr Mburu in Kiswahili that either Scott could understand);

(v) there would have been time for the Athlete to have made the transfer before he re-entered the sitting room with the sample at 8.11am; indeed given that on the Athlete's own evidence Mr Mburu had made his request for money just after the Athlete had provided the sample, it would have been natural for the Athlete to have reacted immediately;

(vi) the Athlete had a stronger motive to misrepresent what occurred at this critical point in the process than the Scotts. The Athlete had to have left the sitting room and his sample unguarded by him to give any scope at all for the spiking/substitution theory. The worst criticism that could be levelled against Mr Scott, had he permitted the Athlete so to leave, would have been of unprofessional behaviour.

[5] see Articles of ISTI. 5.4.2 , 7.1, 7.3.4 I

71. The Panel also prefers, where there was division between the parties, the evidence of the Scotts on the disputed peripheral issues for the following main reasons:

(i) Mr Kipkorir and Mr Kiplagat were adamant that their statements (which dealt for the most part with matters preceding the actual sample collection) were spontaneous (whereas Mrs Scott admitted that her own dated 23 May 2018 was deliberately crafted to respond to the Athlete's). However both statements bore some traces of co-ordination;

(ii) it was highly unlikely that Mr Kipkorir and Mr Kiplagat could, many months after 27 November 2017, have recollected in such detail as appeared in their statements the events of what would have been for them on that date an unremarkable morning;

(iii) whereas the same might be said of the Scotts, in their case, they could resort to contemporary documents to corroborate their version - the DCF and Mrs Scott's handwritten diary ("the diary''), the former signed by the Athlete, the latter whose authenticity there was no reason to doubt.

(iv) For the Scotts, 27 November 2017 was in that hackneyed phrase, "a usual day at the office" when they prudently arrived promptly i.e. before the outset of the period for testing indicated on the Athlete's whereabouts information, took refuge inside the house to escape from the cold (the morning temperature being expressly emphasised in the diary) while awaiting the Athlete's arrival, and in Mr Scott's case went through, and in Mrs Scott's case witnessed, an orthodox procedure of a kind with which they were well familiar.

(v) The record of the Athlete's MPESA transfer deals shows that he was active earlier that same morning which was inconsistent with his version of having slept at the house throughout the night before the test.

72. In summary the Panel is comfortably satisfied that the sample collection procedure set out in the International Standard for Testing and Investigations was properly followed.

Spiking/Substitution?

73. The underlying issue under this heading was whether the sample that tested positive for EPO was the Sample provided by the Athlete, unaffected by any external matter.

74. Preliminary to that issue, which had a number of elements, was a succinct subsidiary issue, namely whether the beaker into which the Athlete provided a urine sample was free of exogenous EPO.

75. The Athlete's own evidence was that he chose one out of three beakers proffered for this purpose. Such beakers are regularly wrapped and packaged with the container and the cap in separate parts. The Panel was unable to see, however, in the absence of damage to that wrapping or packaging - and the Athlete alleged none - how any beaker could have been previously contaminated by EPO, quite apart from any other facts which would have made such a scenario unlikely in the extreme.

76. On whether there was any spiking/substitution the salient questions were what opportunities there were for spiking or substitution, by what means such spiking or substitution could have been affected, and who had any motive to perform such malign acts - in short when, how and why.

77. As to the when, the following times were identified as providing such opportunities, which the Panel considers sequentially, for convenience adding its comments at each juncture on the how and the why:

(i) when Mr Mburu had custody of the lid, while the Athlete was providing his sample. Mr Mburu was, according to the Athlete standing behind him. It

was in the Panel's view fanciful to conclude that this brief period, lasting at most barely a minute, could have provided any real chance to Mr Mburu to do something to the lid with an amount of EPO subsequently identified by the Laboratory in its analysis even had he means and motive. As to motive the Panel could imagine (albeit with difficulty) had the facts been that Mr Mburu had at some time asked for a particular sum of money from the Athlete and the Athlete had declined to provide it, by way of revenge Mr Mburu might have sought to inculpate the Athlete by contriving an Adverse Analytical Finding.

(ii) when the Athlete, as he claimed, left the sitting room. But this necessary premise has already been rejected by the Panel, so the argument fails in limine. Quite apart from that, as Dr Jean-François Naud, Deputy Director of the Doping Control Laboratory at the National Institute of Scientific Research (INRS) in Quebec, Canada, pointed out, anyone who wished malevolently to spike a sample with EPO, might, had he a syringe and the substance to hand at all, been careless of the quantum used, aiming high rather than low. The issue for the Panel, however, was whether such a hypothetical spiker could have nicely judged the amount of EPO, subsequently identified by the Laboratory in its analysis with which to impregnate the Sample; an implausible hypothesis in itself and had as well sufficient time to do so[6]. Moreover, unless gifted with powers of prophesy, that hypothetical spiker could not have known in advance that an opportunity to spike, during some absence of the Athlete, would ever present itself. Finally, as to motive the candidates for this role could only be Mr Mburu, and Mr Scott. But the relationship of the Athlete and the Scotts, was, as both sides described it, a friendly one. The Athlete also described his relationship with Mr Mburu as friendly. Nor was there any

[6] In his witness statement dated 9 May 2018, Mr Kipkorir testified that he went in the sitting room, where he "*found Mr. Scott seated on the far right hand side on a single person sofa. [The Athlete] was not at the sitting room. There was nobody else than Mr. Mburu and Mr. Scott at the sitting room. [He] also saw on the table the small container that [he] had seen [the Athlete] carrying*". With such an evidence, the timescale to spike or substitute the Sample is further abbreviated.

basis for a theory that Mr Mburu was exacting revenge for some shortfall in the payment made to him at 8.11am. The Panel makes all the same points mutatis mutandis as to the substitution theory.

(iii) when the Sample was stowed in the Scotts' refrigerator prior to its onward transmission to the laboratory. This theory is inconsistent with the integrity of the parcel in which the A and B Samples were contained and raises the same issues as to means and motive for those who had access to it (see further paragraph 78(i) and 80 (ii)-(iv) below).

(iv) during that onward journey. Ditto. This alleged opportunity also assumes a diversion of the Sample for a place other than its proper - and ultimate - destination which is not established. See further paragraphs 78(ii) and 80 (v) 81 and 82 below.

(v) at the laboratory. Ditto.

78.In summary as to alleged opportunities (iii)(iv) and (v):

(i) The Panel has concluded, as more fully explained under **Breaches in Chain of Custody**, that the Samples were transported by the DCO to his home and put in his refrigerator. When retrieved, the DCO confirmed that they remained sealed inside the cardboard box with the Sellotape intact and showed no signs of being opened or tampered with in any way;

(ii) the Samples were properly sent to the Laboratory where they were analysed;

(iii) the Sample witness and the director of the Laboratory confirmed that "*the integrity of the B-sample is intact with no signs of tampering*".

Furthermore at each stage in this sequence there is an entire absence of evidence on the part of any persons involved as having means and motive somehow to

interfere with the Sample. Any contrary hypothesis rests on a fragile basis of implausibility too extreme to require rebuttal.

79. The Panel is therefore comfortably satisfied that there was no spiking or substitution of the Athlete's sample.

Breaches in Chain of Custody

80. Mr Scott's evidence (which the Panel accepts and is in major part vouched for by the contemporaneous documentation), provides detail of the Chain of Custody of the Sample between collection on the morning of 27 November 2017 and transfer to a courier on the afternoon of 29 November 2017, including that:

(i) Mr Scott completed a DHL Express Shipment Waybill (the "**Waybill**") with number 59 5403 0202 to ship the Sample via DHL to the Laboratory in Stockholm. This included the Mission Order number M-692914505 as the Shipper's Reference;

(ii) the Sample was immediately moved from the cool box in Mr Scott's car into a fridge on his return to Eldoret at approximately 11:45am on 27 November 2017;

(iii) only Mr Scott, his wife and their housekeeper had access to that fridge in the period 27-29 November 2017. Mr Scott does not recall any visitors to his property in that time;

(iv) when Mr Scott retrieved the Sample from the fridge on 29 November 2017 for transfer to the courier, it remained sealed inside the cardboard box with the Sellotape intact and showed no signs of being opened or tampered with in any way;

(v) the Sample was transferred by Mr Scott to DHL Agent, Fargo Courier Ltd, in Eldoret on the afternoon of 29 November 2017 for overnight shipment to DHL in Nairobi to be sent to the Laboratory.

81. Page 2 of the Laboratory Documentation Package ("**LDP**") for the A Sample contains a proof of parcel delivery. It identifies the receiver name as IDTM and the receiver address as Stockholmsvagen 18, 181 33 Lidingo, Stockholm, Sweden (the address of IDTM in Sweden). This information is incorrect. Although Mr Katwa Kigen explicably and ingeniously sought to make something of it, the Panel has before it a statement from DHL that confirms that the shipment was delivered to the address on the Waybill (i.e the Laboratory) and infers that the address on the proof of parcel delivery was most likely a mistake made by DHL when the parcel was manifested.

82. The proof of parcel delivery from DHL confirms that a shipment with number 5954030202 (the same as the Waybill number) was picked up on 30 November 2017 at 11:44am and delivered on 4 December 2017 at 14:17. The shipment was signed for by a LINNEA RAUSBERG. It provides that the parcel was assigned a Piece ID JD014600005011325493.

83. Page 4 of the LDP for the A Sample sets out the internal chain of custody for the Laboratory. This form records the receipt of a sample by the Laboratory under Mission Order M-692914505 (as recorded on the DCF) that was collected on 27 November 2017. The Sample was delivered by DHL with tracking number JJD014600005011325493 (the same as the Piece ID recorded on the proof of parcel delivery). This form also records that the parcel was received at 02:18:00PM on 4 December 2017 by "6FN3"[7] and sets out that bottle number 3099705 (the number assigned to the Sample) was received on 4 December 2017 and that "*Integrity was confirmed during sample login*".

84. The position of the AIU is that the Sample was delivered to the Laboratory on 4 December 2017 at approximately 02:18PM and signed for by Linnea Rausberg,

[7] Page 6 of the LDP for the A Sample contains the list of the laboratory staff involved in the test. This document identifies the reference "6FN3" as being Linnéa Rausberg, a Biomedical Technician.

Biomedical Technician, with integrity intact (i.e., with no signs of any manipulation, interference or tampering).

85. The Panel is therefore comfortably satisfied that the samples analysed were those of the Athlete, uncontaminated, whether accidentally or advertently, by any other EPO.

Analytical Errors

86. The Panel starts from acceptance of the AIU's submission that it is indeed material that the B Sample analysis confirmed the Adverse Analytical Finding. As a matter of logic the Athlete's arguments in respect of analysis of the Sample can only be sustained on the basis that both the A Sample analysis and the B Sample analysis were incorrect.

87. Paragraph 5.1 of the WADA Technical Document TD2014 EPO (Harmonization of Analysis and Reporting of Erythropoiesis Stimulating Agents (ESAs) by Electrophoretic Techniques)[8] (the "**Technical Document**") sets out the following:

> *5.1 Provision of a Second Opinion*
>
> ***WADA requires that one second opinion is provided by one of the experts designated below before any Adverse Analytical Finding for rEPOs or analogues is reported to the Result Management Authority(-ies**). Any second opinion provided shall be inserted as part of the Laboratory record in the Laboratory Documentation Package.(**Tribunal's emphasis**)*
>
> *[…]*
>
> *Experts (Laboratory affiliation) that may provide second opinions on Laboratory findings for EPO:*

[8] https://www.wada-ama.org/sites/default/files/resources/files/WADA-TD2014EPO-v1-Harmonization-of-Analysis-and-Reporting-of-ESAs-by-Electrophoretic-Techniques-EN.pdf (see paragraph 5.1; footnote 7).

1. *Christiane Ayotte (Montreal)*
2. *Yvette Dehnes (Oslo)*
3. *Françoise Lasne (Paris)*
4. *Nicolas Leuenberger (Lausanne)*
5. *Laurent Martin (Paris)*
6. *Jean-François Naud (Montreal)*
7. *José A. Pascual (Barcelona)*
8. *Christian Reichel (Seibersdorf)*
9. *Philipp Reihlen (Cologne)*
10. *Martial Saugy (Lausanne)*

88. Page 20 of the A Sample LDP provides evidence of a second opinion from Dr Yvette Dehnes PhD, Director of the Norwegian Doping Control Laboratory, and an expert from the WADA accredited laboratory in Oslo.

89. Dr Dehnes is identified in the WADA Technical Document as one of the experts who is authorised to provide a second opinion on laboratory findings for EPO.

90. The opinion of Dr Dehnes dated 22 December 2017 and contained in the A Sample LDP confirms that the analysis results of the A Sample comply with the positivity criteria in the Technical Document and that the Laboratory was justified to conclude that the A Sample contains EPO.

91. Furthermore, Dr Dehnes provides an additional second opinion dated 12 February 2018 in relation to the analysis of the B Sample by the Laboratory in the B Sample LDP. That opinion also confirms that the B Sample analysis results comply with the requirements of the Technical Document and that the Laboratory was justified to conclude that the B Sample contains EPO.

92. In his Response, the Athlete challenges the results of the analysis of the A and B Samples. He claims in particular that the analysis for the A and B Sample should not have been performed by the same laboratory, that the second opinion on both Samples should not have been provided by the same laboratory and that the results of the A and B Samples are clearly different, which "*warrants the request to the tribunal for testing of the same again*".

93. The Athlete provides statements from two scientists to support these allegations. However, neither of them directly challenges the positive finding. Dr Alberto Dolci, prudently admits that the methods of detection of recombinant EPO ("r**EPO**") are "*beyond* [his] *expertise of medical doctor specialized in Clinical Biochemist and Laboratory Medicine*" and only expresses some "*doubts that some sample may appear negative or positive in different analysis*". Mr Sammy Rotich, who does not claim any expertise in this specific area, also points to alleged differences between the A and the B Samples results, but still confirms that "*the findings suggest a very mild presence of EPO*". Neither provides a convincing, if any, rebuttal of the expert evidence adduced by the AIU to support the Laboratory's conclusions: a) evidence from Dr Yvette Dehnes, an expert authorised to provide second opinions on EPO as per the above-mentioned Technical Document and b) from Dr Jean-François Naud with similar status.[9]

94. In short, the procedure for identification of EPO set out in the TD2014 EPO was properly followed. Mr Katwa Kigen sought impromptu to introduce examples of other cases where exogenous and endogenous EPO[10] had been confused but the Panel was not persuaded that any of them sustained the proposition either because they were not concerned with EPO at all, or, if they were, they related to a time before more modern and more effective SAR-PAGE detection techniques had been engaged.

95. As to the Athlete's claims that it was not proper that the same personnel analysed the A and B Sample and that the same expert provided the second opinion for both Samples, article 5.2.4.3.2.2 ISL expressly sets out that the

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[9] Dr Naud explained that the difference in signal intensity between the A and B Sample results could be explained by many experimental factors, such as the efficiency to solubilise the urine aggregates, the elution efficiency of EPO from the MAIIA column or the quality of the transfer of the protein from the gel to the membrane. In any event, Dr Naud was clear in his report, and adhered to his position despite vigorous cross-examination "*although the signal is stronger for the B sample, the same faint band in the recombinant area could be observed, confirming the presence of both endogenous and recombinant EPO*".

[10] EPO is inherently unstable.

laboratory, which performed the confirmation of the analysis of the A Sample, shall conduct the analysis of the B Sample. Therefore, it is normal that both analyses were performed by the Stockholm laboratory. Moreover, nothing in that document suggests that the same expert cannot provide the second opinion in respect of both the A and the B Samples. In any event, the positive finding in the A and B Samples has now been reviewed independently, and confirmed, by a third expert, Dr. Naud.

96. In view of the above, it is clear that EPO was found in the Athlete's A and B Samples and that the anti-doping rule violation is established. The analysis procedures were entirely correct. There has been no departure from the ISL in this case. The analysis results have been thoroughly reviewed in accordance with the Technical Document and the Laboratory's conclusion that EPO was present in both the A Sample and the B Sample is justified.

97. The Panel is therefore comfortably satisfied that there were no analytical errors.

E. ANTI-DOPING RULE VIOLATIONS

98. The Panel summarises its conclusions as follows:

(i) Analysis of the Sample collected from the Athlete on 27 November 2017 demonstrated the presence of EPO. Analysis of the B Sample confirmed the Adverse Analytical Finding. EPO is a prohibited substance included in section 2 of the WADA 2017 Prohibited List, Peptide Hormones, Growth Factors, Related Substances, and Mimetics;

(ii) The Athlete does not have a valid Therapeutic Use Exemption ("**TUE**") justifying the presence or use of EPO;

(iii) The expert evidence of Dr. Schumacher is unequivocal that the hypoxia of altitude and intense physical training cannot explain the presence of exogenous EPO in the Sample;

(iv) None of the medications disclosed by the Athlete on the DCF contains EPO and none of them could have caused the Adverse Analytical Finding;

(v) The Athlete must present evidence to demonstrate to the Panel on the balance of probabilities that a departure from the ISL occurred **and** that said departure could reasonably have caused EPO to be present in the Sample. He has failed to do so;

(vi) In this context it is material that the presence of EPO in the A Sample was confirmed by the analysis of the B Sample. The Adverse Analytical Finding was also subject to review and second opinion in accordance with the Technical Document and the finding was confirmed;

(vii) The Laboratory benefits from the presumption in Art 3.2.3 ADR that it has conducted sample analysis and custodial procedures in accordance with the ISL;

(viii) The Athlete has provided no evidence to demonstrate that a departure from the ISL occurred. The analysis of the Sample was proper and the requirements of the ISL have been fully complied with;

(ix) Although there has been a departure from the ISTI in this case, in that the Athlete received advance notice of the Out-of-Competition doping control, the departure did not cause, and could not reasonably have caused, the presence of EPO in the Sample;

(x) The presence of EPO in the Sample therefore remains as valid evidence in support of the charge against the Athlete for the presence and use of EPO.

99. It is each athlete's personal duty to ensure that no prohibited substance enters his/her body and that no prohibited substance is used. Accordingly, it is not necessary for the IAAF to demonstrate intent, fault, negligence or knowing use by the Athlete in order to establish that an anti-doping rule violation has occurred. An athlete is strictly liable for the presence and use of any prohibited substances.

100. Therefore, the Panel is comfortably satisfied that the Athlete has committed the following anti-doping rule violations:

(i) presence of a prohibited substance in an athlete's sample, pursuant to Art 2.1 ADR, by virtue of the presence of EPO in a urine sample provided by the Athlete on 27 November 2017 numbered 3099705; and

(ii) use of a prohibited substance, namely EPO, pursuant to Art 2.2 ADR.

101. As against all this the Athlete relies on:

(i) his clean record hitherto over a long period as an international athlete;

(ii) his recorded antipathy to doping - himself being denied the presentation of his gold medal at the Beijing Olympics in the stadium since it was only later that the 'winner' was unmasked as a doper;

(iii) his emphatic denials from first to last during this case.

102. None of these matters, all of which the Panel has taken into account, outweigh the impregnable scientific evidence. There is, alas, in doping as in all fields of human activity a first time for everything and denial, the record shows, is the currency of the guilty and the innocent alike.

103. Nor is the Panel persuaded by the assertion:

(i) that EPO would have no utility out of season. As to this, the Athlete was already in training after his post season fallow period on 27 November 2017. Use of EPO would not have been wholly gratuitous; but in any event, the Panel's concern is whether the prohibited substance was used, not why.

(ii) that had the Athlete in fact known that he had been injected with EPO, he would simply have failed to attend the test and incurred no penalty in so doing. As to this, it may be that he was apprehensive that since he had admittedly been given so recently advance notice by Mr Mburu, his absence would have shone a searchlight of suspicion on him. It may be that he was confident that any test would not reveal an Adverse Analytical Finding. The Panel is not obliged to speculate as to why he made the choice he did.

104. The Athlete prayed in aid the negative results of blood samples taken on 21 and 29 November 2017. But as Dr Jean-François Naud explained without contradiction such samples effected for the purpose of the Athlete Biological Passport ("ABP") were not screened for EPO. In any event, as he also explained, depending on the nature of the injection (subcutaneous or intravenous) and the amount of the dosage and taking account of the usual half-life of EPO, there is no scientific reason why a dose administered on a particular date should not give rise to an Adverse Analytical Finding 3 days later, but none 5 days later.

105. Finally the Athlete notes that the uncorrected ADAMS record shows that the 27 November 2017 entry was a negative, not a positive result.[11] It has, according to the AIU (as displayed on screen at the hearing) since been corrected although the Athlete maintains that on 21 March 2019 it still remained in its original form Even if the Athlete be right the suggestion that this showed

[11] 29-Nov-2017 Athletics|Middle Distance 800-1500m Blood passport: Valid

27-Nov-2017 Athletics|Middle Distance 800-1500m Urine: No Result

22-Nov-2017 Athletics|Middle Distance 800-1500m Blood passport: Valid

that somewhere within WADA there was doubt as to the actual results cannot be accepted. In the Panel's view the record must have been in error and discrepant with the actual facts See also Annex A para 11.

106. The Panel therefore finds that the Athlete has committed the above anti-doping rule violations as set out in the Notice of Charge.

F. CONSEQUENCES FOR THE ANTI-DOPING RULE VIOLATIONS

I. Period of Ineligibility

107. The Athlete has been charged with committing two anti-doping rule violations, namely the presence of EPO in the Sample and the use of EPO.
108. Art 10.7.4 ADR provides rules applicable to multiple offences committed under the ADR:

> *10.7.4 Additional Rules for Certain Multiple Offences*
>
> *(a) For purposes of imposing sanctions under Article 10.7, an Anti-Doping Rule Violation will only be considered a second Anti-Doping Rule Violation if the Integrity Unit can establish that the Athlete or other Person committed the second Anti-Doping Rule Violation after the Athlete or other Person received notice, or after the Integrity Unit made a reasonable attempt to give notice, of the first alleged Anti-Doping Rule Violation. If the Integrity Unit cannot establish this, the Anti-Doping Rule Violations shall be considered together as one single Anti-Doping Rule Violation for sanctioning purposes, and the sanction imposed shall be based on the Anti-Doping Rule Violation that carries the more severe sanction.*

109. Since the Athlete was not provided notice of the two anti-doping rule violations separately, they shall be considered together as one single violation for the purposes of sanction pursuant to the foregoing provision of the ADR.

110. Art 10.2 ADR provides the sanction to be imposed for anti-doping rule violations under Art 2.1 ADR (presence) and Art 2.2 ADR (use) as follows:

10.2 Ineligibility for Presence Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method

The period of Ineligibility to be imposed for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6 that is the Athlete or other Person's first anti-doping rule violation shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

(a) 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.

111. EPO is listed in S2 of the WADA 2017 Prohibited List. It is not a specified substance. The period of Ineligibility shall therefore be four years pursuant to art. 10.2.1(a) ADR, unless the Athlete can establish that the anti-doping rule violations were not intentional.

112. The Athlete has not presented any evidence to support a claim that the anti-doping rule violations were not intentional. The explanations advanced by the Athlete are insufficient to explain the presence of EPO in the Sample. A series of CAS cases have held that a failure to establish the origin of a prohibited substance necessarily means that the athlete cannot demonstrate that the violation was not intentional.[12]

113. Even in the CAS cases that have left open the theoretical possibility that an athlete might be able to rebut the presumption of intentionality without establishing the origin of the prohibited substance - in this Panel's respectful view the better analysis -, it has been made abundantly clear that this will be so only in the most exceptional of circumstances. [13]

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[12] See, for example, (i) CAS 2016/A/4377 WADA v. IWF & Alvarez, at para. 51; (ii) CAS 2016/A/4662 WADA v. Caribbean RADO & Greaves, at para. 36; (iii) CAS 2016/A/4563 WADA v. EgyNADO & ElSalam, at para. 50; (iv) CAS 2016/A/4626 WADA v. Indian NADA & Meghali and (v) 2016/A/4845 Fabien Whitfield v. FIVB.

[13] In CAS 2016/A/4534 Villanueva v. FINA, (where the rival analyses are fully explored) the Panel referred to the "*narrowest of corridors*"; In the even more recent award in CAS 2016/A/4919 WADA v. WSF & Iqbal, the Panel held that "*in all but the rarest cases the issue is academic*" (para. 66).

114. The AIU therefore requests the Panel to impose a period of Ineligibility of four years upon the Athlete, pursuant to Art 10.2.1(a) ADR.

115. Pursuant to Art 10.10.2 ADR, the four-year period of Ineligibility shall start on the date that the Panel reaches a decision in this matter. However, any period of provisional suspension shall be credited against the total period to be served by the Athlete.

116. The Athlete has been provisionally suspended since 3 February 2018. The AIU accepts that the Athlete shall therefore receive credit for the period from 3 February 2018 to the date the Panel reaches a decision against the overall four-year period of Ineligibility to be served.

II. Disqualification of Results and Other Consequences

117. Pursuant to Art 10.1.1 ADR, the Athlete's results from the date of the anti-doping rule violation, viz. 27 November 2017 until the date of his provisional suspension on 3 February 2018 shall be disqualified, with all resulting consequences, including the forfeiture of any medals, titles, awards, points, prize and appearance money.

G. ORDER

118. The Panel rules as follows:

(i) The Panel has jurisdiction to decide on the subject matter of this dispute.

(ii) The Athlete has committed anti-doping rule violations pursuant to Art 2.1 and/or Art 2.2 ADR.

(iii) A period of ineligibility of four years is imposed upon the Athlete, commencing on the date of the Tribunal Award.

(iv) The period of provisional suspension imposed on the Athlete from 3 February 2018 until the date of the Panel Award shall be credited against the total period of ineligibility, provided that it has been effectively served by the Athlete.

(v) The Athlete's results from 27 November 2017 until the date of his provisional suspension on 3 February 2018 shall be disqualified with all resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money.

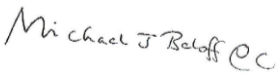
(vi) No contribution is ordered to be paid by the Athlete to the IAAF on account of the latter's legal costs, albeit the charges against the Athlete have been proved: In so deciding the Panel has taken into account the unusual delays in these proceedings for which the IAAF, not the Athlete, was responsible.

119. The AIU noted that it has absolute discretion (and the Panel has discretion where fairness requires) to establish an instalment plan for repayment of any prize money forfeited pursuant to the above and/or for payment of any costs awarded by the Panel. It reserved its rights in full in that respect. The parties have liberty to apply for such instalment plan, (now relevant only to repayment of prize money), if and when required.

H. EPILOGUE

120. The Panel confirms that it has borne in mind throughout in its evaluation of the material adduced before, and the submissions made to it, that it is for the IAAF to make good the charges to the Panel's comfortable satisfaction. It is aware that its order will interrupt and may even terminate the Athlete's sporting career and cast a shadow over his impressive competitive record. But in its opinion the

Laboratory results viewed in the context of the evidential record and the regulatory framework admit of no other conclusion than that the case against the Athlete is convincingly made out.



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10 April 2019

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Annex A

SPORT RESOLUTIONS (UK)

SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/Adhocsport/64/2018

IN THE MATTER OF PROCEEDINGS BROUGHT BY THE ATHLETICS INTEGRITY UNIT (AIU) UNDER THE INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (IAAF) AIU ANTI-DOPING RULES AGAINST ASBEL KIPROP (THE ATHLETE)

DETERMINATION

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1. This is my determination on the various applications of the athlete filed on the 3 July 2018. I have taken full account of the written submissions in support of the application, the AIU's response and the helpful oral argument from both sides' Counsel at a video conference hearing on 16 July 2018.

Jurisdiction

2. The athlete objects that the AIU does not have jurisdiction to prosecute this case but only WADA or the Kenyan Authorities. I do not agree. The sample taken from the athlete on which the case is based, was taken from him on 27 November 2017. At that date the Athletics Integrity Unit ("AIU") was in existence having been constituted by the IAAF under its constitution with effect from 3 April 2017. The IAAF anti-doping rules ("ADR") in force at that time included a reference to the AIU's activities being testing, investigation, results management and hearings ie a full hand of activities (Article 1.2) (See further Article 5 which deals with investigation and, Article 7 which deals with results management). I have not been shown any later ADR which cuts down that range.

Uncontroversial evidentiary requests

3. The admission of additional exhibits enclosed with the applications, and the extension of time for the filing of the applications have been agreed and acted on. I need say no more about them.

The DCF

4. The Athlete requests that the doping control form ("DCF") is struck from the record on the basis that it is "false and misleading". His objection is three-fold:

    (i) the DCF does not constitute a comprehensive record of every aspect of the doping control;
    (ii) It (as is conceded by the AIU) wrongly alleges that the athlete had no advance notice of the doping control;
    (iii) no reference is made to the allegation that money was solicited by the doping control chaperone from the athlete.

5. None of the above factors, whether well-made or otherwise, seem to me to justify striking the DCF from the record. On the contrary it seems to me to be in the Athlete's interest that it remains in the record so that he can make those self-same points by reference to it. As the AIU state in their response "*the DCF is a standard form authentic document that the athlete has signed; there is simply no reason to strike it from the record*".

Reanalysis

6. The athlete seeks reanalysis of the A and B samples. It is common ground that there is no express provision within the ADR which contemplate such re-analysis and I am unpersuaded that there is any basis in point of law or fact for ordering it exceptionally in the present case on grounds of general fairness or otherwise. Under the rules if unto the extent that there has been a material departure from national standards in connection with the analysis of these samples.

7. Under the ADR the athlete may rebut the presumption of regularity by establishing that a departure from the international standard for laboratories occurred which could have reasonably caused the adverse analytical finding (''the premise''). In such an event that the IAAF shall have the burden to prove that such a departure did not cause such an adverse analytical finding (Rule 3.2.3). But the premise has not been made good: No such a departure has been established here. The fact that both A and B samples were tested at the same laboratory and by the same personnel is entirely consistent with the ADR; and it would be wholly impracticable to have different laboratories or different personnel involved in such testing. The protection for the athlete against error (innocent or otherwise) is in the grant to him or her of facility to have the B sample (in addition to the A sample) tested and to be present or represented at the testing of the B sample – no more and no less. The other complaint about the process go not to whether the analysis was properly done but whether it was indeed the athlete's uncontaminated samples (and not those of some other person) which were tested. To this matter I now turn.

DNA

8. The athlete also seeks a DNA analysis of the A and B sample i.e. that he should provide a sample of his DNA from some other source and have it compared to such DNA as is identified in the A and/or B sample in in order to establish or further establish his assertion that the samples tested came from some other person. There was no expert evidence before me from either side as to the efficacy of DNA tests in this context. The AIUs main point was that there was insufficient evidence that the wrong samples were tested to justify this unprecedented course; Mr Wenzel for the AIU, with his considerable experience in this field, tells me on behalf of the AIU that it is not clear that urine samples always contain material that indicates the DNA of the person who provided them or that, to the extent that they do, the absence of correlation of the DNA in either sample, or with some third source is itself compelling indication that the samples were not those of the athlete. Such research as I have, with all due caution, carried out subsequently tends to support his point. In the only specialist article that i have been able to access it is explained "***Urine*** *is not considered an ideal source of* ***DNA*** *due to the*

*low concentration of nucleated cells present in human **urine**. The nucleated cells found in **urine** are typically white blood cells and epithelial cells*.''

9. As a matter of presumptive logic if there was a coincidence of DNA in the urine samples taken from and in his DNA provided by the athlete from some other source, it might well inculpate the athlete in the sense of denying him in consequence the opportunity to assert that the samples tested were **not** his own. But the athlete's purpose in seeking the DNA analysis is to help his case, not to undermine it. However, without prejudice to such matters, and ignoring, as I am invited by the athlete to do, questions of cost, I am, un persuaded that the athlete has laid a sufficient foundation of doubt that the A and B samples were his own for me to make an order of an unusual if not unique kind in this context.

10. The questions that have been raised by the athlete in his statement as to for example (as is admitted) the advance notice that he was given, and (as is admitted, the payment by him to the chaperone in the wake of the test) and (as is disputed by the chaperone) that the chaperone asked the athlete for money are all matters that can be explored in evidence at the substantive hearing without the prior carrying out of a DNA analysis.

Other samples

11. The athlete also requests production of so called urine and blood test findings for samples collected from the athlete between October 2017 and January 2018. There is no evidence before me that the recombinant EPO which was detected in what was said to be the athlete's samples would have been detectable (if used) in any other such sample. The athlete already has access to his test results through ADAMs, and a particular point correctly made that samples taken for ABP purposes (as it appears on the record) on 22 November and 29 November disclosed no presence of EPO is irrelevant given that the tests on those days were carried out on different (blood) samples and for different purposes. It is, I accept, odd that the ADAMs record does not disclose that there was an Adverse Analytical Finding on the sample taken on 27 November 2017, but , whatever the explanation may

be for this administrative error, tardiness of updating the data or other, this does not in my view prima facie cast any doubt at all upon the fact that the laboratory which tested the A and B samples came to a conclusion that there was such AAF My present view on this issue does not prevent the athlete from making such use as he seeks to from the ADAMs record at any substantive hearing. No sufficient purpose would be served by the production sought under this heading.

Conclusion

12. Accordingly, I dismiss all the applications while reminding the athlete yet again that this does not disable or prevent him from advancing such evidence as he already has, as to the process carried out in connection with the sample collection on 27 November 2017 or the conclusions drawn by the laboratory and AIU experts from the tests carried out. I emphasise that I assume that the evidential record from both sides is complete, and would be resistant to any application to adduce further evidence if that were to impact adversely on the ability of the other side fairly to present his or its case to the tribunal on whatever date the hearing is fixed. It would in this context help the Panel to know, no later than a week in advance which witnesses either party intends to call and whether any video conferencing facility will be required.

Michael J Beloff QC

Panel Chairman

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