

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

Before:

Mr Dennis Koolgaard (Sole Arbitrator)

**BETWEEN:**

**WORLD ATHLETICS**

**Anti-Doping Organisation**

and

**Ms MERCY JEROTICH KIBARUS**

**Respondent**

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**DECISION OF THE DISCIPLINARY TRIBUNAL**

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**I. INTRODUCTION**

1. The Claimant, World Athletics (“**WA**”) (formerly International Association of Athletics Federations (“**IAAF**”)), is the international federation governing the sport of athletics worldwide. It has its registered seat in Monaco. World Athletics is represented in these proceedings by the Athletics Integrity Unit (“**AIU**”) which has delegated authority for results management and hearings, amongst other functions relating to the implementation of the 2019 IAAF Anti-Doping Rules (“**ADR**”), on behalf of WA pursuant to Article 1.2 of the ADR.
2. The Respondent, Ms Mercy Jerotich Kibarus (the “**Athlete**”), is a 36-year-old female long-distance runner from Kenya.

3. These proceedings concern the presence of 19-Norandrosterone (“**19-NA**”), a metabolite of Nandrolone, which is a substance listed in category *S1.1B Endogenous Anabolic Androgenic Steroids and their Metabolites and isomers, when administered exogenously* of the WADA 2019 Prohibited List as a non-specified substance that is prohibited at all times, in two urine samples collected from the Athlete on 13 (“**Sample 1**”) and 15 September 2019 (“**Sample 2**” – and jointly referred to as the “**Samples**”) in the lead up to and then during the ‘Sanlam Cape Town Marathon’ held in Cape Town, South Africa.<sup>1</sup>
4. The AIU charges the Athlete with a violation of Article 2.1 (“*Presence*”) and 2.2 (“*Use*”) ADR. The AIU in principle seeks a four-year period of Ineligibility to be imposed on the Athlete for the alleged Anti-Doping Rule Violation (“**ADRV**”) with respect to the Samples, as the Athlete failed to establish that the ADRV was committed unintentionally. It is further maintained by the AIU that this is the Athlete’s second ADRV within a ten-year timeframe and that the period of Ineligibility to be imposed shall therefore be eight years.
5. The Athlete denies that she has committed an ADRV for the presence of 19-NA in her system or use thereof. Instead, she invokes a number of breaches of the International Standards to explain the Adverse Analytical Finding (“**AAF**”) for 19-NA in the Samples and submits that her Samples may have been swapped with those of someone else. The Athlete also maintains that she has not been sanctioned with an ADRV before, so that this is not her second ADRV. For this reason, the Athlete submits that the charges against her should be dropped and that she be discharged and allowed to practice her profession.

## II. FACTUAL BACKGROUND

### A. Sample Collection and Analysis

6. On 13 September 2019, the Athlete provided Sample 1 Out-of-Competition in Cape Town, South Africa, coded 4456412, pursuant to testing conducted by the South African Institute for Drug-Free Sport.
7. On 15 September 2019, the Athlete provided Sample 2 In-Competition during the ‘Sanlam Cape Town Marathon’ in Cape Town, South Africa, coded 4456433, pursuant to testing conducted by the AIU of behalf of WA.

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<sup>1</sup> 19-Noretiocholanolone, another metabolite of Nandrolone was also detected in the Samples, but the AIU primarily relied on the presence of 19-NA in its submissions.

8. Analysis of the Samples by the World Anti-Doping Agency (“**WADA**”) accredited laboratory in Bloemfontein, South Africa (the “**Laboratory**”), revealed results consistent with the presence of exogenous 19-NA.

## **B. Results Management**

9. On 5 December 2019, the Athlete received notice of an AAF for the presence of 19-NA in Sample 2. By means of this letter a provisional suspension was imposed on the Athlete.
10. On 9 December 2019, the Athlete informed the AIU that she had never engaged in doping and only used the medications/supplements disclosed on the Doping Control Form. She indicated that she believed that “*something in the testing procedures must have caused*” the presence of 19-NA or that her sample “*must have been swapped by mistake*”.
11. On 7 January 2020, the Athlete received notice of an AAF for the presence of 19-NA in Sample 1.
12. On 16 January 2020, the Athlete informed the AIU that the specific gravity of Sample 2 as recorded by the Doping Control Officer (“**DCO**”) (i.e. 1.005) and the Laboratory (1.006) differed and on this basis questioned whether it was the same sample. The Athlete also raised suspicion as to why Sample 1 was allegedly tested shortly after her response to the AIU of 9 December 2019.
13. On 14 February 2020, the AIU addressed the Athlete’s concerns and explained that the small discrepancy in specific gravity of Sample 2 was caused by a difference in the analytical specificity of the measurement instruments used by the DCO and the Laboratory. The AIU maintained that the allegation that Sample 2 did not belong to the Athlete or that it was not handled in accordance with the relevant International Standards was unsubstantiated. The Athlete was provided with a copy of the Chain of Custody Documentation and the A Sample Laboratory Documentation Package of Sample 2.
14. On 18 February 2020, the Athlete reiterated her denial of having committed an ADRV, raised objections about the severe sanctions imposed for ADRVs and the consequences this has on athletes. She also highlighted certain alleged inconsistencies in the Chain of Custody Documentation of Sample 2 and requested her provisional suspension to be lifted.
15. On 19 February 2020, the AIU informed the Athlete that, following a review of the documentation in relation to the collection of the Samples, it concluded that there were no apparent departures from the applicable International Standards that could reasonably have caused the AAFs in the Samples.
16. On 7 March 2020, the Athlete informed the AIU that it could proceed with the judgement of her case.

17. On 11 March 2020, the AIU issued a Notice of Charge for violations of Articles 2.1 and 2.2 ADR. The AIU also referred to a decision of Athletics Kenya's Medical Commission dated 10 August 2015, finding the Athlete guilty of an AAF for Furosemide in a sample collected from the Athlete In-Competition on 8 March 2015. Since the present charge would constitute the Athlete's second ADRV, the AIU submitted that the period of Ineligibility to be imposed was eight years.
18. On 18 March 2020, the Athlete reiterated her innocence and requested a hearing to be held.

### **C. Proceedings Before the AIU Disciplinary Tribunal**

19. On 31 March 2020, the Tribunal Secretariat confirmed that Mr Dennis Koolaard had been appointed as the Chair of the Panel to determine this matter.
20. On 14 April 2020, a preliminary meeting was convened between the Chair and the Parties. Both Parties consented to Mr Koolaard acting as Sole Arbitrator. Following the preliminary meeting, Procedural Directions were issued.
21. On 24 April 2020, in accordance with the Procedural Directions, the Athlete informed the Tribunal Secretariat that she denied the charge and provided a summary of her case.
22. On 15 May 2020, in accordance with the Procedural Directions, the AIU submitted a Brief, setting forth the full reasoning and all evidence relied upon to substantiate its charge against the Athlete.
23. On 12 June 2020, further to a request from the Athlete for a seven-day extension that was granted, the Athlete filed her Answer Brief, denying the charge.
24. Although entitled to file a Reply Brief on the basis of the Procedural Directions, the AIU did not avail itself of such opportunity. However, the AIU did file the external Chain of Custody Documentation of Sample 1 on 26 June 2020.
25. On 30 June 2020, in accordance with the Procedural Directions, a hearing was convened by video-conference before the Sole Arbitrator. Mr Ross Wenzel and Mr Tony Jackson, accompanied by Ms Annalisa Cherubino, represented the AIU. Mr Reece Mwani represented the Athlete. The Athlete herself also attended the hearing. Although the Athlete had been informed that an interpreter would be made available to her by the AIU upon her request, she did not make use of such possibility and did not speak during the hearing. The Sole Arbitrator was assisted by Mr Joshua Ingham-Headland of the Tribunal Secretariat.

26. No witnesses or experts were heard. Both Parties had full opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator.
27. Before the hearing was concluded, both Parties expressly stated that they did not have any objection with the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.
28. The Sole Arbitrator confirms that he carefully heard and took into account in his decision all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award.

### **III. JURISDICTION AND APPLICABLE RULES**

29. No jurisdictional issues arise in this matter as to the roles of the AIU, the Sole Arbitrator or the applicability of the ADR to the Athlete.
30. It is not in dispute that the Athlete is an International-Level Athlete in the sense of Article 1.8 ADR. At all material times, the Athlete was a member of Athletics Kenya, a WA member federation and competed in the 'Sanlam Cape Town Marathon', an IAAF Gold Label Road Race, on 15 September 2019, a competition authorized and recognized by WA, while the Athlete had Gold Status in 2019.
31. Being an International-Level Athlete, the Athlete is bound to the ADR on the basis of Article 1.6 ADR.
32. Sample 2 was collected pursuant to testing undertaken by the AIU on behalf of WA. The AIU therefore has jurisdiction of results management in relation to the AAF in Sample 2 in accordance with Article 7.2.1 ADR.
33. The AIU also has jurisdiction for results management for Sample 1 by operation of Article 7.2.4 ADR. By letter dated 12 December 2019, the South African Institute for Drug-Free Sport expressly requested the AIU to proceed with the results management.
34. Pursuant to Article 1.5 in conjunction with Article 8.2(a) ADR, the WA Disciplinary Tribunal has jurisdiction over all matters where ADRVs are asserted.

### **IV. POSITIONS OF THE PARTIES**

#### **A. The Athlete's Explanations**

35. The Athlete summarised her submissions as follows in her email dated 24 April 2020:

- “1. The collection and testing of the samples did not conform with the requirements of the International Standards for testing and investigation.
2. The laboratories failed to analyse the samples and report results in conformity with International Standards for Laboratories.
3. The samples were not properly handled/stored hence might have been contaminated or swapped with another sample hence the variance in specific gravity sample collected and sample tested.
4. The Laboratory used a method which it was not accredited by WADA hence it’s finding cannot be relied upon.”

### **B. The AIU’s Explanations**

36. The AIU maintains that it has reviewed the AAFs for Samples 1 and 2 and has concluded that there has been no departure from the International Standard for Testing and Investigations or from the International Standard for Laboratories. In accordance with Article 3.2.2 ADR, compliance with the International Standards are sufficient to conclude that the procedures addressed were performed properly, unless, as per Article 3.2.4 ADR, the Athlete establishes the occurrence of a departure from the International Standards that could reasonably have caused the AAF. The Athlete’s allegation that there has been an error in the collection, storage and analysis of her Samples remains entirely unspecific.
37. As to the discrepancy between the specific gravity for Sample 2 as recorded by the DCO (i.e. 1.005) and as recorded by the Laboratory (i.e. 1.006), the AIU explains that the specific gravity of a sample is assessed by the DCO at the time of collection for the sole purpose of determining whether the sample collected is diluted and therefore whether an additional sample should be collected. The method used by DCOs to measure specific gravity in the field for such purpose (i.e. using a refractometer or lab sticks) is not as precise as the method used for measuring specific gravity in a laboratory. Consequently, it is very common to find a discrepancy between the specific gravity reported on a Doping Control Form and the one reported by the analysing laboratory.
38. Since both measurements of the specific gravity are 1.005 at a minimum, they are squarely in accordance with the levels prescribed in the International Standards for Testing and Investigations. A minor discrepancy between the two is not indicative of any departure from the International Standards.

## **V. MERITS**

39. Although the AIU formally charged the Athlete with violations of Articles 2.1 and 2.2 ADR, the Sole Arbitrator understands that the primary charge is based on Article 2.1 ADR (“*Presence*”), while a violation of Article 2.2 ADR (“*Use*”) is only raised on a subsidiary basis as a fall back option in case the “*Presence*” violation is not considered established. The Sole Arbitrator therefore primarily focusses on the alleged violation of Article 2.1 ADR.

#### **A. Alleged Deviations from International Standards**

40. Article 3.1 ADR provides that WA shall have the burden of establishing that an ADRV has occurred to the comfortable satisfaction of the Tribunal. Article 3.2 ADR provides the following in that respect:

“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.”

41. The Sole Arbitrator notes that the starting point for the legal analysis is that, pursuant to Article 3.2.3 ADR, the Laboratory is presumed to have conducted the sample analysis and custodial procedures in compliance with the International Standard for Laboratories. It is for an athlete to rebut such presumption by establishing that i) a departure from the International Standard for Laboratories occurred; and ii) that such departure could reasonable have caused the AAF.



42. The Sole Arbitrator finds that the Athlete failed to establish either requirement, i.e. the Athlete did not establish that there was a departure from any International Standard and that, even if such departure had taken place, she did not establish that such departure could reasonably have caused the AAF.
43. Under the currently applicable regulatory framework it is not sufficient for an athlete to merely argue that there may have been a departure from an International Standard and that this may have caused the AAF, without providing any concrete evidence to corroborate such allegation. Absent such particularisation, the presumption set forth in Article 3.2.3 comes into play.
44. The Athlete's argument as to the different specific gravity of Sample 2 as measured by the DCO and by the Laboratory must be dismissed. There is no requirement set forth in any International Standard that the measurements of specific gravity by the DCO and the laboratory must be identical. The Sole Arbitrator finds it logical that different and less sophisticated measurement instruments are used by a DCO in the field than the instruments used by a laboratory. A difference in specific gravity between 1.005 and 1.006, as is the case here, is not considered to be sufficiently large to raise doubts as to the integrity and/or identity of the sample. Indeed, a difference in specific gravity between 1.005 and 1.010 has already been considered acceptable (*SR/Adhocsport/287/2019 World Athletics v. Gomathi Marimuthu*).
45. The Athlete considers it to be an irregularity that the DCO commented in the Chain of Custody Documentation for Sample 1 that "*the samples were collected when I got home, so it was not stored*" and that "*my sister had access to the samples*". Although it is admittedly somewhat inconsistent that the DCO indicated that Sample 1 was not stored, while at the same time indicating that her sister had access to Sample 1 whilst in storage, the Sole Arbitrator does not consider this to be relevant. The mere fact that the DCO's sister had access to the Sample 1 does not lead to any justified suspicion that the DCO's sister would have tampered with Sample 1 or swapped it for another sample.
46. The Doping Control Form, the Chain of Custody Documentation and the Test Report of Sample 1 all contain the code "4456412". No Laboratory Documentation Package was made available with respect to Sample 1, as no such request was made by the Athlete. There is no reason to assume that there were any anomalies with respect to the storage or Chain of Custody of Sample 1, or that the integrity of this Sample was otherwise compromised.
47. The Doping Control Form, the Laboratory Documentation Package, the Chain of Custody Documentation and the Test Report of Sample 2 all contain the code "4456433". The Laboratory Documentation Package further contains the following comment: "*No anomalies were noted regarding the sample condition, chain of custody or aspects that would affect sample integrity*".



48. There is simply no evidence on file supporting the Athlete's contention that her Samples may have been swapped with other samples or were otherwise compromised. Mere speculation can hardly be considered sufficient reason to uphold such argument.
49. The Athlete's speculation in this respect is also discredited by the fact that both Samples tested positive for 19-NA, while collected within a two-day timespan. Accordingly, even in the hypothetical scenario that one of the two Samples would have been swapped inadvertently, this leaves wholly unexplained why there would be an AAF for the other sample. The likelihood that both Samples were inadvertently swapped with other samples that both turned out to coincidentally contain 19-NA is not considered credible.
50. As to the Athlete's argument that it was suspicious that Sample 1 was tested shortly after filing her response to the notification of the AAF for Sample 2, the Sole Arbitrator finds that this argument must be dismissed as factually incorrect, because the Chain of Custody Documentation with respect to Sample 2 demonstrate that Sample 2 was received by the WADA-accredited laboratory in Ghent, Belgium, on 12 November 2019, i.e. before the Athlete's response to the notification of the AAF for Sample 2 dated 9 December 2019. The reason the Bloemfontein Laboratory forwarded Sample 2 to the Ghent Laboratory was to perform a GC/C/IRMS analysis, the specifics of which will be addressed in more detail below, but the Bloemfontein Laboratory must necessarily have detected 19-NA in Sample 1 before forwarding it to the Ghent Laboratory.
51. Consequently, the Sole Arbitrator finds that there is no reason to doubt about the reliability of the testing results of the Laboratory and that these are therefore presumed to be accurate, as prescribed by Article 3.2.3 ADR. The Athlete's speculations about a possible swapping of samples and alleged deficiencies in the collection, testing, analysis, reporting, handling and storage of the Samples are dismissed.

## **B. The Alleged Violation of Article 2.1 ADR**

52. Article 2 ADR specifies the circumstances and conduct that constitute ADRVs. This includes Article 2.1.1 ADR, which provides the following:

"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. [...]"

53. Article 2.1.1 ADR also provides that it is each athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are strictly responsible for any Prohibited Substance or its Metabolites or Markers found 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 [...]."

54. With regard to the presence of a Prohibited Substance or its Metabolites or Markers in an athlete's sample, Article 2.1.2 ADR states the following:

"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."

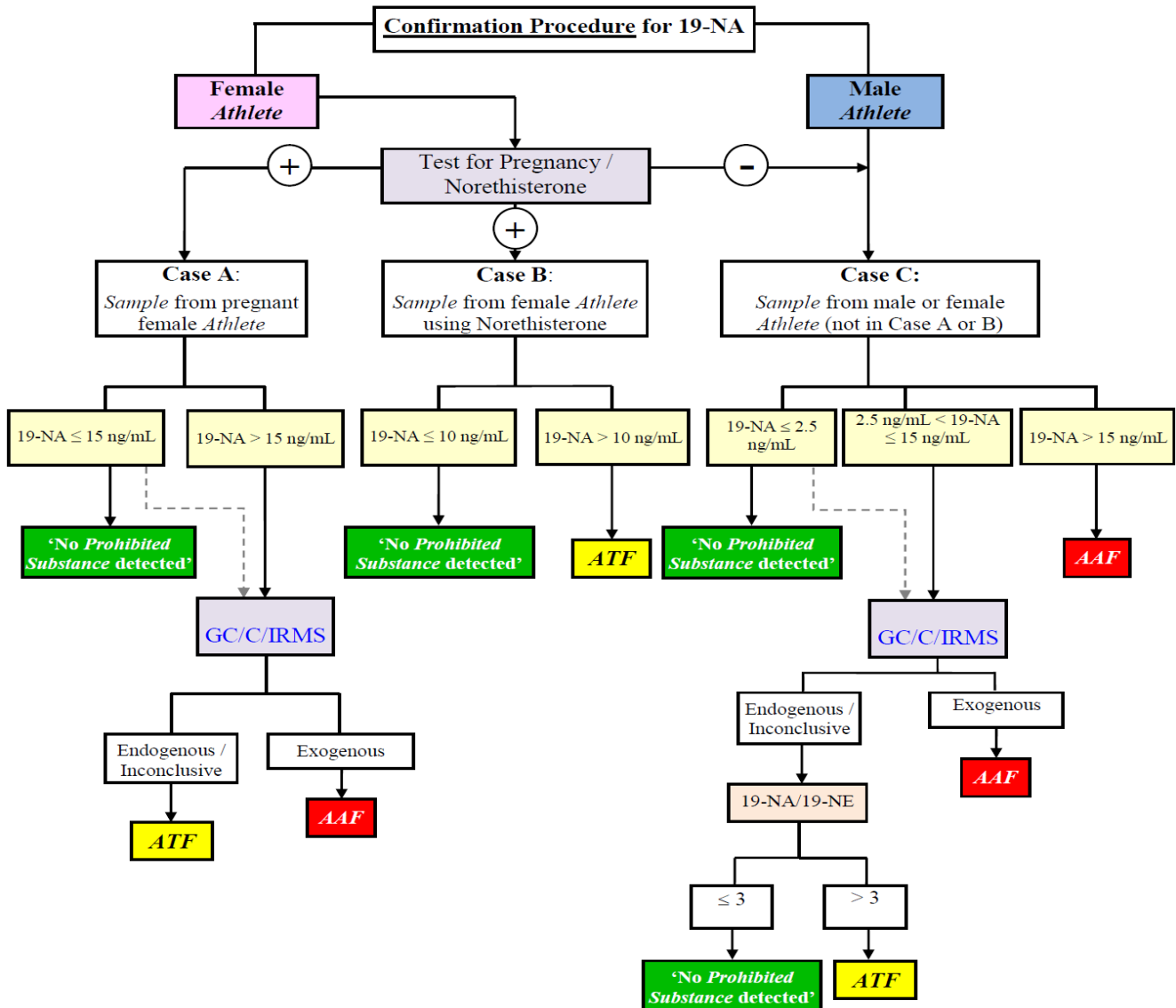
55. The presence of a Prohibited Substance or its Metabolites or Markers in an athlete's Sample is therefore in principle sufficient to establish that an athlete has committed an ADRV pursuant to Article 2.1 ADR.

56. Given that both Samples collected from the Athlete contained 19-NA and that the Athlete waived the analysis of the B Samples, the ADRV is in principle established.

57. However, Nandrolone is an endogenous Substance, i.e. it is listed in category *S1.1B Endogenous Anabolic Androgenic Steroids and their Metabolites and isomers, when administered exogenously* of the WADA 2019 Prohibited List. Accordingly, as acknowledged in WADA Technical Document TD2019NA ("**TD2019NA**"), the mere presence of Nandrolone or its Metabolites in a sample is not *per se* sufficient evidence of an ADRV. Rather, under specific circumstances, additional analytical testing and reporting is required to establish that the substance entered the Athlete's system exogenously. In particular, Article 4.0(C) TD2019NA, applicable to samples from male or female athletes that are neither pregnant nor using norethisterone (contraceptives), an AAF is established for i) samples for which the estimated 19-NA concentration is greater than 15 ng/mL; and for ii) samples for which the estimated 19-NA concentration is equal to or less than 15 ng/mL and the results of the GC/C/IRMS analysis are consistent with an exogenous origin of 19-NA.

58. The Test Reports of both Samples conclude that the 19-NA finding in the Samples are neither consistent with pregnancy nor the use of norethisterone. The Athlete also does not allege that this was the case.
59. The below flowchart that forms part of TD2019NA demonstrates the consequences visually (in particular Case C on right hand side of the flowchart):

Annex A – Flowchart for 19-NA findings



60. TD2019NA is relevant for the matter at hand, because the estimated 19-NA concentration in Sample 1 was between 2.5 and 15 ng/mL, while the concentration in Sample 2 was above 15 ng/mL.
61. Sample 2 was therefore correctly declared as an AAF, without further analytical testing and reporting being required, because the concentration of 19-NA found in this Sample was so high that it is not considered feasible that it may have been of endogenous origin alone.

62. In order for Sample 1 to be declared as an AAF, a GC/C/IRMS analysis had to be performed to establish the exogenous origin of the Nandrolone. Article 3.2 TD2019NA sets forth that “*Laboratories that do not have the analytical capacity to perform GC/C/IRMS analysis for 19-NA shall have Samples transferred to and analyzed by another Laboratory that has such analytical capacity*”. It is indicated in the Test Report for Sample 1 that the analytical method for 19-NA had not yet been validated for the Bloemfontein Laboratory and that Sample 1 was therefore forwarded to another WADA-accredited laboratory for further analysis. The Sole Arbitrator considers it to be consistent with TD2019NA that Sample 1 was forwarded to the Ghent Laboratory to perform the GC/C/IRMS analysis. The Ghent Laboratory confirmed that the origin was exogenous, as a consequence of which also Sample 1 was correctly declared as an AAF.
63. The Athlete considered it to be an irregularity that she was notified of the AAF for Sample 2 before she was notified of the AAF for Sample 1. However, the Sole Arbitrator finds that this can be fully explained by the fact that a GC/C/IRMS analysis had to be performed on Sample 1 to ascertain the exogenous nature of the 19-NA, whereas no such GC/C/IRMS analysis was necessary for Sample 2. Since the GC/C/IRMS analysis was performed by the Ghent Laboratory on a different continent, the Sole Arbitrator finds that the delay in notification of an AAF for Sample 1 was justified. In the absence of any requirement set forth in the ADR or in the International Standards to this effect, the Athlete did not have any legitimate expectation that the test results would be notified in sequence.
64. The procedures set forth by TD2019NA appear to have been fully complied with.
65. Based on this evidence, the Sole Arbitrator finds that the AIU satisfied its burden of proof in establishing that the Athlete violated Article 2.1 ADR because of the presence of exogenous NA-19 in her Samples and that she thereby committed an ADRV.

### **C. Consequences of the ADRV**

66. Article 10.2 ADR provides as follows:

“10.2 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’s or other Person’s first anti-doping rule violation shall be as follows, subject to potential reductions 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.”

67. Considering that 19-NA is a Metabolite of Nandrolone, a non-specified substance, the period of Ineligibility to be imposed on the Athlete is in principle four years, unless the Athlete can establish that the ADRV was not intentional.
68. Having already dismissed the Athlete’s argument that the ADRV was caused by a departure from an International Standard or that her Samples were swapped with the samples of another person, and in the absence of any credible arguments put forward by the Athlete as to how 19-NA became present in her Samples, or that the ADRV was otherwise committed unintentionally, the Sole Arbitrator finds that the Athlete has not established that the ADRV was not intentional.
69. Accordingly, in principle, a four-year period of Ineligibility is to be imposed on the Athlete.

#### **D. The Athlete’s Second ADRV**

70. However, the AIU maintains that the period of Ineligibility should be increased to eight years, because this is the Athlete’s second ADRV. In this respect, the AIU refers to a decision dated 10 August 2015 issued by the Medical Commission of Athletics Kenya, following an AAF for Furosemide in a Sample collected from the Athlete In-Competition on 8 March 2015.
71. Article 10.7 ADR provides as follows:
- “10.7.1 For an Anti-Doping Rule Violation that is the second anti-doping offence of the Athlete or other Person, the period of Ineligibility shall be the greater of:
- a) six months;
  - b) one half of the period of Ineligibility imposed for the first anti-doping offence without taking into account any reduction under Article 10.6; or
  - c) twice the period of Ineligibility that would be applicable to the second Anti-Doping Rule Violation if it were a first Anti-Doping Rule Violation, without taking into account any reduction under Article 10.6.”
72. The decision dated 10 August 2015 provides, *inter alia*, as follows:

"We make reference to the above subject matter where you attended the AK Medical Commission hearing on 4<sup>th</sup> June 2015. The AK Medical Commission has now concluded this matter.

During the hearing, you produced corroborating evidence and were able to establish how the substance entered your body. In the foregoing the AK Medical Commission in accordance with IAAF Rule 40.4 has given you a public warning for this violation. In addition your results for the First Lady's Half Marathon on 8<sup>th</sup> March 2015 will be disqualified.

We further confirm that your provisional suspension has now been lifted and you are eligible to compete both locally and internationally. We would like to remind you about an athlete's responsibility on doping matters. Further violation of anti-doping rules will lead to stiffer sanctions."

73. Since the decision of the Medical Commission of Athletics Kenya is dated 10 August 2015, it falls within the ten-year period set forth by Article 10.7.5 ADR that is to be taken into account for the purposes of applying Article 10.7 ADR.
74. The Athlete maintains that the Medical Commission of Athletics Kenya "*did not find the athlete guilty but exonerated the athlete*" and that it is therefore "*erroneous for one to imply that the athlete was found guilty from a reading of the decision*".
75. The Sole Arbitrator disagrees with the Athlete's interpretation of the decision dated 10 August 2015. Although it is true that the Medical Commission of Athletics Kenya considered that the Athlete had established how the Prohibited Substance had entered her system, it nonetheless issued a "*public warning for this violation*". Accordingly, although the sanctions were relatively mild, there is no doubt that the Athlete was found guilty of an ADRV.
76. Furthermore, the Athlete was specifically warned that a "*further violation*" of the Anti-Doping Rules would lead to harsher sanctions. This statement is significant for two reasons. First, the reference to a possible "*further violation*" in the future indicates that a first violation was considered established. Second, the Sole Arbitrator considers the reference to "*stiffer sanctions*" to be a reference to Article 10.7 ADR, i.e. the provision in the ADR setting forth that a second ADRV is punished more severely.
77. The Sole Arbitrator is therefore comfortably satisfied to accept that the ADRV in the matter at hand is the Athlete's second ADRV, triggering the application of Article 10.7.1 ADR.
78. Pursuant to Article 10.7.1(c) ADR, because a four-year period of Ineligibility is to be imposed for the second ADRV, the period of Ineligibility is to be multiplied to eight years. Although the Sole Arbitrator

does not know the full circumstances of the Athlete's first ADRV, it may be concluded from the mild sanction imposed that such infraction was of limited severity. To invoke such relatively minor infraction to increase the period of Ineligibility to be imposed on the Athlete from four to eight years seems harsh, but the system does not allow for any flexibility in this respect. This is corroborated by CAS jurisprudence, to which the Sole Arbitrator adheres (*CAS 2019/A/6148 WADA v. Sun Yang, paras. 362-367*).

79. Consequently, the Sole Arbitrator finds that an eight-year period of Ineligibility is to be imposed on the Athlete.

#### **E. Relevance of the 2021 WADA Code for the Athlete**

80. During the hearing, the Sole Arbitrator referred the Parties to Article 10.9 of the 2021 World Anti-Doping Code which will enter into force as from 1 January 2021. This new provision on "multiple violations" provides for more leeway in sanctioning a second ADRV in comparison with the ADR that are applicable to the matter at hand. In particular, the 2021 World Anti-Doping Code allows tribunals to take into account the severity of the first ADRV in sanctioning a second ADRV.

81. Article 27.2 ADR however provides as follows:

"Any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred, and not by the substantive anti-doping rules set out in this 2021 Code, unless the panel hearing the case determines the principle of "lex mitior" appropriately applies under the circumstances of the case. For these purposes, the retrospective periods in which prior violations can be considered for purposes of multiple violations under Article 10.9.4 and the statute of limitations set forth in Article 17 are procedural rules, not substantive rules, and should be applied retroactively along with all of the other procedural rules in the 2021 Code (provided, however, that Article 17 shall only be applied retroactively if the statute of limitations period has not already expired by the Effective Date)."

82. Regardless of the fact that it is first for WA to incorporate the changes in the 2021 World Anti-Doping Code in the WA Anti-Doping Rules, given that the "Effective Date" of the 2021 WADA Code lies in the future, i.e. 1 January 2021, the Sole Arbitrator in any event does not see any scope for the application of the principle of *lex mitior*. The content of the 2021 WADA Code therefore can have no impact on the decision in the matter at hand, as explicitly set forth by Article 27.2 ADR.



83. Although the above paragraphs and references to the 2021 World Anti-Doping Code thus do not lead to any other result, the Sole Arbitrator considers it important to draw the Athlete's attention to Article 27.3 ADR, which provides as follows:

"With respect to cases where a final decision finding an anti-doping rule violation has been rendered prior to the Effective Date, but the Athlete or other Person is still serving the period of *Ineligibility* as of the *Effective Date*, the *Athlete* or other *Person* may apply to the *Anti-Doping Organization* which had *Results Management* responsibility for the anti-doping rule violation to consider a reduction in the period of *Ineligibility* in light of the 2021 Code. Such application must be made before the period of *Ineligibility* has expired. The decision rendered by the *Anti-Doping Organization* may be appealed pursuant to Article 13.2. The 2021 Code shall have no application to any anti-doping rule violation case where a final decision finding an anti-doping rule violation has been rendered and the period of *Ineligibility* has expired."

#### **F. Further Consequences of the ADRV**

84. Article 10.10.2 ADR provides as follows:

"The period of *Ineligibility* shall start on the date that the decision is issued provided that:  
(a) any period of Provisional Suspension served by the Athlete or other Person (whether imposed in accordance with Article 7.10 or voluntarily accepted by the Athlete or other Person in accordance with Article 7.10.6) shall be credited against the total period of *Ineligibility* to be served. [...]"

85. A Provisional Suspension was imposed on the Athlete pursuant to Article 7.10.1 ADR on 5 December 2019 and remained in force until the present decision. Since there is no indication that the Athlete did not comply with this Provisional Suspension, the period of the Provisional Suspension shall be credited against the total period of *Ineligibility*. Accordingly, the eight-year period of *Ineligibility* shall effectively run from 5 December 2019 and ends at midnight on 4 December 2027.

86. Article 10.8 ADR provides the following:

"In addition to the automatic Disqualification, pursuant to Article 9, of the results in the Competition that produced the Adverse Analytical Finding (if any), all other competitive results of the Athlete obtained from the date the Sample in question was collected (whether In-Competition or Out-of-Competition) or other Anti-Doping Rule Violation occurred through to the start of any Provisional Suspension or *Ineligibility* period shall be Disqualified (with all of the resulting consequences, including forfeiture of any medals, titles, ranking points

and prize and appearance money), unless the Disciplinary Tribunal determines that fairness requires otherwise.”

87. Given that Sample 1 was collected on 13 September 2019, the Athlete's competitive results obtained between 13 September and 5 December 2019 are disqualified. The Athlete did not argue and the Sole Arbitrator does not find that fairness requires otherwise.

## **VI. COSTS**

88. The AIU has requested a contribution towards its legal costs incurred with respect to these proceedings. Costs are a matter at the Sole Arbitrator's discretion pursuant to Article 8.6.1(j) ADR.
89. The Athlete made an explicit plea not to award costs to the AIU in view of her lack of financial means. Counsel for the Athlete further maintained that he represented the Athlete on a *pro bono* basis, a statement that was accepted by the AIU. The Sole Arbitrator is grateful for Mr Mwani's *pro bono* assistance and efforts in this regard.
90. As the AIU's charge has been fully upheld, the Sole Arbitrator does not find it appropriate not to award any costs to the AIU. However, considering i) the limited financial resources of the Athlete; ii) the fact that the Athlete was represented by *pro bono* counsel; iii) the fact that the Athlete did not raise any frivolous defence arguments that required the AIU to call in the expertise of third parties or to file a Reply Brief, the Sole Arbitrator deems it justified to keep costs at a minimum, and considers an amount of £500 justified as a contribution towards the AIU's legal fees and other expenses incurred in connection with these proceedings within 28 days of notification of this decision.

## **VII. ORDER**

91. The Sole Arbitrator:
- (i) Finds that the Athlete has committed an Anti-Doping Rule Violation pursuant to Article 2.1 of the 2019 IAAF Anti-Doping Rules.
  - (ii) Imposes a period of Ineligibility of eight years on the Athlete under Article 10.2.1 in conjunction with Article 10.7.1(c) of the 2019 Anti-Doping Rules, commencing on the date of this decision. The Provisional Suspension imposed on the Athlete from 5 December 2019 until the date of the present decision shall be credited against the total period of Ineligibility.

- (iii) Orders the disqualification of all results obtained by the Athlete between 13 September and 5 December 2019 with all resulting consequences, including the forfeiture of any titles, awards, medals, points and prize and appearance money.
- (iv) Orders the Athlete to pay to the AIU the total amount of £500 as a contribution towards its legal fees and other expenses incurred in connection with these proceedings.
- (v) Dismisses all other and further motions or prayers for relief.

## VIII. RIGHT TO APPEAL

- 92. Article 8.9.2 of the IAAF Rules requires the Tribunal to set out and explain in its decision the rights of appeal applicable pursuant to Article 13 ADR.
- 93. As this proceeding involves an International-Level Athlete in the sense of Article 1.8 ADR, this decision may be appealed exclusively to CAS.
- 94. Pursuant to Article 13.7 ADR, the deadline for filing an appeal with CAS is 30 days from the date of receipt of the present decision by the appealing party and where the a appellant is a party other than WA, a copy of the appeal must be filed on the same day with WA.



Dennis Koolaard (Sole Arbitrator)

London, United Kingdom

14 July 2020

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