

SR/128/2023

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF WORLD ATHLETICS

Before; Charles Hollander KC (Chair) Pedro Fida Hannu Kalkas BETWEEN: WORLD ATHLETICS Anti-Doping Organisation and Norah Jeruto Respondent DECISION OF THE DISCIPLINARY TRIBUNAL

I. THE PARTIES

- 1. The Claimant, World Athletics ("WA"), is the International Federation governing the sport of Athletics worldwide.
- 2. The Respondent, Ms Norah Jeruto (the "Athlete"), is a long-distance runner from Kenya who represented Kenya until 29 January 2022. From 30 January 2022 the Athlete has represented Kazakhstan. She was the 2022 World Champion in the Women's 3000m Steeplechase and is an International-Level Athlete for the purposes of the World Athletics

THE INDEPENDENT EXPERTS

Anti-Doping Rules (the "ADR" or the "Rules"). There was no dispute as to the jurisdiction of the Tribunal to hear this matter, given the Athlete's participation in elite competitions, although the question as to which version of the Rules applied is slightly complicated and discussed below.

II. FACTUAL BACKGROUND

- 3. The Athlete has been charged by the Athletics Integrity Unit ("AIU") (on behalf of World Athletics) with an Anti-Doping Rule Violation ("ADRV") in connection with abnormalities in the haematological module of her Athlete Biological Passport ("ABP"). In particular, the matter concerns several abnormalities detected in blood samples collected from the Athlete between 21 June 2016 and 2 May 2022, in particular in:
 - (i) Samples 13-15 collected between March 2020 and May 2020,
 - (ii) Samples 17-19 collected between September 2020 and October 2020 and
 - (iii) Sample 25 collected in March 2021, that AIU say indicate blood manipulations.
- 4. World Athletics' position is that the Athlete's ABP profile constitutes clear evidence that the Athlete has committed ADRVs for the Use of a Prohibited Substance/Method based on the abnormalities in Samples 13-14, Samples 17-19, and Sample 25.

III. PROCEDURAL BACKGROUND

- 5. On 5 April 2023, further to the AIU's review of the Athlete's explanations for the alleged abnormalities detected in her ABP, by way of a *Notice of Charge under the World Athlete Anti-Doping Rules* ("the Notice"), the AIU charged the Athlete with a Violation of Article 2.2 ADR for "Use of a Prohibited Substance and/or Prohibited Method, pursuant to Rule 2.2".
- 6. The Notice enclosed multiple documents the AIU relied upon in support of the Charge.

- 7. The AIU provisionally suspended the Athlete as of 5 April 2023, and the Notice outlined the Athlete's procedural options going forward.
- 8. Upon receipt of the Notice, the Athlete exercised her right to a hearing before the WA Disciplinary Tribunal.

IV. PROCEDURE BEFORE THE WA DISCIPLINARY TRIBUNAL

- 9. Charles Hollander KC was appointed as Chair on 20 April 2023.
- 10. Further to Procedural Directions being issued on consent of the Parties on 26 April 2023, the Procedural Calendar was set, and two additional Panel Members were appointed to sit alongside the Chair, namely Pedro Fida and Hannu Kalkas.
- 11. On 9 June 2023, WA filed its Brief.
- 12. On 21 July 2023, the Athlete filed her Answer to WA's Brief.
- 13. On 18 August 2023, WA filed a Reply Brief.
- 14. On 20 September 2023, an oral remote hearing, across a number of time zones took place on 20 September 2023, with oral closing submissions on 9 October 2023 ("Hearing").
- 15. Following the Panel's instructions, on 13 October 2023, WA filed a summary of WA's closing submissions on the scientific evidence of the case ("WA Closing Submission").
- 16. On 16 October 2023, the Athlete filed her closing submissions in reply to WA's latest brief.

V. THE HEARING

- 17. We pay tribute both to the quality of advocacy on both sides, and also the quality of the expert evidence. Paul J Greene and Matthew Kaiser of Global Sports Advocates acted for the Athlete, Adam Taylor of Kellerhals Carrard and Tony Jackson, AIU Deputy Head of Case Management acted for World Athletics.
- 18. During the Hearing, the Athlete gave evidence. We heard from Prof Guiseppe D'Onofrio, speaking on behalf of the AIU Expert Panel, who is a distinguished clinical haematologist, and Dr Kang Jin-Yong, a consultant gastroenteritis, on behalf of World Athletics. Dr John Saltzman, a gastroenterologist practising at Brigham and Women's Hospital and Part time Professor of Medicine at Harvard Medical School, who specialises in peptic ulcer disease and gastrointestinal bleeding gave evidence for the Athlete, as did Dr Stephen Brandt, who is a faculty member at Vanderbilt University Medical Centre in Nashville, and has carried out research on erythropoiesis and cared for patients with haematological disorders for many years.
- 19. The Panel deliberated thereafter and now renders the following decision.

VI. APPLICABLE LAW AND JURISDICTION

a. Which version of the Rules

20. The Athlete was charged on 5 April 2023 with an ARDV based on ABP samples collected between 21 June 2016 and 2 May 2022. The applicable rules in force at the time that the Notice of Charge was issued were the 2023 ADR in force from 31 March 2023 ("the Effective Date"), which provided as follows:

"1.7.2 (b) Any anti-doping rule violation case that is pending as of the Effective Date or is brought after the Effective Date but based on an anti-doping rule violation that occurred prior to the Effective Date, shall be governed by the substantive anti-doping rules in effect at the time the alleged antidoping rule violation occurred and not by the substantive anti-doping rules set out in these Anti-Doping Rules, unless the hearing panel determines that the principle of lex mitior appropriately applies under the circumstances of the case, and with respect to procedural matters by these Anti-Doping Rules (unless by the Effective Date the case has already been referred to a hearing body in accordance with Rule 38 of the 2016-2017 IAAF Competition Rules, in which event the case shall proceed before such hearing body under the 2016-2017 IAAF Competition Rules). For the purposes of this Rule, the retrospective periods in which prior violations can be considered for the purposes of multiple violations under Rule 10.9.4 and the statute of limitations set out in Rule 18 are procedural rules, not substantive rules, and should be applied retroactively, along with all the other procedural rules in these Anti-Doping Rules (provided however that Rule 18 will only be applied retroactively if the statute of limitations period – whether the original one or as extended by subsequent rules – has not already expired by the Effective Date)."

- 21. Therefore, this case is governed, with respect to procedural matters, by the 2023 ADR and, with respect to substantive matters, by the ADR in force at the time that the ADRV occurred. In that respect, the applicable ADR in force at the material times are as follows:
 - a. Samples 13-15 the World Athletics Anti-Doping Rules in force from 1 November 2019 ("2019 ADR")
 - b. Samples 17-19 World Athletics Anti-Doping Rules in force from 1 April 2020 ("2020 ADR"); and
 - c. Sample 25 the World Athletics Anti-Doping Rules in force from 1 January 2021 ("2021 ADR").

b) Relevant Rules

- 22. Rule 2 of the 2021 ADR specifies the circumstances and conduct that constitute ADRVs. This includes Rule 2.2 which 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 their body and that no Prohibited Method is Used. Accordingly, it is not necessary to demonstrate intent, Fault, Negligence or knowing Use on the Athlete's part in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.

2.2.2 The success or failure of the 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."

"Attempt" is defined as follows:

"Purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation; provided, however, that there will be no anti-doping rule violation based solely on an Attempt to commit a violation if the Person renounces the Attempt prior to it being discovered by a third party not involved in the Attempt."

- 23. An ADRV under Rule 2.2 of the 2021 ADR may, according to Rule 3.2 of the 2021 ADR, be established by "any reliable means". According to the comment of Article 3.2 of the 2021 Code, this includes "conclusions drawn from the profile of a series of the Athlete's blood or urine Samples, such as data from the Athlete Biological Passport".
- 24. Pursuant to Article 7 of all applicable ADR versions (2019, 2020 and 2021), the AIU has jurisdiction for result management of the Athlete's alleged ADRV, and pursuant to Article 8 ADR (2019, 2020 and 2021 ADR), the WA Disciplinary Tribunal has jurisdiction to adjudicate the matter and this Panel's composition has not been challenged.

VII. PARTIES' ARGUMENTS

a) Blood Doping

25. We set out a brief explanation of the process of blood doping. The explanation is taken from World Athletics' brief but, so far as it goes, we do not believe it is controversial.

- 26. There are three widely known substances or methods used for blood doping, namely: (i) administering recombinant human erythropoietin ("rEPO") (administered by injection to trigger erythropoiesis, the stimulation of the production of red blood cells);
 - (ii) synthetic oxygen carriers (i.e., infusing blood substitutes such as a haemoglobin-based oxygen carrier ("HBOC") or perfluorocarbons ("PFC") to increase haemoglobin well above normal levels); and
 - (iii) blood transfusions (i.e., infusing a matching donor's or the athlete's own (previously extracted) red blood cells to increase the haemoglobin well above normal).
- 27. rEPO is a Prohibited Substance and included in class "S2. Hormones and related substances" of the World Anti-Doping Agency ("WADA") Prohibited List.
- 28. Synthetic oxygen carriers and blood transfusions are Prohibited Methods under class "M1. Enhancement of oxygen transfer" on the World-Anti Doping Agency Prohibited List. M1 provides as follows:

Manipulation of Blood and Blood Components

The following are prohibited:

- 1. The Administration or reintroduction of any quantity of autologous, allogenic (homologous) or heterologous blood, or red blood cell products of any origin into the circulatory system.
- 29. WADA developed and refined the concept of the ABP, which World Athletics formally introduced into its blood testing programme in 2009. The ABP consists of an electronic record that compiles and collates a specific athlete's test results and other data over time and is unique to that particular athlete. The haematological module of the ABP records the values in an athlete's blood samples of haematological parameters that are known to be sensitive to changes in red blood cell production.

- 30. The values collected and recorded include haemoglobin concentration ("HGB" or "HB") and percentage of immature red blood cells viz. reticulocytes ("RET%"). The ratio of the HGB and the RET% values is also used to calculate a further value, known as the "OFF-score", which is sensitive to changes in erythropoiesis.
- 31. The marker values from the blood samples collected in the ABP programme are inputted into a statistical model, known as the "Adaptive Model". The Adaptive Model uses an algorithm that considers both (i) the variability of such values within the population generally (i.e., blood values reported in a large population of non-doping athletes) and (ii) factors affecting the variability of the athlete's individual values (including gender, ethnic origin, age, type of sport, and instrument-related technology).
- 32. The selected biological markers are monitored over a period and a longitudinal profile is created that establishes an athlete's upper and lower limits within which the athlete's values would be expected to be found, assuming normal physiological conditions (i.e., the athlete is healthy and has not been doping). The upper and lower limits have been calculated, (as per the WADA ABP Operating Guidelines ("the Guidelines")) with a "specificity" of 99%. The Adaptive Model also calculates the probability of abnormality of the sequence of values in the ABP profile.
- 33. The athlete becomes his/her own point of reference and each time a blood sample is recorded, the Adaptive Model calculates where the reported HGB, RET% and OFF-score values fall within the athlete's expected distribution. After each new test, a new range of expected results for the athlete is determined.
- 34. The Athlete's Biological Passport is not, of itself, sufficient to establish an ADRV.
- 35. The ABP is, and has been generally accepted as, a reliable means of evidence to assist in establishing ADRV.

- 36. The procedural steps, which were followed in this case, are set out in Article C.1.3:
 - "a) The review begins with the application of the Adaptive Model.
 - b) In case of an Atypical Passport Finding or when the Athlete Passport Management Unit considers that a review is otherwise justified, an Expert conducts an initial review and returns an evaluation based on the information available at that time.
 - c) In case of a "Likely doping" initial review, the Passport is then subjected to a review by three (3) Experts including the Expert who conducted the initial review.
 - d) In case of a "Likely doping" consensus of the three (3) Experts, the process continues with the creation of an Athlete Biological Passport Documentation Package.
 - e) An Adverse Passport Finding is reported by the Athlete Passport Management Unit to the Passport Custodian if the Experts' opinion is maintained after review of all information available at that stage, including the Athlete Biological Passport Documentation Package."

b) The Athlete's ABP

37. A summary table of the Athlete's ABP showing the Athlete's HGB, RET% and OFF scores for each of the valid samples is as follows:

#	Sample code	Collection date	HGB	RET%	OFF-score	нст	RET#	IRF			
1	126586	21.06.2016	Invalid								
2	363132	20.11.2017	14.9	2.29	58.2	39.8	0.1	3.2			
3	239024	09.05.2018	14.5	0.97	85.91	39.3	0.0445	3.9			
4	237797	23.05.2018	Invalid								
5	363281	25.07.2018	14.8	0.96	89.21	39.7	0.0453	1.9			
6	624913	10.11.2018	15.3	1.1	90.1	42.4	0.0529	3.8			
7	600722	26.11.2018	15.1	0.73	99.7	40.5	0.0339	12.4			
8	624101	14.01.2019	15.6	1.53	81.8	42.9	0.0779	7.3			
9	619629	16.04.2019	15.1	1.09	88.4	42	0.0532	5.6			
10	683611	10.09.2019	14.4	1.23	77.5	40.2	0.0565	5.7			
11	676792	20.11.2019	15	1.55	75.3	41.5	0.0722	6.5			
12	459835	02.03.2020	Invalid								
13	682195	18.03.2020	12.8	4.31	3.4	34.1	0.1698	12.6			
14	683374	26.03.2020	13.6	3.69	20.7	38.7	0.1576	10.1			

15	682214	21.05.2020	15.2	1.06	90.2	42.7	0.0506	8.5		
16	471564	05.07.2020	15	1.35	80.3	43.6	0.0666	6.6		
17	471570	06.09.2020	16.1	1.79	80.7	45.4	0.0925	17.1		
18	699341	28.09.2020	17.1	1.77	91.2	48.5	0.0959	10.1		
19	470018	02.10.2020	16.1	1.49	87.8	46.5	0.0767	15.5		
20	682160	05.11.2020	17.2	1.31	103.3	49.4	0.0715	8.4		
21	469998	20.12.2020	15	1.58	74.6	42.5	0.0762	6.5		
22	708549	30.12.2020	16.9	1.7	90.77	49	0.095	3.9		
23	478441	08.02.2021	Invalid							
24	478490	24.02.2021	Invalid							
25	683373	10.03.2021	14.1	3.06	36	38.5	0.1353	9.7		
26	699333	23.03.2021	15	1.91	67.1	41.3	0.0896	5.6		
27	489811	27.05.2021	15.6	1.3	87.59	44.6	0.0657	5.7		
28	479362	08.06.2021	14.9	2.4	56	43.6	0.1195	12.6		
29	702174	10.08.2021	15.2	1.83	70.8	44.8	0.093	17.3		
30	721061	20.08.2021	14.6	0.9	89.1	41.9	0.0431	4.4		
31	919547	25.09.2021	14.7	1.99	62.4	42.1	0.0971	17		
32	0054598	25.11.2021	15.2	1.95	75.2	41	0.0942	8		
33	469820	19.12.2021	15.8	2.36	65.8	44.3	0.118	17.4		
34	932606	05.01.2022	15.5	0.87	99	44.3	0.0432	2.8		
35	932860	20.01.2022	14.9	2.27	58.6	40.5	0.1056	9.9		
36	1038590	03.04.2022	15.1	2.72	52	42.2	0.1268	17.1		
37	932450	02.05.2022	14.5	2.37	52.6	38.8	0.1033	15.3		

Units for the results are those presented in ADAMS. All the results are based on ADAMS information.

- 38. In its qualitative assessment of the ABP profile, the Expert Panel noted several abnormal patterns as follows:
 - a. Samples 13-14 collected on 18 March 2020 and 26 March 2020 respectively show highly elevated RET% and low HGB, indicating a low, but recovering, HGB mass characteristic of a blood loss: bleeding or blood extraction (donation or withdrawal)
 - b. Sample 14, collected eight days after Sample 13, confirms the progressive restoration of the red blood cell mass: increase of haemoglobin, although still below the usual values of the Athlete, decrease of RET% compared to Sample 13, but still well above the upper limit of the expected normal range, and only a small decrease of the immature - 10-

reticulocyte fraction ("IRF"). The increase in HGB is said by World Athletics to be the result of the accelerated reticulocyte release from the bone marrow.

- c. Sample 15, collected about two months later on 21 May 2020, shows a recovery of HGB and normalization of the RET% and IRF to the Athlete's normal values at the residence at altitude;
- d. Samples 17-19 collected between 6 September 2020 and 28 September 2020 show an alleged artificial stimulation of erythropoiesis via alleged use of EPO at different doses in September and October 2020 with the view to increase the exercise capacity before competition based on relatively high IRF values (17.1, 10.1 and 15.5 respectively) HGB (16.1, 17.1 and 16.1 respectively) and an increase in red cell distribution width ("RDW-SD") (41.7fl, 42.9fl and 43.8fl respectively) which was not caused by altitude since the Athlete had been residing at altitude for six months since 13 March 2020. Sample 20 collected on 5 November 2020 has the highest HGB value and most abnormal OFF-score occurring before a competition in Kenya on 28 November 2020; 26 and 27.3.
- e. Sample 25 collected on 10 March 2021 has a high RET% (3.06%) with HGB (14.1) and Off-Score (36) like those in Sample 14 indicating possible recovery from blood withdrawal.

c) Views of the Expert Panel

39. On 24 August 2020 the first joint expert opinion stated (based on information until 30.6.2020):

"There is no indication of blood donation or blood loss in the DCFs of samples 13 and 14, which could explain these abnormalities. For this reason, it is our unanimous opinion that, in the absence of appropriate explanation, the variation observed in sample 13 and 14 reflects collection of blood in the context of a transfusion strategy. Thus, on the basis of the available information, it is likely that a Prohibited Method had been used and highly unlikely that the biological profile is the result of any other cause."

40. On 28 December 2020 the revised joint expert opinion stated based on the information until 30.6.2020:

"There is no indication of blood donation or blood loss in the DCFs of samples 13 and 14, explaining these abnormalities. Given the absence of an appropriate explanation, the variation observed in samples 13. and 14 plausibly reflects, in our opinion, the collection of blood or packed red blood cells in the context of a transfusion strategy. In consideration of the current limits of the Word Anti-Doping Agency's Prohibited List, which does not consider the scientific evidence of blood withdrawal as an anti-doping rule violation, we recommend further testing and investigation activity on this case and recommend specifically asking the Athlete about any possible cause of decrease in HB associated with increase in reticulocytes in March 2020."

41. On 24 June 2022 a further joint expert opinion stated based on the information until 31March 2022:

"We therefore conclude that it is highly likely that a prohibited substance such EPO has been used in September-October 2020 and that blood withdrawal has taken place in February or March 2020 and in the same period in 2021 and that it is unlikely that the passport is the result of any other cause. "

42. On 3 March 2023 a further joint expert opinion stated based on the information until 31 March 2022:

"Based on the explanations provided by the Athlete, we confirm our previous opinion that a prohibited substance or method has likely been used. The information provided to the date does not explain the ABP abnormalities, which are on the opposite indicative of blood manipulation."

d) The issues in the case

- 43. AIU's case was, therefore, that the ABP results in relation to
 - a. Samples 13-15 and 25
 - b. Samples 17-19

were evidence of blood doping and therefore gave rise to breaches of Article 2 ADR.

- 44. At the hearing, World Athletics accepted that they could not show in relation to the Samples 13-15 and 25 the charge of *Use of a Prohibited Substance or a Prohibited Method*. However, the case put forward, only foreshadowed in their Brief at footnote 52 "*or in the alternative attempted use*", was that they were nevertheless able to show *attempted* use, which is still a breach of Article 2.2. This was because, they said, the evidence in relation to those samples showed blood withdrawal but no more; blood withdrawal was not of itself an offence but was indicative of a desire and intent to administer prohibited substances: hence the "Attempted Use" charge.
- 45. In relation to Sample 17-19, World Athletics said the ABP results here were consistent with the use of a prohibited substance such as EPO, and thus maintained the charge of "Use."
- 46. The Athlete provided an explanation for the ABP results as follows.
- 47. She suffers bleeding ulcers associated with H. pylori, the leading cause of peptic ulcer disease. Her bleeding ulcers have caused her a lot of pain and have even hospitalised her on multiple occasions. She has been prescribed and taken a Pylotrip kit in an attempt to kill her H. pylori, heal her peptic ulcers and relieve her pain, but the bleeding ulcers and H. pylori have continued to plague her. Besides a Pylotrip kit, she has been given other medicines to try and cure her bleeding ulcers and ease her pain: Esotid (to stop the bleeding from her ulcers and to treat H pylori), Ulgicid (an anti-ulcer medicine), Cefuroxime (an antibiotic designed to kill H pylori), Esose (an H. pylori treatment kit), and Relcer (a gel to treat ulcers). The bleeding ulcers are brought on by stressful times in her life. When the

bleeding ulcers are at their worst, she has no appetite but always feels full, vomits blood that looks like coffee, has blood in her stool and pain in her stomach. There are periods of time where the pain and symptoms have gone away, but only temporarily. The pain in her stomach and all the symptoms have always come back, particularly when she experiences severe stress in her life. She had severe bleeding ulcers in March 2020. She had another bout of bleeding stomach ulcers in March 2021 as a result of an incredibly stressful period of her life.

48. The Athlete's explanation for the results on Samples 17-19 was different. In August 2020, she had a runny nose, dry cough, and pain in her chest. She did not feel like eating and had pain in her muscles all over her body. She could not taste any food and just drank liquids. She felt very weak and slept a lot and went to the hospital. She was told to take a medicine called Rhinathiol/Promethazine to help her lungs and make it easier for her to breathe. It was suggested it was possible she had COVID-19. In October, she got sores on her lips which became blistered. Her gums became swollen. The chemist gave her Zytee RB to treat her mouth sores.

VIII. PANEL'S CONCLUSIONS:

a) Samples 13-15 and 25

49. M1 bans administration or reintroduction of blood or blood products but it does not ban blood withdrawal. The World Athletics Expert Panel concluded:

"... the variation observed in samples 13 and 14 plausibly reflects, in our opinion, the collection of blood or packed red blood cells in the context of a transfusion strategy. In consideration of the current limits of the World Anti-Doping Agency's Prohibited List, which does not consider the scientific evidence of blood withdrawal as an anti-doping rule violation, we recommend further testing and investigation activity..."

50. The AIU were unable to prove administration of blood or blood products in relation to samples 13-15 or 25, a conclusion confirmed by Prof D'Onofrio in cross-examination. Prof

D'Onofrio said that it was possible to speculate on occasions when blood might have been administered but could do no more than that. His views on reinfusion were his own, not those of his expert panel colleagues. The AIU's case was that it was to be inferred from the evidence of blood withdrawal that there was an attempted breach of M1: the blood withdrawal had no purpose other than as part of a strategy of blood doping. Hence the charge of "Attempted Use". It was submitted that the blood withdrawal was "*a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation.*"

- 51. In our judgment this simply does not work. Assume for a moment that the Athlete did withdraw blood with a view to a subsequent administration of blood in breach of M1, the withdrawal cannot of itself constitute an attempt to administer blood any more than the purchase of a gun for a nefarious purpose can constitute attempted murder.
- 52. Withdrawal of blood can possibly be seen as preparation of an ADRV, but it cannot be seen as an Attempt, because Attempt would require also at least the intent of reinfusion. World Athletics have only been able to show the withdrawal of blood in Sample 13-14 and 25. That is not enough to constitute even an Attempted Use. We do not consider evidence of blood withdrawal can be regarded by itself as "a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation."
- 53. That is sufficient to deal with the Attempted Use charge based on Samples 13-15 and 25. However, we should add that, particularly in the light of Dr Saltzman's evidence, we do not consider it would have been easy to reject the Athlete's explanation as to what happened.
- 54. Dr Saltzman's evidence was that the Athlete's anaemia in 2020 and 2021 was consistent with blood loss from GI bleeding from exacerbations of peptic ulcer disease. He particularly relied on her explanation of her vomiting "coffee grounds", and her description of diarrhoea, foul smelling dark stools which he regarded as consistent with consistent with melena. He pointed out that she has had extremely poor care: Kenya has less than 30 gastroenterologists in a population of 40 million.

55. Dr. Saltzman's conclusion was:

"Certainly possible that she had GI bleeding as a reason for these symptoms. And I never saw, at least when I looked over the reports, that there was any evidence of blood being given back to her. So to me, I think it's a pretty simple case of some poor, you know, patient who's not treated well, who has, you know, ongoing symptoms and then has recurrent symptoms, including bleeding."

- 56. Dr Kang explained in his report that bloody diarrhoea and blood in the stool were not consistent with GI bleeding. He also explained that urine in the blood was not consistent with GI bleeding, Nevertheless, the Athlete reported all three symptoms.
- 57. Dr Kang and Prof D'Onofrio did not agree with Dr Saltzman's conclusions, but given the disagreement between reputable experts, the majority of the Panel would have been unwilling to hold that we were satisfied to the standard of comfortable satisfaction that an ADRV had been committed even if we had considered the evidence of blood withdrawal was sufficient of itself to constitute "Attempted Use".

b) Samples 17-19

- 58. That leaves the charge based on Samples 17-19. The evidence of Prof D'Onofrio was the high peaks of haemoglobin were highly suspicious. He was asked whether those samples alone would have been sufficient for a case to be brought against the Athlete, to which his answer may be described as a slightly half-hearted yes. He considered that the data was consistent with administration of a relatively low dose of rEPO.
- 59. Dr Brandt's evidence was that the combination of a high % IRF, increased RDW-SD, and no corresponding increase of RET% are consistent with a COVID-19 infection which causes stimulated isolated erythropoiesis. Dr Brandt put this to Prof D'Onofrio in an exchange between experts. Prof D'Onofrio said that he did not think that the results could

be related to a mild infection and were more consistent with an EPO injection in small doses.

- 60. Dr Brandt's evidence was that the Athlete's symptoms in August/September 2020 were consistent with a bout of COVID-19. The Athlete was prescribed rhinathiol promethazaine, a prescription drug which can be effective for COVID-19. She subsequently was prescribed a cream for mouth sores; mouth sores are sometimes an effect of COVID-19.
- 61. World Athletics criticised Dr Brandt's evidence because, notwithstanding his haematological experience, he had no experience of ABPs and submitted that Prof D'Onofrio's evidence was more reliable. They also criticised Dr Brandt for having changed his position, and a lack of reference to stress erythropoiesis in his first report. They pointed out that on the evidence it would need to have been a serious illness to affect the ABP in the way alleged by the Athlete and the evidence did not on any view support that.
- 62. We also had to take into account the Athlete's own evidence about her illness in August/September 2020. She was sufficiently unwell, she said, that she went to hospital. Her evidence was that she was told she did *not* have COVID-19 but said that she was told that she had tuberculosis.
- 63. It was unsatisfactory that there was no documentary evidence in relation to the Athlete's hospital visit in September 2020. We found her evidence on this confused and difficult to rely on.
- 64. In conclusion on this issue, we found the factual evidence somewhat unsatisfactory in relation to this period. The ABP showed abnormal results consistent with a relatively low dose of EPO, which would have been an ADRV. We did not find resolution of this charge easy. We accept that there was at least room for the view that Dr Brandt's conclusions were somewhat speculative.

- 65. However, the majority of the Panel is persuaded that, having heard the experts, and recognising that all the experts we heard from were distinguished practitioners, and taken into account their differing views, the sample results might also be explained by a bout of COVID-19. On balance we cannot say that World Athletics have proved their case in relation to Samples 17-19 so that we are comfortably satisfied. Whilst we recognise that compelling arguments were made here in favour of the view of the Expert Panel, we consider there is sufficient doubt on this part of the case that it would be unfair to convict the Athlete.
- 66. Thus, we dismiss the charges.

c) ABP Cases Procedure

- 67. Although in many doping cases scientific evidence is led before the Tribunal, ABP cases such as the present have the potential to involve a different level of complexity. It may be that even in such cases few are as complex, or involve a dispute as to the scientific evidence between reputable experts in the way this case did. Given the extent of the expert evidence, and disputes, with hindsight the Tribunal would have wished to have had more assistance in grappling with and understanding the expert evidence and the disagreements between the experts than it received here. That is not a criticism of the parties, advocates or their experts it may be said it is for the Tribunal to case manage hearings so it obtains the assistance it needs. It may be that it is an issue that arises in a relatively small number of ABP cases.
- 68. However, if in future, particularly in ABP cases, it appears there is likely to be a significant difference of view between experts, we would invite World Athletics to alert the Tribunal as soon as it becomes apparent, so that consideration may be given as to whether additional directions are required.

IX DISPOSITION

- 69. Based on the above considerations, the Tribunal rule the following:
 - a. The charges are dismissed.
 - b. No period of Ineligibility is imposed on the Athlete and no results are disqualified.
 - c. The Provisional Suspension is lifted with immediate effect.

X RIGHT OF APPEAL

- 70. This decision may be appealed to the Court of Arbitration for Sport ("CAS"), located at Palais de Beaulieu Av. des Bergières 10, CH-1004 Lausanne, Switzerland (procedures@tas-cas.org), in accordance with Article 13 ADR.
- 71. In accordance with Art. 13.6.1(a) ADR, the deadline for filing an appeal with CAS is 30 days from the date of receipt of this decision.

Clubs Holland

Charles Hollander KC (Chair)

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Pedro Fida

Hannu Kalkas

London, United Kingdom

27 October 2023

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