

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

Before:

David Sharpe KC (Chair)

Anna Bordiugova

Parth Goswami

BETWEEN:

**WORLD ATHLETICS**

**Anti-Doping Organisation**

**- and -**

**RODGERS KWEMOI**

**Respondent**

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**DECISION OF THE DISCIPLINARY TRIBUNAL**

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**I. INTRODUCTION**

1. World Athletics (“WA”) is the International Federation governing the sport of Athletics worldwide. It has its registered office in Monaco. In these proceedings WA is represented by the Athletics Integrity Unit (the “AIU”), as per Rule 1.2 of the World Athletics Anti-Doping Rules in force from 31 March 2023 (the “ADR”).
2. The Respondent, Mr Rodgers Kwemoi (the “Athlete”), is a long-distance runner from Kenya and is an International-Level Athlete for the purposes of the ADR.

3. The AIU and the Athlete are hereinafter collectively referred to as the "Parties".
4. The Disciplinary and Appeals Tribunal (the "Tribunal") has been appointed to determine a charge alleging an Anti-Doping Rule Violation ("ADRV") brought by the AIU against the Athlete in connection with abnormalities in the haematological module of his Athlete Biological Passport ("ABP").
5. The Athlete denies using any Prohibited Substances or Methods that could have caused the abnormalities detected in his ABP and has requested that the matter be determined by way of a hearing before the Tribunal.

## **II. JURISDICTION**

6. The applicable procedural rules for the testing and investigations undertaken by the AIU are the ADR which implements the requirements of the 2021 version of the World Anti-Doping Code, to which WA is a signatory, in the sport of Athletics. The Athlete has competed regularly in competitions organised by WA and does not challenge the jurisdiction of the Tribunal to hear his case and the applicability of the ADR to him.
7. Dr David Sharpe KC, United Kingdom, was appointed on 28 September 2023 as Chair of the Panel, along with Dr Anna Bordiugova, Ukraine, who was appointed on 17 November 2023, and Mr Parth Goswami, India, who was appointed on 21 November 2023, to determine this matter. The Parties consented to the matter being dealt with by way of a Panel composed of three members of the Tribunal.
8. In these circumstances and pursuant to Rule 1.3 ADR in conjunction with Rule 8.2(a) ADR, the Tribunal has jurisdiction to determine this matter.

## **III. FACTUAL BACKGROUND**

9. The Athlete has been charged by the AIU with an ADRV under the Rule 2.2 ("Use") ADR in connection with abnormalities in the haematological module of his ABP. In

particular, the matter concerns several abnormalities in biological markers detected in blood samples collected from the Athlete between 18 July 2016 and 1 February 2023.

10. WA's position is that the Athlete's ABP profile constitutes clear evidence that the Athlete has committed an ADRV for the Use of a Prohibited Substance or a Prohibited Method based on the abnormalities in the Samples and the pattern of the Athlete's blood count.

#### **IV. THE RELEVANT ANTI-DOPING RULES**

11. The Athlete was charged on 8 August 2023 with an ADRV based on ABP samples collected between 18 July 2016 and 1 February 2023. The applicable rules in force at the time that the Notice of Charge was issued, on 8 August 2023, were the ADR in force from 31 March 2023 (the "Effective Date") (the "2023 ADR"), which provide, 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 anti-doping 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)."*

12. 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. Sample 1 – IAAF Competition Rules 2016-2017 in force from 1 November 2015 (“2016 ADR”);
- b. Samples 4-5, and 13 – IAAF Anti-Doping Rules 2019 in force from 1 January 2019 (“2019 ADR”);
- c. Samples 15, 17, 18, 21-23, 25-30, and 37-38 – the World Athletics Anti-Doping Rules in force from 1 January 2021 (“2021 ADR”).
- d. To avoid repetition, reference is made to the 2021 ADR as (i) they are the ADR in force at the time of the most recent evidence of blood doping in the ABP (i.e. Samples 37-38) and (ii) there are no material differences with the previous applicable versions of the ADR in relation to the referenced Rules. For the avoidance of doubt, reliance is placed on all versions of the ADR, as applicable.

13. Rule 2 of the 2021 ADR specifies the circumstances and conduct that constitute ADRVs. Rule 2.2 of the 2021 ADR provides as follows:

**“2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method**

2.2.1 *It is the 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.”*

14. Attempt is defined in the various ADRs as “[p]urposely 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.”*

15. Rule 3.1 of the 2023 ADR provides that the AIU has the burden of establishing that an ADRV has been committed to the comfortable satisfaction of the hearing panel:

**“3.1 Burdens and Standards of Proof**

*The Integrity Unit or other Anti-Doping Organisation will have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof will be whether the Integrity Unit or other Anti-Doping Organisation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that has been made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, except as provided in Rules 3.2.4 and 3.2.5, the standard of proof will be by a balance of probability.”*

## **V. BLOOD DOPING AND THE ABP**

16. Given the subject matter of this case it is appropriate to briefly set out some information on blood doping and the ABP. This detail is provided within the AIU papers and is not believed to be contentious.
17. 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).

18. rEPO is a Prohibited Substance, and it is included in class “S2. *Hormones and related substances*” of the World Anti-Doping Code Prohibited List. Synthetic oxygen carriers and blood transfusions are Prohibited Methods under class “M1. *Enhancement of oxygen transfer*” of the World-Anti Doping Code Prohibited List for dates relevant to this case.
19. The World Anti-Doping Agency (“WADA”) developed and refined the concept of the ABP, which WA formally introduced into its blood-testing programme in 2009.
20. 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.
21. The values collected and recorded include haemoglobin concentration (“HGB” or “HB”) and the 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.
22. 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 takes into account 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).
23. The selected biological markers are monitored over a period of time 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).

24. 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.
25. 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.
26. WA implements the ABP in accordance with the International Standard for Results Management (the “ISRM”) through a procedure that is designed to afford the athlete due process in establishing whether an ADRV has been committed. The procedural steps, which were followed in this case, are set out in “Annex C – Results Management. Requirements and Procedures for the Athlete Biological Passport”, under point 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.*
- f) The Athlete is notified of the Adverse Passport Finding and offered the opportunity to provide explanations.*
- g) If after review of the explanations provided by the Athlete, the Experts maintain their unanimous conclusion that it is highly likely that the Athlete*



*Used a Prohibited Substance or a Prohibited Method, an anti-doping rule violation is asserted against the Athlete by the Passport Custodian.”*

## **VI. THE HEARING**

27. A hearing by video conference took place before the Panel on 11 January (the “First Hearing”) and 20 March 2024 (the “Second Hearing”). WA was represented by Mr Adam Taylor (of Kellerhals-Carrard, Lausanne, Switzerland) and the Athlete was represented by Mr David Hopkins (of 39 Essex Chambers, London, United Kingdom). The Panel is most grateful to both representatives for their co-operation and their clear, concise, and helpful submissions. We record our special appreciation to the lawyer acting for the Athlete who so acted on a pro bono basis.
28. The Athlete confirmed during the Preliminary Meeting with the Parties on 13 October 2023 that the proceedings should be conducted in English. However, it became clear during the First Hearing that whilst his oral English appeared satisfactory, he had difficulties with comprehending written English. The hearing was adjourned to facilitate the provision of the translation of documents into Swahili and the procurement of a Swahili translator. An official translator was organised by Sport Resolutions to deal with the Athlete’s oral evidence and a Ugandan athlete with good English volunteered to assist with the remainder of the Second Hearing. The Second Hearing was arranged with the translators present to conclude the case. Thanks are to be recorded to the translators.
29. The Panel heard evidence from Dr Jakob Sehested Morkeberg (Senior Science Manager, Anti-Doping Denmark), Prof. Giuseppe d’Onofrio (Consultant Haematologist, WADA) and Dr Laura Lewis (Director of Science, US Anti-Doping Agency) for WA, and the Athlete on his own behalf supplementing his detailed written witness statements and exhibits.



## **VII. THE PARTIES' SUBMISSIONS**

30. Both parties provided detailed written and oral submissions, for which the Panel is most grateful. This section sets out a summary of the Parties' respective positions in these proceedings. It serves by way of synopsis only and does not necessarily include every submission advanced in pleadings and other correspondence. The Panel has, however, considered all arguments both written and oral presented to it in rendering the present award.

### ***A. THE AIU's CASE***

#### **(a) The Athlete's ABP**

31. The full set of blood samples and their analysis is set out below:

#	Sample code	Collection date	HGB	RET%	OFF-score	HCT	RET#	IRF	
1	144733	18.07.2016	17.6	0.9	119.1	48.9	0.0518	1.8	
2	227139	15.06.2017	Invalid						
3	505914	16.08.2019	18.3	1.14	118.9	52.7	0.067	4.6	
4	505934	27.08.2019	19.4	1.41	122.8	54.5	0.0874	6.8	
5	663548	20.09.2019	18	0.99	120.3	49	0.056	6	
6	505863	21.09.2019	17.8	1.11	114.8	50.9	0.0639	8.9	
7	688275	03.10.2019	17.4	1.32	105.07	48.8	0.0747	7.5	
8	689217	06.10.2019	17.8	1.59	102.34	49.4	0.0908	5.3	
9	702509	05.01.2020	Invalid						
10	682627	26.02.2020	18.6	1.37	115.8	53.1	0.0836	4.7	
11	471613	25.05.2020	18.8	1.4	117	52.9	0.0855	8	
12	471867	22.09.2020	16.7	1.42	95.5	46.8	0.0763	5.2	
13	699145	26.11.2020	16.4	1.67	86.5	45.9	0.0888	15	
14	469631	15.12.2020	17.1	1.42	99.5	48	0.0785	9.8	
15	698840	15.05.2021	15.8	1.46	85.5	46.1	0.0749	6.7	
16	480219	07.06.2021	Invalid						
17	721397	10.06.2021	17.8	2.32	86.6	51.4	0.1332	11.5	
18	905513	16.06.2021	17.8	2.08	91.5	50.1	0.1181	10.6	
19	906027	10.07.2021	17.1	1.6	95.1	47.7	0.0861	7.9	
20	490738	22.10.2021	17.5	1.62	98.63	46.9	0.0867	7.5	
21	932896	18.01.2022	17.7	2.89	75	49.5	0.1627	19.1	
22	932741	20.01.2022	17.6	1.93	92.6	48.7	0.1079	9.5	
23	932756	12.02.2022	17.9	2.07	92.7	49.4	0.1155	9.9	
24	916973	18.02.2022	Invalid						
25	932871	15.03.2022	18.2	1.53	107.8	50.7	0.0874	10.9	
26	919227	23.03.2022	17.3	1.38	102.5	48.1	0.0751	9.5	
27	932840	25.03.2022	18.5	1.27	117.38	51.2	0.073	9.7	
28	932865	01.04.2022	19.2	0.89	135.4	53	0.0543	4.3	
29	0054605	05.04.2022	17.7	1.02	116.4	49.1	0.0571	11.9	
30	932489	15.04.2022	18.6	1.53	111.8	52.3	0.0904	10	
31	953230	18.05.2022	16.9	1.41	97.8	46.9	0.077	8.8	
32	0021121	23.06.2022	17.4	1.48	101	47.8	0.0826	17.2	
33	504179	02.07.2022	16.6	1.63	89.4	46.2	0.0861	8.8	
34	1053223	04.07.2022	16.9	1.67	91.5	47.4	0.0898	10	
35	189572V	15.07.2022	Invalid						
36	192867V	17.07.2022	17.7	1.42	105.5	50.2	0.0792	13.5	
37	1088103	20.09.2022	19.1	1.78	111	53.3	0.1093	9.9	
38	919579	27.09.2022	19.4	1.61	117.9	54.1	0.1019	9.7	
39	1076649	05.10.2022	18.1	1.59	105.3	50.9	0.0994	12.7	
40	1088309	16.10.2022	17.9	1.34	109.5	48.7	0.0775	8.1	

41	1064197	22.10.2022	17	1.4	99	48.3	0.0784	7.9
42	1088088	26.10.2022	18.1	1.11	117.8	50.4	0.0652	6.4
43	1149995	01.02.2023	17.9	1.65	101.9	48.5	0.0944	10.6

## (b) The Expert Panel's Views

32. The Athlete's ABP was submitted by the Athlete Passport Management Unit ("APMU") to a panel comprised of three experts with knowledge in one or more of the fields of clinical and laboratory haematology, sports medicine or exercise physiology, as they apply to blood doping: Dr Jakob Sehested Morkeberg, Prof. Giuseppe d'Onofrio, and Dr Laura Lewis (together, the "Expert Panel").
33. Upon review, the Expert Panel identified abnormalities in the ABP and confirmed their unanimous opinion of "*Likely Doping*" as set out in their Joint Expert Panel Opinion dated 14 April 2023 (the "First Expert Panel Joint Opinion"). The Expert Panel noted that there were "*abnormalities at 99% specificity for Haemoglobin concentration (Hb) in samples 1, 4, 28, 37 and 38 (upper limit) and samples 13 and 15 (lower limit), OFF score in samples 1, and 28 (upper limit) and samples 13 and 21 (lower limit) as well as for reticulocyte% in samples 17 and 21 (upper limit) and sample 28 (lower limit)*".
34. In its qualitative assessment of the ABP profile, the Expert Panel observed the repetition of two types of abnormal patterns:
- a. "**clear off phases**" (i.e. elevated OFF-score values driven by high HGB and low reticulocyte values) in relation to:
    - Sample 1 (collected on 18 July 2016): Sample 1 displayed an OFF-score value of 119.1, a day before the Athlete's participation in the Bydgoszcz IAAF World U20 Championships;
    - Samples 4-5 (collected on 27 August and 20 September 2019): Samples 3 (16 August 2019) to 8 (6 October 2019) were collected in the lead up to the Athlete's participation in the 2019 Doha World Athletics Championships. Sample 4 showed a very elevated HGB (i.e. 19.4 and an OFF-score of 122.8) likely resulting from erythropoiesis-stimulating agent

(“ESA”) stimulation and Sample 5, collected 24 days later, had a high HGB of 18 and low RET% value of 0.99 (with a resulting OFF-score of 120.3), indicative of an OFF condition;

- Samples 25-30 (collected between 15 March and 15 April 2022): Sample 28 (1 April 2022), in particular, demonstrated an abnormally increased HGB mass with a “*pathological*” HGB value of 19.2, low RET% value of 0.89 and an OFF-score of 135.4, a few days after the Athlete’s participation in a half marathon;
- Samples 37 and 38 (collected respectively on 20 and 27 September 2022): The two samples displayed “*pathological*” HGB values of 19.1 and 19.4 a week apart.

b. **“clear stimulation (increased reticulocytes and IRF)”** for:

- Samples 17-18 (collected on 10 and 16 June 2021): Samples 17 and 18 were collected shortly before the Kenya Olympic Games Trials and showed a clear pattern of stimulation with RET% above 2% (2.32% and 2.08% respectively);
- Samples 21-23 (collected between 18 January and 12 February 2022): The Samples, collected in the lead up to the Ras Al Khaimah Half Marathon, indicated stimulation with RET% values above 2% for Sample 21 and 23 (2.89% and 2.07% respectively);

35. Regarding the abnormal pattern observed in Samples 21 to 29 (between 18 January and 5 April 2022), the Expert Panel made the following comments:

*“A high OFF score is typically observed when the red cell mass of the organism has been supraphysiologically increased (high haemoglobin) and the body’s own red cell production was reduced (low reticulocytes) as a consequence to downregulate the excess in red blood cells. This constellation is pathognomonic for the use and recent discontinuation of an erythropoiesis stimulating agent (ESA) or the application of a blood transfusion (2,3). In 2022, it is clearly visible that the constellation develops further over samples 21-29 (taken over 2.5 months) and goes from clear erythropoietic stimulation in sample 21 with elevated reticulocytes*

*into suppression with low reticulocytes in samples 28 and 29 and a low immature reticulocyte fraction (IRF) in sample 28.”*

36. The Expert Panel also noted that altitude could not account for the abnormalities observed in the Passport:

*“Since the athlete is an altitude resident, altitude is a mild confounding factor. The impact of altitude on markers used in the ABP has been studied extensively (4–6). There is agreement that altitude of sufficient duration and height will cause mild changes in the ABP: A main feature, a mild increase in the OFFscore, is visible within 7 to 10 days upon return to sea level. The magnitude of these changes ranges between 10 and 20 points from baseline.*

*In the present case, the timeline of the changes does not support altitude as a potential cause. As mentioned above, the blood picture alterations (increase in OFFscore) in the passport caused by altitude will be visible 7 to 10 days after return to sea level. However, the highest OFF score seen in the present case (sample 28, 135.4) is visible 4 days after a return to altitude, with the sojourn at sea level only 3 days in duration. It is thus highly unlikely that altitude alone has caused changes in the OFFscore visible in the profile.*

*In addition, the increased reticulocyte% cannot be explained by altitude, with the high fluctuations in reticulocyte% in samples 17 and 21 inconsistent with the athlete’s regular exposure to a constant altitude stimulus. Rather, the blood anomalies observed in the profile reflect exogenous stimulation of erythropoiesis up to a dangerous level.”*

37. The First Expert Panel Joint Opinion therefore concluded:

*“In summary, the profile bears several features of blood manipulation during the preparation for competition. We therefore conclude that it is highly likely that a prohibited substance or prohibited method has been used and that it is unlikely that the passport is the result of any other cause.”*

### **(c) The Athlete’s Explanation for his ABP**

38. On 5 May 2023, the AIU wrote to the Athlete, notifying him of the abnormalities detected in his ABP profile and that the AIU was considering bringing charges against him. The Athlete was invited to provide explanations for the abnormalities by 19 May 2023 and was informed that any explanations would be sent to the Expert Panel for review before any charges were brought. The Athlete did not respond within the given deadline.

39. On 25 May 2023, the AIU granted the Athlete an extension until 2 June 2023 to provide his explanation for the Adverse Passport Finding. On 31 May 2023, the Athlete provided his explanation for the ABP anomalies indicating that he never doped intentionally and that the abnormalities in the ABP were *“a result of natural variations due to the physiological responses influenced by the frequent changes in climate, altitude, and other environmental factors”* (the “Explanation”).
40. The Athlete provided a timeline of his movements during the relevant period. The AIU asserts that there is contradictory information on various of the Athlete’s Doping Control Forms.

#### **(d) Review of the Athlete’s Explanation by the Expert Panel**

41. On 3 August 2023, the Expert Panel issued a joint opinion that considered and dismissed the Explanation (the “Second Expert Panel Joint Opinion”).
42. The Expert Panel rejected the hypothesis that the pattern observed in Samples 3 to 7 might have been caused by altitude. Noting that Sample 3 (16 August 2019) was collected several months after the Athlete’s arrival at altitude, the Expert Panel explained:

*“The time course of erythropoietic adaption to altitude is well documented (Lobigs et al. 2017, Garvican et al. 2012), with the most significant changes occurring in the first days and weeks at altitude. Since altitude exposure remained constant during this period until the athlete traveled to Doha (after 21.09.2019 when sample 6 was collected), altitude does not explain the changes observed in Hb and reticulocytes observed in these samples.”*

43. The Expert Panel also rejected the suggestion that the stimulation observed in Samples 17 and 18, on 10 and 16 June 2021 (prior to the Kenya Olympic Games Trials), might result from the Athlete’s return to altitude in Kaptagat (2500m) after a stay at sea-level in Japan:

*“The athlete was tested on 15.05.2021 in Japan. The results of this sample (15) are consistent with sea level residence. However, in June 2021, before the Olympic trials, there is a clear pattern of erythropoietic stimulation in samples 17 and 18,*

*with reticulocyte% above 2%. Samples 17 and 18 were collected on 10.06.2021 and 16.06.2021, respectively, therefore 3 and 4 weeks after return to altitude.*

*Even for sea level natives training at altitude, the reticulocyte response is known to increase within the first 7-10 days (300 km.hr)<sup>1</sup> at altitude, before returning to basal levels as the altitude continues (Garvican et al. 2012, Lobigs et al. 2017). By contrast, the high reticulocyte values occur in close proximity to the Olympic trials in which the athlete performed well and in our view are consistent with ESA administration prior to important competition. The decrease in reticulocyte values in sample 19 therefore reflects an off condition upon cessation of ESA use rather than a modest decrease in elevation from 2500 to 1800 m.”*

44. As for the stimulation pattern observed between January and February 2022, in Samples 21 to 23, the Expert Panel noted that while the high RET% value in Sample 21 may be partially explained by the Athlete’s return at altitude (in Kaplagat at 2500m) twelve (12) days prior, *“the explanation is weakened by the persistently high value in sample 23 collected approximately 3 weeks later, and 1 week before a half marathon in the UAE on February 19<sup>th</sup>. In such competition, the athlete obtained his best result in that discipline with a time of 58:30.”*

45. Regarding the OFF phase observed in Samples 25 to 30 (collected between 15 March and 15 April 2022), and in particular the extreme abnormality in Sample 28, the Expert Panel dismissed the Athlete’s Explanation:

*“Sample 28 was collected on 01.04.2022, three days after the athlete returned to altitude after a competition in Turkey (Istanbul half-marathon, which was won by the athlete, who established the competition record). Of note, the sample collected on 25.03.2022 in Turkey does not show hemodilution as expected at sea level. Sample 28 has a pathological Hb value of 19.2 g/dL and his highest OFF score of 135.4 points, well above the minimal expected haemoconcentration effect upon return to altitude. By contrast, sample 31 was collected one day after returning to altitude from Japan (where the athlete stayed between 27<sup>th</sup> April and 17<sup>th</sup> May) and displays a relatively low Hb (for the athlete) of 16.9 (i.e. without haemoconcentration at altitude, Garvican et al. 2012).”*

46. The Expert Panel also noted that the Athlete had failed to offer any explanation for the abnormalities (pathologically high HGB values) detected in Samples 37 and 38.



## **(e) The Expert Panel's Conclusions**

47. The Expert Panel rejected the Athlete's Explanation and concluded that:

*"Whilst we acknowledge that altitude is a mild confounding factor of the passport, none of the specific explanations provided by the athlete can explain the severe haematological abnormalities observed. Notably, some of the most abnormal Hb and OFF score values were obtained in correspondence to some of the best athlete's performances. Therefore, we confirm our previous opinion that it is highly likely that a prohibited substance or prohibited method has been used and that it is highly unlikely that the passport is the result of any other cause."*

## **B. THE ATHLETE'S CASE**

48. The Athlete asserted that the evidence presented by the AIU was insufficient for the Panel to be comfortably satisfied that the Athlete committed the alleged ADRV. He submitted that the more serious the charge, then the more cogent the evidence must be to satisfy the necessary standard of proof. The allegations against the Athlete were extremely serious, and the evidence was not sufficient to allow the Panel to satisfy itself on the necessary standard.
49. It was submitted on behalf of the Athlete that use of ABP to prove a charge of blood doping was unreliable. In particular, the case necessary draws upon inferences drawn upon from the ABP data and there is no direct evidence of *"Use of a Prohibited Substance or Prohibited Method"*. Crucial details of the ABP testing procedure and the Adaptive Model are not disclosed. It is suggested by the Athlete's Counsel this places the ABP beyond scientific scrutiny.
50. Counsel for the Athlete argued that the evidence does not satisfactorily exclude alternative explanatory factors including pure chance, incorrect analysis, breaches of the chain of custody, medical conditions, or manipulation of blood. In particular, it was advanced that the AIU has presented insufficient evidence to exclude the plausible scenarios that the Athlete's abnormal results arose from pure chance; breaches in the chain of custody; effect of iron supplements, and/or the physiological effects of frequent altitude changes. The Panel was asked to note that the Athlete provided

evidence in the form of oral testimony, passport entries and Doping Control Forms (“DCFs”) in respect of the altitude and iron supplements.

51. The AIU has not proved a plausible doping scenario. The correlation of the competition schedule with haematological results showed a number of abnormal results which occurred at times which were distant from competition. It was insufficient to prove a plausible doping scenario to the Panel’s comfortable satisfaction for the AIU to cherry-pick the abnormal results which did occur in proximity to competition while ignoring the inconvenient facts.
52. Counsel asserted that reliance should not be placed on the Athlete’s initial response to the AIU’s case given that he was not legally represented at that time. Similarly, any explanation given by the Athlete was made without access to the full documentary record of DCFs.
53. The Athlete has always given information which is true to the best of his knowledge and belief. His memory of his whereabouts at a time up to 7 years after the events in question is unlikely to be 100% reliable; and when establishing his historic whereabouts, the Panel should generally prefer the evidence of the documentary record in the DCFs over his recollection, absent some exceptional factor or corroborating evidence which is inconsistent with the DCFs.
54. The Athlete gave evidence that he was unable to secure independent scientific evidence to present at the hearing. It was asserted that WADA-accredited laboratories and experts are precluded from acting on behalf of athletes and that consequently it is extremely difficult to secure any expert capable of supporting his case. It was further asserted that the Expert Panel was advocating on behalf of the AIU, therefore their opinion cannot be considered independent.
55. During the hearing the Athlete’s counsel made a new argument, not submitted to this Panel in his written submissions, namely that several Samples within the ABP should be excluded due to anomalies with laboratory testing or documentation. These Samples included assays performed on laboratory equipment different from that stated upon the assay sheets, e.g. a discrepancy between the XT and XE series equipment of the same manufacturer. It also included anomalies on the lab certificate

of analysis, absence of assay sheets, and Anti-Doping Administration and Management System (“ADAMS”) error. This related to Samples 1, 3, 4, 5, and 17. It was asserted that given these anomalies then the ABP could not be relied upon to satisfy the cogent evidential standard to comfortably satisfy the Panel.

## **VIII. THE MERITS**

### **A. IS THE ABP A “RELIABLE MEANS”?**

56. The Panel considered the ABP and its use in anti-doping cases given that the Athlete raised concerns about the Adaptive Model’s reliability and whether the ABP took adequate account of various confounding factors. An ADRV under Rule 2.2 may, according to Rule 3.2 of the 2023 ADR, be established by “*any reliable means [...]*”.
57. The issue as to whether the ABP is a reliable mean of proof has been considered regularly in Court of Arbitration for Sport (“CAS”) decisions. In CAS 2020/A/7510 Daniel Kinyua Wanjiru v. World Athletics, the Court determined at paragraph 93:

*“It is now well-settled in CAS cases that the ABP model is a reliable means of establishing blood doping, i.e. the use of a Prohibited Substance or Prohibited Method. As the Panel in CAS 2012/A/2773 concluded: “Systems which make use of these longitudinal profiles have evolved to become widespread and highly effective means of detecting EPO doping.”*

58. The CAS continued, at paragraphs 94 and 95, by referring to other supportive decisions, including CAS 2014/A/3614 & 3561, CAS 2016/O/4464, CAS 2016/O/4463, CAS 2016/O/4469 & CAS 2016/O/4481, and CAS 2018/O/5822, as well as “*numerous recent WA Disciplinary Tribunal awards*”.
59. In summary, this Panel determines that the ABP is a reliable means that may assist in establishing an ADRV, and although not definitive, it is highly convincing when supported by Expert Reports such as those presented in this case.

### **B. THE BURDEN OF PROOF IN ABP CASES**

60. The burden of proof raises specific issues in cases like this one, where the Athlete denies wrongdoing and where no physical paraphernalia of doping is in evidence, nor even traces of a Prohibited Substance are detected by testing. Instead, the positive finding is based on an abnormal haemoglobin value said to establish the unlikelihood of innocence as scientifically sufficient to justify disqualification from competition.
61. This Panel must reach a conclusion based on an assessment of the likelihood of a violation. That assessment requires the intermediate standard of “*comfortable satisfaction*” of the Panel – greater than the “*balance of probabilities*”, but less than proof beyond a reasonable doubt. The Panel concludes that the burden of proof lies with the AIU, and it was discharged with the evidence of its Expert Panel, to establish to the Panel’s “*comfortable satisfaction*” that an ADRV occurred in the circumstances advanced. A hypothesis of innocence would need to be significantly and objectively convincing to overcome the charges and their scientific foundation.

**C. HAS THE AIU ESTABLISHED A DOPING SCENARIO TO THE COMFORTABLE SATISFACTION OF THE PANEL?**

62. This is not a “*presence*” case where positive sample’s result is an unequivocal conclusion that an ADRV has been committed pursuant to Article 2.1.2 of the 2021 ADR. Pursuant to Article 3.2 of the 2023 ADR, “*Use*” is determined by the ascertainment of “*reliable means*” of evidence. Although the ABP has been confirmed to be a “*reliable means*” by numerous CAS Panels, this is not in itself conclusive.
63. The Athlete argues that there were anomalies with five (5) of the Samples (Samples 1, 3, 4, 5, and 17) which ought to cast doubt over their veracity and therefore the whole ABP. This proposition was specifically put to the Expert Panel and their evidential consensus was that the issues described were not serious and that any minor documentation anomalies or use of different models of similar laboratory equipment from the same manufacturer would not have adversely affected the results. The Expert Panel also stated that if there was any breach of the ISRM, the five Samples would be considered invalid. The Expert Panel went further and stated that even if the five identified Samples were excluded from the ABP it would make no difference to

their overall conclusions regarding the Athlete, i.e. that it was highly likely that a Prohibited Substance or a Prohibited Method has been used and that it was highly unlikely that the ABP is the result of any other cause.

64. It is also appropriate to consider the Athlete's claim to have experienced difficulty in obtaining a suitable expert to act on his behalf and the absence of any scientific or medical evidence to counter that of the Expert Panel. The Panel notes that this assertion was inconsistent with the Athlete's oral evidence where he accepted that he had not attempted to instruct any expert and that the only person he had contacted was a friend who was a nurse.
65. The Athlete drew the Panel's attention to the fact that there were Samples described as abnormal by the Expert Panel which were temporally distant from competitions and thus were unlikely to represent evidence of blood doping. The Expert Panel responded to this by emphasising that there were qualifying or selection events throughout the season in which an athlete could derive benefit from blood doping and that it was also not unusual for the athletes to dope during their training time.
66. The Expert Panel's evidence was clear and unanimous. It was not challenged by any scientific or medical expert evidence. It noted that there were abnormalities at 99% specificity for Hb in Samples 1, 4, 28, 37, and 38 (upper limit) and Samples 13 and 15 (lower limit), OFF-score in Samples 1 and 28 (upper limit) and Samples 13 and 21 (lower limit), as well as for RET% in Samples 17 and 21 (upper limit) and Sample 28 (lower limit). It observed the repetition of two types of abnormal patterns, namely "*clear off phases*" (i.e. elevated OFF-score values driven by high HGB and low reticulocyte values) in relation to Samples 1, 4-5, 25-30, and 37-38, and "*clear stimulation (increased reticulocytes and IRF)*" for Samples 17-18 and 21-23.
67. The Expert Panel concluded that the profile bears several features of blood manipulation during the preparation for competition and that it is highly likely that a Prohibited Substance or Prohibited Method had been used and that it was unlikely that the ABP was the result of any other cause.

68. The Panel takes full account that the Expert Panel specifically rejected the Athlete's position that the anomalies on the ABP could be explained by his regular training at altitude for the following reasons:
- a. In respect of Sample 3 (16 August 2019), it noted that the Sample was collected several months after the Athlete's arrival at altitude. It specifically indicated that the erythropoietic adaption to altitude is well documented in scientific literature, and further specified that the most significant changes occurred in the first days and weeks at altitude. Since altitude exposure remained constant during this period until the Athlete travelled to Doha (after 21 September 2019 when Sample 6 was collected), altitude did not explain the changes observed in Hb and reticulocytes observed in these Samples.
  - b. Samples 17 and 18, collected on 10 and 16 June 2021 (prior to the Kenya Olympic Games Trials), related to the Athlete's return to altitude in Kaptagat (2500m) in May 2021 after a stay at sea level in Japan. The Expert Panel noted that the Athlete was tested on 15 May 2021 in Japan. The results of this Sample (15) were consistent with sea-level residence. However, in June 2021, before the Olympic trials, there was a clear pattern of erythropoietic stimulation in Samples 17 and 18, with RET% above 2%. Samples 17 and 18 were collected three and four weeks after return to altitude. Even for sea-level natives training at altitude, the reticulocyte response is known to increase within the first seven to ten days at altitude, before returning to basal levels as the altitude continues. By contrast, the high reticulocyte values occurred in close proximity to the Olympic trials, in which the Athlete performed well, was consistent with ESA administration prior to an important competition. The decrease in reticulocyte values in Sample 19 therefore reflects an OFF condition upon cessation of ESA use, rather than a modest decrease in elevation from 2500m to 1800m.
  - c. The stimulation pattern observed in January and February 2022 in Samples 21 to 23 may be partially explained by the Athlete's return to altitude (in Kaplagat at 2500m) twelve days prior, but the explanation is weakened by the persistently high value in Sample 23 collected approximately three weeks later, and one week

before a half marathon in the UAE. on 19 February 2022, in which the Athlete obtained his best result in that discipline with a time of 58 minutes 30 seconds.

- d. The OFF phase observed in Samples 25 to 30 (collected between 15 March and 15 April 2022), and in particular the extreme abnormality in Sample 28 is of importance. Sample 28 was collected on 01 April 2022, three days after the Athlete returned to altitude after a competition in Turkey (Istanbul half-marathon, which was won by the Athlete, who established the Competition Record). The Sample collected on 25 March 2022 in Turkey does not show haemodilution as expected at sea level. Sample 28 has a pathological Hb value of 19.2 g/dL and the Athlete's highest OFF-score of 135.4 points was well above the minimal expected haemoconcentration effect upon return to altitude. By contrast, Sample 31 was collected one day after returning to altitude from Japan (where the Athlete stayed between 27 April and 17 May 2022) and displayed a relatively low Hb (for the Athlete) of 16.9 points.
69. The Panel concludes that on the basis of the evidence presented, it is comfortably satisfied that the Athlete had used a Prohibited Substance or a Prohibited Method throughout the dates of the Samples, i.e. from 18 July 2016 and 1 February 2023. Therefore, the charge against the Athlete stands proven.

## **IX. CONSEQUENCES**

### **A. PERIOD OF INELIGIBILITY**

70. Rule 10.2 of the 2021 ADR provides the Consequences to be imposed for ADRVs under Rule 2.2 of the 2021 ADR as follows:

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

*The period of Ineligibility for a violation of Rule 2.1, Rule 2.2 or Rule 2.6 will be as follows, subject to potential elimination, reduction or suspension pursuant to Rules 10.5, 10.6 and/or 10.7:*



10.2.1 Save where Rule 10.2.4 applies, the period of Ineligibility shall be four years where:

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

71. The Panel notes that at paragraph 94 of CAS 2020/A/7377 El Mahjoub Dazza v. World Athletics, the panel concluded that since *“the use of erythropoietic stimulant (rEPO) or a blood transfusion can exclusively be done by injections, the ADRV at hand has, in the Panel’s view, to be considered as having been committed intentionally”*.
72. The Panel determines on the standard of *“comfortable satisfaction”* that the use of blood manipulation over a prolonged period by the Athlete was intentional. The starting point for sanction in accordance with the 2021 ADR is a period of Ineligibility of four years.
73. However, Rule 10.4 of the 2021 ADR specifies that, where Aggravating Circumstances are present, then the period of Ineligibility may be increased by a period of up to two years depending on the seriousness of the violation(s) and the nature of the Aggravating Circumstances, unless the Athlete can establish that he did not knowingly commit the ADRV.
74. Aggravating Circumstances are defined in the 2021 ADR as follows:

*“**Aggravating Circumstances:** Circumstances involving, or actions by, an Athlete or other Person that may justify the imposition of a period of Ineligibility greater than the standard sanction. Such circumstances and actions include, but are not limited to: the Athlete or other Person Used or Possessed multiple Prohibited Substances or Prohibited Methods, Used or Possessed a Prohibited Substance or Prohibited Method on multiple occasions or committed multiple other anti-doping rule violations; a normal individual would be likely to enjoy the performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility; the Athlete or other Person engaged in deceptive or obstructive conduct to avoid the detection or adjudication of an anti-doping rule violation; or the Athlete or other Person engaged in Tampering during Results Management. For the avoidance of doubt, the examples of circumstances and conduct described herein are not exclusive and other similar circumstances or conduct may also justify the imposition of a longer period of Ineligibility.”*

75. The Panel considers that the circumstances of this case constitute Aggravating Circumstances for the purposes of Rule 10.4 of the 2021 ADR for the following reasons:
- a. There are multiple instances, namely eighteen, of blood doping between 18 July 2016 (Sample 1) and 27 September 2022 (Sample 38) across an extended period of more than 6 years representing Use of a Prohibited Substance or Prohibited Method on multiple occasions.
  - b. Most of those manipulations were done in the lead-up to the most important Athletics competitions. For example, the Athlete's blood doping observed around Samples 17 and 18 appears targeted to assist the Athlete in qualifying for the rescheduled Tokyo 2020 Olympic Games. This represents Use of a doping regime focussed on the apex of Athletics competitions.
  - c. The Athlete engaged in a deliberate, systematic, and sophisticated doping regime. Such actions would not have been possible without deliberate intent and the assistance of experts.
76. The Panel considers that the identified Aggravating Circumstances are significant and that the Athlete's repeated violations are extremely serious in nature. In his defence, the Athlete did not put forward any argument that would suggest the possibility of reducing the maximum additional period of Ineligibility applicable under Rule 10.4 of the 2021 ADR, i.e. two (2) years of Ineligibility. Accordingly, the Panel is convinced that it is appropriate to award the maximum penalty that can be imposed under Rule 10.4 of the 2021 ADR. The period of Ineligibility is increased to six (6) years.

#### ***B. COMMENCEMENT OF THE PERIOD OF INELIGIBILITY***

77. Rule 10.13 of the 2023 ADR provides that the period of Ineligibility shall begin on the date that the Panel issues its decision in this matter. This is subject to credit for the period of Provisional Suspension served by the Athlete since 8 August 2023.

### **C. DISQUALIFICATION**

78. The first evidence of an ADRV in the Athlete's ABP is in Sample 1, the day before the Athlete's participation in the Bydgoszcz IAAF World U20 Championships (where he ranked 1st in the 10,000 m).
79. Rule 10.10 of the 2021 ADR provides that any competitive results obtained by the Athlete between the date of the first evidence of an ADRV (i.e., 18 July 2016) and his Provisional Suspension on 8 August 2023 shall be disqualified with all resulting Consequences, including the forfeiture of any medals, titles, ranking points, prizes, and prize and appearance money unless the Panel determines that fairness requires otherwise.
80. The Panel, having taken into account all of the evidence presented at both hearings and the submissions made on behalf of the Parties, determines that Disqualification should apply from 18 July 2016 and until the start of the Athlete's Provisional Suspension and that fairness does not require otherwise, given the seriousness of the ADRV and the Athlete's repeated conduct over an extended period of time.

### **X. COSTS**

81. The Tribunal has broad discretion as to costs as per Rule 10.12.1 2023 ADR and takes into account the principle of proportionality including a consideration of the Athlete's means. Given that the Athlete had to rely upon pro bono representation, that the costs of the translator had to be paid for, and, that there is reference within the Athlete's first witness statements to the loss of remuneration and financial difficulties, the Panel concludes that the Athlete is of limited means. However, the Panel notes that the AIU has been successful in its case. The Panel also takes account of the attendance of three Experts on behalf of the AIU at the First Hearing and that the Second Hearing was only necessary because the Athlete incorrectly indicated at the Preliminary Meeting that his English was sufficiently good to conduct the First Hearing without a Translator.

82. Taking all of the circumstances into account and applying the proportionality principle, the Panel determines that the Athlete should pay part of the AIU's costs, limited to US \$3,000 (three thousand US Dollars). The Panel draws the attention of the Parties to Rule 10.12.3 2023 ADR and encourages implementation of its provisions by the Parties.

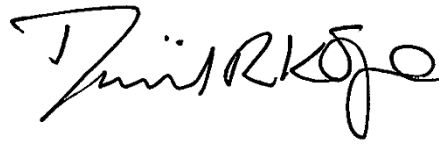
## **XI. AWARD**

83. The Panel makes the following order:

- a. The Panel has jurisdiction over the present matter.
- b. The Athlete has committed an Anti-Doping Rule Violation pursuant to Rule 2.2 of the World Athletics 2021 Anti-Doping Rules.
- c. The Athlete must serve a period of Ineligibility of six (6) years for the Anti-Doping Rule Violation committed based on Rule 10.2.1 of the 2021 Anti-Doping Rules and the application of Aggravating Circumstances pursuant to Rule 10.4 of the 2021 Anti-Doping Rules, commencing on the date of this Decision.
- d. The Athlete shall be given a credit for the period of Provisional Suspension served since 8 August 2023 until the date of this Decision against the period of Ineligibility imposed for the Anti-Doping Rule Violation. The period of Ineligibility is, therefore, ordered to run from 8 August 2023 (the starting date of the provisional suspension) and shall end at 23:59 on 7 August 2029.
- e. All the Athlete's results obtained since 18 July 2016 until the date that the Provisional Suspension was imposed, are disqualified pursuant to the Rules 9, 10.1 and 10.10 of the 2021 Anti-Doping Rules with all resulting Consequences including the forfeiture of any titles, awards, medals, points, prizes, and prize and appearance money.
- f. Costs in the amount of US \$3,000 (three thousand US Dollars) are payable by the Athlete to WA.

## XII. RIGHT OF APPEAL

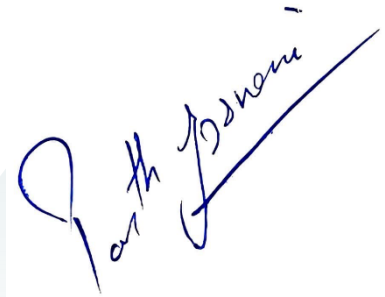
84. This decision may be appealed to the Court of Arbitration for Sport, located at Palais de Beaulieu, Av. des Bergières 10, CH-1004 Lausanne, Switzerland (procedures@tas-cas.org), in accordance with Rule 13.2 of the 2024 ADR.
85. In accordance with Rule 13.6.1(a) of the 2021 ADR, the deadline for filing an appeal with CAS is thirty (30) days from the date of receipt of this decision.



David Sharpe KC (Chair)



Anna Bordiugova



Parth Goswami

London, UK  
24 April 2024

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