

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

Before:

Malcolm Holmes QC (Chair)

Despina Mavromati

Daniel Ratushny

BETWEEN:

International Association of Athletics Federations (IAAF)

Anti-Doping Organisation

-and-

Eliud Magut

Respondent

DECISION OF THE DISCIPLINARY TRIBUNAL

INTRODUCTION

1. Mr Eliud Magut ("Athlete") is a thirty-one-year-old Kenyan marathon runner who has competed in several marathons, including the Vienna City Marathon on 23 April 2017 in Austria and the Harmony Geneve Marathon on 07 May 2017 in Switzerland.
2. The Athlete provided urine samples whilst In-Competition in both Vienna and Geneva. Both samples were analysed and revealed an Adverse Analytical Finding ("AAF") for the Presence of 19-norandrosterone, a metabolite of nandrolone, which is a prohibited substance under the 2017 WADA *Prohibited List*.
3. As a result of the AAF, these proceedings have been brought by the International Association of Athletics Federations ("IAAF") against the Athlete.
4. The IAAF is represented in these proceedings by the Athletics Integrity Unit ("AIU") which has delegated authority for the implementation of the IAAF Anti-Doping Rules ("ADR") including Education, Testing, Investigations, Results Management, Hearings, Sanctions and Appeals.

THE INITIAL CORRESPONDENCE

5. The AIU wrote to the Athlete by email dated 14 July 2017 requesting a written explanation for the AAF and advising that he was provisionally suspended from all competitions and activities in athletics pending the resolution of his case.
6. The AIU's email was collected by the Athlete from the offices of the Anti-Doping Agency of Kenya ("ADAK") on 27 July 2017 in Kenya. He responded to the AIU by email dated 1 August 2017 as follows:

"I hereby wish to state as follows;-

That I indeed bought the said Norandrosterone substance from a Gymnasium Instructor after informing him of my shortcomings and issues concerning my sexual relationship with my partner. He assured me that the said substance would help boost my Libido. However, I was completely innocent and was not

aware that the said substance was prohibited and would lead to my suspension and disciplinary case.

Further, I embarked on tracing the said gymnasium instructor but my efforts to locate him have proved futile."

7. The AIU reviewed the Athlete's explanation and considered that it was inadequate to explain the AAF and that the Athlete had a case to answer. On 22 December 2017, the Athlete was issued with a Notice of Charge for committing the Anti-Doping Rule Violations ("ADRVs") of *"Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample, pursuant to Art 2.1 of the ADR...and Use of a Prohibited Substance...pursuant to Art 2.2 ADR"*. The Athlete was invited to respond to the Notice of Charge, including confirmation of how he wished to proceed with this matter by no later than 08 January 2018.

8. The Athlete ultimately responded to the Notice of Charge on 23 February 2018, when he sent an email to Mr Tony Jackson, Senior Case Manager with the AIU, as follows:

"Hi mr Tony Jackson. Iam sorry for not replying the email in time . I think you understood my problem .I accept that results but it was not my intention to use, the drugs was to boost my libido ." [sic]

9. On 06 March 2018, Mr Jackson emailed the Athlete and stated that it was the AIU's understanding that he accepted the AAF and the ADRVs, but that he disputed that he had acted intentionally. Mr Jackson advised that the matter must therefore be necessarily referred to the Disciplinary Tribunal for a hearing but before the matter was referred to the Disciplinary Tribunal, he invited the Athlete to provide further information in support of his explanation that the drugs were to boost his libido. Mr Jackson stated:

"As a minimum, please provide the following information to support that explanation:

- The name of the product(s) used (please provide photos of the products/packaging if you still have them);*

- *The type of product (pill/tablet/injection/powder for mixing with liquid etc);*
- *The name of the shop/pharmacy/individual/website from which you purchased/acquired the product(s);*
- *The date(s) you purchased/acquired the product(s);*
- *How much you paid for the product(s) and the method of payment (cash/card);*
- *Any receipt or record of payment for the product(s);*
- *The name of any doctor(s)/medical person(s) or other(s) that you spoke to or took advice from concerning your purchase/use of the product(s);*
- *How frequently you used the product (for example, if the product was in pill/tablet form, how many tablets you would take at what time (am/pm) on how many days per week);*
- *Details of your use of the product(s) between 1 April 2017 and 7 May 2017.*

Please provide as much information as possible to help demonstrate that you have not acted intentionally by no later than Tuesday 13 March 2018."

10. There was no response by the Athlete and on 15 March 2018 the Athlete was informed that the matter must necessarily be referred to the Disciplinary Tribunal for a decision.

THE DISCIPLINARY TRIBUNAL PROCEEDINGS

11. The IAAF has established the Disciplinary Tribunal pursuant to Article 1.5 ADR to determine ADRVs committed under the ADR.

12. The Chair of the Disciplinary Tribunal, the Hon. Michael Beloff QC, appointed a panel of three members to hear and decide in respect of the Athlete's alleged ADRVs arising from the AAF as set out in the Notice of Charge. The members appointed to the panel were Mr Malcolm Holmes QC as Chairperson, Ms Despina Mavromati and Mr Daniel

Ratushny (collectively, the "Panel").

13. Sport Resolutions has been appointed to act as the Secretariat for all proceedings before the Disciplinary Tribunal and provided administrative support for the Panel in these proceedings.

14. A preliminary meeting was arranged for Tuesday 03 April 2018 before Mr Holmes QC to be held by telephone conference call. The Athlete attended by telephone from Kenya. He had made an earlier request for pro bono legal advice and representation but none had been appointed by the time of the preliminary meeting.

15. Directions were made at the preliminary meeting to ready the matter for a hearing to be held on Friday, 01 June 2018. The directions contemplated that a pro bono legal representative for the Athlete would be appointed from a panel maintained by Sport Resolutions who would be available to assist the Athlete in responding to the Notice of Charge. Subsequently Mr Simon Eastwood from Eastwoods Solicitors, London, was appointed as the Athlete's pro bono legal representative.

16. The AIU filed its written brief (the "IAAF Brief") which included its evidence and submissions on 30 April 2018.

17. The AIU submitted that the Athlete had committed ADRVs under Art. 2.1 and/or Art. 2.2 of the ADR and that a period of Ineligibility of four years was applicable under Art. 10.2.1 of the ADR unless the Athlete could establish that the ADRV was not intentional. The AIU submitted that the Athlete's explanation is "*threadbare and unsubstantiated*" and that in the circumstances, he must therefore be deemed to have committed an intentional ADRV.

18. On behalf of the Athlete, Mr Eastwood served an Answer Brief on 16 May 2018 that included a written unsigned statement from the Athlete confirming his earlier accounts given in his letter dated 01 August 2017 and his email dated 23 February 2017, as set out above. The statement also included the answers to the questions that he had been asked by Mr Jackson by email dated 06 March 2018 and which had remained unanswered.

19. In this statement the Athlete stated:

"In regard to ... the queries raised in the email to me dated 06 March 2018 I respond as follows:

The name of the product(s) used (please provide photos of the products - packaging if you still have them)?

I am unable to name the product, except to say that it was a liquid injection, given to me in early 2017, in Eldoret, Kenya.

The type of product (pill / tablet / injections / powder for mixing with liquid etc)

As stated above I received a liquid injection, into each buttock, administered for the specific purpose of improving my libido.

The name of the shop / pharmacy / individual / website from which you purchased/acquired the product(s).

The person who administered the injection was, I believe, Mr Too.

The date(s) you purchased / acquired the product(s)

In early 2017 – before April 2017.

How much you paid for the product(s) and the method of payment (cash / card).

12,000 Kenyan shillings.

Any receipt or record of payment for the product(s).

No.

The name of any doctor(s) / medical person(s) or other(s) that you spoke to or took advice from concerning your purchase / use of the product(s).

Mr Too.

How frequently you used the product (for example, if the product was in pill/tablet form, how many tablets you would take at what time (am/pm) on how many days per week)

This is the only injection I have had during 2017. I never become sick and I never go to hospital. I do not have a regular doctor.

Details of your use of the product(s) between 1 April 2017 and 7 May 2017.

No use.

20. In the Answer Brief, it was submitted that the Athlete had established on the balance of probabilities how the substance had entered his body and that his actions were not an intentional violation and that he was entitled to a reduction in the period of Ineligibility (Answer Brief, paras [4]-[6]).

21. On 23 May 2018 the AIU served its Reply submissions. The AIU submitted that the *"Athlete's explanation remained so unspecific and uncertain that it amounted to nothing more than speculation"*. The AIU maintained that the Athlete had failed to establish that the ADRVs were not intentional and therefore the four-year period of Ineligibility could not be reduced. The AIU also added (Reply submissions, para [6]) that the Panel did not have jurisdiction under Art. 10.6.3 of the ADR to reduce the period of Ineligibility because (a) the Article requires the discretionary approval of both WADA and the IAAF, and neither had been given, and (b) recent authority had held that the application of Art. 10.6.3 was contingent on the athlete providing a prompt *"enhanced admission"*, specifically by *"describing the factual background of the Anti-Doping Rule Violation both fully and truthfully"* and that the enhanced explanation must not only be asserted but also substantiated, which had not been done in the present case.

THE HEARING

22. The hearing took place on 01 June 2018 at the premises of Sport Resolutions in London with those attending either in person, by videoconference or by telephone. The

Chairperson of the Panel was present in London assisted by Ms Alisha Ellis, Case Manager from Sport Resolutions. The other members of the Panel attended by video link with Ms Mavromati and Mr Ratushny attending from Lausanne.

23. The AIU was represented by Mr Ross Wenzel of Kellerhals Carrard in Switzerland and Mr Tony Jackson of the AIU in Monaco, both of whom attended by video link.

24. The Athlete was represented by Mr Simon Eastwood from London who also attended by video link. The Athlete was resident in rural Kenya and had previously advised that he would only be able to participate in any hearing by telephone. Accordingly, at the commencement of the hearing Ms Ellis telephoned the Athlete in Kenya. The Athlete was then placed on speaker phone. This means of communication with the Athlete was not always successful as it meant that those attending by video link had no direct electronic connection with the Athlete. Their voices were broadcast into the hearing room at Sport Resolutions in London to be picked up by the speaker phone and then transmitted to the Athlete in Kenya.

25. The Athlete's oral evidence in answer to questions from Mr Eastwood included:

- He lives with his wife, 2 children (one 4 years and the other 3 months) and his mother in the village of Kosegee in rural Kenya which is 10 kilometres from Turbo which itself is 20 kilometres from Eldoret.
- He ran his first marathon in 2012 and has run eight marathons since then, including the marathons in Vienna and in Geneva.
- He did not receive any money from running the marathons in Vienna and in Geneva.
- He has received some money from running marathons and in 2017 had a manager, Mr Volker Wagner, who made all the travel arrangements for him to take part in the marathons in Vienna and in Geneva.
- He took three days to write his letter dated 01 August 2017 to make sure he was writing clear and he had no advice or assistance in writing this letter. He confirmed that the letter was correct and honest.
- He went to a club in Eldoret, but didn't remember its name and met a man whom he referred to as both "she" and "he" (he later confirmed it was a man) who said

he would meet him the following Friday and give him injections for his libido issues at a cost of 12,000 Kenyan shillings. He did not know his name.

- The following Friday he went to the club and the “guy” took him to the cloakroom, he gave the guy the money and then the guy gave him two injections, one in each buttock. He did not know what was in the injections.
- He asked him what was in the injections and he said he would tell him after but after he went downstairs, and he never came back again, he went for good. The only thing he thought was that the injection was in order to help his libido.
- He said he received the injections in January 2017.
- He said that he tried to find the man who injected him in Eldoret and went back to the club, then he went from chemist to chemist looking for him.
- He was in a chemist shop when he saw the man who injected him, he asked a customer who pointed out another customer and said that the other customer was a Mr Too.
- He said he was only there to know just the name of the person who injected him and as a result he did not speak Mr Too. He has not attempted to contact Mr Too since then. He noted that Mr Too was a doctor, because he was in the chemist shop and after asking a customer.
- He confirmed that the statement he gave to Mr Eastwood to put forward in these proceedings *“I wish to state that I have never knowingly taken performance-enhancing drugs and can only assume that the injection I was given in early 2017 led to the adverse analytical findings in April and May of that year.”* was true and correct. He added that he never used any drugs and the one he used was not to help him with racing but only to improve his libido.
- His suspension since July 2017 had an important financial impact on him and on his family. His only income now comes from selling milk, earning 150 Kenyan shillings per week, and sometimes he goes to eat at a farm.

26. The Athlete’s oral evidence under cross examination by Mr Wenzel included:

- He went to the club on two occasions.
- He said that the club is not so big and he did not know the address of the club but when he goes to town he knows it from its sight.
- He said that he did not know the name of the club but when he was asked again he said that he just remembered the name of the club in Eldoret was Elasco, which

he spelled as Delcos.

- He asked the name of the liquid substance in the injections but he was told by the gym instructor that when he had finished the injections, he would tell him the name of the product but afterwards he went downstairs to get some tablets and then disappeared.
- He knew that as an athlete there were certain substances he could not take.
- He thought the injections were administered by a gym instructor at the time but later in the chemist in Eldoret he thought the guy was a doctor.
- He said it was a customer he asked in the chemist who told him that the name of the other customer was Dr Too.
- He did not know when this discussion in the chemist shop occurred. He said he did not try to speak to Dr Too.
- The chemist shop was not so big, it was a small chemist.
- When he spoke with the anti-doping authorities in Nairobi, they asked him to go and find the name of the person who administered the substance. So, he tried to find the name of the person, since this was his only mission, to know the name.

27. Following the Athlete's oral evidence, Mr Wenzel and Mr Eastwood each addressed the Panel. Mr Wenzel submitted that the origin or source of the substance had not been established by the Athlete. He submitted that the Athlete's explanation lacked credibility, was unsubstantiated and amounted to mere speculation and that the Athlete must therefore be deemed to have committed an intentional ADRV. Alternatively, on the assumption that the Athlete's explanation was accepted, he submitted that it was a clear case of an "*indirect*" intention under Art. 10.2.3 of the ADR as the Athlete knew there was a significant risk in receiving the injections and his conduct in allowing a person who was unknown to him at the time to administer such injections showed a complete manifest disregard for that risk.

28. Mr Wenzel also submitted that the Panel did not have jurisdiction to proceed under Art. 10.6.3 of the ADR to reduce the period of Ineligibility because (a) that Article required the discretionary approval of both WADA and the IAAF, and neither had been given, and (b) recent CAS authority in the case of *WADA v International Ice Hockey Federation & Filip Lestan*, CAS 2017/A/5282, had held at [90] held that the application of Art. 10.6.3 was contingent on the athlete promptly providing an "*enhanced admission*".

29. In response Mr Eastwood submitted that the Athlete had given an account which was clear and credible. He submitted that the Athlete had not attempted to cheat and that he had used the substance on a single occasion to treat his libido issues in a context unrelated to sport performance as contemplated by the last three lines of Art. 10.2.3 of the ADR. Mr Eastwood submitted that this was not a case of a mere denial, that the Athlete had responded in detail and had done his best to assist, having regard to his educational issues. The Panel was, in his submission, "*entitled to look at the case in the round*".

JURISDICTION AND APPLICABLE RULES

30. The Panel notes the submissions on the jurisdiction of the Panel and the applicable rules set out in paras [29]-[48] of the IAAF Brief, which were not challenged by the Athlete.

31. The applicable rules are the ADR that apply to all athletes who participate in competitions organized, convened, authorized or recognised by the IAAF (see Art. 1.7(b) of the ADR). The marathons in Vienna and Geneva on the 23 April 2017 and 07 May 2017 respectively, were authorized and recognised by the IAAF. The Athlete was classified as an International Level Athlete at the time the samples were provided (see Art. 1.9(b)(vi) of the ADR) and the Disciplinary Tribunal has the jurisdiction to hear and determine the ADRVs alleged against the Athlete pursuant to Art. 8.2(a) of the ADR.

RELEVANT PROVISIONS OF THE ADR

32. Art. 2 of the ADR specifies the circumstances and conduct that constitute ADRVs. Doping is defined as the occurrence of one or more of the following (each an "Anti-Doping Rule Violation"):

A. 2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

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

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.

2.1.3 ...

B. 2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

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

2.2.2 The success or failure of the Use or Attempted Use of a Prohibited

Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an Anti-Doping Rule Violation to be committed.

ANTI-DOPING RULE VIOLATIONS

33. There was no dispute that the analysis by the accredited laboratory in Austria of the Vienna sample and the analysis by the accredited laboratory in Germany of the Geneva sample collected from the Athlete on 23 April 2017 and 07 May 2017 respectively, showed the presence of the same banned substance. Further, there is no dispute that the Athlete does not have a valid Therapeutic Use Exemption justifying the Presence or Use of the banned substance and nothing was raised in the proceedings which would cast doubt on the testing of the urine samples provided by the Athlete or the test results.

34. In the circumstances the Panel finds that the Athlete has committed an ADRV under Art. 2.1 (Presence) and under Art. 2.2 (Use) of the ADR.

THE CONSEQUENCES

35. The relevant provisions of the ADR relating to the period of Ineligibility to be imposed where it is, as it is in this case, an Athlete's first ADRV are found in Art. 10.2 of the ADR. The standard period of Ineligibility of four years may be reduced under Art. 10.6. Art. 10.2 and 10.6 of the ADR relevantly provide:

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

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

10.2.1 *The period of Ineligibility shall be four years where:*

(a) The Anti-Doping Rule Violation does not involve a Specified Substance, unless the Athlete or other Person establishes that the Anti-Doping Rule Violation was not intentional.

(b) ...

10.2.2 *If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.*

10.2.3 *As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes or other Persons who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct that he knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance that is only prohibited In-Competition (a) shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that it was Used Out-of-Competition; and (b) shall not be considered "intentional" if the Substance is not a Specified Substance and the Athlete can establish that it was Used Out-of-Competition in a context unrelated to sport performance.*

...

10.6 Elimination, Reduction, or Suspension of the Period of Ineligibility or other Consequences for Reasons Other than Fault

...

10.6.3 Prompt Admission of an Anti-Doping Rule Violation after being confronted with a Violation sanctionable under Article 10.2.1 or Article 10.3.1

An Athlete or other Person potentially subject to a four-year sanction under Article

10.2.1 or 10.3.1 (for evading or refusing Sample Collection or Tampering with Sample Collection) may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete or other Person's degree of Fault, by promptly admitting the asserted Anti-Doping Rule Violation after being confronted with it, upon the approval and at the discretion of WADA and the Integrity Unit.

36. As nandrolone and its metabolites are not Specified Substances on the 2017 WADA *Prohibited List*, the period of Ineligibility is therefore the standard four years under Art. 10.2.1(a) of the ADR, unless the Athlete can establish on a balance of probability that the ADRV was not intentional. The AIU submitted that the Athlete must establish what was the origin of the prohibited substance and how it entered his body and that he had failed to discharge this burden and the violation should be deemed to be intentional. Alternatively, it was submitted that even if the Athlete's explanation did establish the origin of the Prohibited Substance and how it entered his body and his evidence was accepted at face value, it was a clear case of an "indirect" intentional violation of the ADR.

AN INTENTIONAL VIOLATION

37. The AIU submitted on its primary case that "[f]or the purposes of satisfying this burden, a whole series of CAS cases have held that the athlete must necessarily establish how the substance entered his/her body" and that the Athlete must establish and substantiate the origin of the substance beyond merely the Athlete's word (IAAF Brief at paras [55]-[56]). As also noted by the AIU, some Court of Arbitration for Sport ("CAS") cases such as *Villanueva v. FINA*, CAS 2016/A/4534 have expressed the contrary view that there is no such rigid requirement and that an athlete might be able to rebut the presumption of intentionality without establishing the origin of the prohibited substance. The Panel does accept that this will arise rarely, as discussed in the more recent case of *WADA v. WSF & Iqbal*, CAS 2016/A/4919 at [65]-[66].

38. The Panel accepts, however, that any explanation by an athlete in respect of an ADRV must be more than a mere denial, as was recognised in the case of *International*

Wheelchair Basketball Federation v UK Anti-Doping and Simon Gibbs, CAS 2010/A/2230 where the Sole Arbitrator expressed the Athlete's burden in the following terms:

"To permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body."

39. The Panel accepts the submission by the AIU that evidence establishing that a scenario is possible is not enough to establish the origin of the Prohibited Substance. The Panel agrees that the nature and quality of the defensive evidence put forward by the Athlete, in light of all the facts established, must be such that it leaves the Panel actually satisfied on the balance of probability that the Athlete's explanation is more likely than not to be true.

40. The AIU submitted that the explanation given by the Athlete in this case was unsubstantiated and amounted to mere speculation. It was simply a matter of his unsubstantiated assertion initially made in his email of 01 August 2017 that *"I indeed bought the said Norandrosterone substance from a Gymnasium Instructor"*. In oral submissions, Mr Wenzel asked the Panel to consider several matters relating to the credibility of the explanation offered by the Athlete and submitted that his story *"simply did not ring true"*. The Panel has carefully considered the credibility of his asserted explanation. The Panel notes that his memory changed; initially he could not remember the name of the club (where the injection was given) when asked and yet in oral evidence he gave a name, Delcos or Elasco, which had never been mentioned before. He remembered in oral evidence that the injection was in January 2017, whereas previously he had said only that such injection was given in early 2017. The Athlete was also vague; he initially said that a gymnasium instructor gave the injection after he complained of libido issues and in his statement of 01 August 2017 he said that he tried to find the instructor but had not been successful. The Athlete gave no evidence of visiting other clubs or gymnasiums to find out the identity of the gymnasium instructor, but later said

that he went from chemist to chemist in Eldoret to do so. Eventually, the gymnasium instructor was identified as "Mr Too", but this was later changed to "Dr Too". Such efforts were not referred to in the Athlete's Answer Brief or in the included unsigned statement, but this particular matter may be explicable by communication problems with his representative.

41. The Athlete had never said, before giving oral evidence, that the person who gave him the injections was a medical practitioner. The Athlete volunteered in oral evidence that his efforts did lead to find him in a small chemist shop after speaking to one customer and found out that another customer was allegedly Dr Too and not Mr Too, and yet the Athlete then did not try to speak to Dr Too or to make any further contact with him. He did not obtain any material or other information to support his assertion that *"I indeed bought the said Norandrosterone substance from a Gymnasium Instructor"*. This assertion is contradicted by his oral evidence that at the time he asked what the substance he was being injected with was, but that he was never told. There was no proof of purchase of the substance. Furthermore, his assertion that Dr Too did not hear or notice in the "small" chemist shop that he was being discussed or had been identified, may be doubted. The Athlete's evidence that he did not try to find Dr Too again to speak to him or to ask him to provide a statement casts some doubt on his explanation.

42. The Athlete said he asked what he was being injected with in the cloakroom of the club in January 2017, but was not told because the person giving the injection said that he would tell him after he went downstairs. He said for the first time in his oral evidence eighteen months later that it was a medical practitioner and not a gym instructor who injected him in the cloakroom and then fled. In the Panel's view, this is not a credible explanation.

43. The Athlete accepted that there is no scientific or other evidence that the substance he was injected with was the same as, or was related to, the substance detected in his urine samples following the marathons in Vienna in April 2017 and in Geneva in May. Nonetheless the AIU did frankly concede during submissions that *"it is not wholly implausible that it might be used in connection with libido issues."*

44. However, there was no attempt by or on behalf of the Athlete to support or build

on this concession. He made no effort to lead or point to any evidence at all, other than his bald assertion, such as by referring to any medical literature, if any exists, which might establish a link between nandrolone and his libido issues, or which might take the matter beyond the realm of possibilities and satisfy the Panel on the balance of probability, that the substance with which he was injected was or was the reason for the AAF .

45. Nevertheless, the Panel was invited to conclude, based on the Athlete's explanation and on the balance of probability, that the substance injected in January 2017 either was the same substance as, or had caused the Presence of the substance that was detected in the urine samples given by the Athlete in Vienna on 23 April 2017 and in Geneva on 07 May 2017.

46. Even looking at the case "in the round" as was submitted on behalf of the Athlete, having regard to the Athlete's circumstances and based on the totality of the evidence proffered by the parties, the Panel concludes that it is not satisfied that the Athlete's explanation is more likely than not to be true. The Athlete has failed to establish that his ADRV was not intentional. In these circumstances, the consequence is that the standard period of Ineligibility of four years is applicable, with no reduction and is imposed on the Athlete.

AN INDIRECT INTENTIONAL VIOLATION

47. Given the conclusions reached in the previous paragraph, it is strictly not necessary to address the AIU's alternative submission made in respect of Article 10.2.3 of the ADR. Nevertheless, as the Panel has considered the alternative submission, it may be of assistance to the parties that it sets out its reasons for why it has reached the firm conclusion that even if it had accepted the Athlete's explanation as establishing the origin of the Prohibited Substance and that his evidence was accepted by the Panel at face value, it was a clear case of an "indirect" intentional violation under Art 10.2.3 of the ADR.

48. Art 10.2.3 provides:

10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes or other Persons who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct that he knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance that is only prohibited In-Competition (a) shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that it was Used Out-of-Competition; and (b) shall not be considered "intentional" if the Substance is not a Specified Substance and the Athlete can establish that it was Used Out-of-Competition in a context unrelated to sport performance.

49. The AIU submitted that it was a case of "indirect intention" under Art. 10.2.3 as the term intentional is meant to identify those Athletes or other Persons who cheat and the term is satisfied where the Athlete engaged in conduct that he/she "*knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk*".

50. The Athlete's oral evidence established that:

- He did not know the person or the name of the person who was about to inject him.
- He did not believe that the person giving him the injection was a medical practitioner, but thought that he was a gym instructor.
- He knew that as an Athlete, there were some substances he should not take.
- He asked what was the substance that he was being injected with but was told that he would be told after he had been injected.
- He allowed the injection to take place in the cloakroom of a club, not knowing what the substance that he was being injected with was, and not knowing the person who was injecting him.

51. The AIU submitted that it was evident that the Athlete appreciated that there was a significant risk because he asked what he was going to be injected with and that his conduct in going ahead under those circumstances amounted to a manifest disregard of that risk. The Panel agrees that even if the Athlete's explanation was to be accepted at

face value, the Athlete's conduct would amount to a case of an indirect intention under Art. 10.2.3 ADR.

52. The Panel agrees that the behaviour of an athlete who receives an injection of an unknown substance from an unknown person in a locker room of a club or gymnasium must be considered as intentional for the purposes of a provision such as Art. 10.2.3 of the ADR. Furthermore, the Panel notes the case *WADA v. Indian NADA & Pereira*, CAS 2016/A/4609, where an athlete had been referred to a doctor by his club doctor and subsequently allowed that other doctor to inject a substance into him without making any inquiries and without checking what was in the injection. This conduct was held by the CAS Panel in that case (at para [78]) to be "*not only extremely negligent, but indeed reckless*" and an "indirect" intentional violation. In that case, the athlete had taken a risk without asking any questions and even though the injection was to be administered by a medical practitioner, it was still a case of an intentional violation as it was significant risk and a manifest disregard of that risk to allow the injection without making any inquiries. The CAS Panel in that case also rejected a submission that there was no such legal concept as "indirect intent" under the equivalent provision to Art. 10.2.3 of the ADR.

53. In the present case, the Panel is satisfied that had it accepted the explanation given by the Athlete at face value, it would be a clear case of an indirect intentional violation pursuant to Art. 10.2.3 of the ADR.

NO JURISDICTION TO CONSIDER ART. 10.6.3

54. The AIU also added that the Panel did not have jurisdiction to proceed under Art. 10.6.3 of the ADR to reduce the period of Ineligibility because (a) that Article required the discretionary approval of both WADA and the IAAF, and neither had been given, and (b) recent CAS authority in the case of *WADA v International Ice Hockey Federation & Filip Lestan*, CAS 2017/A/5282, had held at [90] held that the application of Art. 10.6.3 of the ADR was contingent on the athlete promptly providing an "*enhanced admission*".

55. The Panel adopts the reasoning in *WADA v International Ice Hockey Federation &*

Filip Lestan, CAS 2017/A/5282 at [90], that the enhanced admission “*must describe the factual background of the anti-doping rule violation both fully and truthfully and not merely, accept the accuracy(s) of the adverse analytical finding*”. In that case, the Panel found that the athlete was eligible for a reduction of six months in proportion to the seriousness of his violation and his degree of fault, subject to the approval of WADA and the International Ice Hockey Federation. In the present case and based on the Panel’s view that it is not satisfied on the balance of probability that the Athlete’s explanation was credible or truthful, there is no justification for any reduction under Art 10.2.3 of the ADR.

THE START DATE OF THE PERIOD OF INELIGIBILITY

56. A period of Ineligibility of four years is imposed upon the Athlete, commencing on the date of the Panel’s decision. During the hearing the representatives for the Athlete and the AIU accepted that the period of provisional suspension imposed on the Athlete had been effective from 14 July 2017 and not from the time of receipt of the notice on 27 July 2017. It was also agreed that the period from 14 July 2017 up until the date of the Panel’s decision should be credited against the total period of Ineligibility.

DISQUALIFICATION OF RESULTS

57. Mr Eastwood confirmed that pursuant to Art. 10.1.1 of the ADR in the event of an ADRV being found, the Athlete’s results from 23 April 2017 up to 14 July 2017 shall be disqualified, with all resulting consequences, including the forfeiture of any medals, titles, awards, points, prize and appearance money.

COSTS

58. The IAAF sought an award for a contribution to its legal costs. This was opposed by the Athlete as disproportionate having regard to his limited resources. The Panel has had regard to all the circumstances of the case and the Athlete. The Panel declines to

make any costs order against any party under Art. 8.9.3 of the ADR.

THE RIGHTS OF ANY APPEAL

59. Art. 8.9.2 of the ADR requires the Panel to set out and explain in its decision the rights of appeal applicable pursuant to Art. 13 of the ADR.

60. As this proceeding involves an International Level Athlete, the decision may be appealed exclusively to the CAS (see Art. 13.2.2 of the ADR and Art. 16.2 of the IAAF Disciplinary Tribunal Rules). The scope of review on appeal includes “all relevant issues to the matter and is expressly not limited to the issues or scope of review before the initial matter” (see Art 13.1.1 of the ADR). The deadline for filing an appeal to CAS is 21 days from the date of receipt of the decision by the appealing party (See Art. 16.4 of the IAAF Disciplinary Tribunal Rules). In making its decision, the CAS need not give deference to the discretion exercised by the Disciplinary Tribunal (see Art. 13.1.2 of the ADR).

DECISIONS AND ORDERS

61. For the reasons set out above, the Disciplinary Tribunal makes the following decisions and orders:

- (i) The Disciplinary Tribunal has jurisdiction to decide on the subject matter of this dispute.
- (ii) The Athlete has committed an ADRV under Art. 2.1 and 2.2 of the ADR.
- (iii) A period of Ineligibility of four years is imposed upon the Athlete, commencing on the date of the Disciplinary Tribunal Award. The period of provisional suspension imposed on the Athlete from 14 July 2017 until the date of the Tribunal Award shall be credited against the total period of Ineligibility.

- (iv) The Athlete's results from 23 April 2017 until the commencement of his provisional suspension on 14 July 2017 shall be disqualified with all resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money.
- (v) The Disciplinary Tribunal makes no order or award for costs.



Malcolm Holmes

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15 June 2018



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