INTERNATIONAL TENNIS FEDERATION

INDEPENDENT ANTI-DOPING TRIBUNAL

DECISION IN THE CASE OF DR ELENA DOROFEYEVA

Ian Mill QC as sole arbitrator

(1) Introduction

1. This is the decision of an independent Anti-Doping Tribunal ("the Tribunal") appointed by the International Tennis Federation ("the ITF") under Article 8.1.1 of the ITF Tennis Anti-Doping Programme 2015 ("the 2015 Programme") to determine the charge that Dr Elena Dorofeyeva ("Dr Dorofeyeva") committed an Anti-Doping Rule Violation[1] under Article 2.8 of the ITF Tennis Anti-Doping Programme 2014 ("the 2014 Programme") - the allegation being that Dr Dorofeyeva in November and December 2014, while providing medical, nutrional and/or other support to a Player, Ms Kateryna Kozlova ("Ms Kozlova"), administered to Ms Kozlova a Prohibited Substance, namely 1,3-dimethylbutylamine ("DMBA"), as an ingredient of a product (known as "Red Rum") which she advised Ms Kozlova to take shortly before matches in Turkey (in December 2014) and Australia (in January 2015) ("the Charge").

2. The ITF was represented at the hearing of the Charge in London by Jonathan Taylor and Lauren Pagé of Bird & Bird, its solicitors. Dr Dorofeyeva did not attend the hearing, nor was she represented at it. She had however filed written submissions in support of Motions filed by her:

   a. To dismiss the case against her for lack of jurisdiction;

   b. To reject the case against her for deadline lapse; and

[1] This Decision contains a number of undefined capitalised terms. The definitions are to be found in the relevant Programme.

c. For "Summary Judgment without Notice Application to Dismiss for Deprivation of Rights and Lack of Jurisdiction".

The hearing included consideration of those Motions as well as the Charge referred to above.

3. The Tribunal heard live evidence from two witnesses, both on behalf of the ITF: Ms Kozlova and Alina Moiseeva (who was at the material times, and remains, Ms Kozlova's manager ("Ms Moiseeva")). Ms Moiseeva gave her evidence in person. Ms Kozlova gave her evidence via a Skype connection.

4. The Tribunal listened to and considered this evidence during and following a hearing lasting several hours in London on 13 May 2016, and it has read and considered the detailed submissions on behalf of the parties.

(2) Factual Background

5. During her participation in the Dubai Tennis Championships in February 2015, Ms Kozlova was selected for doping control and provided a urine sample. The test report on that sample identified the presence within it of DMBA. DMBA was identified as a Stimulant within Category S6 of the 2014 List of Prohibited Substances (set out in the 2014 Programme) - Substances prohibited In-Competition.

6. Ms Kozlova, in an attempt to ascertain how she might have ingested this Prohibited Substance, contacted the First Moscow State Medical University ("FMSMU"), who informed her that DMBA was also referred to as 2-amino-4-methylpentane (AMP) citrate. She checked this name against the ingredients of products that she was taking at the time, and found that it was listed as an ingredient of Red Rum. In consequence she sent her container of Red Rum to FMSMU for testing. FMSMU confirmed the presence within that product of DMBA.

7. Ms Kozlova thereupon informed the ITF that she intended to admit the commission by her of an Anti-Doping Violation under Article 2.1 of the 2015 Programme. She gave evidence to the ITF in the form of an Affidavit dated 15 April 2015 as to the circumstances in which she had come to ingest the DMBA found in her sample. Subsequently, the ITF (which accepted her account) published a Decision on 27 May 2015 which imposed a period of six months' Ineligibility on Ms Kozlova, commencing on the date when the sample was taken, Disqualification of results in specified events and Forfeiture of the ranking points and Prize money awarded at those events. This Decision was published following the written agreement of Ms Kozlova to such an outcome.

8. Ms Kozlova's account to the ITF set out in her Affidavit contained the following assertions:

   a. That the Red Rum which she had ingested prior to the match in Dubai following which she was tested had been given to her by Dr Dorofeyeva in Moscow at the end of November 2014.

   b. She had first consulted Dr Dorofeyeva in 2013 as a specialist who could assist her in recovering from a knee injury suffered in December 2012. Dr Dorofeyeva was recommended to her by fellow players at the Donetsk tennis club where she was then based as a highly qualified medical specialist and as one of the best in the field of sports medicine in the Ukraine.

   c. Thereafter she had met with Dr Dorofeyeva for general body check-ups and had received from her a personal schedule which included vitamins for which Dr Dorofeyeva provided prescriptions[2].

[2] In her evidence to me, Ms Kozlova told me that during this period she saw Dr Dorofeyeva on a weekly basis, and that she paid a sum of money for every consultation and and also 10% of her prize money.

d. In July 2014, she had left the Ukraine for Moscow. From that point on, she had continued to consult Dr Dorofeyeva by email and telephone. Having found a new training facility in Moscow, she had invited Dr Dorofeyeva to visit her in Moscow in November 2014 to assess her general physical condition.

e. Prior to her arrival in Moscow on 27 November 2014, Dr Dorofeyeva had sent her an email in which she had referred to the fact that she wanted to bring Ms Kozlova *"an interesting substance to take at competitions"*.

f. That substance, which Dr Dorofeyeva had bought in Dnepropetrovsk, brought to Moscow and given to her at the end of November 2014, was Red Rum. Dr Dorofeyeva had described that product to Ms Kozlova, when she gave it to her, as an energy drink to be taken 30 minutes before a match. It had no banned substances in it, it contained pure vitamins, it was very good and was used by other athletes who liked it a lot[3].

g. On 9 December 2014, Dr Dorofeyeva had sent Ms Kozlova an email in which she set out detailed instructions as to what vitamins to ingest and when. In relation to the tournaments in which Ms Kozlova was scheduled to participate in Ankara (in December 2014) and in Australia (in January 2015), those instructions had included that she should ingest half a tablespoon of Red Rum 30 minutes before each match.

h. Following the Australian tournament, she had spoken with Dr Dorofeyeva to get her instructions as to vitamin intake for the Dubai tournament in February 2015. Dr Dorofeyeva had recommended among other things the continued use of Red Rum before each match.

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[3] During the visit in Moscow, Dr Dorofeyeva was paid a sum of money and also was reimbursed her expenses, including in particular the cost of products which she supplied. It was in this context that Ms Kozlova received the receipt for Red Rum referred to below.

i. It was her implementation of this recommendation which had resulted in the positive test during that tournament.

j. When informed of the positive test, she had spoken with Dr Dorofeyeva, who had responded that the test result was impossible, as she had only given Ms Kozlova vitamins, which could not have contained the Prohibited Substance found in her sample.

k. Once she had obtained the result of the analysis carried out by FMSFU, Ms Kozlova had spoken again with Dr Dorofeyeva, who on this occasion had responded that she was afraid that her reputation might suffer harm and that she might even be subject to some procedure against herself.

l. Dr Dorofeyeva had failed to assist her in relation to the Anti-Doping Rule Violation alleged against her by the ITF[4].

9. The ITF wrote to Dr Dorofeyeva on 2 July 2015 seeking her comments on Ms Kozlova's account. When there was no response, a follow up email was sent on 29 July 2015. This too received no response.

10. The ITF sent a Notice of Charge to Dr Dorofeyeva dated 12 October 2015. It recited the facts which Ms Kozlova had asserted, as set out above, and alleged that, in those circumstances, Dr Dorofeyeva:

a. Was Player Support Personnel for the purposes of Article 1.15 of the 2014 Programme, as this definition included medical personnel who had been working with, treating or assisting a Player [i.e. Ms Kozlova] in her sporting capacity.

[4] In her oral evidence, Ms Kozlova explained that Dr Dorofeyeva had not denied supplying her with red Rum, but refused to confirm this fact publicly.

b. Was accordingly bound by the 2014 Programme.

c. Had administered a Prohibited Substance [i.e. DMBA] to Ms Kozlova in violation of Article 2.8 of the 2014 Programme.

11. In that Notice of Charge, the ITF referred to the definition of "Administration", which had been included within the 2015 Programme[5], and asserted that the facts asserted by Ms Kozlova would mean that Dr Dorofeyeva had "Administered" the DMBA to Ms Kozlova because she had recommended, bought and supplied to Ms Kozlova that Prohibited Substance.

(3) Procedural History

12. Dr Dorofeyeva failed to respond to the Notice of Charge within the 10 day window provided for in the 2015 Programme. The ITF sent her an email on 27 October 2015, giving her a further two days in which to respond, failing which a decision adverse to her would be issued.

13. When Dr Dorofeyeva failed to respond within this extended window, the ITF in fact chose not to issue such a decision.

14. Dr Dorofeyeva did in fact respond, eventually, on 5 November 2015. She claimed that the delay was due to loss of access to her email inbox as a result of military operations in Donetsk. In a statement dated 5 November 2015, Dr Dorofeyeva asserted the following factual case:

a. That she had not made an agreement with Ms Kozlova for the provision of medical support. There had been negotiations, but these had failed.

[5] The word "administration" in the 2014 Programme was not defined. The ITF's contention was that it should be given a meaning which accorded with the definition of Administration in the 2015 Programme.

b. That she had not prescribed or advised the use of Red Rum to anyone as she did not know the product; she only advised and gave opinions on products on which she was expert.

c. The "Elena" named on the receipt for Red Rum produced by Ms Kozlova (which Ms Kozlova said had been given to her by Dr Dorofeyeva in Moscow in November 2014) did not refer to her. *"Fortunately in Dnepropetrovsk live thousands of women with name Elena"*.

15. The legal assertions made by her included that:

a. She was not, in the circumstances, Player Support Personnel of Ms Kozlova for the purposes of Article 1.15 of the Programme.

b. The accusations against her were based on free translations of her private emails containing her private opinions. Using them without her consent involved an invasion of her right to privacy.

16. The ITF sent Dr Dorofeyeva a series of questions in a letter dated 20 November 2015, which concerned the factual detail set out in the Notice of Charge that the ITF considered that Dr Dorofeyeva's response had failed to address.

17. In a further response dated 27 November 2015, Dr Dorofeyeva sought to expand upon certain of the points previously made by her - including that "Player Support Personnel" required that the person concerned be employed by the Player and that certain of her emails had been distorted. She did not however respond to the questions which the ITF had raised.

18. There followed a period during which, according to the ITF, it took various steps to consider Dr Dorofeyeva's legal arguments, as well as her arguments

about the authenticity of the evidence relied upon in the Notice of Charge. Having completed its inquiries, and satisfied itself that it remained appropriate to continue with the Charge against her, the ITF contacted me to request that a preliminary directions hearing be convened.

19. Given Dr Dorofeyeva's response, denying that she was Player Support Personnel - and therefore denying that she was bound by the Programme - I invited her to make submissions on whether the Independent Tribunal set up under the Programme was competent to rule on its own jurisdiction over her.

20. Dr Dorofeyeva responded to this with a further statement dated 22 February 2015. This however failed explicitly to address the question which I had posed, but rather amounted to a further iteration of arguments previously made by her (as set out above). It seemed to me that I had to decide the issue which I had raised, and my decision was that the Independent Tribunal was so competent, essentially for three reasons:

    a. In my view, the Independent Tribunal had the qualities and characteristics of an arbitral tribunal to which the provisions of the Arbitration Act 1996 applied[6]. By Section 30 of that Act: *"unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction"*. There was and is no such agreement contained within the Programme.

    b. There were indications within Dr Dorofeyeva's response of 22 February 2015 which suggested that she would be content for the Independent Tribunal to resolve the issue of its own jurisdiction. Thus, in the latter part of her statement she referred not only to answering questions as a witness or as *amicus curiae* but also to the possibility of her being forced to defend herself "within the trial".

[6] See *England and Wales Cricket Board v Kaneria* [2013] EWHC 1074 (Comm).

c. Those indications were reinforced by an email from her of 23 February 2015, in which Dr Dorofeyeva requested that the Independent Tribunal *"withdraw my name from doping case of Ms K Kozlova with immediate effect and drop the case against me since found groundless due to law"*.

21. In any event, the matter was put beyond doubt when, on 25 February 2015, Dr Dorofeyeva emailed to me her Motion to Dismiss for Lack of Jurisdiction ("the Jurisdiction Motion"). I address below the merits of that application.

22. On 29 February 2015, two material events occurred:

a. Dr Dorofeyeva informed me by email that she would not, due to her circumstances in her war torn country, be able to attend the directions hearing which I had fixed for that day, and at the same time sent me a further Motion, this time to Reject Case for Deadline Lapse (the merits of which I address below) ("the Deadline Lapse Motion").

b. I gave directions at the convened hearing, which I considered should go ahead in the absence of Dr Dorofeyeva. Specifically, I gave directions for the filing of written briefs which, in the case of the ITF brief, was to address Dr Dorofeyeva's Motions as well as the Notice of Charge. Also, I acceded at that hearing to the request of the ITF (made under Article 8.4.2(a) of the 2015 Programme) that I hear the disputes between the parties alone. Given the nature of the points advanced by Dr Dorofeyeva up to that point, this seemed to me to be a sensible request.

23. Implicit in these directions was that I had decided that Dr Dorofeyeva's Motions should be considered at the substantive hearing, not at some separate and earlier hearing. This decision was based on my understanding of the points which she was raising on those Motions, which seemed to me to

involve some considerable overlap with the facts relevant to the merits of the Notice of Charge. It did not seem to me to be good case management to have the possibility of duplicated evidence and argument.

24. Dr Dorofeyeva appears not to have understood this, as she wrote to me on 3 March 2016 on the assumption that I had, at the directions hearing on 29 February 2016, decided her Motions against her. I explained to her the correct position (as set out in paragraph 23 above) in a responsive email.

25. By this stage, I had become concerned that Dr Dorofeyeva should if at all possible participate in the hearing either in person or remotely by some form of videolink and also obtain legal representation in order to ensure both that she understood the process in which she was involved and that her arguments were clearly presented to me at the hearing. I expressed these concerns to her on several occasions in the subsequent correspondence; however, I never received any response which addressed these concerns.

26. Instead of serving a written brief which responded to the ITF written brief served in support of the Notice of Charge and in response to Dr Dorofeyeva's Motions referred to above, Dr Dorofeyeva on 9 April 2016 emailed a further written Motion - this time, "for Summary Judgment without Notice Application to Dismiss for Deprivation of Rights to Defense and Lack of Jurisdiction" ("the Summary Judgment Motion"). I address the merits of this third Motion below.

27. Although the summary Judgment Motion did not comply with the requirements under the 2015 Programme of a respondent's written brief, I decided to treat it as such in order that the ITF would be required to reply to it in writing prior to the hearing. The ITF did so on 25 April 2016.

28. On the same day, Dr Dorofeyeva emailed me asserting that, by forwarding (as I had done) her Summary Judgment Motion to the ITF, I had decided that

Motion against her. I explained by way of response that this was not the case, that there was on question of my deciding that Motion on an ex parte basis and that it would be considered along with her other Motions at the hearing.

29. In my correspondence with her at this time, she made it clear that her Summary Judgment Motion was not to be treated as a written brief from her in accordance with my directions and that she was not and never had been under my jurisdiction.

30. Also at this time, Dr Dorofeyeva sent me another email in which she identified a number of individuals whom she expected me to call as witnesses. I explained in response that the Independent Tribunal did not operate on an inquisitorial basis and that it was for the parties to present their evidence to me for my consideration.

31. In the light of the procedural history set out above, it is perhaps unsurprising that Dr Dorofeyeva did not participate in the hearing on 13 May, either in person or through any legal representative or otherwise. It is regrettable that this was the case. I had made every effort that I considered I reasonably could to encourage her to adopt a different approach, but unfortunately those efforts were unsuccessful.

(4) My Conclusions on the Issues

(a) The Jurisdiction Motion

32. Dr Dorofeyeva's Jurisdiction Motion asserts that she was not and never had been "Player Support Personnel" of Ms Kozlova, for the reasons set out in her statements of 5 November 2015 and 22 February 2016 (referred to in paragraphs 14 and 20 above). Most importantly, as it seems to me, this involves a factual challenge to the assertions made by Ms Kozlova set out in paragraph 8 above.

33. Dr Dorofeyeva's failure to participate in the hearing is unhelpful to her in this context. She was unable to cross examine the ITF's witnesses and I did not have the advantage of observing Dr Dorofeyeva setting out her factual case in evidence before me. Nonetheless, it by no means follows that I am bound to accept the evidence of Ms Kozlova or Ms Moiseeva. I was careful to test their evidence through questioning, and I evaluated their evidence in the light not only of their answers to my questions but also the documents which they asserted supported their factual case.

34. In the end, I was and am satisfied that their evidence before me was truthful and accurate. There were minor discrepancies between their two accounts and between their oral evidence and their written statements. However, in my view, these served to enhance rather than diminish the reliability of the essential features of what they had to say. In particular, therefore, I accept as accurate Ms Kozlova's account as summarised in paragraph 8 above. Ms Moiseeva corroborated that part of Ms Kozlova's account which dealt with Dr Dorofeyeva's trip to Moscow and the provision by her to Ms Kozlova of Red Rum at the end of November 2015, and I accept that corroborative evidence as truthful as well. Both those accounts are in my view supported by the emails referred to in paragraphs 8(e) and (g) above and the receipt for the Red Rum ("*Received by: Elena*") dated 18 November 2015, which Mz Kozlova attached to her statement in these proceedings.

35. As for the factual arguments made by Dr Dorofeyeva, set out in paragraph 14 above:

    a. It matters not whether there was any agreement between Ms Kozlova and Dr Dorofeyeva for the provision of medical support. The definition of "Player Support Personnel" in Article 1.15 of the 2014 Programme[7] clearly includes any person who *de facto* works with, treats or assists a

[7] "*Any coach, trainer, manager, agent, team staff, official, medical or paramedical personnel, parent or any other Person working with, treating or assisting a Player in his/her sporting capacity...*"

Player in his/her sporting capacity, irrespective of the nature of any legal relationship between them. The accounts which I have accepted of Ms Kozlova and Ms Moiseeva firmly establish Dr Dorofeyeva as someone who fell into such a broad category in the period from July 2013 until at least December 2014.

b. I am unable to accept Dr Dorofeyeva's denial of the prescription by her, and the provision by her, to Ms Kozlova of Red Rum in November 2014. That denial is inconsistent with the oral and documentary evidence to which I have referred above.

c. I am also unable to accept Dr Dorofeyeva's denial that the "*Elena*" on the 18 November 20165 pharmacy receipt referred to her. She offers no explanation as to how Ms Kozlova might have possession of such a receipt, unless it had been given to the Player by Dr Dorofeyeva, in the circumstances which the Player describes.

36. The ITF relies, in addition to the evidence referred to above, upon Dr Dorofeyeva's sporting and medical background as set out in her CV which Ms Moiseeva says was provided to her by Dr Dorofeyeva in November 2014 (and which she attached to her statement in these proceedings). This describes Dr Dorofeyeva as a former USSR champion swimmer who:

a. Had worked since 1994 with "*the leading athletes of Donetsk region in swimming, cycling, wrestling, track and field athletes*";

b. "*Exercises medical control and pharmacological support of athletes*"; and

c. "*During her work with the athletes ... pays special attention to selection, assessment of a functional state and resources. On the basis of studying the mechanisms of urgent and long-term adaptation to significant physical loads she has been developing criteria of assessment of adaptation opportunities,*

timely identification of de-adaptation, referral to rehabilitation therapy and individual pharmacological support".

37. The ITF asserts, on the basis of this background, that Dr Dorofeyeva must have been aware at the relevant time of the WADA Code and of its adoption by every Olympic sport, including tennis. It also prays in aid the evidence of Ms Kozlova and Ms Moiseeva that they discussed with Dr Dorofeyeva the contents of Red Rum and the other products recommended by her, and that during that discussion Dr Dorofeyeva assured them that none contained any substances that were prohibited for use by tennis professionals (thereby, it is said, evidencing her knowledge of the existence of such prohibitions). This evidence, which I accept as accurate, does seem to me to support the ITF's assertion. However, in any event, Article 1.16.1 of the 2014 Programme specifies that it is "*the responsibility of each Player Support personnel to acquaint him/herself with all the provisions of this Programme*" (which includes knowing what constitutes an Anti-Doping Violation under that Programme and the identity of Prohibited Substances).

38. Accordingly:

    a. By virtue of Article 1.15 of the 2014 Programme, Dr Dorofeyeva was and is "*automatically bound by and required to comply with all of the provisions of*" that Programme.

    b. As the Independent Tribunal appointed under the 2016 Programme, Dr Dorofeyeva is therefore subject to my jurisdiction.

39. Accordingly, I must and do reject the Jurisdiction Motion.

(b) The Deadline Lapse Motion

40. The Deadline Lapse Motion asserts that, pursuant to Article 8.4.1 of the 2015 Programme, the Preliminary Hearing (which I convened on 29 February 2016 - see paragraph 22 above) should have taken place as soon as possible and (save in exceptional circumstances) no more than 21 days after the date of the Notice of Charge (12 October 2015), whereas in fact it took place some 94 days after her response of 5 November 2015. Dr Dorofeyeva points out that no request was made for an extension of time by the ITF.

41. The ITF responds as follows:

    a. Factually, that some of the delay was attributable to the failure of Dr Dorofeyeva to respond to the Notice of Charge and to the nature of such response (which necessitated seeking clarification from her and then subsequently assessing her arguments - see paragraphs 16 to 18 above). The ITF accepted, however, in submissions before me, that it could have taken less time than it did before resolving to proceed against Dr Dorofeyeva and inviting me to convene a preliminary hearing. It accepted responsibility for one month's delay in that regard.

    b. More substantively, that there is nothing in the Programme that would justify me in concluding that the delay in proceeding meant that the Notice of Charge should be dismissed. If that had been the intention of the Programme, then this would have been made expressly clear in its provisions - especially since the dismissal (otherwise than on the merits) of an anti-doping charge would clearly be contrary to the public interest in the fight against doping in sport. The Programme (and in particular Article 8.4.1) does not contain any provision which would support the assertion that delay in holding a preliminary hearing was intended to have such a jurisdictional impact.

42. I agree with the submissions of the ITF. It may well be that the preliminary hearing in these proceedings did not take place as soon as possible, but:

    a. The Programme does not suggest let alone specify any jurisdictional bar against the proceedings continuing in those circumstances.

    b. Dr Dorofeyeva does not point to any prejudice which she has suffered due to the period of avoidable delay.

    c. To the extent that there is prejudice by reference to the period of any Ineligibility, this can be taken into account by the Tribunal in backdating the start of such a period (under Article 10.10.3(c) of the Programme)[8].

43. Accordingly, I also reject the Deadline Lapse Motion.

(c) The Summary Judgment Motion

44. This third Motion by Dr Dorfeyeva repeats and to some extent expands upon the points made by her in her first two Motions dealt with above. To that extent, I do not consider that she raises any matters which cause me to reconsider my conclusions in those respects.

45. This Motion however raises one fresh argument, which does require to be considered. Dr Dorofeyeva points to a series of press releases/reports following upon the agreement reached between it and Ms Kozlova in May 2015 (see paragraph 7 above). Some of those releases/reports referred to Ms Kozlova's assertion that her positive test was the result of the prescription of a substance by *"a doctor"* with whom she had been working.

46. Dr Dorofeyeva asserts that:

[8] See paragraph 71 below.

a. These releases/reports were published by *"official persons representing ITF"*.

b. They demonstrated that the ITF had by that stage already decided that Dr Dorofeyeva had committed an Anti-Doping Violation almost five months before the Notice of Charge.

c. This decision violated her right to a fair trial under Article 6 of the Human Rights Act 1998.

47. In my view, these assertions are misconceived. Even if (which I do not accept) the quoted utterances of officials of the Ukrainian Tennis Federation and by Ms Kozlova herself (which contain the passages in the releases/reports to which Dr Doroveyeva objects) could in some manner be attributed to the ITF, this does not in any way affect Dr Dorofeyeva's right to a fair trial of the Charge brought against her. She appears not to have appreciated that the Independent Tribunals which decide Charges brought alleging Anti-Doping Violations in professional tennis are indeed independent of the ITF itself. The ITF's role in relation to such proceedings is solely to act as the prosecutor, and as such it bears the burden of proving the case that it brings. Its internal view as to the merits of that case is entirely irrelevant to the decision making processes with which I and other such Independent Tribunal members are involved.

48. Accordingly, I reject Dr Dorofeyeva's Summary Judgment Motion.

(d) The Notice of Charge

49. The details of the Charge are set out in paragraph 1 of this Decision. The essential facts that are alleged, in paragraphs 1 to 7 of the Notice of Charge, to justify the Charge are as set out above and, as already stated, are accepted by me as true and accurate.

50. Article 2.8 of the 2014 Programme provides (in material part) as follows:

> *"Administration or Attempted administration to any Player at any time or place of a substance that is prohibited at all times…or administration or Attempted administration to any Player in-Competition of any Prohibited Substance that is only prohibited In-Competition…"*

51. In paragraph 8 of the Notice of Charge, the ITF asserts as follows:

> *"It appears from the above account that the "Red Rum" powder that Ms Kozlova ingested on 16 February 2015 came from the actual tub of "Red Rum" that you bought for her and gave her on 27 November 2015. This would fall squarely within the definition of "Administration" in the 2015 Programme: you recommended, bought and supplied to Ms Kozlova the prohibited substance that was found in the sample collected from her at the Dubai event. But even if Ms Kozlova used a different tub of the Red Rum product in Dubai than the tub that you gave her in late November 2014, and even if Ms Kozlova sourced that different tub of the Red Rum product herself, her sue of half a spoon of the powder on 16 February 2015, 30 minutes before her match that day, was on the recommendation of and as directed by you, and therefore amounts to you "supervising, facilitating or otherwise participating in the Use by [Ms Kozlova] of a Prohibited Substance, and so still amounts to "Administration" for purposes of Article 2.8".*

52. There are several points that need to be addressed here:

a. First, I accept the evidence of Ms Kozlova that it was the same tub of Red Rum that she had been provided by Dr Dorofeyeva which she used during the Dubai tournament in February 2015.

b. Secondly, however, I do not regard this as a significant factual finding, contrary to the ITF's case. Ms Kozlova's evidence was that her use of that product in Dubai was the result of a conversation which she had had with Dr Dorofeyeva following the time of the events she played in Australia - in January 2015 (see paragraph 8(h) above). The Notice of Charge specifies that Dr Dorofeyeva has committed an Anti-Doping Violation under the 2014 Programme. This requires relevant activity

during the 2014 calendar year. Accordingly, the material factual findings relate to (a) the events which occurred in Moscow in November 2014 and (b) the emails sent by Dr Dorofeyeva in November and December 2014 - see paragraphs 8(e) to (g) above.

c. Thirdly, The ITF has relied in the quoted paragraph on the definition of "Administration" in the 2015 Programme. That reliance is explained by the ITF in the Notice of Charge as follows:

> *"The 2014 Programme does not define "administration". However, the 2015 Programme defines it as follows (and the ITF's position is that that definition should be used in this case):*
> *Providing, supplying, supervising, facilitating, or otherwise participating in the Use or Attempted Use by another Person of a Prohibited Substance..."*

As to this:

i. It is not entirely clear to me on what basis a definition only first employed following the taking place of the relevant events can be used in this way (especially as the WADA Code did not contain any such definition either, prior to 2015).

ii. However, and helpfully, the ITF points to decisions of disciplinary panels which have considered charges involving the undefined term "*administration*" as it appeared in the WADA Code and in international sporting bodies which had adopted it. Specifically:

1. In *WADA & FIFA v CFA & Ors* [CAS 2009/A/1817 & 1844], CAS upheld a finding that a Bulgarian football coach had administered a prohibited substance (Oxymesterone) to Cypriot football players, who had ingested them. The coach was found to have given food

supplements to the players, including pills containing the prohibited substance, during a training session. The charge against the coach was based on Article II.8 of the FIFA Doping Control Regulations, which defined as an anti-doping violation the *"administration or attempted administration of a prohibited substance"*.

2. In *FISA v Gryhchenko* (9 February 2005), the Ukrainian doctor in charge of the Ukrainian Olympic rowers was found to have committed an anti-doping violation for having *"administered"* a prohibited stimulant, Ethamivan, to a member of the women's quadruple sculls. The prohibited substance was found in a medication, Instenon, which the rower had ingested on the recommendation of the doctor.

iii. Neither of these cases contained any consideration of the meaning of the word *"administration"*, but the context makes it clear that the panel in each case had no difficulty in finding that it encompassed at least the facts with which it was dealing.

iv. It seems to me that this was obviously right in both those cases. It also seems to me that there are no material differences between those cases and the present one.

v. I find therefore that Dr Dorofeyeva *"administered"* DMBA to Ms Kozlova.

53. Paragraph 9 of the Notice of Charge reads as follows:

"You obviously intended to supply the "Red Rum" product to Ms Kozlova, and for her to take it 30 minutes before a match. Furthermore it is clear from the above account that you gave her the "Red Rum" product to enhance her

performance in matches. If any more than that is required to establish the Art 2.8 violation, then the ITF's case is that you know that there was a prohibited substance in the product, or (if you did not know) then at best you wilfully ignored the significant red flags warning you of that fact (on the product label, in the marketing material for the product, and in various place on-line, including those referred to in paragraph 2.10.5 of the ITF's decision relating to Ms Kozlova), thereby effectively accepting the risk that the product would cause Ms Kozlova to test positive. The ITF's case is that this is sufficient to establish the Anti-Doping Rule Violation of Administration set out in Article 2.8 of the Programme".

54. This raises as an issue before me the test for liability under Article 2.8 of the 2014 Programme. By its terms, an Anti-Doping Rule Violation under that Article is committed irrespective of any element of intent, fault or negligence on the part of the respondent to the charge. It is, by its terms a strict liability offence, committed where the elements of Article 2.8 are present and established – in this case, "*administration*" to "*a Player In-Competition*" of "*any Prohibited Substance that is only prohibited in-Competition*".

55. Those elements have been established in the present case to my satisfaction:

    a. As to "*administration*", see above.

    b. Ms Kozlova was clearly a "*Player*", and the evidence establishes that the recommendation to her by Dr Dorofeyeva was that she ingest Red Rum 30 minutes before her matches in Turkey and Australia. Ms Kozlova was therefore a "*Player In-Competition*".

    c. DMBA was a "*Prohibited Substance that is only prohibited In-Competition*" – see paragraph 5 above.

56. Nonetheless, the ITF's position before me (as set out in paragraph 9 of the Notice of Charge and in written and oral submissions) was that Article 2.8 was not a strict liability offence. The person charged with such a violation had to be shown to have administered the product containing the Prohibited Substance either intentionally, recklessly or negligently.

57. The ITF relied for this approach on the following matters:

a. The two cases referred to in paragraph 52(c) above. As to this, I derived no assistance either way from the second case, but the first case (*Eranosian*) if anything supports a strict liability analysis. In that case, the CAS panel rejected on the facts an argument of No Significant Fault or Negligence in relation to an administration charge. Such a plea is relevant, it seems to me, where there is a strict liability offence and the offender is seeking to establish a lack of fault in order to diminish the otherwise applicable sanction.

b. More significantly, the ITF pointed to the note in the 2015 WADA Code in relation to Article 10.5.2 of that Code (which deals with circumstances of No Significant Fault or Negligence). The note reads:

> *"Article 10.5.2 may be applied to any anti-doping rule violation, except those Articles where intent is an element of the anti-doping rule violation (e.g. Article 2.5, 2.7, 2.8 or 2.9..."*

c. The reference in this note to Article 2.8 of the 2015 Code is to the Anti-Doping Violation of Administration (equivalent to Article 2.8 of the 2014 Programme).

d. Thus, as the ITF asserted, it would appear that, in the 2015 Code, WADA was treating administration as a violation in respect of which intent was required.

58. I note, however, the following points:

a. The ITF was unable to identify any decision involving Article 2.8 of the WADA Code or its equivalent in international sporting regulations

(whether before or after 2015) in which it was contended or accepted that intent was required.

b. The predecessor WADA Code (in force throughout 2014, and beforehand) contained no such note as is to be found in the 2015 Code.

c. The other anti-doping rule violations referred to in the 2015 note (Articles 2.5, 2.7 and 2.9 of the 2015 WADA Code) all explicitly or by implication require an element of intent ("*intentional interference*", "*trafficking*" and "*intentional complicity*", respectively).

d. The 2014 Programme provides for a Period of Ineligibility in Article 10.3.3 of four years minimum "*unless the conditions specified in Article 10.5 are met*". Those conditions include Article 10.5.2 (No Significant Fault or Negligence). This provision is also reflected in the WADA Code in operation in 2014 (see Article 10.3.2 of that Code). I note however that the cross reference to Article 10.5 in Article 10.3.2 is not present in the 2015 WADA Code.

e. It cannot sensibly be suggested that WADA would have intended in 2015 to transform the elements of an Article 2.8 Violation so as to introduce such a fundamental requirement as one of intent by such indirect means as a note (as opposed to by the inclusion of express language of intent in Article 2.8 itself).

59. In the light of the above, and the terms of Article 2.8 of the 2014 Programme, I have concluded that the reference to Article 2.8 of the WADA Code in the 2015 note, and the lack of reference to Article 10.5 in Article 10.3.2, were likely to have been errors on the part of the authors of that edition of the Code. Even if that is not the case, I cannot see how these features of the 2015 Code can have relevance in interpreting provisions in the previous Code and in the

2014 Programme, which were the regulations in force at the time of the events relevant to these proceedings.

60. Accordingly, and contrary to the submissions of the ITF, I regard Article 2.8 of the 2014 Programme as a strict liability offence. Dr Dorofeyeva has therefore committed an Anti-Doping Rule Violation under that Article, irrespective of whether she intended to administer a Prohibited Substance to Ms Kozlova.

61. In case I am wrong about that, I now turn to consider the evidence of her degree of fault, in the light of the way in which the case has been advanced by the ITF in paragraph 9 of the Notice of Charge.

62. In its submissions, the ITF contended that Dr Dorofeyeva was on notice that there was a significant risk that the Red Rum energy drink powder would contain a prohibited substance and manifestly disregarded that risk. I agree:

    a. The labelling on the Red Rum container clearly indicates that the powder is an energy and performance enhancer with a fast-acting stimulant effect. In particular:

        i. The product is described as a *"Pre-Workout Energy Performance Formula"*.

        ii. The label claims that the product *"takes your workouts to the next level of intensity and beyond!"* and *"this fast-acting workout intensifying formula is on the "bleeding edge" of neutraceutical innovations. RPM's own alpha tests reveal that RED RUM SS produces an energy and performance experience that grips you for the first to the last set"*.

        iii. The label advises the player to take the product 15 minutes before the workout. It works in two phases - the first occurs

within minutes of ingestion, the second approximately 30 minutes later.

b. The ingredients identified on the label included 2-amino-4-methylpentane (AMP) citrate - i.e DMBA (see paragraph 6 above). Internet searches conducted at the time would have identified this ingredient as a stimulant, and therefore as highly likely to be a Prohibited Substance.

c. This as well as other chemical compound ingredients listed on the label would hardly qualify as "*vitamins*" (as Dr Dorofeyeva described the contents to Ms Kozlova - see paragraph 8(f) above)[9].

63. The ITF also submits, in the circumstances, that even if Dr Dorofeyeva did not specifically intend to give Ms Kozlova a Prohibited Substance, she must be taken to have accepted that risk as a clear likely outcome of her actions, and so to have acted not just highly recklessly but also with "*indirect*" intent sufficient to sustain an Article 2.8 Charge against her even if that element of intent were required.

64. In support of this submission, the ITF drew my attention to two CAS decisions (*Qerimaj v IWF* [CAS 2012/A/2822] (at para 8.14) and *Lapikov v IWF* [CAS 2011/A/2677] (at para 64), in which it was accepted that the element of "*intent*" in Article 10.4 of the IWF implementation of the WADA Code should be interpreted broadly to include "*indirect intent*" (known in civil law as *dolus eventualis*) - where the person charged acts recklessly such that he is to be taken to have accepted that an adverse analytical finding might occur.

65. In the light of these authorities and my findings (set out above) about (a) what would or should have been apparent to Dr Dorofeyeva about the product Red

[9] Dr Dorofeyeva also referred to Red Rum as a "*vitamin*" in her 9 December 2014 email.

Rum, and (b) Dr Dorofeyeva's background and expertise[10], I would if necessary have found that Dr Dorofeyeva had the necessary intent to have committed the Article 2.8 Violation with which she has been charged.

(5) Sanction

(a) Length of Period of Ineligibility

66. This being Dr Dorofeyeva's first Anti-Doping Violation, the relevant provision for assessing a period of Ineligibility is Article 10.3.3, which provides for *"... a minimum of four (4) years up to lifetime Ineligibility, unless the conditions specified in Article 10.5 are met..."*

67. So far as Article 10.5 is concerned, in the light of my findings set out in paragraphs 62 to 65 above I am satisfied that Dr Dorofeyeva would not (had she attempted to do so) have been able to establish the necessary lack of Fault or Negligence to warrant any reduction in the period of her Ineligibility below four years.

68. The ITF did not advocate before me, or point to any features of the case that would warrant, any period of Ineligibility above and beyond the four year minimum period.

69. I have concluded that in all the circumstances a period of Ineligibility of four years is the correct one. The ITF was keen to emphasise to me the seriousness of a doctor setting him/herself up as a sports medicine specialist and telling athletes that he/she can support them. Such a person, emphasises the ITF bears an extremely heavy responsibility because of the reliance likely to be placed by athletes (in particular, young athletes) upon his/her advice and recommendations. I agree, and doubtless that is why the minimum period of Ineligibility of four years has been specified in the WADA Code.

[10] Which would among other things have meant that she knew that stimulants are banned substances.

(b) Starting Point for the Period of Ineligibility

70. Article 10.10.3 of the 2015 Programme[11] provides that, in normal circumstances, the period of Ineligibility is to start on the date that the Decision is issued. However, subparagraph (c) provides that, where there have been substantial delays in the hearing process, the period of Ineligibility may be deemed to have started at an earlier date.

71. Here, having regard to the ITF concession referred to in paragraph 41(a) above and to the length of time since the hearing which it has taken me to issue this Decision, I have decided that Dr Dorofeyeva's period of Ineligibility should be deemed to have commenced on 1 May 2016.

(c) Scope of Ineligibility

72. Pursuant to Article 10.11.1(a) of the 2015 Programme, Dr Dorofeyeva is prohibited during her period of Ineligibility from assisting any Player, coaching or otherwise participating in any capacity the Events, Competitions and activities listed in subparagraphs (i) to (iv) of that Article.

[11] And Article 10.9.3 of the 2014 Programme

(6) The Tribunal's Ruling

73. Accordingly, for the reasons set out above, the Tribunal:

a. Rejects each of Dr Dorofeyeva's three Motions.

b. Upholds the Charge that Dr Dorofeyeva committed an Anti-Doping Rule Violation under Article 2.8 of the 2014 Programme, as alleged in the Notice of Charge.

c. Imposes on Dr Dorofeyeva a period of Ineligibility of four years commencing upon 1 May 2016.

Ian Mill QC

9 June 2016