Case Reference Number 120056

NATIONAL ANTI-DOPING PANEL

Before: Paul Gilroy QC (Chairman)
Lorraine Johnson
Dr Barry O'Driscoll

BETWEEN:

BERNICE WILSON

Appellant

and

UK ANTI-DOPING

Anti-Doping Organisation

IN THE MATTER OF AN APPEAL BROUGHT UNDER THE ANTI-DOPING RULES OF UK ATHLETICS

DECISION OF THE APPEAL TRIBUNAL

INTRODUCTION

1. Alleged Anti-Doping Violations in competitive athletics in the UK fall under the jurisdiction of the National Anti-Doping Panel ("NADP") applying the UK Anti-Doping Rules ("UKADR").

2. The body charged with the responsibility of policing anti-doping in sport in the UK is UK Anti-Doping ("UKAD").

3. Bernice Wilson ("the Appellant") appeals against a decision of an Anti-Doping Tribunal of the NADP consisting of Mr William Norris QC, Ms Carole Billington-Wood and Dr Terry Crystal ("the Arbitral Tribunal") dated 28 September 2011.

4. The Arbitral Tribunal:

    4.1. declared that the Appellant had committed the following Anti-Doping Rule violations:

        4.1.1. the presence of Prohibited Substances (testosterone and clenbuterol) in the urine sample provided by her on 12 June 2011, in violation of International Association of Athletics Federations ("IAAF") Anti-Doping Rule ("ADR") 32.2(a), and

        4.1.2. use of those two Prohibited Substances prior to that sample provision, in violation of IAAF ADR 32.2(b), and

4.2. disqualified:

4.2.1. the Appellant's results in the 100 metres at the 2011 Bedford International Games ("BIG"), by operation of IAAF ADR 39;

4.2.2. any other results obtained by the Appellant at the 2011 BIG, in accordance with IAAF ADR 40.1, and

4.2.3. any results obtained by the Appellant at any subsequent events up to the date she was provisionally suspended in accordance with IAAF ADR 40;

4.3. found that there were aggravating circumstances within the meaning of IAAF ADR 40.6, so that in accordance with its decision under that provision, the Appellant shall be ineligible to compete for a period of four years from 9 July 2011, and

4.4. ordered that the Appellant pay the costs of the B sample in the sum of £848 plus VAT.

5. The charges against the Appellant arose out of her participation in the BIG on 12 June 2011. On that date she provided a urine sample which, on later analysis, was found to contain two anabolic steroids, namely testosterone and clenbuterol, both of which are on the Prohibited List of the World Anti-Doping Agency ("WADA") 2011.

6. It was alleged that the Appellant had committed the following Rule violations, namely:

6.1. having two Prohibited Substances (testosterone and clenbuterol) present in the sample collected in violation of IAAF ADR 32.2(a) (presence of a Prohibited Substance or its Metabolites or Markers in a sample), and

6.2. using, ingesting or otherwise consuming clenbuterol and testosterone prior to the provision of the sample in violation of IAAF ADR 32.2(b) (use or attempted use by an athlete of Prohibited Substance or a Prohibited Method).

PROCEDURAL HISTORY

7. For the reasons outlined at paragraphs 10 to 23 below, it was determined that the appeal would proceed by way of a review rather than a de novo hearing[1]. Accordingly, for a full understanding of this appeal decision, it will be necessary for the same to be considered in conjunction with the decision of the Arbitral Tribunal.

8. The Appeal Tribunal was appointed by the President of the NADP pursuant to Articles 5.3 and 12.6.1 of the Procedural Rules of the National Anti-Doping Panel 2010 ("the NADP Rules") following the filing by the Appellant of a Notice of Appeal on 14 November 2011.

9. Under Article 12.8 of the NADP Rules, an Appeal Tribunal shall have the power to increase, decrease or remove any consequences imposed by an Arbitral Tribunal, in accordance with the Anti-Doping Rules.

[1] A de novo hearing is for all material purposes a re-hearing.

10. Article 12.4 (Standard of Review) of the NADP Rules provides:

12.4.1 Where required in order to do justice (for example to cure procedural errors in the Arbitral Tribunal proceedings) appeals to an Appeal Tribunal pursuant to this Article 12 shall take the form of a re-hearing de novo of the issues raised in the proceedings, ie the Appeal Tribunal shall hear the matter over again, from the beginning, without being bound in any way by the decision being appealed.

12.4.2 In all other cases, the appeal to an Appeal Tribunal shall not take the form of a de novo hearing but instead shall be limited to a consideration of whether the decision being appealed was erroneous.

11. The Appellant pursued the following Grounds of Appeal, which are hereinafter set out verbatim.

A. AGAINST THE DECISION

1. *Under IAAF Rule 33.1 it is expressly provided that the Standard of Proof required to be achieved in all cases is "greater than as mere balance of probability." It is submitted that such higher standard was not achieved and that the Decision now appealed ("the Final Decision") was in fact based on that lower standard of proof, the balance of probability.*

2. *The Panel in reaching the Final Decision failed properly to take into account the issues raised by the Appellant regarding the collection of the samples (the A Sample and the B Sample). Instead, it relied upon assertions by the sample-collectors that they would have remembered if the procedure adopted by them had differed from the norm. That reliance was unsafe and was made against the weight of such evidence as there was. The Panel failed to give appropriate weight to the separate elements of conflicting evidence, and in particular failed to ensure that the evidential standard of proof was achieved.*

3. *Separately the Panel misdirected itself in concluding that the failure of the "sample-collectors" to recall matters in detail ("...they acknowledged that they had little or no direct recollection...") did not weaken the case presented.*

4. *The Panel was wrong to conclude that the sample-collector (Ms Kelman) had "followed standard practice." Plainly the collection of a urine sample in 2 parts was not "standard."*

5. *The Panel misdirected itself as to the weight to be given to the evidence of a departure or a partial departure from "standard procedure." That departure may have led to contamination of a type or in a way which neither the Appellant nor the Panel recognises or understands and may have led to an incorrect analysis. It would be inappropriate to expect the Appellant to have submitted in "scientific detail" a full explanation for or of an incorrect reading which may have resulted from the departure from "standard practice" in the collection of a urine sample. In this the Panel should have accepted that UK Anti-Doping had not discharged the burden of proof which fell upon it.*

6. *The Panel was wrong to conclude that if one of two testing procedures was flawed then it must necessarily have been the Glasgow test that was flawed.*

7. *Furthermore the Panel was wrong to conclude that an implication of a flawed test in Glasgow was not so important as to be discountable. The Panel should have recognised that as there was a possibility of the procedure in respect of the Glasgow test having been flawed then that alone comprised sufficient evidence of the possibility of the Bedford test also being flawed.*

8. *The Panel gave inappropriate weight to the fact that the Appellant "expressed herself to be satisfied" with the testing process. The Appellant had no expertise and no special knowledge of such matters and her "expression of satisfaction" was no more than mere neutral acceptance and no "significance" at all should have been attached to it.*

9. *Additionally the Panel was wrong to attach any significance to 9 word answer made by the Appellant on 8th July 2011. Firstly the Panel misdirected itself as to the evidential value of such a statement at all and*

secondly the Panel failed to recognise that the words "It was kind of the same" do not have the same meaning as the words "It was the same".

10. *The Panel was wrong as a matter of Law to attach any significance to the Appellant's apparent reaction to news of a positive test. Reactions by people vary and neither UKAD nor the members of the Panel were trained in the proper interpretation of human reactions. The Panel misdirected itself both as to the admissibility and the evidential value of such matters.*

11. *The Panel was wrong to consider and to draw any conclusion whatsoever about what may (or may not have been said) either by or in the presence of Dr Skafidas. He was not a witness for the UKAD and in fact had no standing in the matter until later accepted as "representative" of the Appellant before the Panel.*

12. *The Panel was wrong to conclude that anything later said by the Appellant or by Dr Skafidas was consistent with anything other than an innocent athlete shocked by a test result but unable to offer any explanation because of a lack of knowledge of scientific matters.*

13. *It is plain (from paragraph 54 of the Final Decision) that the Panel has given weight to its own view of how a "genuinely innocent" person would have reacted. The Panel was wrong to attach any weight whatsoever to such a "conclusion".*

B. AGAINST THE SANCTION

1. *The Appellant submits that the sanction imposed was too severe.*

2. *The Appellant had no previous Anti-Doping Rule Violations (although to the Panel's certain knowledge she had previously been tested).*

3. *The Panel was wrong to conclude that the matters raised on behalf of the Appellant were so serious as to amount to "aggravating factors".*

12. The above grounds will be referred to as Grounds A1 to A13, and B1 to B3 respectively.

13. In her Notice of Appeal, the Appellant requested that her appeal be heard by way of a de novo hearing.

14. By letter dated 18 November 2011, UKAD objected to the application that the appeal be determined by way of a de novo hearing, essentially on the basis that the Appellant had failed to provide any grounds which satisfied the conditions for such a hearing, and contending that the appeal was instead limited to arguments that:

    14.1. there was no basis for the Arbitral Tribunal's decision on the evidence, and

    14.2. that the discretion exercised by the Arbitral Tribunal in its decision making was irrational or unreasonable.

    UKAD requested that in the event that consideration was to be given to the appeal proceeding as a de novo hearing, there should be a procedural hearing by telephone for the purposes of the determination of the Appellant's application for such a hearing.

15. The Chairman of the Appeal Tribunal directed that the issue of whether or not the appeal should be heard de novo should be heard by way of a telephone procedural hearing, which was adjourned at the Appellant's request from 29 November 2011 to 6 December 2011, so as to facilitate the attendance of her legal representative. At the telephone procedural hearing the Appellant was represented by Mr Dennis Bambridge (Solicitor) and

UKAD by Mr Richard Redman (Head of Case Management). Shortly prior to that hearing, the Appellant submitted a short written submission in support of her application which was in the following terms (again, the text is set out verbatim):

Based on standards of review as it is stated on rule 12.4 (sic) *of the procedural rules of the NADP, in order to do justice, appeals to an appeal tribunal shall take the form of a rehearing de novo.*

I do believe that issues that have been raised in the proceedings demand of a rehearing de novo.

The following is the main reason for this:

No defending doctor present at the hearing for the vital establishment of the otherwise evidence (sic).

The fact that new medical evidence and new witnesses is to be introduced to deal with:

1. The ways by which these two substances might have been found in the athlete's urine sample

2. A reason why the athlete's sample showed performance enhancing substances.

calls for a de novo hearing

I do strongly believe, on the basis of a fair hearing, that I have the right to have medical experts to represent me and help the panel in their decision.

16. At the commencement of the telephone hearing on 6 December 2011, the Chairman ascertained from Mr Redman that he had received the above submission from the Appellant. He confirmed that he had. The Chairman asked whether UKAD's position in relation to the Appellant's application for a de novo hearing had altered in any way in the light of the content of that submission document. Mr Redman indicated that it had not. UKAD maintained that the appeal should not be heard de novo. Mr Bambridge was, in the circumstances, invited to outline the Appellant's application.

17. Mr Bambridge submitted that the NADP Rules offered little guidance as to when appeals should be heard de novo. He submitted that the only example given within the Rules was where there had been a procedural error. He suggested that assistance may be provided by the Civil Procedure Rules ("CPR") in the High Court/County Court. He indicated that he was not suggesting that the CPR applied, but rather that they could be looked to for general guidance. Mr Bambridge was, however, unable to point to any provision under the CPR which could be said to be of relevance to the matters which were the subject of his application.

18. Mr Bambridge submitted that in the interests of justice the case demanded a re-hearing, the reason being lack of representation and the proposed introduction of new medical evidence. The Chairman asked Mr Bambridge for details of the new medical evidence. Mr Bambridge replied that there was new evidence relating to the question of how the substances were ingested, and more specifically the timescale of their ingestion. The proposed challenge would look at the possibility of the substances having been ingested within a short space of time and not over a long period of time as was found at the hearing below. The Chairman enquired as to when this matter had occurred to the Appellant. Mr Bambridge stated that it occurred to her some time after the hearing below, when Mr Bambridge was first consulted.

19. Mr Redman expressed concern that the alleged new medical evidence was not mentioned in interview by the Appellant or at the hearing below. Mr Redman submitted that a new full hearing was not required in the light of this information in any event, as it would only go to sanction. Mr Redman submitted that Article 12.4.1 was available only to cure procedural errors. The fact that the Appellant had not put this matter forward at the time of the original hearing was not a procedural error. The Chairman observed that a procedural error is merely cited in the Rules as an example, which Mr Redman accepted.

20. The Chairman declined the application for a de novo hearing and directed that the appeal would proceed in accordance with Article 12.4.2 of the UKAD Rules. The Chairman was not persuaded that a de novo hearing was required "in the interests of justice". The Appellant's argument was entirely circular. The application for a de novo hearing was based on nothing more than the assertion that such a hearing was required "in the interests of justice".

21. Lack of representation at the hearing before the Arbitral Tribunal could not of itself justify a de novo hearing. The Arbitral Tribunal had, in any event, been at pains to invite the Appellant to obtain proper representation at the hearing below. The Chairman of the Appeal Tribunal was not prepared to order a de novo appeal hearing on the basis of "new medical evidence", which was described in the vaguest of terms and which, on the face of Mr Bambridge's submission, could only go to sanction.

22. On the basis of the submissions made on behalf of the Appellant if this was a case which was appropriate for a de novo appeal hearing all appeal cases would be suitable for such a hearing which plainly cannot have been the intention behind Article 12 of the NADP Rules.

23. Accordingly, the Appeal Tribunal Chairman determined that the appeal would proceed in accordance with Article 12.4.2 of the NADP Rules, namely that it would be *"limited to a consideration of whether the decision being appealed was erroneous".*

DIRECTIONS FOR (AND MATTERS LEADING UP TO) THE APPEAL

24. On 9 December 2011, the Chairman of the Appeal Tribunal issued directions for the conduct of the appeal, which included the following:

    2. *By 4 pm on Friday 16 December 2011, the Appellant shall serve on the Respondent and the NADP all material upon which she proposes to rely at the appeal hearing (other than the material relied upon by her at the original hearing).*

    3. *By 4 pm on Friday 23 December 2011, the Respondent shall serve on the Appellant and the NADP all material upon which it proposes to rely at the appeal hearing (other than the material relied upon by it at the original hearing).*

25. By e-mail on 16 December 2011, Mr Bambridge notified the NADP as follows:

    I write, as a matter of courtesy, to let you know that Ms Wilson will not be filing any new material today.

26. The parties were then notified as follows by the NADP by e-mail on 19 December 2011:

    The Appellant was directed to serve on the Respondent and the NADP all material upon which she proposes to rely at the appeal hearing (other than the material relied upon by her at the original hearing), by

Friday 16 December 2011.

At 16.57 on 16 December 2011, the Appellant's solicitor e-mailed the NADP in the following terms:

"I write, as a matter of courtesy, to let you know that Ms Wilson will not be filing any new material today".

The Appellant's solicitors' e-mail is ambiguous. One the one hand, it could mean that the Appellant does not wish to rely on any new material. On the other hand, it could mean that the Appellant is minded to serve fresh material at some future stage.

Given that the Appellant's solicitor indicated during the telephone application on 6 December that fresh medical evidence will be relied upon by the Appellant at the appeal, it would appear that the Appellant will seek to rely on new material for the purposes of her appeal, with the result that she may be labouring under the misapprehension that she will be at liberty to file new material at some future stage.

It will only be in exceptional circumstances that the Appellant will now be permitted to rely upon any fresh material.

Given that the Appellant has filed no new material, it is anticipated that there will be no need for UKAD to file any new material.

27. On 23 December 2011, UKAD served its Skeleton Argument for the purposes of the appeal on the NADP and Mr Bambridge.

28. At 15:43 hours on 5 January 2012, the day prior to the Appeal Hearing, the Appellant, in breach of the Directions Order of 9 December 2011, and notwithstanding the content of the e-mail distributed by NADP at the instruction of the Appeal Board Chairman on 19 December 2011, served on UKAD and the NADP a "Submission" document, "the Appellant's Additional Submission". It appeared from this document that the Appellant:

    28.1. no longer pursued certain of the grounds of appeal set out in her Notice of Appeal dated 14 November 2011;

    28.2. was seeking to introduce fresh grounds of appeal, and

    28.3. was seeking to introduce new material.

PARTIES AND PROCEDURE AT THE APPEAL HEARING

29. The appeal hearing was conducted at the offices of Sport Resolutions (UK), 1 Salisbury Square, London, EC4Y 8AE, on Friday 6 January 2012.

30. At the appeal hearing, the Appellant represented herself, and was accompanied by Dr George Skafidis, her coach, who represented her before the Arbitral Tribunal.

31. UKAD was represented by Mr Jonathan Taylor, Solicitor, who was accompanied by Mr Redman.

32. At the beginning of the appeal hearing Mr Taylor was invited to outline UKAD's position in view of the late filing of the Appellant's Additional Submission the day prior to the appeal hearing. Mr Taylor indicated that UKAD was prepared to defend the appeal on the basis of the original Notice of Appeal including the original Grounds of Appeal, together with all of the matters contained in the Appellant's Additional Submission. Accordingly, the Appeal Tribunal dealt with the appeal in accordance with UKAD's concession.

33. In the circumstances, given that the appeal proceeded by way of a review rather than a de novo hearing, it is necessary to set out in full the content of the Appellant's Additional Submission:

Re BERNICE WILSON

APPEAL *against the decision of the National Anti-Doping Panel (sometimes called the National Anti-Doping Tribunal but hereafter in this document called "the Panel") dated September 2011 ("the Decision").*

Submission of Bernice Wilson

1. *It is submitted that the Decision is flawed.*

2. *It is submitted that the Panel misdirected itself as to:*

   2.1. *The facts (i.e. as to what exactly occurred during the taking of a Urine Sample from the Appellant ("the Athlete") on 12 June 2011*

   2.2. *The applicable Rules*

   2.3. *The implication of the failure of the .... to follow those Rules.*

3. *The Applicable Rules*

   The Rules which govern (inter alia) the conducting of Sampling are the IAAF Anti-Doping Regulations (2011 Edition in force from 1 May 2011) (the IAAF Rules). This appears to be common ground.

   No other Rule supercedes (sic) *or takes precedence over the IAAF Rules. This appears to be common ground.*

   It appears that the U.K.'s national anti-doping organisation UKAD may have produced a Handbook for the use of its staff and in particular for use by Doping Control Officers (DCOs).

   It is not possible for the Athlete to cite that Handbook herein but to do so is unnecessary in any event because it must necessarily be accepted that the IAAF Rules take priority over any Handbook that an inferior organisation produces.

4. *It is common ground that the Athlete did not initially provide a sufficient quantity of Urine Sample.*

5. *IAAF Rule 4.24 provides:*

   4.24 Athletes shall be required to provide as much urine as possible and no less than the Suitable Volume of Urine for Analysis (a minimum of 90 ml).

   IAAF Rules 4.33/34 provide:

   4.33 Where the volume of Urine is insufficient (see 4.24 above) the DCO shall inform the Athlete that a further sample shall be collected to meet the Suitable Volume of Urine for Analysis requirements

   Although the words actually spoken are not recalled with great clarity it does not form part of this Appeal that the Athlete was not informed in terms of (1) her failure to provide an adequately sized sample (2) the necessity to provide an additional sample later.

The IAAF Rules continue:

4.34 The DCO shall instruct the Athlete to select a partial Sample container or kit from a selection of sealed containers or kits and to check that all seals on the selected equipment are intact and that the equipment has not been tampered with.

Although the words actually spoken are not recalled with great clarity it does not form part of this Appeal that the Athlete was not informed in terms of her right to check the integrity of the Partial Sample Container.

IAAF Rule 4.35 provides:

4.35 The DCO shall then instruct the Athlete to open the relevant equipment, pour the insufficient Sample into the container and seal it as directed by the DCO. The DCO shall check, in full view of the Athlete, that the container has been properly sealed.

The Athlete does not recall that this was done exactly in this way, but it is acknowledged that nothing turns on the point.

IAAF Rule 4.36 provides:

4.36 The DCO and the Athlete shall check that the equipment code number and the volume and identity of the insufficient Sample are recorded accurately by the DCO…..

The Athlete acknowledges and accepts that details of that insufficient Sample were correctly recorded on the Doping Control Form (Urine) as follows:

Partial Sample Number	*~ Vol (ml)*	*Time Sealed*	*DCO Initials*	*Athlete Signature*
281017	*075*	*1646*	*SK*	*B.Wilson*

IAAF Rule 4.36 continues:

The DCO shall retain control of the sealed partial Sample container.

The Athlete was not aware that the partial Sample had been sealed. She does not recall being told of its sealing nor being shown the seal. Previously she may have sought to argue that the partial Sample may thus have become contaminated by an outside agency but such argument is not pursued in this Appeal.

IAAF Rule 4.38 provides:

4.38 When the Athlete is able to provide an additional Sample, the procedures for collection of the Sample shall be repeated as set out above.

The Rules for collection of Samples are contained in IAAF Rules 4.17 to 4.23.

In particular Rule 4.18 (a) provides:

……..The Sample Collection Equipment shall:

(a) have a unique numbering system incorporated into all bottles, containers, tubes or other item used to seal a Sample

6. *It must be the case that the Athlete gave two partial Samples.*

It is plain from the Doping Control Form that the first partial Sample contained 75 millilitres of urine (correctly written on the Doping Control Form, in manuscript, as "075").

Later, according to the Doping Control Form, (in fact about 45 minutes later) a sufficient Sample (i.e. a sample exceeding 90 ml, and in fact recorded as being 100 ml) was transferred to a Urine Sample Bottle (bottle number 1097525) presumably in compliance with IAAF Rules 4.26, 4.27 and 4.29.

7. *The Doping Control Form shows no record of how the second partial Sample was obtained, yet, by analysis of the facts set out in paragraph 7 above (sic), and in accordance with the evidence given both by the DCOs and the Athlete patently a second Sample was provided. There is a material failure on the part of UKAD to fully comply with the requirements of the IAAF Rules in this regard. The fact of that failure is self-evident from the incomplete state (or inaccurate completion) of the Doping Control Form.*

8. *The evidence of the obtaining of the second partial Sample does vary and it is seen that the Panel preferred the evidence of UKAD on the point. However, that "preference" ignores the inevitable conclusion which must necessarily be drawn from the inaccurate or incomplete state of the Doping Control Form (that it is incomplete or inaccurate is not in doubt) i.e. that IAAF Rules were not fully complied with.*

9. *As stated previously, the fact that the procedures set out in a Handbook were followed "to the letter" is of no consequence. It is the IAAF Rules that must be followed and the absence of details of the second partial Sample is incontrovertible evidence of a failure to follow those Rules.*

10. *It is not a requirement of the Athlete to explain how a departure from the Rules of the IAAF might have led to a "false reading" when her urine Sample was tested. It is sufficient for her simply to establish on the **balance of probabilities** that the IAAF Rules were not followed at the time of the sampling.*

11. *That balance plainly swings in her favour when the Doping Control Form is properly considered. As stated above it **must** be the case that 2 partial samples were provided and it **is** the case that no reference to one of them (believed to be the second, but at least theoretically possibly the first!) appears on the Doping Control Form.*

12. *The Panel appears to have given some consideration to the issue of "materiality" but declined to consider the point in detail, declaring it unnecessary to do so in the light of its previous findings. It is therefore unnecessary for the Athlete to consider that point in detail in light of the Panel's decision in that regard but nonetheless it is submitted that the issue of "materiality" is broadly irrelevant: a failure to follow IAAF Rules is so fundamental as to render all other considerations unnecessary.*

13. *The Panel appears to have given some weight to the fact that the Athlete wrote "No comment. Everything fine" on the Doping Control Form but to do so presupposes that the Athlete knew or should have known that "everything" was not "fine" at the time that she wrote on the Form. She did not (and of course no evidence was adduced that she did know or could have known that "everything" was not "fine"). The Athlete was not an expert in the Procedure and properly no weight whatsoever should have been attached to those words. The athlete was lead to suppose that she was required to make a comment in this box.*

14. *It should not be considered that it is necessary for the Athlete to provide a "reasonable explanation" for the presence of 2 banned substances in her urine Sample. This is not a case where a prima facie case had been satisfactorily established by UKAD. It has not been: it has not discharged the evidential burden that rests upon it because, on the balance of probabilities, it failed to follow the IAAF Rules when taking the Athlete's Samples.*

15. *Despite what is said in paragraph 14 above the Athlete has made her own enquiries to try to establish by what means banned substances might have entered her body. Following receipt of positive test results the Athlete made enquiries of suppliers to try to establish whether the supplements she uses might have contained banned substances. As noted on the Doping Control Form she does use a multi-vitamin drink. The athlete went even further and made similar enquiries about supplements that she used at the period prior to the 7 day period noted on the Doping Control Form. Those supplements included a series of vitamins and amino acids. The*

manufacturers of a total of 5 more products were contacted. To the Athlete's surprise 2 manufacturers of supplements she uses have not been able to provide certificates of testing for compliance (although the third manufacturer has).

16. *The Athlete has no sponsorship. The Athlete has no funds with which to finance a full blown defence of the charges against her.*

17. *All of the work done for the Athlete in connection with the initial Hearing and Appeal has had to be done with an inadequate budget and with the support of her coach who did his best to present her case at first instance, unfortunately though, perhaps inadequately in the event.*

18. *Separately, in relation to the length of the ban imposed upon her the Athlete submits that there are no (or no sufficient) "aggravating factors" present, to warrant a 4-year ban.*

19. *There is no evidence at all to suggest that the Athlete was or had taken part in a doping scheme or plan, and certainly nothing to suggest that she was involved in any conspiracy to use banned substances.*

20. *It is correct, of course, to say that 2 banned substances were found in her sample and to that extent those 2 substances can properly be described as "multiple" although of course the term "multiple " encompasses any number from 2 upwards.*

21. *There is no evidence to support an allegation of use on multiple occasions. Although there was an assertion that the banned substances were likely to have been ingested over a period of time it was ultimately accepted that it was possible that this was not the case, and that there was a possibility of the banned substances having been ingested just a few hours before the sampling was carried out.*

22. *It is by no means frivolous to suggest that the Athlete is not a role model, or at least is no more a role model than is any other athlete. It is submitted that it is inappropriate to suggest that this is or should be termed "an aggravating factor" because to do so means that all athletes must necessarily always face a 4 year ban because by that token all athletes are always role models. There is nothing to distinguish this Athlete's role from that of other athletes.*

23. *It appears to have been suggested that the way that the Athlete sought to contact her own defence, in particular by raising an issue regarding the failure of the DCO's to follow the letter of the IAAF Rules is somehow an "aggravating" factor and should be taken into account when determining the length of the period of ineligibility. It is submitted that is neither proper nor equitable to penalise any person for the way in which, inexpertly, they conduct their own defence. Certainly such a "factor" is not listed in IAAF Rules 40.6 as an example.*

24. *Four previous cases appear to have a bearing on the length of ban properly to be imposed:*

    1. *On 7 June 2011 a period of ineligibility of 3 years was imposed on Mark EDWARDS as a consequence of the view that he was a role model in that firstly he was employed as a performance coach for disabled athletes and secondly he "used" his position as an athlete in furtherance of his business interests. Furthermore, he took active steps to try to avoid the probable consequences of sampling. No such factors apply in this Athlete's case and by comparison a period of no more than two years should properly have been imposed.*

    2. *In June 2011 in Macedonia Ivan EMILIANOV was awarded 2 years ineligibility after using 2 banned substances.*

    3. *In July 2011 in Portugal Jose GONCALVES awarded 2 years ineligibility after using 2 banned substances.*

    4. *In June 2010 in Serbia Luka RUJEVIC was awarded 2 years ineligibility after using 2 banned substances.*

34. The Appellant was invited to outline the basis of her appeal. Thereafter Mr Taylor outlined UKAD's response. The hearing then adjourned for lunch, whereupon the Appellant made submissions in reply to Mr Taylor.

DECISION

35. The Appeal Tribunal accepted the submissions made on behalf of UKAD as to the principles it must apply when determining this appeal, as follows:

    35.1. The burden of showing that the Arbitral Tribunal made an error which requires disturbing is on the Appellant.

    35.2. Where the Appeal Tribunal is being asked to reverse findings of fact made by the Tribunal below, the following principles apply:

        35.2.1. It is not the Appeal Tribunal's function to consider what findings and conclusions it would have made on the evidence before the Tribunal below, and substitute those findings and conclusions for the findings and conclusions of the Tribunal below.

        35.2.2. This is particularly the case when those findings were based on assessment of the relative credibility of witnesses who testified below but are not testifying on appeal.

        35.2.3. The Appeal Tribunal should only interfere with those findings and conclusions if it concludes that they were clearly wrong.

    35.3. Subject to paragraph 35.2 above, it is not the function of the Appeal Tribunal to substitute its own findings of fact for those of the Arbitral Tribunal where the Arbitral Tribunal heard (and observed the demeanour of) the witnesses and considered all of the evidence in the light of such matters.

    35.4. Where the Appeal Tribunal is being asked to overturn the way the Tribunal below exercised its discretion, the Appeal Tribunal should not interfere unless it is satisfied that the Arbitral Tribunal's decision was reached on wrong principles or was otherwise plainly wrong, or that the Arbitral Tribunal exceeded the generous ambit within which a reasonable disagreement might be possible.

    35.5. As to the Arbitral Tribunal's decision in relation to sanction, in the exercise of its discretion under IAAF ADR 40.6, to impose a four year sanction, that decision can only be disturbed if the Appeal Tribunal is satisfied that it was reached on incorrect principles or was otherwise plainly wrong.

CONCLUSIONS

36. The Tribunal's conclusions in respect of (a) each of the Appellant's Grounds of Appeal, and (b) each of the issues raised in the Appellant's Additional Submission are as follows:

    Grounds of Appeal

36.1. Ground A1:

Under IAAF Rule 33.1 it is expressly provided that the Standard of Proof required to be achieved in all cases is "greater than as mere balance of probability." It is submitted that such higher standard was not achieved and that the Decision now appealed ("the Final Decision") was in fact based on that lower standard of proof, the balance of probability.

36.2. The Appeal Tribunal rejected this argument. The Arbitral Tribunal expressly directed itself as to the burden and standard of proof in accordance with IAAF ADR 33.1 (paragraph 22 of the Arbitral Tribunal's Decision). In relation to the "Presence" charge under IAAF ADR 32.2(a) and the "Use" charge under IAAF ADR 32.2(b) the Arbitral Tribunal explained the basis upon which it applied the relevant standard of proof and concluded that UKAD had discharged that burden.

36.3. Ground A2:

The Panel in reaching the Final Decision failed properly to take into account the issues raised by the Appellant regarding the collection of the samples (the A Sample and the B Sample). Instead, it relied upon assertions by the sample-collectors that they would have remembered if the procedure adopted by them had differed from the norm. That reliance was unsafe and was made against the weight of such evidence as there was. The Panel failed to give appropriate weight to the separate elements of conflicting evidence, and in particular failed to ensure that the evidential standard of proof was achieved.

36.4. The Appeal Tribunal rejected this argument. The Appeal Tribunal accepted the submission of UKAD that this argument should be rejected for the same reasons such arguments were rejected in ***ITF v Hingis***, decision dated 3 January 2008 of an Anti-Doping Tribunal of the International Tennis Federation (cited with approval in ***La Barbera v IWAS***, ***CAS 2010/A/2277***, para. 4.9):

> *37. The lack of detailed recall on the part of all three witnesses is not surprising, since the Snowballs* (the two DCO's in that case) *between them collected some 146 urine samples during the 2007 Wimbledon Championships, while the player has undergone many doping tests during her career, and all have proved uneventful apart from this one. In those circumstances, Mr Morton-Hooper, for the player, submitted that we did not have reliable evidence of what happened during the sample collection process. Mr and Mrs Snowball could only say what they believe "would" have happened, based on their standard practice.*
>
> *38. We do not accept that argument for the following reasons. First, it was accepted that the Snowballs were honest witnesses doing their best to perform their functions at Wimbledon competently and professionally. Secondly, on the evidence we have, we do not have any reason to find that the Snowballs' standard practice was departed from. Thirdly, the following of standard practice is in no way contradicted by, and indeed is corroborated by, the doping control form which is intended to provide a contemporaneous record of the process precisely because accurate and detailed recollection is unlikely. Fourthly, the record of what happened to the sample after it left the doping control station is in no way inconsistent with the Snowballs' account.*

36.5. Ground A3:

Separately the Panel misdirected itself in concluding that the failure of the "sample-collectors" to recall matters in detail ("...they acknowledged that they had little or no direct recollection...") did not weaken the case presented.

36.6. The Appeal Tribunal rejected this argument. The Appeal Tribunal repeats and adopts its conclusions in relation to Ground A2.

36.7. Ground A4:

The Panel was wrong to conclude that the sample-collector (Ms Kelman) had "followed standard practice". Plainly the collection of a urine sample in 2 parts was not "standard".

36.8. The Appeal Tribunal rejected this argument. Partial samples (ie samples of less than 90 ml) are very common and are expressly catered for by way of a standard procedure contained within the International Standard for Testing ("IST") and the UKAD Handbook.

36.9. Ground A5:

The Panel misdirected itself as to the weight to be given to the evidence of a departure or a partial departure from "standard procedure." That departure may have led to contamination of a type or in a way which neither the Appellant nor the Panel recognises or understands and may have led to an incorrect analysis. It would be inappropriate to expect the Appellant to have submitted in "scientific detail" a full explanation for or of an incorrect reading which may have resulted from the departure from "standard practice" in the collection of a urine sample. In this the Panel should have accepted that UK Anti-Doping had not discharged the burden of proof which fell upon it.

36.10. The Appeal Tribunal rejected this argument. Under IAAF ADR 33.3(b), the burden is on the athlete to prove (i) a departure from the IST; and (ii) that that departure "could reasonably have caused" the Adverse Analytical Finding, "AAF". It is only if she discharges this burden that the burden switches to UKAD to prove that the departure did not cause the AAF.

36.11. Before the Arbitral Tribunal, the Appellant alleged the following material departures:

36.11.1. DCO Kelman asked her to remove the strip sealing partial sample.

36.11.2. DCO Anderson then handled the partial sample, taking it from her to put in the shower room and picking it up from the shower room to give back to the Appellant.

36.11.3. In the meantime, the sample remained unsealed in the shower room.

36.12. UKAD established before the Arbitral Tribunal that none of the above occurred. In any event, on the basis of the Appellant's own account, she was in the same room with DCOs Kelman and Anderson and her partial sample throughout. No one could have touched it without her seeing them do so (except DCO Anderson momentarily handling it to pick it up and put it down, behind a wall).

36.13. For adulteration of the sample to have occurred, DCOs Kelman and Anderson would have had to be involved in a conspiracy. Asked before the Arbitral Tribunal if they had adulterated the sample, they denied and were not pressed on the matter, and the Appellant disclaimed any suggestion that anyone at UK Athletics ("UKA") or UKAD might have had motive to harm the Appellant[2].

[2] As noted below, according to the Appellant's Additional Submission, the only material departure ultimately relied upon for the purposes of the appeal was the failure to record the number of lid on the combined sample on the

36.14. Ground A6:

The Panel was wrong to conclude that if one of two testing procedures was flawed then it must necessarily have been the Glasgow test that was flawed.

36.15. The Appeal Tribunal rejected this argument. Under the Glasgow procedure, the second blue lid number was noted on the DCF, even though the combined sample was 90ml. Under the Bedford procedure, the second blue lid number was not noted on the DCF, because the combined sample was greater than 90ml.

36.16. At no stage, either orally or in writing, did the Appellant explain why this was an error. The Arbitral Tribunal was entitled to conclude that if one of the two testing processes was contrary to standard practice, it was the one conducted at Glasgow rather than the one conducted at Bedford.

36.17. Ground A7:

Furthermore the Panel was wrong to conclude that an implication of a flawed test in Glasgow was not so important as to be discountable. The Panel should have recognised that as there was a possibility of the procedure in respect of the Glasgow test having been flawed then that alone comprised sufficient evidence of the possibility of the Bedford test also being flawed.

36.18. The Appeal Tribunal rejected this argument. The Appeal Tribunal repeats and adopts its conclusions in relation to Ground A6.

36.19. Ground A8:

The Panel gave inappropriate weight to the fact that the Appellant "expressed herself to be satisfied" with the testing process. The Appellant had no expertise and no special knowledge of such matters and her "expression of satisfaction" was no more than mere neutral acceptance and no "significance" at all should have been attached to it.

36.20. The Appeal Tribunal rejected this argument. In ***ITF v. Hingis*** (see paragraph 36.4 above), the Anti-Doping Panel observed:

99. That does not mean that by signing the doping control form, the player formally waived her right to allege later that the requirements of the IST had been breached; indeed, the ITF did not so contend. What it means is that the player's signature and any comment she makes - such as, in this case, the comment "All good !" - is of potential evidential value in determining whether Article F.5 of the Programme which the player is deemed to understand, and the IST, have been complied with.

36.21. Ground A9:

Additionally the Panel was wrong to attach any significance to 9 word answer made by the Appellant on 8th July 2011. Firstly the Panel misdirected itself as to the evidential value of such a statement at all and secondly the Panel failed to recognise that the words "It was kind of the same" do not have the same meaning as the words "It was the same".

36.22. The Appeal Tribunal rejected this argument. The Arbitral Tribunal was entitled to attach such weight as it saw fit to the reaction of the Appellant and her coach to

---

Doping Control Form. The Appellant conceded before the Arbitral Tribunal, however, that there was no way that this could have caused her AAF's.

the news of her positive drugs test. In any event, however, it is clear from its Decision that the Arbitral Tribunal would have reached the same conclusions even without any of that evidence, given (as the Arbitral Tribunal was entitled to find) the weight and cogency of all of the other evidence.

36.23. Ground A10:

The Panel was wrong as a matter of Law to attach any significance to the Appellant's apparent reaction to news of a positive test. Reactions by people vary and neither UKAD nor the members of the Panel were trained in the proper interpretation of human reactions. The Panel misdirected itself both as to the admissibility and the evidential value of such matters.

36.24. The Appeal Tribunal rejected this argument. The Appeal Tribunal repeats and adopts its conclusions in relation to Ground A9.

36.25. UKAD relied on the Appellant's actions on 8 July 2011 (the date she was told of her AAF's) in two respects:

36.25.1. her initial reaction in the car park (not even asking what the results of her drug test were), and

36.25.2. her statement that evening that the Bedford testing procedures had been "fine".

36.26. It was entirely open to the Arbitral Tribunal (a) to conclude that this evidence was relevant, and (b) to attach such weight to it as it deemed appropriate.

36.27. Ground A11:

The Panel was wrong to consider and to draw any conclusion whatsoever about what may (or may not have been said) either by or in the presence of Dr Skafidas. He was not a witness for the UKAD and in fact had no standing in the matter until later accepted as "representative" of the Appellant before the Panel.

36.28. The Appeal Tribunal rejected this argument. The Appeal Tribunal repeats and adopts its conclusions in relation to Grounds A9 and A10.

36.29. Ground A12:

The Panel was wrong to conclude that anything later said by the Appellant or by Dr Skafidas was consistent with anything other than an innocent athlete shocked by a test result but unable to offer any explanation because of a lack of knowledge of scientific matters.

36.30. The Appeal Tribunal rejected this argument. The Appeal Tribunal repeats and adopts its conclusions in relation to Grounds A9 and A10.

36.31. Ground A13:

It is plain (from paragraph 54 of the Final Decision) that the Panel has given weight to its own view of how a "genuinely innocent" person would have reacted. The Panel was wrong to attach any weight whatsoever to such a "conclusion".

36.32. The Appeal Tribunal rejected this argument. The Appeal Tribunal repeats and adopts its conclusions in relation to Grounds A9 and A10.

B. AGAINST THE SANCTION

36.33. Ground B1:

The Appellant submits that the sanction imposed was too severe.

36.34. The Appeal Tribunal rejected this argument for the reasons set out at paragraphs 36.35 to 36.44, and 36.56 to 36.68 below.

36.35. Ground B2:

The Appellant had no previous Anti-Doping Rule Violations (although to the Panel's certain knowledge she had previously been tested).

36.36. There is no evidence to suggest that the Arbitral Tribunal treated the Appellant otherwise than someone against whom no previous doping violations were recorded.

36.37. It is entirely possible that if the Appellant had had one or more prior violations recorded against her, the sanction the Arbitral Tribunal imposed would have been much greater than four years.

36.38. Ground B3:

The Panel was wrong to conclude that the matters raised on behalf of the Appellant were so serious as to amount to "aggravating factors".

36.39. It is assumed that this ground should read as being a reference to matters raised *against* the Appellant rather than on her behalf.

36.40. IAAF ADR 40 ("Sanctions on Individuals") provides (under ADR 40.6):

> ***Aggravating Circumstances which may increase the period of Ineligibility.***
>
> *6. If it is established in an individual case involving an anti-doping rule violation….that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of 4 years unless the Athlete or other Person can prove to the comfortable satisfaction of the Hearing Panel that he did not knowingly commit the anti-doping rule violation.*
>
> *(a) Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanctions are: the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the Athlete or other Person used or possessed multiple Prohibited Substances or Prohibited Methods or used or possessed a Prohibited Substance or Prohibited Method on multiple occasions; a normal individual would be likely to enjoy 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 obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation. For the avoidance of doubt, the examples of aggravating circumstances referred to above are not exclusive and other aggravating factors may also justify the imposition of a longer period of Ineligibility.*

(b) An Athlete or other Person can avoid the application of this Rule by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation [which means no later than the date of the deadline given to provide a written explanation in accordance with rule 37.4[c] above and, in all events before the Athlete competes again].

36.41. As expressly provided for under IAAF ADR 40.6(a), the matters listed as aggravating circumstances within that provision are cited by way of illustration only. Having said that, the Arbitral Tribunal found that 3 of the aggravating circumstances listed under that provision were present in the instant case, namely:

36.41.1. the Presence and Use of multiple Prohibited Substances (testosterone and clenbuterol);

36.41.2. the Use of testosterone on multiple occasions, and

36.41.3. the engagement by the Appellant in deceptive or obstructing conduct to avoid a detection or adjudication of an anti-doping rule violation.

36.42. The Appellant accepted before the Appeal Tribunal that in the light of the evidence of Professor Cowan, as far as the Use of testosterone was concerned, the only basis upon which it could reasonably be concluded that she had ingested that substance on one occasion only would have been if it had been administered by injection. The Appellant steadfastly maintained that she had received no such injection. The Arbitral Tribunal was, therefore, entitled to conclude that the Appellant had ingested testosterone on multiple occasions, albeit expressed to be as a matter of weeks rather than months or years.

36.43. At paragraphs 82 to 87 of its decision the Arbitral Tribunal set out with absolute clarity why it considered that there were aggravating factors which justified an increased sanction, namely the use of more than one anabolic steroid, repeated use of testosterone, setting a bad example as a role model for young athletes, and not accepting guilt but instead making untrue allegations in an unjustified attempt to blame the Doping Control Officers and others.

36.44. The Appeal Tribunal's remaining conclusions as to sanction are set out at paragraphs 36.56 to 36.68 below.

Appellant's Additional Submission ("AAS")

AAS para. 7 The Doping Control Form shows no record of how the second partial Sample was obtained, yet, by analysis of the fact…….and in accordance with the evidence given both by the DCOs and the Athlete patently a second Sample was provided. There is a material failure on the part of UKAD to fully comply with the requirements of the IAAF Rules in this regard. The fact of that failure is self-evident from the incomplete state (or inaccurate completion) of the Doping Control Form.

36.45. The Appeal Tribunal repeats and adopts its conclusions in relation to Grounds A4 and A5.

AAS para. 8 The evidence of the obtaining of the second partial Sample does vary and it is seen that the Panel preferred the evidence of UKAD on the point. However, that "preference" ignores the inevitable

conclusion which must necessarily be drawn from the inaccurate or incomplete state of the Doping Control Form (that it is incomplete or inaccurate is not in doubt) i.e. that IAAF Rules were not fully complied with.

36.46. The Appeal Tribunal repeats and adopts its conclusions in relation to Grounds A4 and A5.

AAS para. 9 As stated previously, the fact that the procedures set out in a Handbook were followed "to the letter" is of no consequence. It is the IAAF Rules that must be followed and the absence of details of the second partial Sample is incontrovertible evidence of a failure to follow those Rules.

36.47. The Appeal Tribunal repeats and adopts its conclusions in relation to Grounds A4 and A5. The Arbitral Tribunal found, and was entitled to find, that there had been no departures from the IAAF ADR. It did not uphold either charge against the Appellant merely on the basis of any alleged breach of the UKAD Handbook.

*AAS para. 10 It is not a requirement of the Athlete to explain how a departure from the Rules of the IAAF might have led to a "false reading" when her urine Sample was tested. It is sufficient for her simply to establish on the **balance of probabilities** that the IAAF Rules were not followed at the time of the sampling.*

36.48. This argument is misconceived. The Appeal Tribunal repeats and adopts its conclusions in relation to Ground A5, in particular the conclusions set out at paragraph 36.10 above.

*AAS para. 11 That balance plainly swings in her favour when the Doping Control Form is properly considered. As stated above it **must** be the case that 2 partial samples were provided and it **is** the case that no reference to one of them (believed to be the second, but at least theoretically possibly the first!) appears on the Doping Control Form.*

36.49. The Appeal Tribunal repeats and adopts its conclusions in relation to Ground A5, in particular the conclusions set out at paragraph 36.10 above.

AAS para. 12 The Panel appears to have given some consideration to the issue of "materiality" but declined to consider the point in detail, declaring it unnecessary to do so in the light of its previous findings. It is therefore unnecessary for the Athlete to consider that point in detail in light of the Panel's decision in that regard but nonetheless it is submitted that the issue of "materiality" is broadly irrelevant: a failure to follow IAAF Rules is so fundamental as to render all other considerations unnecessary.

36.50. This argument is misconceived. In the light of the Arbitral Tribunal's rejection of the Appellant's arguments as to departures from procedure, based on findings of fact it was entitled to make (paragraph 47 of the Arbitral Tribunal's Decision), the issue of materiality did not arise (paragraph 48 of the Arbitral Tribunal's Decision).

AAS para. 13 The Panel appears to have given some weight to the fact that the Athlete wrote "No comment. Everything fine" on the Doping Control Form but to do so presupposes that the Athlete knew or should have known that "everything" was not "fine" at the time that she wrote on the Form. She did not (and of course no evidence was adduced that she did know or could have known that "everything" was not "fine"). The Athlete was not an expert in the Procedure and properly no weight whatsoever should have been attached to those words. The athlete was lead to suppose that she was required to make a comment in this box.

36.51. The Appeal Tribunal repeats and adopts its conclusions in relation to Grounds A9 and A10.

AAS para. 14 It should not be considered that it is necessary for the Athlete to provide a "reasonable explanation" for the presence of 2 banned substances in her urine Sample. This is not a case where a prima facie case had been satisfactorily established by UKAD. It has not been: it has not discharged the evidential burden that rests upon it because, on the balance of probabilities, it failed to follow the IAAF Rules when taking the Athlete's Samples.

36.52. The Appeal Tribunal repeats and adopts its conclusions in relation to Ground A5, in particular the conclusions set out at paragraph 36.10 above.

AAS para. 15 Despite what is said in paragraph 14 above the Athlete has made her own enquiries to try to establish by what means banned substances might have entered her body. Following receipt of positive test results the Athlete made enquiries of suppliers to try to establish whether the supplements she uses might have contained banned substances. As noted on the Doping Control Form she does use a multi-vitamin drink. The athlete went even further and made similar enquiries about supplements that she used at the period prior to the 7 day period noted on the Doping Control Form. Those supplements included a series of vitamins and amino acids. The manufacturers of a total of 5 more products were contacted. To the Athlete's surprise 2 manufacturers of supplements she uses have not been able to provide certificates of testing for compliance (although the third manufacturer has).

36.53. This adds nothing to the appeal.

AAS para. 16 The Athlete has no sponsorship. The Athlete has no funds with which to finance a full blown defence of the charges against her.

36.54. This adds nothing to the appeal.

AAS para. 17 All of the work done for the Athlete in connection with the initial Hearing and Appeal has had to be done with an inadequate budget and with the support of her coach who did his best to present her case at first instance, unfortunately though, perhaps inadequately in the event.

36.55. This adds nothing to the appeal.

AAS para. 18 Separately, in relation to the length of the ban imposed upon her the Athlete submits that there are no (or no sufficient) "aggravating factors" present, to warrant a 4-year ban.

36.56. This argument is misconceived. The Appeal Tribunal repeats and adopts its conclusions in relation to Ground B3 at paragraphs 36.39 to 36.43 above.

AAS para. 19 There is no evidence at all to suggest that the Athlete was or had taken part in a doping scheme or plan, and certainly nothing to suggest that she was involved in any conspiracy to use banned substances.

36.57. This argument is misconceived. UKAD made no such allegation against the Appellant and the Arbitral Tribunal made no such finding.

AAS para. 20 It is correct, of course, to say that 2 banned substances were found in her sample and to that extent those 2 substances can properly be described as "multiple" although of course the term "multiple " encompasses any number from 2 upwards.

36.58. This argument is either misconceived or adds nothing to the appeal.

AAS para. 21 There is no evidence to support an allegation of use on multiple occasions. Although there was an assertion that the banned substances were likely to have been ingested over a period of time it was ultimately accepted that it was possible that this was not the case, and that there was a possibility of the banned substances having been ingested just a few hours before the sampling was carried out.

36.59. This argument is misconceived. The Appeal Tribunal repeats and adopts its conclusions in relation to Ground B3 at paragraph 36.42 above.

AAS para. 22 It is by no means frivolous to suggest that the Athlete is not a role model, or at least is no more a role model than is any other athlete. It is submitted that it is inappropriate to suggest that this is or should be termed "an aggravating factor" because to do so means that all athletes must necessarily always

face a 4 year ban because by that token all athletes are always role models. There is nothing to distinguish this Athlete's role from that of other athletes.

36.60. This argument is misconceived. The Arbitral Tribunal was entitled to conclude that the Appellant is seen as a role model. She is a Sports Development Officer working with children and vulnerable people. She also trains with more than 20 young athletes. In her career she had attained a level of prominence. The assertion that she might not be viewed as a role model is, in all the circumstances, unsustainable.

AAS para. 23 It appears to have been suggested that the way that the Athlete sought to conduct her own defence, in particular by raising an issue regarding the failure of the DCO's to follow the letter of the IAAF Rules is somehow an "aggravating" factor and should be taken into account when determining the length of the period of ineligibility. It is submitted that is neither proper nor equitable to penalise any person for the way in which, inexpertly, they conduct their own defence. Certainly such a "factor" is not listed in IAAF Rules 40.6 as an example.

36.61. The Appeal Tribunal rejected this argument.

36.62. The Arbitral Tribunal found, as it was entitled to find, that the Appellant

> *"sought to blame other people, unidentified and identified, for her predicament"*
>
> (paragraph 85 of the Arbitral Tribunal's decision), including:
>
> *"unnamed athletes or competitors who she suggested were so jealous of her that they might want to spike her drinks and the Doping Control Officers who (she alleges) deliberately or carelessly departed so seriously from procedures that the opportunity arose for her sample to become contaminated - that is, if they did not deliberately contaminate it themselves".*
>
> (paragraph 86 of the Arbitral Tribunal's decision)

36.63. The Arbitral Tribunal was entitled to find that:

> *"these are very serious allegations",*
>
> (paragraph 87 of the Arbitral Tribunal's decision), and ultimately that it regarded this matter:
>
> *"as a very bad case of doping"*
>
> (paragraph 93 of the Arbitral Tribunal's decision)

AAS para. 24 Four previous cases appear to have a bearing on the length of ban properly to be imposed:

1. *On 7 June 2011 a period of ineligibility of 3 years was imposed on Mark EDWARDS as a consequence of the view that he was a role model in that firstly he was employed as a performance coach for disabled athletes and secondly he "used" his position as an athlete in furtherance of his business interests. Furthermore, he took active steps to try to avoid the probable consequences of sampling. No such factors apply in this Athlete's case and by comparison a period of no more than two years should properly have been imposed.*

2. *In June 2011 in Macedonia Ivan EMILIANOV was awarded 2 years ineligibility after using 2 banned substances.*

3. *In July 2011 in Portugal Jose GONCALVES awarded 2 years ineligibility after using 2 banned substances.*

4. *In June 2010 in Serbia Luka RUJEVIC was awarded 2 years ineligibility after using 2 banned substances.*

36.64. No case reports were produced for the Appeal Tribunal's consideration in relation to ***Emilianov*** or ***Goncalves***. UKAD supplied a one page translated summary in relation to ***Rujevic***, but it was impossible to discern from that summary any matter of principle which could be said to be of application to the instant case.

36.65. The Appeal Tribunal considered the case of ***Edwards***, a decision of a separately constituted Arbitral Tribunal of the NADP.

36.66. Anti-doping cases turn on their own facts. As is fairly typically the case when considering the facts of another case, arguments could be made that ***Edwards*** was on the one hand a more serious case than the instant matter, whereas it could be said with equal force that ***Edwards*** was a less serious case than the instant matter. No useful purpose would be served by conducting in this decision a detailed comparative analysis of the ***Edwards*** case. It will suffice to say that the Appeal Tribunal was not persuaded, by reference to that case, that the Arbitral Tribunal's decision as to sanction was erroneous.

36.67. In the judgment of the Appeal Tribunal, there is no basis upon which it would be appropriate to interfere with the Arbitral Tribunal's decision that the aggravating circumstances in this case warranted imposition of an extra two year ban under IAAF ADR 40.6.

36.68. Reference to previous cases decided by the NADP, the Court of Arbitration for Sport ("CAS") or any other such body is an exercise of limited value in terms of determining sanction in any given case. That value diminishes even further when the issue which is being tested on appeal is whether it was open to an Arbitral Tribunal to reach the conclusion it did in relation to sanction. Every case is fact-sensitive. An anti-doping adjudicating body of first instance has a broad discretion as to where, within a range of possible sanctions, the justice of a particular case is met. The decision of the Arbitral Tribunal cannot be faulted. It is not the function of the Appeal Tribunal to tinker with the sanction imposed by the Arbitral Tribunal but only to intervene if it concludes that the Arbitral Tribunal's decision was erroneous. In the unanimous view of the Appeal Tribunal the decision of the Arbitral Tribunal as to sanction was not erroneous.

SUMMARY

37. Accordingly, and on the basis of the reasons set out above, this appeal is dismissed.

COSTS

38. Article 11.2 of the NADP Rules provides:

Where the Tribunal finds that an argument advanced by a party was frivolous or otherwise entirely without merit, the Tribunal may award costs as it deems appropriate against that party. Alternatively, if it appears to the Tribunal that the conduct of a party's representative during the proceedings before the Tribunal was

unreasonable or improper, the Tribunal may order that representative to pay the costs which the unreasonable or improper conduct has caused any other party to incur.

39. UKAD invited the Appeal Tribunal to exercise its discretion under Article 11.2 to direct that the Appellant bear UKAD's costs of this appeal.

40. The Appeal Tribunal concluded that all of the Appellant's arguments were entirely without merit. The Appellant was opportunistic and inconsistent in her defence, keen to advance any argument which might conceivably result in a dismissal of the charges framed against her. It was patently open to the Arbitral Tribunal to reach the conclusions it reached. Given the Standard of Review the Appeal Tribunal was bound to apply in accordance with Article 12.4 of the NADP Rules, this was a hopeless appeal.

41. Accordingly, the Appeal Tribunal determined that the Appellant shall pay UKAD's costs of and incidental to this appeal.

42. UKAD brought to the Appeal Tribunal's attention that the Appellant had yet to pay the costs of the "B Sample" analysis of the sample (being £1017.60 including VAT), as directed by the Arbitral Tribunal. At the appeal hearing, UKAD accepted that the Appeal Tribunal had no power to make any further order in relation to the costs order of the Arbitral Tribunal.

FURTHER APPEAL

43. The parties' attention is drawn to Article 13 of the NADP Rules and Article 13.6 of the UKADR concerning further rights of appeal.

Paul Gilroy QC (Chairman)

Lorraine Johnson

Dr Barry O'Driscoll

Signed on behalf of the Appeal Tribunal on……19 January 2012……