IRISH SPORT ANTI-DOPING DISCIPLINARY PANEL

IN THE MATTER OF THE IRISH MARTIAL ARTS COMMISSION

AND

Athlete IS-1517

DECISION

A. INTRODUCTION

1. This is the decision of the Irish Sport Anti-Doping Disciplinary Panel (the "Panel") following a hearing into an allegation that Ms. IS-1517, an athlete engaged in the sport of kick boxing, was guilty of an anti-doping rule violation by refusing to provide a urine sample when requested to do so by authorised Doping Control Officers on 8 September 2008.

2. The Panel feels that it might be helpful at the outset to provide a brief summary of the allegation made against Ms. IS-1517 and of the process leading to the Panel's decision before recording the decision itself. The Panel will, of course, set out its decision and the reasons for it in greater detail later in this document.

B. SUMMARY OF DECISION

3. It was alleged by the Irish Martial Arts Commission (the "IMAC") and by the Irish Sports Council (the "Council") that Ms. IS-1517 violated the provisions of Article 2.3 of the Irish Anti-Doping Rules (the

"Rules"). In particular, it was alleged that Ms. IS-1517 committed the following anti-doping rule violation:

> *"Refusing, or failing without justification, to submit to sample collection, after notification, in breach of the Rules, or otherwise evading the sample collection in breach of the Rules, pursuant to Article 2.3 of the Rules"*.

4. It was alleged that the offence occurred on 8 September 2008 when Ms. IS-1517 was notified of the requirement to provide a urine sample in an out-of-competition drugs test at her place of residence and that she refused to do so.

5. The matter was referred to the Panel under the Rules and the Panel conducted a hearing into the alleged anti-doping rule violation. The hearing commenced on 19 November 2008. While some evidence was heard by the Panel on that occasion, the Panel was concerned that not all of the relevant witnesses were available or present to give evidence and that Ms. IS-1517, who was not represented (legally or otherwise) on that occasion, may not fully have understood the significance of the proceedings and the consequences of any finding of an anti-doping rule violation which might be made against her. Accordingly, the Panel decided that it was appropriate to adjourn the hearing to enable the Irish Sports Council (the "Council") to become a party to the proceedings (if it so wished) and to enable Ms. IS-1517 to consider whether she wished to be represented in the proceedings before the Panel. The proceedings were then adjourned to a date to be fixed by agreement.

6. By letter dated 27 November 2008 the Council informed the Panel that it would be exercising its entitlement pursuant to Article 8.3.7 of the Rules to join the proceedings as a party.

7. It took some time before the hearing resumed. That arose due to the fact that it was necessary for a number of different persons to be present at the resumed hearing. The delay was not due to any fault on the part of Ms. IS-1517 and was not attributable to her in any way. The hearing resumed on 26 January 2009. At the hearing, the IMAC was represented by Neil Drew, IMAC's Anti-Doping Officer. The Council was represented by Dr. Una May, who is the Programme Manager for the Council's Anti-Doping Programme, and by Gary Rice, a partner in Beauchamps Solicitors. Ms. IS-1517 was present and asked to be represented by Roy Baker, Director of Anti-Doping with the World Association of Kick Boxing Organisation ("WAKO"). Mr. Baker was also representing WAKO (which, as the relevant international federation for the IMAC, was entitled to attend the hearings before the Panel as an observer under Article 8.3.8 of the Rules).

8. The case against Ms. IS-1517 was presented by Mr. Drew of the IMAC and by the Council. Evidence was given by John Fogarty, the Chaperone for the Doping Control Officer ("DCO") who attended to take a sample from Ms. IS-1517 on 8 September 2008 who was Ms. Caoimhe Crosbie. Evidence was also given (over the telephone) by Troy Renneker, the Programme Executive for Testing for the Anti-Doping Unit of the Council. Attempts were made to make telephone contact with Ms. Crosbie (the DCO) who was in Western Australia at the time, for the purpose of taking evidence from her. However, despite a number of attempts, it was not possible to contact Ms. Crosbie. A written statement was tendered on behalf of the Council from Ms. Crosbie and there was no objection on behalf of Ms. IS-1517 to the Panel considering that statement. Dr. May was also called to give evidence on behalf of the Council. Ms. IS-1517 then gave evidence on her own behalf. Submissions were then made to the Panel. A detailed written submission was provided by Mr. Rice on behalf of the Council. An opportunity was offered to Mr. Baker on

behalf of Ms. IS-1517 to respond in writing to that submission. However, that opportunity was declined. As was his entitlement, Mr. Baker chose to respond orally to the submission. The Panel reserved its decision and is now providing it having received the transcript of the hearing.

9. In exercising its functions under the Rules, the Panel had to decide the following:

   (1) Whether Ms. IS-1517 did commit an anti-doping rule violation in refusing or failing without "*justification*" to provide a sample on 8 September, 2008;

   (2) If Ms. IS-1517 did commit that anti-doping rule violation, what penalty or sanction (if any) should be imposed ? This in turn required the Panel to consider whether Ms. IS-1517 had established that she bore "*no fault or negligence*" or "*no significant fault or negligence*" in respect of the violation which would permit the Panel to reduce the sanction which might otherwise be imposed.

10. In determining whether Ms. IS-1517 committed the violation alleged, the Panel had to consider on whom the burden of proving the presence or absence of "*justification*" lay. This is not clear from the Rules and the case law is not clear-cut on the point. The Panel has taken the view that it is not necessary for the Panel's decision to resolve that issue in this case. The Panel does, however, consider that there is some force to the suggestion that the onus of establishing that an athlete refused or failed "*without justification*" to provide a sample lies on the party alleging the violation, in this case that would be IMAC and the Council and not on the athlete.

11. Evidence was provided by Mr. Fogarty and in the Statement of Ms. Crosbie to the effect that Ms. IS-1517 responded to the request for a

sample by stating that she did not have the time to provide the test, that she had to attend to a private work related matter and that the testers could return later that evening to carry out the test. In her evidence, Ms. IS-1517 explained that the justification for not providing the sample requested at the time was because she had a pressing work engagement which was confidential and from which she believed she could not extricate herself at short notice.

12. Irrespective of the party on whom the onus lies to establish the absence or presence of a "*justification*" for a refusal or failure to provide a sample, the Panel is satisfied to its comfortable satisfaction that the evidence establishes that Ms. IS-1517 did refuse to provide a sample when requested and that such refusal was "*without justification*". We elaborate on those reasons later in this Decision. In those circumstances, the Panel is satisfied that it has been established that Ms. IS-1517 committed an anti-doping rule violation contrary to Article 2.3 of the Rules and so finds.

13. In determining the appropriate sanction, the Panel notes the changes made to the version of the Rules from 2007 by the new Rules introduced with effect from January 2009. By virtue of those changes (which it is accepted by the Council apply in favour of the athlete in this case notwithstanding that the proceedings against her commenced under the 2007 version of the Rules), it was open to Ms. IS-1517 to seek to establish to the Panel that she bore "*no fault or negligence*" in respect of the violation or, alternatively, that she bore "*no significant fault or negligence*" in respect of it.

14. Having considered the submissions of the parties and having reviewed the authorities opened by Mr. Rice on behalf of the Council, the Panel is satisfied that Ms. IS-1517 has just about on the balance of probabilities (being the appropriate standard of proof under the Rules) established that she bore "*no fault or negligence*" for the

violation. As a consequence, the range of sanctions which it is open to the Panel under the Rules to impose in this case is a range of between two years' ineligibility and no period of ineligibility. The Panel believes that in the circumstances the appropriate sanction to impose having regard to the particular facts established in evidence is a period of ineligibility of three months.

15. The Panel then had to address the date of commencement of the period of ineligibility. In that regard, the Panel notes that Ms. IS-1517 was not provisionally suspended from the date of the notification of the alleged violation to her on 19 September 2008 and in fact competed in the National Championships on 13 or 14 September 2008, subsequent to the date of the violation. However, the Panel feels that it is entitled under the Rules to determine that the date of commencement of the period of ineligibility should be a date other than the date of this decision or the date on which the hearing resumed on 26 January 2009. For reasons set out in greater detail later in this Decision, the Panel believes that it would be appropriate, and so determines, that the period of ineligibility should commence on the first day of the hearing of these proceedings, namely, 19 November 2008.

16. The decision of the Panel is, therefore, that Ms. IS-1517 did commit the alleged anti-doping rule violation in breach of Article 2.3 of the Rules and that the appropriate sanction is a period of three months' ineligibility dating from 19 November 2008. That period will, therefore, expire on 19 February 2009.

17. We now set out in greater detail the reasons for our findings and conclusions.

C. THE ALLEGED VIOLATION

18. As noted in the summary earlier, the allegation which the Panel had to consider was that Ms. IS-1517 was guilty of an anti-doping rule violation under Article 2.3 of the Rules by refusing or failing without justification to submit to sample collection after notification or otherwise evading sample collection in breach of the Rules. The allegation was that Ms. IS-1517 had refused to provide a urine sample when requested by the DCO on 8 September 2008.

D. THE PROCEDURAL BACKGROUND

19. Ms. IS-1517 was notified of the alleged violation by the Council by a registered letter dated 19 September 2008. The letter was sent pursuant to the provisions of Article 7.6 of the Rules. The letter referred to the disciplinary procedure under Article 8 of the Rules and referred to the sanctions which could be imposed in the event of a finding adverse to the athlete.

20. On the same day the Council wrote to Mr. Drew, the Anti-Doping Officer of the IMAC, and referred the matter to the Panel by another letter of the same date.

21. On 22 September 2008, the Secretary to the Panel wrote to Ms. IS-1517 informing her that the case had been referred to the Panel and explaining briefly the procedure before the Panel. Ms. IS-1517 was asked to inform the Panel whether she was disputing or admitting the alleged violation. In a letter dated 14 October 2008, Ms. IS-1517 responded stating that she had not violated the relevant rule as she felt that she had "*justification for refusing the test*". She stated that she would justify her reasons to the Panel.

22. The Panel then issued a series of directions to the parties in advance of the hearing which was scheduled to take place on 19 November 2008. Both the Council and WAKO (as the international federation of the relevant national governing body, the IMC) gave notice of their

intention to attend the hearing as observers as they were entitled to do under Article 8.3.8 of the Rules. At that stage, the Council did not make any request to be made a party to the proceedings.

E. THE HEARING ON 19 NOVEMBER 2008

23. A hearing did take place on 19 November 2008. Present at the hearing were Mr. Drew of the IMAC and Ms. IS-1517. Also present as observers were Mr. Baker of WAKO and Ms. Siobhan Leonard of the Council. Ms. IS-1517 was not represented either legally or otherwise at the hearing that evening. It is necessary to record briefly what occurred at that hearing.

24. Mr. Drew opened the case on behalf of the IMAC. The Panel had before it copies of documents previously provided by the Council to all the parties, including a "*Failure to Provide a Sample Report Form*" dated 8 September 2008 and a "*Doping Control Form*" also bearing that date. Ms. IS-1517 then commenced giving evidence in response to the allegation. She contended that she was justified in declining to provide the sample when requested on the evening of 8 September 2008. In support of her position, Ms. IS-1517 read from and furnished a written statement to the Panel setting out her position. She also furnished two letters dated 19 November 2008. Those letters (which emanated from her current employer and from a potential new client for her employer) were furnished in support of her case that she explained to the DCO and her chaperone who arrived at her home on the evening in question that she was unable to provide the requested sample as she had an urgent commitment away from her house and that it was private and work related. She also explained that it was not possible for the testers to accompany her but that she would be at her training venue from 8pm later that evening and would be available to meet with the testers to provide the sample then. Ms. IS-1517 explained that she had just taken up a

new position in July 2008, some five weeks previously, as a manager of a [...], and that she had arranged a meeting with a important client for the [...] who might be in a position to bring a considerable amount of business to the [...].

25. It emerged from a consideration of Ms. IS-1517 account of events that evening and the relevant documents that there was some potential conflict between what Ms. IS-1517 maintained was said to her by the testers and what appeared from the documentation. It further became clear to the Panel during the course of Ms. IS-1517 evidence that she may not fully have appreciated the consequences of a finding that an anti-doping rule violation may have occurred. The Council was not in a position to assist the Panel on the potential conflict of evidence issue as it was only attending the hearing as an observer and the DCO and her chaperone had not been requested to attend and were not present to give direct evidence to the Panel.

26. Having considered the position, the Panel decided that it would be appropriate in the interests of fairness both to Ms. IS-1517 and to others, to adjourn the hearing. The Panel's reasons were two fold. First, the Panel felt that it would not be in a position to obtain a full picture as to what had occurred on 8 September 2008 without evidence from the DCO and/or her chaperone and that this might require the participation by the Council as a party to the proceedings. Secondly, the Panel felt that it would be appropriate in the interests of fairness to afford Ms. IS-1517 the opportunity to obtain advice (including legal advice) and to consider obtaining representation at a resumed hearing of the Panel. In those circumstances, the Panel adjourned the hearing to a date to be fixed. It is relevant to observe that Ms. IS-1517 was somewhat reluctant for the matter to be adjourned and wished the matter to be concluded that evening.

27. It was hoped by the Panel that the resumed hearing could take place as soon as possible in December.

F. EVENTS BETWEEN 19 NOVEMBER 2008 AND 26 JANUARY 2009

28. Following the adjournment of the hearing on 19 November 2008, the Secretary to the Panel wrote to the Council and to Ms. IS-1517 by letters dated 25 November 2008. In the letter to Ms. IS-1517 of 25 November 2008, the Secretary sought to ascertain whether it was Ms. IS-1517 intention to be represented at the resumed hearing and, if so, to provide details of such representation. The Secretary also sought to ascertain Ms. IS-1517 availability for a hearing on certain dates in December 2008. In her letter to the Council, the Secretary sought to ascertain whether it was the Council's intention to become a party to the proceedings. The Council replied by letter dated 27 November 2008 stating that the Council would be exercising its entitlement pursuant to Article 8.3.7 of the Rules and would be joining the proceedings as a party. The letter further pointed out that the Council intended calling a number of witnesses including the DCO.

29. It was not possible to secure the agreement of all the relevant parties and participants for the hearing to resume before the Christmas break and the first date upon which all relevant persons were stated to be available was 26 January 2009. The Panel wishes to make it clear that this was not due to any fault on the part of, and was not attributable to, Ms. IS-1517 who had confirmed her availability to attend a resumed hearing on a number of the suggested dates in December 2008.

G. THE HEARING ON 26 JANUARY 2009

30. The hearing ultimately resumed on 26 January 2009. Mr. Drew again appeared on behalf of the IMAC. The Council was present as a party, represented by Gary Rice of Beauchamps Solicitors and by Dr. Una May. Mr. Baker indicated that he was now representing Ms. IS-1517 (as well as attending as an observer on behalf of WAKO). There was no objection to that. Ms. IS-1517 was also present. The Panel decided that it would be appropriate effectively to re-commence the hearing afresh and did so.

31. The case was briefly opened again by Mr. Drew on behalf of the IMAC. Mr. Rice on behalf of the Council then called John Fogarty to give evidence.

(a) <u>Evidence of John Fogarty</u>

32. Mr. Fogarty was the chaperone to Ms. Caoimhe Crosbie, the DCO who attended at Ms. IS-1517 home on the evening of 8 September 2008 to take a urine sample from Ms. IS-1517. Mr. Fogarty's evidence is recorded in the transcript and it is appropriate only to summarise the relevant parts of his evidence. Mr. Fogarty stated that when he and Ms. Crosbie attended for the purpose of taking a sample from Ms. IS-1517, she informed them that she did not have the time to do the test at that stage, that she was going out, that she had a private matter to attend to and that it was work related. She asked whether Mr. Fogarty and Ms. Crosbie could come back at a later stage. Mr. Fogarty said they informed her that they could not as the testing procedure had already commenced. Mr. Fogarty further stated that Ms. IS-1517 was informed that a failure to provide a sample constituted a doping control violation and that she may be subject to sanctions. He did not specify what those sanctions were or might be. He then commenced filling out the "Doping Control Form". He further stated that Ms. Crosbie informed Ms. IS-1517 that the failure to provide the test constituted an offence (by which he meant

a violation of the Rules) and that Ms. Crosbie then went away to telephone Troy Reneker of the Council for further advice. Mr. Fogarty stated that while Ms. Crosbie was away speaking with Mr. Reneker, he again informed Ms. IS-1517 that the failure to provide a sample constituted an anti-doping offence and was a breach of the Rules. Mr. Fogarty stated that he did not specify to Ms. IS-1517 what the sanctions were for failing to provide the sample. He also stated that he was unable to indicate whether Ms. IS-1517 had read the form but that she had signed it "*pretty straight away*". Mr. Fogarty stated that he believes that the issue of Ms. IS-1517 not being in receipt of any funding from the Council did come up but he was not "*100% certain*" of this. He felt that it did as a result of a conversation which Ms. Crosbie had with Ms. IS-1517 when he believes Ms. Crosbie said to Ms. IS-1517 that if she did not provide the sample "*you can lose everything*". Mr. Fogarty explained that what he thought was meant by that was that if Ms. IS-1517 was to receive a ban for refusing to give a sample, she would lose everything she had achieved in her sport.

33. Under cross-examination by Mr. Baker, Mr. Fogarty reiterated that he was definite in saying that he informed Ms. IS-1517 that if she failed to provide a sample, she was subject to sanctions. He reiterated that again when he was re-examined by Mr. Rice.

34. While the Panel notes that there was some disagreement as to what was or was not said by Mr. Fogarty to Ms. IS-1517 on the evening of 8 September 2008, the Panel accepts Mr. Fogarty's evidence and is satisfied that he did tell her that a failure to provide a sample constituted a rule violation and that she could be subject to sanctions. However, it is clear that Ms. IS-1517 was not informed as to what those sanctions were (and it is noted that there is no express requirement in the Rules or otherwise for an athlete to be so

informed). The Panel further accepts Ms. IS-1517 evidence that she was unaware of what those sanctions were.

(b) <u>Evidence of Ms. Caoimhe Crosbie</u>

35. A number of attempts were made to contact Ms. Crosbie by telephone. Ms. Crosbie was in Western Australia and had indicated that she would be available to take a call. However, the Panel notes that there appears to have been an issue in relation to the mobile telephone coverage in the area in which Ms. Crosbie was at the time. It was also in the early hours of the morning in Western Australia.

36. Following a number of unsuccessful attempts to contact her, Mr. Rice applied for liberty to submit a statement which Ms. Crosbie had approved. There was no objection on behalf of Ms. IS-1517 to the admission of that statement. It was open to the Panel to accept Ms. Crosbie's written statement under Articles 8.4.7 and 8.4.8 of the Rules.

37. The Panel notes that there are some minor discrepancies between what is stated in that witness statement and what appears from other documentation available to the Panel such as the "*Failure to Provide a Sample Report Form*". However, the Panel does not believe that the discrepancies are significant.

38. In her witness statement, Ms. Crosbie described arriving at Ms. IS-1517 house and waiting for Ms. IS-1517 to turn up before calling at her door and identifying herself and Mr. Fogarty as Doping Control Officers. Ms. Crosbie noted in her statement that Ms. IS-1517 informed them that she was on her way out as she had a prior engagement which was related to work and asked whether they could come back later. Ms. Crosbie stated that they could not do because the notification process had already begun. Ms. Crosbie further stated that they asked Ms. IS-1517 a number of times

whether it would be possible for them to go with her and observe her until such time as she was in a position to provide a sample. She stated that Ms. IS-1517 declined that offer but gave no specifics other than stating it was a "*private work event*" which she was attending "*up the road*" and that it was not possible for Ms. Crosbie and Mr. Fogarty to attend. Ms. Crosbie further stated that Ms. IS-1517 informed them that she did not have time to complete the sample collection process. She stated that she told Ms. IS-1517 that failing to comply with the request to provide a test "*could be seen as a positive test and that the Irish Sports Council may impose sanctions"*. She does not state whether she told Ms. IS-1517 what those sanctions might be. The Panel believes the evidence establishes that Ms. IS-1517 was not told what the sanctions might be. Ms. Crosbie then stated that "*once it became clear that she was not going to comply with the test, [she] explained again that this could be perceived as a possible positive test and asked if she understood the ramifications of this"*. Ms. Crosbie stated that Ms. IS-1517 indicated that she did and that she (Ms. Crosbie) then went to telephone Mr. Reneker at the Irish Sports Council. She then records what she discussed with Mr. Reneker before returning to Ms. IS-1517 and informing her that she should call her national governing body for advice because of the seriousness of the issue. She stated that Ms. IS-1517 said that she would do so later and that she (Ms. IS-1517) "*seemed very rushed and having signed the paperwork was eager to go"*. Ms. Crosbie stated that it was her understanding that Ms. IS-1517 "*knew what was at risk and that she did not want to discuss it any further"*. She then stated that she got the impression from Ms. IS-1517 that Ms. IS-1517 "*did not feel obliged to partake in the Irish Sports Council's testing since she was not carded by the Irish Sports Council"* and that she explained to Ms. IS-1517 that regardless of whether she was carded or not, she was required to co-operate with the Rules. Ms. Crosbie stated that onceit was clear

to her that Ms. IS-1517 knew that this could be seen as an anti-doping rule violation and the consequence of this, she gave her the pink copy of the "Doping Control Form" and then left Ms. IS-1517 home.

39. It is important to note that Ms. Crosbie was not available for cross-examination by Ms. IS-1517. Having regard to the evidence given by Ms. IS-1517 as to her understanding of the position, the Panel does not believe that it can attach much weight to Ms. Crosbie's comments in her statements on what her impressions were as to Ms. IS-1517 understanding of the position and of the consequences of the failure to provide a sample there and then. Having regard to the evidence subsequently given by Ms. IS-1517, the Panel does have a doubt as to whether Ms. IS-1517 was fully aware of the consequences of declining to provide the sample requested. Apart from that, however, the Panel accepts Ms. Crosbie's evidence and notes that it is in general consistent with the evidence given by Mr. Fogarty and (subsequently) by Mr. Reneker.

(c) Evidence of Troy Reneker

40. Mr. Reneker then gave evidence by telephone as he was unable to attend in person due to illness. Mr. Reneker was the Programme Executive for Testing of the Anti-Doping Unit of the Council at the time of the test on 8 September 2008. He gave evidence of the telephone call which he received from Ms. Crosbie that evening. He explained that he made a note of his call with Ms. Crosbie the following morning. His evidence was generally consistent with what is recorded in Ms. Crosbie's statement. In addition to giving evidence about that telephone call, Mr. Reneker also outlined a previous occasion on which Ms. IS-1517 was subjected to out-of-competition testing. A copy of an "*Out-of-Competition Testing: Doping-Control Session Report*" dated 11 July 2007 and a "*Doping Control Form*"

also bearing that date was provided to the Panel. Mr. Renneker explained that he was the DCO on that occasion and gave evidence of the taking of a sample from Ms. IS-1517. He was asked by Mr. Rice to note for the Panel his comments in Section 5 of the "Doping Control Session Report". He stated there:

> "*Athlete has been tested twice before but both times were overseas. This was her first test in Ireland. She did not know of certain policies e.g. she had to stay with the chaperone at all times. We explained it all to her thoroughly. She said she had never really been told about the procedures before. Just though it was worth noting*'.

41. Mr. Renneker was cross-examined by Mr. Baker on behalf of Ms. IS-1517. However, his cross-examination was confined to the events of 8 September 2008. He was not cross-examined in relation to the previous test in July 2007.

(d) Evidence of Dr. Una May

42. Dr. May then gave evidence in relation to the International Standard for Testing (Version 3.0 of June 2003) (the "International Standard"). She explained that the procedures were that unless the athlete has a good reason for postponing or delaying sample collection, then those operations should not be postponed. She noted, however, that if there was a good reason for postponing the test, that the athlete must be chaperoned at all times. Dr. May referred to paragraph 5.4.6 of the International Standard. She was also asked by the Panel to consider paragraph 5.3.1 which provides that the notification method for out of competition sample collection whenever possible is what is defined in the International Standard "*No Advance Notice*". This is defined in paragraph 3.1 of the International Standard as follows:

"A doping control which takes place with no advance warning to the athlete and where the athlete is continuously chaperoned from the moment of notification through sample provision".

43. Dr. May also gave evidence in relation to the procedure which a DCO is expected to undertake when seeking to ensure that reasonable attempts were made to notify an athlete of his or her selection for sample collection (for the purposes of paragraph 5.3.6 of the International Standard). Dr. May was cross-examined by Mr. Baker on the issue of "*reasonable attempts*".

(e) Evidence of Ms. IS-1517

44. Ms. IS-1517 then gave evidence. Her evidence was consistent with the written statement which she had previously provided to the Panel. She stated that when she arrived home at approximately 5.50pm on 8 September 2008 the Anti-Doping Officers called to her door. She said that she explained to them that she would not be in a position to do the test that evening as she had somewhere to go. She states that they asked where she had to go and she said it was "*private*". Ms. IS-1517 then stated that the officers asked whether they could come with her and that she said they could not as it was "*work related*". She then said that Ms. Crosbie asked her whether she realised that "*everything you get from Sports Council is now at risk by refusing the test"*. She said she asked Ms. Crosbie what she meant by that and that Ms. Crosbie did not answer but went to make a phone call. She says that Mr. Fogarty then took out a sheet and asked her to get some identification which she did while Mr. Fogarty was filling in the form. She says Ms. Crosbie then came back and repeated again whether she (Ms. IS-1517) realised that everything she was getting from the Sports Council was at risk. She said that she then told Ms. Crosbie that she did not get anything at all from

the Sports Council. She said that Mr. Fogarty then asked her to sign the form and that he said the form was to record the fact that she was refusing to do the test. She said she signed the form and says that Ms. Crosbie said that she (Ms. IS-1517) should get in touch with someone from her national governing body. She said she would. Ms. IS-1517 said that she stated to the officers that she had a work related matter to go to but that at 8 o'clock that evening she would be at training in her club and she would be able to do the test then. However, she was told that they could not come back and that she had to do the test there and then. She states that when Mr. Fogarty asked her to sign the form he told her that the form was to the effect that she was refusing to do the test. She said that she did sign it because she was refusing to do the test because she had somewhere else to go and because she was not in a position to do it. She was asked whether there was any possibility that the testers could attend the meeting but she replied: "*No, it [was] completely private and work related*".

45. Ms. IS-1517 was asked to elaborate on the work commitment to which she was referring. She referred to the two letters dated 19 November 2008. She explained that she had started employment in the [...] in July 2008, that she had a senior position there, that she was dealing with a lot of members and had many meetings which were "*completely private and confidential*". She said that she was not in a position to bring the testers into any of those meetings. She referred to the particular meeting which she had to attend that evening had been arranged sometime in advance and was with a potentially very important customer for the [...] with whom Ms. IS-1517 had previously dealt in her position as manager of another [...]. She said that the meeting had been arranged for a number of weeks. The Panel accepts on the basis of Ms. IS-1517 evidence as corroborated by the letters which she provided to the Panel that this was the reason why Ms. IS-1517 felt that she

was not in a position to provide the requested sample on the evening of 8 September 2008.

46. Ms. IS-1517 was cross-examined by Mr. Drew and then by Mr. Rice. In response to a question from Mr. Drew concerning the previous occasion on which she was tested (11 July 2007), Ms. IS-1517 stated that she knew that the testers had to "*follow you everywhere*" and that they "*can't let you out of their sight*". She further stated that when they called to her house that evening (on 8 September 2008) there was "*no way … that (she) would be in a position to be able to bring them to work with me"*. She stated that she was assuming that when Ms. Crosbie said that everything she got from the Council would be lost, she thought that Ms. Crosbie was referring to funding (which she did not receive from the Council), although she accepted that the words "*money*" or "*income*" were not mentioned. Ms. IS-1517 was then cross-examined by Mr. Rice.

47. The Panel then directed a number of questions to Ms. IS-1517. Essentially, the Panel sought to ascertain what Ms. IS-1517 meant when she stated in her letter to the Secretary to the Panel of 14 October 2008 that she felt she had "*justification"* for refusing the test and that she would "*justify*" her reasons to the Panel. She confirmed that the justification which she was relying on was the fact that she had started a new job to which she was very committed, that she had many commitments at work with targets to reach and that she was effectively on trial in her new job for the first year. She felt that when she was asked to undergo the test, she was being forced to chose between her financial income and her sport, which she described as her "*hobby*". She also explained that she was not in a position to contact the person she was to meet that evening (at 6.30pm) as she did not have her number in her mobile phone. She also felt that she was not in a position to permit Mr. Fogarty and Ms. Crosbie to accompany her to the [...] and to keep her

under observation while the meeting was taking place. She felt that she was not in a position to do that for a number of reasons but particularly because of the perception on her part as to how her employer would react to it. She explained that when the testers arrived at her door she did "*panic a little bit*" because she knew that she would not be in a position to bring them with her. She explained that she was anxious to keep her private life separate from her work life and, having just started the job five weeks previously, she felt she was not in a position to bring Mr. Fogarty and Ms. Crosbie with her to the meeting.

48. In response to a further question from the Panel, Ms. IS-1517 accepted that she had received a letter from the Council on 18 April 2008 notifying her of her inclusion in the Council's Registered Testing Pool and which also enclosed a copy of the Rules. She said that she had not read the Rules and did not speak to anyone about the Rules when she got them. She further said that she had no idea at all of the consequences or sanctions for refusing to provide the sample requested that evening and that the first time she found out about these was when she telephoned Mr. Baker after training that evening. She explained that she had not been available for any previous seminar or information session in relation to the Rules although she accepted that she had received notification of one or more of those in the past. She further explained that her own governing body had not been in communication with her about anti-doping issues or about the rules and obligations and responsibilities in relation to anti-doping.

49. Subsequently, under cross-examination by Mr. Rice, Ms. IS-1517 confirmed that Mr. Fogarty did say to her that it was a rule violation to refuse to provide a sample and that apart from that she did not know of the consequences of such a refusal. She presumed that when Ms. Crosbie said that everything she got from the Council was

at risk that she was talking about money and that they were the consequences. It was only subsequently when she spoke with Mr. Baker that she was informed of what the consequences were. Ms. IS-1517 stated that she did not recall Mr. Fogarty stating that the failure to provide the sample may be subject to sanction. As indicated earlier, the Panel accepts that Mr. Fogarty did inform Ms. IS-1517 of that fact but also notes that she was not informed as to what the potential sanctions were.

(f) <u>Observations of Mr. Drew and Mr. Baker</u>

50. Mr. Drew then clarified the position about funding on behalf of IMAC. He explained that IMAC had put in place an initiative some years ago whereby athletes who filled in whereabouts forms would receive a payment of €500. He explained that the decision to do this was taken in late 2006 and that the first payment to athletes was in December 2007. Mr. Drew also explained that IMAC had a number of anti-doping officers for each representative martial arts group and that it was part of IMAC's national coaching programme to train up anti-doping officers and they would disseminate information about anti-doping matters, including the anti-doping rules, to the athletes. He stated that while some information came directly from the Council to the athletes, IMAC would also disseminate information to the anti-doping officers of the relevant sport. However, he was not in a position to state whether relevant information was passed on to the relevant athletes by the Anti-Doping Officer for kick boxing. Mr. Baker (who was the relevant Anti-Doping Officer for IMAC at the time) confirmed that IMAC had held three seminars between 2006 and 2007 for athletes. He explained that Ms. IS-1517 coach would have been given information by IMAC and by the AKAI and that it was the responsibility of the coach then to pass on the information to athletes.

(g) **<u>Submissions</u>**

51. Submissions were then made on behalf of the various parties. Mr. Drew briefly addressed the Panel. Mr. Rice on behalf of the Council provided detailed and extremely helpful written submissions to the Panel. The submissions referred to the relevant provisions of the Rules and drew the Panel's attention to some relevant authorities from the Court of Arbitration for Sport ("CAS") and from other anti-doping tribunals around the world.

52. Subsequent to the hearing, Mr. Rice wrote to the Panel on 30 January 2009 correcting a matter which had been recorded in the submissions. The Panel is grateful to Mr. Rice for doing so. Where necessary, we address aspects of the Council's submissions when setting out our findings and conclusions in the next section of this Decision.

53. In summary, the Council submitted that the evidence supported a finding that Ms. IS-1517 had committed the anti-doping Rule violation alleged. The Council contended that the burden of establishing that the failure or refusal was "*justified*" lay on Ms. IS-1517 and that she had not discharged that burden on the facts. The Council submitted that, in the alternative, if the burden lay on the Council to establish the absence of any "*justification"* for the failure or refusal to provide the requested sample, then the Council (or rather the Council and IMAC, as the party presenting the case) had discharged that onus.

54. The Council submitted that the explanation provided by Ms. IS-1517 for failing or refusing to providing the sample, namely, that she had a pressing engagement at work which was private and confidential and to which it was not possible to bring the testers did not amount to "*justification*". The Council further submitted that Ms. IS-1517 had been adequately notified of the possible consequences of refusing to provide the requested sample. The Council drew attention to the

"*Doping Control Form*" signed by Ms. IS-1517 on 8 September 2008 (an issue to which will return later in this Decision). The Council also submitted that while the International Standard does require the DCO / chaperone to inform the athlete of the consequences of failing to comply with the request for a sample if possible, there is no requirement to notify the athlete of what the possible consequences of failing to provide the sample are. The Council submitted that Ms. Crosbie and Mr. Fogarty had adequately notified Ms. IS-1517 of the consequences of the failure or refusal to provide the requested sample. In those circumstances, the Council submitted that on the evidence the Panel should find that Ms. IS-1517 had committed an anti-doping rule violation in breach of Article 2.3 of the Rules.

55. The Council then addressed the question of the penalties or sanctions which the Panel should consider imposing in respect of that violation. Mr. Rice quite properly drew to the Panel's attention the relevant provisions of the 2007 version of the Rules which were amended by the 2009 version and accepted that Ms. IS-1517 was entitled to the benefit of any of those amendments which were in her favour. However, the Council submitted that Ms. IS-1517 had not established on the evidence that there was "*no fault or negligence*" or "*no significant fault or negligence*" on her part in refusing to provide the sample. The Council accepted the appropriate sanction or consequence was a matter for the Panel.

56. The Panel was conscious that the Council's detailed written submissions and the supporting book of authorities were provided at the conclusion of the evidence and felt that Ms. IS-1517 and Mr. Baker ought to be afforded the opportunity of some time to respond orally and in writing to those submissions, if they required time. However, they declined that request and Mr. Baker was happy to proceed to make oral submissions in response.

57. It was accepted on behalf of Ms. IS-1517 that she had refused to provide the sample (Ms. IS-1517 accepted this in her evidence to the Panel). However, Mr. Baker submitted that the evidence established that Ms. IS-1517 had a "*justification*" for doing so. He contended that Ms. IS-1517 work commitment was "*absolutely unavoidable*" and that she had to depart for the particular meeting at the time the testers arrived. He submitted that Ms. IS-1517 had to make a difficult choice between "*her job, her career and her ability to pay her mortgage"* and her sport. He reminded the Panel of Ms. IS-1517 amateur status and also emphasised the fact that Ms. IS-1517 had offered to provide the sample at her place of training later that evening but that that offer was not taken up. In those circumstances, Mr. Baker submitted that there was no breach of Article 2.3 of the Rules.

58. In the alternative and as a fall-back position, Mr. Baker submitted that there was "*no fault or negligence"* on the part of Ms. IS-1517 in not providing the sample when requested that evening. In the further alternative, he submitted that there was "*no significant fault or negligence"* on her part.

59. Mr. Baker concluded by informing the Panel that if Ms. IS-1517 was not permitted to participate in the national trials for her sport on 1 March 2009 it would mean that she would not be in a position to compete at the world level this year. He submitted that if the Panel were to impose a period of ineligibility on her that would "*basically retire IS-1517 from her sport*". He further submitted as follows:

> *"IS-1517 has been a guiding light in our sport for a number of years. She is a fantastic role model and we believe that she has a significant potential for support in the country and she would [be] on of the few potentials that we have going*

forward into 2010 when our sport itself reaches a new level internationally and worldwide".

60. Mr. Baker finally drew attention to the apparent contradiction in the "*Doping Control Form*" signed by Ms. IS-1517 (an issue we address later). Mr. Baker declined the opportunity of making any further submissions in writing in response to the Council's written submission.

61. The Panel decided that in the circumstances it would be appropriate to reserve its decision.

H. FINDINGS ON WHETHER VIOLATION ESTABLISHED

(a) Findings on the facts

62. While there were some minor differences between the parties on what precisely occurred when the DCO and chaperone attended at Ms. IS-1517 home on the evening of 8 September 2008 to take the sample, ultimately the Panel does not believe that those differences are material to its decision. We have set out earlier in our outline of the evidence those areas of differences and the Panel's views in relation to the evidence given. The Panel is satisfied that the evidence establishes that Ms. IS-1517 did refuse to provide the requested sample on 8 September 2008. The Panel also accepts the evidence given by Ms. IS-1517 as to the reasons why she felt she was not in a position to provide the sample at that stage. The Panel accepts that Ms. IS-1517 was in a genuine quandary and felt obliged to fulfil her commitment at work. The Panel accepts that Ms. IS-1517 did genuinely feel that she had to chose between honouring her work commitment and pleasing her employer and complying with her obligations to provide the sample requested. The question as to whether this provides sufficient "*justification*" for her refusal is addressed below.

63. The Panel also accepts that Ms. Crosbie and Mr. Fogarty informed Ms. IS-1517 that her failure or refusal to provide the sample was a breach of the Rules and that she could be subject to sanction for it. However, it is clear on the evidence that Ms. IS-1517 was not informed as to what those sanctions were or might be and she did not ask that question of Mr. Fogarty or Ms. Crosbie. We also address this issue later and make some concluding comments in relation to it.

64. The evidence establishes to the satisfaction of the Panel that Ms. IS-1517 did refuse to provide the sample when requested and that she did so because she felt she had an unavoidable commitment at work. The Panel also accepts that Ms. IS-1517 refusal was not an outright refusal to provide a sample that evening and that she did offer to submit to sample collection at 8pm at her place of training. While not relevant to the issue as to whether an anti-doping rule violation occurred, the Panel feels that that factor is one of the factors which the Panel ought to take into account in determining the appropriate consequences or sanctions to be imposed in respect of the violation.

(b) <u>Findings on Legal Issues on Violation Issue</u>

65. As indicated in the introductory section of this Decision, the Panel has to decide the following:

    (a) Whether Ms. IS-1517 did commit an anti-doping Rule violation in refusing or failing without justification to provide a sample on 8 September 2008 in breach of Article 2.3 of the Rules.

    (b) If Ms. IS-1517 did commit that anti-doping Rule violation, what penalty or sanction (if any) should be imposed ? In addressing this issue, the Panel is required to consider the provisions of Article 10 of

the Rules and, in particular, the issue as to whether on the evidence it could be said that Ms. IS-1517 bore "*no fault or negligence*" or "*no significant fault or negligence*" in respect of the violation.

(i) Application of the Rules to Ms. IS-1517

66. In the first place, it is not disputed that Ms. IS-1517 is subject to the provisions of the Rules. Article 1.2.1.1 of the Rules provides that the Rules apply to:

> "*Persons are members of a National Governing Body or its affiliated members, clubs, teams, associations, or leagues regardless of where the Persons reside or are situated*".

67. Article 1.2.2. of the Rules provides that:

> "*Participants including minors are deemed to accept, submit to and abide by these anti-doping Rules by virtue of their participation in sport*".

68. Ms. IS-1517 is a member of IMAC, which is the relevant national governing body and participates in the sport of kick boxing. In those circumstances, she is subject to and bound by the Rules. The issue as to whether or not she is or was in receipt of any funding from the Council or elsewhere is irrelevant to that issue.

(ii) Whether a Violation of Article 2.3 Occurred

69. Having regard to the facts outlined earlier, the Panel is of the view that Ms. IS-1517 did refuse to provide the sample requested. The only issue then in determining whether a violation of Article 2.3 occurred is whether that refusal was "*without justification*".

70. The first issue to consider in that regard is on whom the burden of establishing the presence or absence of "*justification*" lie. It is noted that in one of the leading texts, Sport: Law and Practice[1], the authors (Lewis and Taylor) observe that Article 2.3 does not make it clear whether the relevant anti-doping organisation bears the burden of showing that there was no justification or whether the burden lies on the athlete to show that there was justification. While the authors of that text refer to "*compelling justification*", it is accepted by the Council that the Rules do not require the existence of a "*compelling justification*" but merely a "*justification*". That was explained in the letter from Beauchamps dated 30 January 2009. While the term "*compelling justification*" is now used in Article 2.3 of the 2009 version of the Rules, the word used in Article 2.3 of the 2007 version of the Rules is merely "*justification*". The Council observed in its submissions that there is not a consensus on the issue as to which party bears the burden of proof on the question of presence or absence of "*justification*" for a refusal. The Panel does, however, note the decision of CAS in ***Fazekas v IOC***[2] where the burden was found to lie on the athlete rather than on the anti-doping organisation. Having regard to the provisions of Article 3.1.1. of the Rules (2007 version), it seems to us that the correct position is not clear cut and there is some force to the suggestion that the burden of establishing that there is no "*justification*" for the failure or refusal should lie with the party seeking to establish the violation.

71. However, the Panel does not believe that it is necessary to resolve the controversy which exists as to whether the burden lies on the anti-doping organisation to disprove the existence of justification or on the athlete to prove the existence of such justification. The Panel is of the view that irrespective of whether the burden lies on the Council and/or IMAC or on Ms. IS-1517, the evidence does not

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[1] **(2nd Edition) Lewis and Taylor, Tottel Publishing 2008, page 970.**

[2] **CAS 2004/A/714 dated 31 March 2005.**

establish the existence of any sufficient "*justification*" within the meaning of that term in Article 2.3. The Panel does not believe that on the facts of this case, Ms. IS-1517 need to fulfil her work commitment did amount to a "*justification"* for refusing to provide the sample. In those circumstances, irrespective of where the burden of proof lies on that issue, the Panel is comfortably satisfied that there was no "*justification*" for the refusal.

72. In those circumstances, the Panel is satisfied that on the facts and on the law it must find that Ms. IS-1517 did commit the anti-doping violation alleged by refusing without justification to submit to sample collection after notification in breach of Article 2.3 of the Rules.

I. FINDINGS ON SANCTIONS

73. **What Sanction Should be Imposed ?**

73. It now falls to the Panel to impose an appropriate sanction in respect of the violation. Subject to a relevant amendment introduced by the 2009 version of the Rules, the applicable sanctions are set out in Article 10 of the 2007 version of the Rules.

74. Under Article 10.4.1. of the Rules, the sanction for a violation of Article 2.3 is a period of ineligibility (i.e. a ban). The relevant period or periods of ineligibility are those set out in Article 10.2. They provide that in the case of a first violation the relevant period is two years' ineligibility. In the case of a second violation, it is a lifetime period of ineligibility. However, Article 10.2 makes it clear that the athlete has the opportunity before a period of ineligibility is imposed to establish a basis for eliminating or reducing the sanction under the provisions of Article 10.5. Prior to the amendment of Article 10 by the 2009 version of the Rules, it was not open to an athlete who had been found to have violated Article 2.3 of the Rules to seek to establish that no period of ineligibility should be imposed. The only

opportunity which such an athlete had was to seek to have the period of ineligibility reduced from two years to one year and only then provided the athlete could establish that he or she bore "*no significant fault or negligence*". The 2009 version of the Rules amended the earlier version by providing the athlete with the opportunity of establishing that the period of ineligibility should be eliminated altogether (or reduced to a period of less than one year) provided that the athlete could establish that he or she bore "*no fault or negligence"* in respect of the violation.

75. The Council accepted that having regard to the provisions of Article 19.3 of the 2009 version of the Rules, it was open to the Panel to determine that Ms. IS-1517 could benefit from the new provisions in place, assuming they were less severe, notwithstanding that the events which led to the violation occurred before the new version of the Rules came into force. The Panel believes that that is correct and has determined that it is appropriate to afford Ms. IS-1517 the opportunity of establishing whether she bore "*no fault or negligence*" in respect of the violation or, in the alternative, to establish "*no significant fault or negligence"*.

76. The burden of establishing that she bore "*no fault or negligence"* or, alternatively, "*no significant fault or negligence*" for the violation lies on Ms. IS-1517. Having regard to the provisions of Article 3.1.2 of the Rules, Ms. IS-1517 must establish this on the balance of probabilities.

77. Mr. Rice drew our attention to the definition of "*no fault or negligence*" in the Rules. The term is defined in the definitions section on page 65 of the 2007 version of the Rules as follows:

> *"No fault or negligence:*
>
> *The athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected*

even with the exercise of utmost caution, that he or she had used or been administered the prohibited substance or prohibited method."

The same definition is contained in the 2009 version of the Rules.

78. The term "*no significant fault or negligence*" is defined in the Rules as follows:

> *"No significant fault or negligence:*
>
> *The athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence was not significant in relation to the anti-doping rule violation."*

Again that term is similarly defined in the 2009 version of the Rules.

79. The definition of the term "*no fault or negligence*" is given in the context of the use or administration of a prohibited substance or prohibited method. That is not what is at issue here. The definitions do not, at least, expressly cover what an athlete has to establish to demonstrate "*no fault or negligence*" or, alternatively, "*no significant fault or negligence*" in the context of a refusal to provide a sample. Mr. Rice submitted that the definition of "*no fault or negligence*" should be adapted to reflect a refusal situation so that the athlete would have to establish that he or she "*did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that she had committed the alleged violation*". Mr. Rice made this submission in light of the fact that the World Anti-Doping Agency (WADA) amended its World Anti-Doping Code to expand the circumstances in which the sanction imposed in respect of a breach of Article 2.3 could be mitigated with the establishment of "*no fault or negligence*". However, WADA did not amend the definition of "*no fault or negligence*".

80. It is unfortunate that the relevant definition has not been amended so as to expressly apply it to situations such as that before the Panel. It is possible that the definition would have been different in the case of a failure or refusal to provide a sample and that the definition may be readily applicable or adaptable to such a situation.

81. The Panel has reviewed and considered again the evidence and, in particular, the case made by Ms. IS-1517 for her refusal to supply the sample. The Panel further notes that Ms. IS-1517 was previously required to undergo sample collection by the Council (in July 2007), that she had received notification of at least one seminar or conference in relation to anti-doping matters and that she had received a copy of the Rules when notified of her inclusion in the Registered Testing Pool on 18 April 2008. The Panel further believes that it is likely that Ms. IS-1517 received the payment which Mr. Drew referred to in evidence as having been made by the IMAC to its athletes in the Registered Testing Pool in return for sending in their completed whereabouts forms. On the other hand, while not amounting to a "*justification*" within the correct meaning of that term in Article 2.3, the Panel does believe that the circumstances in which Ms. IS-1517 found herself on the evening of 8 September 2008 and the particular quandary which she faced, are relevant to the issue of sanction and, in particular, to the issue as to whether it could be said that she bore "*no fault or negligence*" or, alternatively, "*no significant fault or negligence*". The Panel also takes into account the fact that Ms. IS-1517 offered to provide the sample at her place of training at 8pm that evening. The Panel can, however, readily understand why that was not acceptable to Ms. Crosbie and Mr. Fogarty and would not have complied with the requirements for testing under the Rules or under the International Standard. However, it is a factor which the Panel believes can be taken into account in determining the appropriate sanction.

82. In all the circumstances, the Panel has formed the view that Ms. IS-1517 has just about, on the balance of probabilities, established "*no fault or negligence*" on her part. The Panel observes, however, that its decision in this regard was a very finely balanced one. On balance, therefore, the Panel accepts that Ms. IS-1517 bore "*no fault or negligence*" for the violation.

83. In those circumstances, it falls to the Panel to determine what the appropriate sanction should be in circumstances where the range of possible sanctions is between two years' ineligibility and no period of ineligibility. In all the circumstances, the Panel believes that the appropriate period of ineligibly is a period of three months.

(b) <u>Date of Commencement of Sanction</u>

84. The Panel must then consider when that ineligibility should commence. This issue is addressed in Article 10.8 of the Rules. Article 10.8 provides as follows:

> "***10.8 Commencement of Ineligibility Period***
>
> *10.8.1* *The period of ineligibility shall start on the date of the hearing decision providing for ineligibility or, if the hearing is waived, on the date ineligibility is accepted or otherwise imposed.*
>
> *10.8.2* *Any period of provisional suspension (whether imposed or voluntarily accepted) shall be credited against the total period of ineligibility to be served.*
>
> 10.8.3 *Where required by fairness, such as delays in the hearing process or other aspects of doping control not attributable to the athlete, the period of ineligibility may be started at an*

earlier date commencing as early as the date of sample collection".

85. It is noted that these provisions have been amended by Article 10.7 of the 2009 version of the Rules. However, the provisions of Article 10.8 of the 2007 version appear more favourable to the athlete and, in those circumstances, the Panel is satisfied that they are the appropriate provisions to apply.

86. Under Article 10.8.1 the period of ineligibility would commence on the date of the "*hearing decision providing for ineligibility*". The hearing commenced on 19 November 2008 and was adjourned that day before resuming and completing on 26 January, 2009. However, the "*hearing decision providing for ineligibility*" is not a term defined in the Rules. It is not clear whether it is the date of the hearing itself or, if there are a number of hearing days, the first of those days or whether it is the date on which the decision is made. Having regard to our view on the provisions of Article 10.8.3, it is not necessary to formally rule on that issue. As noted above, Article 10.8.3 provides for certain circumstances in which the Panel may decide that the period of ineligibility may be started at an earlier date, as early even as the date of sample collection. This may arise where it is required by considerations of fairness. Article 10.8.3 gives the example of where there are delays in the hearing process or other aspects of doping control which are not attributable to the athlete.

87. In this case there were some delays in the hearing process in that it was not possible to resume the hearing which had been adjourned on 19 November 2008 until 26 January 2009. The delay in resuming the hearing was not due to any fault on the part of and was not in any way attributable to, Ms. IS-1517 who was available to resume the hearing at a number of the earlier dates in December 2008. That being so, it appears to the Panel that it is appropriate to start the

period of ineligibility at a date earlier than the date of this decision or the date of the hearing on 26 January 2009.

88. Ms. IS-1517 was not provisionally suspended so there is no question of crediting any such period against the total period of ineligibility. Furthermore, Ms. IS-1517 did complete in the national championships on 13 or 14 September 2008 which was subject to the date of the violation. In fairness to Ms. IS-1517 and having regard to the delays in the resumption of the hearing (which were unavoidable and were due to the fact that it was necessary to convene a number of persons and witnesses for the resumed hearing), the Panel believes that the appropriate date on which the period of ineligibility should commence is the date of the first hearing before the Panel on 19 November 2008.

89. The period of ineligibility, therefore, which the Panel has decided is appropriate, is a period of three months dating from 19 November 2008. That period will, therefore, expire on 19 February 2009.

J. SOME CONCLUDING COMMENTS

90. We have concluded that Ms. IS-1517 did violate Article 2.3 of the Rules by refusing to submit to sample collection on 8 September 2008. Therefore, an anti-doping rule violation has been established. We have also concluded that on the evidence the appropriate sanction is a period of three months' ineligibility commencing on 19 November 2008. We were just about satisfied that Ms. IS-1517 bore "*no fault or negligence*" in respect of the violation. Our decision was, however, finely balanced.

91. The Panel believes that it is appropriate to draw attention to a number of aspects of concern generally in relation to the process which came to its attention during the course of this hearing. They are as follows:

(1) Although there is no express obligation under the Rules, or in any of the case law referred to by the Council for the DCO and/or chaperone to refer specifically to the precise consequences of a refusal to submit to sample collection, we believe that it would be appropriate if instructions were provided to the DCO / chaperone not only to inform the athlete that a failure or refusal without "*justification*" (or now, "*compelling justification*") constitutes an anti-doping rule violation which may be subject to sanctions but that the athlete should also be told that those sanctions may include a period of ineligibility or ban of up to two years. If this were done then it would be very difficult for the athlete to protest that he or she was unaware of what the consequences were of such a failure or refusal. We also believe that it would be in the interest of fairness that the athlete is informed of the possible consequences where they are so serious.

(2) The Panel has some concerns about the format and layout of the "*Doping Control Form*". This issue was addressed during the course of the hearing. The problem referred to at the hearing was that the portion of the form which is required to be signed by the athlete is potentially contradictory in the case of an athlete who has failed or refused to provide a sample. The form contains the following words:

> *"I hereby acknowledge that I have received and read this notice, and I consent to provide a sample(s) as requested. I further understand that failure to provide a sample may constitute an anti-doping rule violation".*

There is then provision for the athlete to sign the form just under those words.

The words quoted above appear to cover two situations. The first is where the athlete has consented to provide a sample and the second is where the athlete fails (or refuses) to provide a sample. By signing underneath those words, the athlete appears to be accepting both situations. While it may be possible to consent to provide a sample and then to be unable to provide a sample (thereby perhaps failing to provide that sample), in most cases, the form would appear to be intended to cover two conflicting situations, one of agreement to provide the sample and, the other, of a failure or refusal to do so. We would suggest that in the interest of clarity the form be restructured so as to provide a separate place for the athlete who is failing or refusing to provide the sample to sign his or her name. That would then make it clear what the athlete was signing and would avoid the sort of debate that occurred during the course of this case.

(3) The final area of concern to the Panel arises from the fact that under Article 8.4.3 of the 2007 version of the Rules, it is the national governing body of the athlete concerned or its international federation which presents the case against the athlete before the Panel. In this case the Rules, therefore, required the IMAC to present the case against Ms. IS-1517. It was not until the resumed hearing that the Council appeared as a party to the proceedings. The Council attended the previous hearing in November 2008 as an observer only. It was not in a position to and did not present or assist in the presentation the case against the athlete at that stage. Once it became a party, it did assist in the presentation of the case at the resumed hearing. The Panel is concerned that national governing bodies may not be in a position, whether due to the absence of resources or otherwise, to properly present a case against an athlete. The Panel does not in any

way intend by this comment to criticise the manner in which the case was presented by the IMAC at the original or resumed hearing. These are comments which apply generally and not just to this particular case. The Panel would have preferred that under the version of the Rules under which the Panel was operating, the case was presented by or with the assistance of the Council. It was drawn to the Panel's attention during the course of the hearing that under the 2009 version of the Rules, the Council is permitted to assist the national governing body in the presentation of the case against the athlete by agreement between the relevant national governing body and the Council (Article 8.4.2 of the 2009 version of the Rules). That is a welcome amendment. The Panel would urge that careful consideration be given by the Council to all cases referred to the Panel as to whether the Council should assist the national governing body in presenting the case.

92. Finally, the Panel would like to thank its Secretary, Ms. June Menton, for her hard work and assistance in relation to these proceedings. The Panel would also like to thank the parties and participants in the proceedings for their assistance.

Dated the ___ day of February 2009

Signed on behalf of the Panel by

David Barniville S.C.

Chairman