



Arbitration CAS 2016/O/4683 International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation (ARAF) & Andrey Krivov, award of 22 June 2017

Panel: Mr Lars Halgreen (Denmark), Sole Arbitrator

Athletics (race-walking)

Doping (blood doping)

CAS jurisdiction under IAAF Rule 38.3

Applicable law

Establishment of the violation of “use” of a prohibited method

Determination of the period of ineligibility based on aggravating circumstances

Disqualification of results in light of the fairness exception

1. As a consequence of the suspension of its membership, the ARAF is not in a position to conduct a hearing process in an athlete’s case by way of the delegated authority from the IAAF pursuant to Rule 38 of the 2016 IAAF Rules. In these circumstances, it is plainly not necessary for the IAAF to impose any deadline on the ARAF for that purpose. Consequently, if the athlete is an International-Level Athlete in accordance with IAAF Rules, and the ARAF is indeed prevented from conducting a hearing in the athlete’s case within the deadline set by Rule 38.3 of the IAAF Rules, therefore, the IAAF is permitted to refer the matter directly to a Sole Arbitrator appointed by CAS subject to an appeal to CAS in accordance with Rule 42 of the IAAF Rules.
2. Pursuant to the legal principle of *tempus regit actum*, any procedural matters are governed by the regulations in force at the time of the procedural act in question, whereas the substantive issues are governed by the IAAF Rules in force at the time of the alleged violation.
3. According to Rule 33 IAAF Rules, the IAAF has the burden to establish the occurrence of an anti-doping rule violation. It is specifically stated that facts related to Anti-Doping Rule Violations may be established “by any reliable means” including, but not limited to, conclusions drawn from longitudinal profiling such as the athlete’s biological passport (ABP) and other analytical information. The ABP has been generally accepted as a reliable means of evidence to assist in establishing Anti-Doping Rule Violations. Furthermore, evidence such as an Expert Panel’s unanimous opinions can convincingly establish that the athlete engaged in blood doping practices throughout a subsequent period. Finally, the establishment of the fact that the athlete generally had high levels of haemoglobin (HGB) on the eve of competitions, whereas his base level of HGB appeared to be much lower as shown by the samples taken, when the athlete was not competing is relevant.
4. The fact for an athlete to be involved over a substantial period (almost five years) in

both multiple doping offences as well as a doping scheme or plan constitutes aggravating circumstances pursuant to article 40.6 IAAF Rules justifying an increased suspension compared to the standard suspension of 2 years.

5. The question of fairness and proportionality of Rule 40.8 of the 2008 IAAF Rules providing for automatic disqualification of results has been discussed in light of the length of the disqualification period vis-à-vis the time which may be established as the last time that the athlete objectively committed a doping offence according to the ABP. Under these circumstances, it may be unfair and disproportionate, if the disqualification period was extended all the way through the commencement of the provisional suspension especially where there is no clear evidence that the athlete was using doping after the last sample collection establishing doping. On that basis there would be no legal grounds to extend the disqualification for an additional period, such additional period of time being mainly caused by the duration of the IAAF investigations and procedures.

I. THE PARTIES

1. The International Association of Athletics Federations (hereinafter referred to as the “Claimant” or the “IAAF”) is the world governing body for the sport of athletics established as an association under the laws of Monaco. The IAAF has its registered seat in Monaco.
2. The All Russia Athletics Federation (hereinafter referred to as the “First Respondent” or the “ARAF”) is the national governing body for the sport of athletics in the Russian Federation, with its registered seat in Moscow. The ARAF is the relevant member federation of the IAAF for Russia, currently suspended from membership.
3. Mr Andrey Krivov (hereinafter referred to as the “Second Respondent” or the “Athlete”) is a Russian athlete born 14 November 1985, specialising in race walking and participating in IAAF World Race Walking Cups, World Athletics Championships and Olympic Games. The Athlete is an International-Level Athlete for the purposes of the IAAF competition rules (hereinafter referred to as the “IAAF Rules”).
4. The Claimant, the First Respondent and the Second Respondent together shall herein-after be referred to as the “Parties”.

II. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts as established on the basis of the Parties written or oral submissions and the evidence as presented during the course of the present arbitration proceedings and during the hearing. This background is set out for the sole purpose of

providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion that follows below. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

6. The Athlete has been charged with violating IAAF Rule 32.2(b) – *Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method* – based on a longitudinal analysis of his Athlete Biological Passport (hereinafter referred to as the “ABP”) and allegedly involves prohibited blood doping during the period from May 2011 until October 2013.
7. Blood doping is defined by the World Anti-Doping Agency (hereinafter referred to as “WADA”) as “*the misuse of certain techniques and/or substances to increase one’s red blood cell mass, which allows the body to transport more oxygen to muscles and therefore increase stamina and performance*”, (see WADA Questions and Answers on the Athlete Biological Passport).
8. From 14 August 2009 until 15 October 2015, the IAAF collected 24 ABP blood samples from the Athlete. Each of the samples was analysed by a laboratory accredited by WADA and logged in the Anti-Doping Administration & Management System (“ADAMS”) using the so-called “Adaptive Model”, which is the statistical model that calculates, whether the reported haemoglobin concentration (“HGB”), and the percentage of immature red blood cells viz. reticulocytes (“RET%”) and the so-called “OFF-score”, which is a combination of HGB and RET% values, fall within an athlete’s expected distribution.
9. Thus, the ABP consists of an electronic record that compiles and collates a specific athlete’s test results and other data over time and is unique to that particular athlete. The haematological model of the ABP records the value in an athlete’s blood sample of haematological parameters that are known to be sensible to change in red blood cell production.
10. In the testing period from August 2009 to October 2015, the registered values for HGB, RET% and OFF-score in the Athlete’s respective 24 samples were as follows:

No.	Date of Sample	HGB (g/dL)	RET%	OFF-score
1.	14 August 2009	14.60	0.84	91.00
2.	26 July 2010	14.30	0.70	92.80
3.	25 February 2011	15.20	1.30	83.60
4.	10 April 2011	14.20	1.39	71.30
5.	20 May 2011	16.00	1.35	90.29
6.	16 July 2011	14.50	0.74	93.40
7.	18 October 2011	14.70	1.31	78.30
8.	17 January 2012	14.70	1.08	84.60
9.	14 April 2012	15.30	1.34	83.50
10.	11 May 2012	16.90	0.63	121.40
11.	03 August 2012	14.90	0.84	94.00
12.	10 October 2012	14.10	1.43	69.30

13.	16 October 2012	14.80	1.33	78.80
14.	21 November 2012	16.10	1.16	96.40
15.	09 December 2012	15.50	0.80	101.30
16.	21 December 2012	14.90	0.77	96.40
17.	18 January 2013 ¹⁵	15.5	0.98	95.60
18.	12 April 2013	14.80	1.43	76.30
19.	11 May 2013	14.70	0.89	90.40
20.	06 July 2013	16.80	1.09	105.40
21.	11 October 2013	15.10	2.01	65.90
22.	22 April 2014	14.10	1.02	80.40
23.	14 December 2014	14.10	1.20	75.30
24.	15 October 2015	14.00	1.37	69.80
¹⁵	Sample 17 was invalidated as the timeframe for the analysis exceeded the prescribed 48 hours			

11. In accordance with IAAF procedures, the Athlete’s ABP was submitted to a panel of experts for an initial review on an anonymous basis. Such panel was comprised of three experts, prof. York Olaf Schumacher, prof. Giuseppe d’Onofrio, prof. Michel Audran (hereinafter referred to as “the Expert Panel”), who each in their own right possessed expert knowledge in the field of clinical haematology (diagnosis of blood pathological conditions), laboratory medicine, and haematology (assessment of quality control data, analytical and biological variability and instrument calibration) and sports medicine and exercise physiology.
12. The Expert Panel examined the Athlete’s ABP, which was identified with the code “BPG289I26”, and the identity of the Athlete was anonymised. The Expert Panel produced a joint expert opinion dated 18 February 2016, which reads as follows:

“Conc.: Evaluation of Blood Profile PBG289I26 – Joint expert opinion

Dear colleague,

In accordance with paragraph 8.29 of the IAAF Anti-Doping Regulations, this letter constitutes the joint evaluation of the Expert Panel in the above referenced case. Access to the profile coded PBG289I26 was provided in ADAMS. Each of us had previously evaluated the profile individually and delivered an independent initial review. Furthermore, for the purpose of this joint evaluation, we have reviewed the following documents, available in pdf format:

- *the ABP profile summary*
- *the full documentation packages (LPDs) of samples 2,5,6,9,10,18,20,21 and 22*
- *the certificate of analysis (CA) of samples 1,3,4,6,7,8,11,12,13,14,15,16,17,19, 23 and 24*
- *the competition schedule of the athlete.*

The profile includes 23 valid samples obtained from a male athlete in the years 2009-2015. Sample 17 (18/10/2013) was invalidated as the analysis exceeded the delay of 48 hours.

In the automated analysis by the adaptive model, which determines whether fluctuations in the biomarkers of the Athlete Biological Passport are within the expected individual reference ranges for an athlete or not, the profile was flagged five times with a specificity level set at 99.0%:

- *twice for high haemoglobin (HB) values: samples 10 and 20*
- *once for a high OFF-score (OFFs) value: sample 10*
- *once for a low OFFs: sample 21*
- *once for a high % reticulocytes (RET%) value: sample 21*

The probability of sequence abnormality is above 99.9% for HB, and OFFs.

All samples were scrutinized for their analytical details outlined in the documentation packages and certificates of analysis. There is no indication that any analytical or pre-analytical issues in these samples might have influenced the results in a way that would explain the abnormalities in the profile or influence the analytical result to the disadvantage of the athlete.

Hematological evaluation

The main abnormalities in this blood profile reside in samples 10.

Sample 10 shows high HB, 169 g/l, and OFFS, 121.4, values, well above the corresponding upper individual reference limits. High HB and high OFFS values are characteristic of a “OFF-phase” of blood manipulation where, because an unphysiological increase of the red cell mass (high HB), a down regulation of erythropoiesis (decrease of reticulocytes and in consequence, increase of the OFFs) is observed (1). Sample 10 was taken one day before an international race in Saransk.

Interestingly, a similar feature, although less pronounced in terms of OFFS, is visible in samples 5, and 20. Like sample 10, samples 5 and 20 are very close to competitions. The use of a hypoxic device (Gipotent) is mentioned in the blood sampling form of sample 20. Some studies have documented that the hypoxia of altitude can cause changes in markers of the athlete biological passport (2). However, the magnitude of such changes is generally small and cannot explain the HB increase, 19 g/l (13.6%), between samples 19 and 20 (3). Excepted for the samples mentioned above, HB is very stable, around 145 g/l. Moreover, the three tests carried out in 2014 and 2015 (samples 22, 23 and 24) show a constant HB of 140-141.

Conclusion

Based on these facts and the information available to date, it is our unanimous opinion that, in the absence of an appropriate physiological explanation, the likelihood of the abnormalities described above being due to blood manipulation, namely the artificial increase of red cell mass using for example blood transfusions and/or erythropoietic agents, is high. On the contrary, the likelihood of environmental factors or a medical condition causing the described pattern is extremely low.

We therefore conclude that it is highly likely that a prohibited substance or prohibited method has been used that it is unlikely that the passport is the result of any other cause.

We remain at your disposal for any further questions you might have.

Sincerely yours,

By alphabetical order

Michal Audran

[signature]

Giuseppe d'Onofrio

[signature]

York Olaf Schumacher

[signature]".

13. Based on the conclusion of the Expert Panel in the joint expert opinion, the IAAF Anti-Doping Administrator wrote to the Athlete on 24 February 2016 to report the abnormalities detected in his ABP profile. In the letter, the IAAF advised the Athlete that the IAAF was considering bringing charges against him, but that such charges would not be brought until he had been given the opportunity to provide an explanation for the alleged abnormalities. A deadline of 9 March 2016 was granted for the Athlete to provide any explanations.
14. On 3 March 2016, the Athlete sent an email to the IAAF providing the following explanation for his ABP profile:
"Now, I can suggest that the Adverse Passport Finding could be caused by the long training camps in the Midlands, experienced illnesses, by using hypoxic tents or others [sic] different factors that could have an effect on blood count".
15. On 24 March 2016, the Expert Panel issued a second joint report that considered and dismissed the Athlete's explanation. The report reads as follows:
"Conc.: Blood Profile PBG289I26 – EVALUATION OF THE ATHLETE'S ARGUMENTS"
Dear colleague,
With an email dated 17.3.2016, we were asked to comment on the justifications provided by the athlete regarding his blood profile (BPG289I26), according to the IAAF Anti-Doping regulations and ABP guidelines. The explanations of the athlete were available as a written anonymized translation, dated 3-3-2016.
We refer to our previous evaluations, dated 8-2-2016, for the abnormalities observed in the profile. In Brief, the key abnormality was a typical OFF picture (high hemoglobin of 16.9 g/dl and high OFF score of 121, above the ABP upper individual limits), observed in sample 10 (11-5-2012) one day before an international race in Saransk. Similar features were visible in samples 5 (20-5-2011) and 20 (6-7-2013), very close to other competitions.
In the majority of the other remaining tests, and in particular in the ones performed in 2014 and 2015, the athlete displayed hemoglobin values of 14.0-14.1 g/dl, normal for an adult male. We therefore concluded that the profile was typical for blood manipulation by displaying features of supraphysiologically increased red cell mass.

In this statement, the athlete claims that he is unable to provide a full explanation of such abnormalities, and suggest that they could have been caused by long training camps, illnesses, hypoxic tent and “other different factors”. He does not provide details about the duration and intensity of any of such hypothetical confounding factors.

Hematological evaluation

The effect of training, even intensive, on the blood count, has been extensively studied and a host of data confirms that training induces in the first weeks a compensatory expansion of plasma, the liquid fraction of blood, with relative decrease of hemoglobin (followed in the subsequent weeks by normalization of the blood picture [1]. Training can thus be excluded as a cause of increased hemoglobin and increased OFF score, as those seen in sample 10 in this profile.

Moreover, as anticipated in our first Joint Report, changes in ABP possibly ascribable to artificial hypoxia are very small, and cannot explain the magnitude of the hemoglobin variation observed in this profile [2-6].

A possible hematologic effect of intervening disease, finally, is very unlikely, because:

- 1) The Athlete was training and racing very near the time of collection of the more suspicious samples,*
- 2) Only rare and irreversible congenital disorders can produce an increase in hemoglobin and in the OFF score similar to those observed in the more suspicious samples.*

Conclusion

In summary, the generic arguments forwarded by the athlete cannot explain the hematological abnormalities in his ABP profile and can be dismissed. In contrast to the explanations provided by the athlete, it is typical to observe features such as seen in the profile assuming blood manipulation, notably an artificial increase in the red blood mass.

Considering the information available at this stage, we therefore confirm our previous opinion that this profile is highly suspicious for blood manipulation. It is highly unlikely that it is the result of a normal physiological or pathological condition, and it is highly likely that it was caused by the use of prohibited substances or prohibited methods.

We remain at your disposal for any further questions you might have.

Sincerely yours,

[signature]

M. Audran

[signature]

G. d’Onofrio

[signature]

Y.O. Schumacher”.

16. On 12 April 2016, the IAAF notified the Athlete of the alleged anti-doping rule violation, his immediate provisional suspension and of his right to request a hearing within 14 days of the notification.

17. On 10 May 2016, having not received any response from the Athlete, the IAAF Anti-Doping Administrator wrote another letter to the Athlete. In the new letter, the IAAF advised the Athlete that his case would be referred to the Court of Arbitration for Sport (the “CAS”) in Lausanne, Switzerland, in view of the suspension of the ARAF membership of the IAAF.
18. The IAAF offered the Athlete to choose between the following two procedures: His case could either be referred to a Sole Arbitrator appointed by the CAS with the possibility of a further appeal against such Sole Arbitrator’s decision pursuant to IAAF Rule 38.3 or, subject to the content of all relevant parties, to a CAS Panel for a single hearing with no right of appeal pursuant to IAAF Rule 38.19. The Athlete was given a deadline of 22 May 2016 to state his preference.
19. The IAAF never received a response from the Athlete to its letter of 10 May 2016.

III. PROCEEDINGS BEFORE THE CAS

20. On 23 June 2016, the IAAF filed a Request for Arbitration with CAS in accordance with Article R38 of the Code of Sport-related Arbitration (2016 edition) (the “CAS Code”).
21. The IAAF informed CAS that its Request for Arbitration was to be considered as its Statement of Appeal and Appeal Brief and requested the matter to be submitted to a Sole Arbitrator.
22. On 30 June 2016, the CAS Court Office initiated the present arbitration and noted the Claimant’s request for this matter to be heard by the CAS as a first instance body, but that in doing so the provisions applicable to the CAS Appeals Arbitration Division (Article R47 *et seq.* of the CAS Code) should apply accordingly and pursuant to Article S20 of the CAS Code. The present arbitration was assigned to the Ordinary Arbitration Division of the CAS, but would be dealt with according to the Appeals Arbitration Division Rules (Articles R 47 *et seq.* of the CAS Code). In its letter to the Parties, CAS further invited the Respondents to submit their answers within 30 days of receipt of the letter by courier.
23. On 14 July 2016, Mr Lars Halgreen, Attorney-at-law, Copenhagen, Denmark, was appointed by the CAS as the Sole Arbitrator in this matter.
24. On 15 August 2016, the CAS Court Office communicated to the Parties that the deadline set out in the letter 30 June 2016 had expired on 3 August 2016. To date, the CAS Court Office had not received the Respondents’ Answers to the Request for Arbitration or any other communication from the Respondents in this regard.
25. On 5 September 2016, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a hearing in this matter, which was to be held in Lausanne. For the sake of limiting the arbitral costs in these procedure, the Sole Arbitrator had proposed that the hearing be held on the same day as – albeit separately from – the hearing in the procedure CAS 2016/O/4682.

26. On 17 October 2016, the CAS Court Office forwarded an Order of Procedure to the Parties, which was duly signed by the First Respondent on 20 October 2016 and by the Claimant on 24 October 2016. The Second Respondent has not signed the Order of Procedure.
27. On 9 November 2016, the CAS Court Office informed the Parties that due to compelling reasons, the Sole Arbitrator was not in a position to hold the hearing on 30 November 2016, but he proposed that the hearing be rescheduled to 7 December 2016.
28. On 7 December 2016, a hearing was held at the CAS in Lausanne, Switzerland. In addition to the Sole Arbitrator, Ms Andrea Zimmermann, Counsel to the CAS, was present at the hearing.
29. Mr Ross Wenzel, Counsel, represented the IAAF, but no representatives of the First Respondent or the Second Respondent were present at the hearing.
30. The Sole Arbitrator asked at the outset of the hearing the IAAF to confirm that it had no objection to the constitution and composition of the arbitral tribunal, and the IAAF made such confirmation.
31. The Sole Arbitrator heard evidence via video conference by Prof. Giuseppe d'Onofrio, expert haematologist, and Dr. York Olaf Schumacher, expert in sports medicine.
32. Both expert witnesses were invited by the Sole Arbitrator to tell the truth subject to the sanctions of perjury under Swiss law. The IAAF and the Sole Arbitrator had the opportunity to examine and pose questions to the expert witnesses.
33. After the expert witnesses had testified, the IAAF was afforded ample opportunity to present its case, submit its arguments and answer the questions posed by the Sole Arbitrator.
34. At the end of the hearing, the IAAF expressly stated that it had no objections with the procedure of these proceedings and that its right to be heard had been respected.

IV. SUBMISSIONS OF THE PARTIES

A. The position of the IAAF

35. In its Request for Arbitration, the IAAF made the following requests for relief:
 - i) *“CAS has jurisdiction to decide on the subject matter of this dispute;*
 - ii) *The request for arbitration of the IAAF is admissible.*
 - iii) *The Athlete be found guilty of an Anti-Doping Rule Violation in accordance with Rule 32.2(b) of the IAAF Rules.*
 - iv) *A period of ineligibility of between two and four years be imposed on the Athlete, commencing on the date of the (final) CAS Award. Any period of ineligibility or provisional suspension effectively served*

by the Athlete before the entry into force of the CAS Award shall be credited against a total period of ineligibility to be served.

- v) All competitive results obtained by the Athlete from 20 May 2011 through to the commencement of his provisional suspension on 12 April 2016, shall be disqualified, with all resulting consequences (including forfeiture of any titles, awards, medals, profits, prizes, and appearance money).*
- vi) The arbitration cost be borne entirely by the Respondents.*
- vii) The IAAF is awarded a contribution to its legal costs”.*

36. The IAAF’s submissions in support of its requests for relief may, in essence, be summarised as follows:

- The Athlete’s ABP profile constitutes clear evidence that the Athlete has committed an Anti-Doping Rule Violation in breach of Rule 32.2(b) as follows:
 - i. The ABP sequence is abnormal for HGB and OFF-score with a probability in excess of 99.9 %; the sequence is abnormal for RET% with a probability in excess of 99.9 %.
 - ii. The Athlete’s ABP profile contains individual “outliners” for all three blood markers. An outlier on the upper or lower limit is abnormal with a probability of 99.9 % (i.e. 1 in 10,000) and an outlier over or under the limit is abnormal with an even higher degree of certainty.
 - iii. Sample 10 from 11 May 2012 is a clear example of an OFF-phase. HGB is 16.9 g/dL and RET% is only 0.63%, producing a high OFF-score of 121.40 as explained by the Expert Panel, these values are symptomatic of the use and discontinuation of an ESA in order to boost artificially red cell mass during competition. Unsurprisingly, this sample was taken on the eve of an international competition.
 - iv. The three highest HGB values all occur in close proximity to major competition:
 - Sample 5 – HGB 16.0 – taken one day before the Athlete competed in the European Race Walking Cup in Olhão (Portugal).
 - Sample 10 – HGB 16.9 – taken one day before the Athlete finished second the IAAF World Race Walking Cup in Saransk (Russia).
 - Sample 20 – HGB 16.8 – taken 3 days before the Athlete won the men’s 20km event at the Universiade in Kazan (Russia).
- In view of the foregoing, and in particular, on the basis of the opinions of the Expert Panel, the IAAF submits that the ABP profile of the Athlete constitutes reliable evidence of blood doping, in particular the period from 2011 - 2013.
- With respect to the period of eligibility, the IAAF submits that the Sole Arbitrator may impose a sanction of up to four-year ineligibility on the Athlete in accordance with the Rules 40.2 and 40.6 of the 2012 IAAF Rules.
- In particular, the IAAF maintains that aggravating circumstances pursuant to Rule 40.6 of the 2012 IAAF Rules may be applied, as the evidence indicates that the Athlete (i)

used a Prohibited Substance or a Prohibited Method on multiple occasions, and (ii) engaged in a doping plan or scheme.

- In view of the CAS Jurisprudence in cases concerning aggravating circumstances, the IAAF submits that, in view of the doping plan or scheme and repeated indications of blood doping by the Athlete, the Sole Arbitrator should impose a period at the very upper end of the two – four-year spectrum.
- In accordance with Rule 40.10 of the 2012 IAAF Rules, the IAAF submits that the period of ineligibility should commence on the date of the (final) CAS Award.
- With respect to disqualification, the IAAF is willing to consider that the date of sample no. 5 (20 May 2011) is the date of the first violation. This means that the 2012 IAAF Rules provides for the automatic disqualification of all results from this date of the anti-doping rule violation through the commencement of any period of provisional suspension.
- Moreover, the IAAF submits that the “fairness exception”, which had been included in the 2008 IAAF Rules, was removed from all versions of the IAAF Rules from 2009 to 31 December 2014. Therefore, the applicable 2012 IAAF Rules do not include the “fairness exception” to be applied in this case.
- However, under the principle of *lex mitior* the Athlete’s sanction may be determined in accordance with the current IAAF Rules (i.e. the 2016 IAAF Rules). Thus, Rule 40.9 of the 2016 IAAF Rules provides that subsequent results shall be disqualified “unless fairness requires otherwise”.
- The IAAF submits, however, that if the Athlete were on the basis of *lex mitior* to seek to avail himself of the fairness exception in the 2016 IAAF Rules, he would have to accept that his pre-2015 Anti-Doping Rule Violations were entirely, as opposed to only partially, under the 2016 IAAF Rules. The IAAF hereby rejects the notion of “mix-and-match” the rules and sanctions to the benefit of the Athlete.
- The IAAF points out that both the European Court of Human Rights and the Swiss Federal Tribunal have ruled that an athlete cannot combine two laws and applying parts of one and parts of another, whenever it would be more convenient.
- Should the Athlete elect to be sanctioned entirely pursuant to the 2016 IAAF Rules, it is his choice, but in that case the IAAF submits that he should necessarily suffer a four-year period of ineligibility in respect of his pre-2015 Anti-Doping Rule Violations.
- In this context, the IAAF points out that Rule 40.2(a)(i) stipulates that the Athlete has to establish that the Anti-Doping Rule Violation was not intentional to avoid a sanction of four years of ineligibility. It is uncontroversial to assert that blood manipulation is indeed an intentional form of doping, and the Athlete has made no arguments that the violations, if established, would not be intentional.
- In view of the foregoing and unless the Athlete accepts that his Anti-Doping Rule Violations may be sanctioned entirely in accordance with the 2016 IAAF Rules, the IAAF submits that all his results from 20 May 2011 until his provisional suspension on

12 April 2016 shall be disqualified together with the forfeiture of any money, medals, prize money, and appearance money.

B. The position of the First and Second Respondents

37. Although duly invited by the CAS Court Office, neither the ARAF, nor the Athlete did submit any position on the merits in these proceedings.

V. LEGAL ANALYSIS

A. Jurisdiction

38. The IAAF submits that the jurisdiction of CAS in these proceedings derives from Rule 38.3 of the 2016-2017 IAAF Rules, which were effective as from 1 November 2015.

39. Rule 38.3 of the 2016 IAAF Rules provides as follows:

“If a hearing is requested by an Athlete, it shall be convened without delay, and the hearing completed within two months of the date of notification of the Athlete’s request to the member. Members shall keep the IAAF fully informed as to the status of all cases pending hearing and of all hearing dates, as soon as they are fixed. The IAAF shall have the right to attend all hearings as an observer. However, the IAAF attendance at a hearing, or any other involvement in a case, shall not affect its right to appeal its Member’s decision to CAS pursuant to Rule 42. If the Member fails to complete a hearing within two months, or, if having completed a hearing, fails to render a decision within a reasonably time period thereafter, the IAAF may impose a deadline for such event. If in either case the deadline is not met, the IAAF may elect, if the Athlete is an International-Level Athlete, to have the case referred directly to a Single Arbitrator appointed by CAS. The case shall be handled in accordance with CAS rules (those applicable to the appeal arbitration procedure without reference to any time limit for appeal). The hearing shall proceed at the responsibility and expense of the Member, and the decision of the Single Arbitrator shall be subject to appeal to CAS in accordance with Rule 42. A failure of the Member to hold a hearing for an Athlete within two months under this Rule, may further result in the imposition of a sanction under Rule 45”.

40. At the time of the IAAF letter to the Athlete dated 24 February 2016, the suspension of ARAF membership of the IAAF had been confirmed on the occasion of the IAAF Council meeting in Monaco on 26 November 2015. On 17 June 2016, the IAAF Council decided that the ARAF had not met the conditions for reinstatement to membership, and the suspension therefore remains in place.

41. As a consequence of the suspension of its membership, the ARAF was (and is) not a position to conduct the hearing process in the Athlete’s case by way of the delegated authority from the IAAF pursuant to Rule 38 of the 2016 IAAF Rules. In these circumstances, it is plainly not necessary for the IAAF to impose any deadline on the ARAF for that purpose.

42. Consequently, the Sole Arbitrator notes that the Athlete is an International-Level Athlete in accordance with IAAF Rules, and the ARAF is indeed prevented from conducting a hearing

in the Athlete's case within the deadline set by Rule 38.3 of the IAAF Rules. Therefore, the Sole Arbitrator confirms that the IAAF has been permitted to refer the matter directly to a Sole Arbitrator appointed by CAS subject to an appeal to CAS in accordance with Rule 42 of the IAAF Rules. The IAAF and the ARAF also confirmed the jurisdiction of CAS based on this rule by having signed the Order of Procedure.

43. Hence, it follows that CAS has jurisdiction to adjudicate and decide on the present matter, and that the present case shall be dealt with according to the Appeals Arbitration Rules in the CAS Code.

B. Applicable Law

44. Article R58 of the CAS Code provides the following:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the Parties, or in the absence of such a choice, according to the law of the country, in which the federation, association, or sports-related body, which has issued the challenged decision, is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

45. Rule 42.23 of the 2016 IAAF Rules states as follows:

"In all CAS appeals involving the IAAF and CAS, the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (the Anti-Doping Regulations)".

46. Rule 42.24 of the 2016 IAAF Rules further provides as follows:

"In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitration shall be conducted in English, unless the Parties agree otherwise".

47. Rule 30.1 of the 2016 IAAF Rules states as follows:

"The Anti-Doping Rules shall apply to the IAAF, its Members, and Area Associations and to Athletes, Athletes' Support Personnel and Other Persons, who participate in the activities or Competitions of the IAAF, its Members and Area Associations by virtue of their agreement, membership, affiliation, authorisation, or accreditation".

48. With respect to the applicable law in these proceedings, the IAAF submits that the procedural aspects shall be subject to the 2016-2017 edition of the IAAF Rules and the substantive aspects of the asserted Anti-Doping Rules Violation shall be governed by the 2012-2013 edition of the IAAF Rules, being in force at the time of the alleged violations, and subject to the possible application of the principle of *lex mitior*. To the extent that IAAF Rules do not deal with the relevant issue, Monegasque law shall apply (on a subsidiarily basis) to such issue. Neither Respondents put forward any specific position in respect of the applicable law. Hence, the Sole Arbitrator observes that it is not disputed that the proceedings are primarily governed by the IAAF Rules.

49. The IAAF submits that the Athlete's ABP is evidence of Anti-Doping Rules Violations

occurring from 2011 – 2013, and the IAAF Rules in force at that period were the same, in all material aspects, with respect to violations and sanctions.

50. Pursuant to the legal principle of *tempus regit actum*, the Sole Arbitrator is therefore satisfied that any procedural matters are governed by the regulations in force at the time of the procedural act in question. As such, whereas the substantive issues are governed by the 2012-2013 edition of the IAAF Rules, procedural matters are governed by the 2016-2017 version of the IAAF Rules.

C. The Merits

51. The main issues to be resolved by the Sole Arbitrator in these proceedings are:

Question 1

Did the Athlete violate Rule 32.2(b) of the 2012-2013 IAAF Rules?

Question 2

If so, what sanctions shall be imposed on the Athlete?

a) *Analysing Question 1*

52. The Sole Arbitrator observes that the following general regulatory framework is relevant as to the merits of the case at hand.
53. The relevant parts of Rule 32 of the 2012-2013 IAAF Rules read as follows:

"RULE 32 Anti-Doping Rule Violation

1. *Doping is defined as the occurrence of one or more of the anti-doping rule violations set out in Rule 32.2 of these Anti-Doping Rules.*
2. *Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List. The following constitute anti-doping rule violations:*
3. *[...]*
 - (b) *Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method.*
 - (i) *it is Each Athlete's personal duty to ensure that no Prohibited Substance enters his body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.*
 - (ii) *the success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used, or Attempted to be Used, for an anti-doping rule violation to be committed".*

54. Rules 33 (1), (2), and (3) of the 2012-2013 IAAF Rules read as follows:

“RULE 33 Proof of Doping

- 1. The IAAF, Member or other prosecuting authority shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the IAAF, Member or other prosecuting authority has established an anti-doping rule violation to the comfortable satisfaction of the relevant hearing panel, bearing in mind the seriousness of the allegation which is made. The standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.*
- 2. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Rules 40.4 (Specified Substances) and 40.6 (aggravating circumstances) where the Athlete must satisfy a higher burden of proof.*

Methods of Establishing Facts and Presumptions

- 3. Facts related to anti-doping rule violations may be established by any reliable means, including but not limited to admissions, evidence of third Persons, witness statements, expert reports, documentary evidence, conclusions drawn from longitudinal profiling such as the Athlete’s Biological Passport and other analytical information”.*

55. The Sole Arbitrator has noted that the IAAF in its attempt to establish an Anti-Doping Rule Violation on the Athlete under the IAAF Rule 32.2(b) relies on the conclusion drawn from longitudinal profiling as shown by the Athlete’s ABP.

56. In particular, the IAAF focuses on the abnormal sequence in HGB and OFF-score values in the Athlete’s ABP with a probability in excess of 99.9 %, which findings are supported by the joint expert opinion of 18 February 2016 provided by the Expert Panel.

57. The following conclusion was thus reached by the Expert Panel:

“Based on these facts and the information available to date, it is our unanimous opinion that, in the absence of an appropriate physiological explanation, the likelihood of the abnormalities described above being due to blood manipulation, namely the artificial increase of red cell mass using for example blood transfusions and/or erythropoietic agents, is high. On the contrary, the likelihood of environmental factors or a medical condition causing the described pattern is extremely low.

We therefore conclude that it is highly likely that a prohibited substance or prohibited method has been used that it is unlikely that the passport is the result of any other cause”.

58. Again, on 24 March 2016, in response to the Athlete’s explaining the abnormalities in his ABP profile, the Expert Panel dismissed the Athlete’s explanation and confirmed its previous joint expert opinion and determined unanimously that:

“Considering the information available at this stage, we therefore confirm our previous opinion that this profile is highly suspicious for blood manipulation. It is highly unlikely that it is the result of a normal physiological

or pathological condition, and it is highly likely that it was caused by the use of prohibited substances or prohibited methods”.

59. As pointed out above, Rule 33 of the 2012-2013 IAAF Rules outline the methods, by which the IAAF may establish facts and presumptions as proof that an Athlete has committed an Anti-Doping Rule Violation. It is specifically stated that facts related to Anti-Doping Rule Violations may be established “*by any reliable means including, but not limited to, ... conclusions drawn from longitudinal profiling such as the Athlete’s biological passport and other analytical information*”.
60. In the present proceedings, neither the ARAF, nor the Athlete has submitted any claims, arguments, or evidence at all. For that very reason, none of the Respondents have expressed a general or specific doubt regarding the reliability of the ABP or the findings in the 24 samples submitted in the period from 2011 to 2015.
61. Although, the Respondents have decided not to participate in these proceedings, it is nevertheless the duty of the Sole Arbitrator to ensure that the IAAF has fulfilled its burden of proof pursuant to Rules 33 (1), (2), and (3) of 2012-2013 IAAF Rules.
62. Firstly, the Sole Arbitrator observes that the ABP has been generally accepted as a reliable and accepted means of evidence to assist in establishing Anti-Doping Rule Violations. This has been confirmed in a number of CAS cases relating to blood doping, see e.g. CAS 2010/A/2174, para 9.8, CAS 2016/O/4469, para 137, and CAS 2016/O/4463, para 90.
63. Secondly, after having evaluated the evidence brought forward by the IAAF in these proceedings, in particular the Expert Panel’s unanimous opinions referred to above, the Sole Arbitrator finds it to be convincingly established by the IAAF that the Athlete engaged in blood doping practices throughout the period from 2011 - 2013.
64. Thirdly, the Sole Arbitrator is satisfactorily convinced that the Athlete generally had high levels of HGB in close proximity to major competitions, whereas his base level of HGB appeared to be much lower as shown by the samples taken, when the Athlete was not competing.
65. Against this background, the Sole Arbitrator finds that the IAAF successfully has established that the Athlete has violated Rule 32.2 (b) of the 2012-2013 IAAF Rules.

b) Analysing Question 2

66. Having established that the Athlete has committed an Anti-Doping Rule Violation pursuant to Rule 32.2(b) of the 2012 IAAF Rules, the Sole Arbitrator will now deal with the issue of sanctions in particular (a) the period of ineligibility and (b) disqualification.
 - ba) Period of Ineligibility
67. The Sole Arbitrator notes that the IAAF has requested that CAS imposes a sanction of up to four years of ineligibility of the Athlete in accordance with Rule 40.2 and 40.6 of the 2012

IAAF Rules.

68. For the Sole Arbitrator to evaluate the relevant circumstances surrounding the Athlete's blood doping and the seriousness of this offence, it is necessary to analyse, whether aggravating circumstances have been present that may increase the period of ineligibility. In this context, Rule 40.6 of the 2012 IAAF Rules is relevant and reads as follows:

“Aggravating Circumstances which may increase the Period of Eligibility

If it is established in an individual case involving an anti-doping rule violation other than violations under Rule 32.2(g) (Trafficking or Attempted Trafficking) and Rule 32.2 (h) (Administration or Attempted Administration) 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 four (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 sanction 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) and, in all events, before the Athlete competes again)”.*
69. As shown in the listing of examples of aggravating circumstances that may justify the imposition of a period of ineligibility greater than the standard sanction of two years, the provision points to a doping plan or scheme or the use or possession of a Prohibited Substance or Prohibited Method on multiple occasions.
70. In relation to these two types of circumstances, the IAAF has argued that the Athlete's ABP clearly shows that the Athlete has been involved in both types of aggravating circumstances.
- Doping plan or scheme
71. The IAAF submits that the Athlete's blood doping has been carefully planned to avoid direct detection and maximise the impact in competition. Indeed, the use of blood doping techniques, which necessarily involves advice and support from medical personnel and other third parties, has consistently been held by the CAS to constitute a doping plan or scheme.

- Use of Prohibited Substances and Prohibited Methods on multiple occasions
- 72. The IAAF has submitted that whereas the ABP profile provides only a snapshot of the Athlete's blood values, when the sample was collected, there is certainly evidence of repeated use of Prohibited Substances and/or Methods in samples 5, 10, and 20 indicated blood doping, in particular around major competitions.
- 73. In support of its claim for increased sanctions based on aggravating circumstances, the IAAF has referred to CAS Jurisprudence, which has supported IAAF claims. In CAS 2012/A/2773 and CAS 2013/A/3080 a four-year period and a two-years and nine months' period of ineligibility, respectively were imposed on athletes for ABP violations. In CAS 2016/O/4469, the Sole Arbitrator established that the ABP violation of the Athlete had lasted considerably longer than the case CAS 2013/A/3080, but on the other hand since the IAAF did not maintain that the whole career of the Athlete was built on doping, the Sole Arbitrator found that the period of ineligibility of three years and eight months was appropriate to the severity of the Athlete's misbehaviour.
- 74. Again, the Sole Arbitrator may unfortunately decide on the matter without having heard any mitigating or other circumstances by the Athlete that could lead to a lesser period of ineligibility.
- 75. Against this background, the Sole Arbitrator finds that the Athlete over at least a two-year period from 2011 to 2013 has been involved in both multiple doping offences as well as a doping scheme or plan, since the findings in his ABP profile clearly demonstrates that the blood doping had been orchestrated to avoid detection around major championships and competitions.
- 76. Taking all relevant and aggravating factors into account, the Sole Arbitrator finds that the Athlete should be sanctioned with a period of ineligibility of three years.
- 77. In accordance with Rule 40.10 of the 2012 IAAF Rules, the Sole Arbitrator finds that the period of ineligibility should commence on the date of final CAS award and that any period of provisional suspension effectively served by the Athlete before the entry into force of this CAS Award shall be credited against the total period of ineligibility to be served. In the light of such rule and of the fact that the provisional suspension is still running without any interruption, the Sole Arbitrator determines that, for practical reasons, the period of ineligibility shall start on 12 April 2016, i.e. on the date of commencement of the provisional suspension and not on the date of the award.
- bb) Disqualification
- 78. With respect to the issue of disqualification pursuant to the Athlete's Anti-Doping Rule Violations, the Sole Arbitrator observes that the IAAF is willing to consider that the date of sample No. 5 on 20 May 2011 is the date of the first violation. The Sole Arbitrator therefore

concurr with this date being the relevant for any possible consequences as a result of disqualification.

79. Based on Rule 40.8 of the 2008 IAAF Rules, the Sole Arbitrator notes that a literal reading of this provision would then provide for the automatic disqualifications of all results from the date of the Anti-Doping Rule Violation, i.e. 20 May 2011 through the commencement of the period of provisional suspension on 12 April 2016.
80. In this case, the automatic disqualification of all results thus would be for a period of almost five year (4 years, 10 months and 22 days), even though the date of 6 July 2013 (Sample 20) is the last date, which provides clear evidence that the Athlete used doping.
81. The interpretation of Rule 40.8 of the 2008 IAAF Rules has been made by several CAS panels under these circumstances in recent decisions, see e.g. CAS 2016/O/4464, CAS 2016/O/4481 and CAS 2016/O/4883.
82. Especially the question of fairness and proportionality has been discussed in light of the length of the disqualification period vis-à-vis the time which may be established as the last time that the Athlete objectively committed a doping offence according to the ABP.
83. Based on established CAS Jurisprudence, which under the principle of proportionality requires the panel to assess, whether a sanction is appropriate to the violation committed in the case at stake, the panel in CAS 2016/O/4481 at para 197, stated the following in similar circumstances:
“The Sole Arbitrator does not consider it fair to disqualify any results of the Athlete between 19 August 2012 and 24 August 2015 considering that there is no evidence that the Athlete used doping substances or methods during this period and that she is not accountable for the fact that the result management process got started a long time after the relevant ABP samples became known to the IAAF”.
84. Under these circumstances, and concurring with the opinion expressed in the paragraph above, the Sole Arbitrator finds that it would be unfair and disproportionate, if the disqualification period was extended all the way through the commencement of the provisional suspension of 12 April 2016.
85. This result is motivated by the fact that there is no clear evidence that the Athlete was using doping after the date of the sample collected on 6 July 2013, and on that basis there would be no legal grounds to extend the disqualification for an additional period of almost three years, such additional period of time being mainly caused by the duration of the IAAF investigations and procedures.
86. Consequently, and based on the principle of fairness and proportionality, the Sole Arbitrator rules that all competitive results obtained by the Athlete from 20 May 2011 until 6 July 2013, shall be disqualified with all resulting consequences (including forfeiture of any titles, awards, medals, profits, prizes, and appearance money) pursuant to Rule 40.8 of the 2012 IAAF Rules.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Request for Arbitration filed on 23 June 2016 by the International Association of Athletics Associations against the All Russia Athletics Federation and Mr Andrey Krivov is upheld.
2. A period of ineligibility of three years is imposed on Mr Andrey Krivov, starting from 12 April 2016.
3. All results of Mr Andrey Krivov since 20 May 2011 are disqualified through to 6 July 2013, including forfeiture of any titles, awards, medals, points, prizes, appearance money obtained during this period.
4. (...).
5. (...).
6. All other and further prayers or requests for relief are dismissed.