

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

*Before:*

*Michael Beloff QC (Chair)*

*Dominique Gavage*

*Francisco Larios*

**BETWEEN:**

**International Association of Athletics Federations (IAAF)**

***Anti-Doping Organisation***

**-and-**

**Despoina Zapounidou**

***Respondent***

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**DECISION OF THE DISCIPLINARY TRIBUNAL**

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## A. INTRODUCTION

1. The International Association of Athletics Federations ("**IAAF**"), the international federation governing the sport of athletics worldwide, acting by its Athletics Integrity Unit ("**AIU**") has charged Ms Despoina Zapounidou (the "**Athlete**"), a 32 year old Greek female race walker with committing the following Anti-Doping Rule Violations ("**ADRVs**"):

- (i) Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample, pursuant to Article 2.1 ADR, by virtue of the presence of r-EPO in a urine Sample provided on 11 August 2017 numbered A3822854; and
- (ii) Use of a Prohibited Substance, namely recombinant-erythropoietin EPO, pursuant to Article 2.2 ADR.

## B. FACTUAL BACKGROUND

2. On 9 August 2017, the Athlete provided a blood sample out-of-competition during the period of the 16th IAAF World Championships in Athletics in London (the "**Championships**") for the purposes of the Athlete Biological Passport (the "**ABP Sample**"). The Athlete Biological Passport includes a haematological module that collects information on physiological blood markers and an adaptive model that can identify the use of prohibited substances or prohibited methods for the enhancement of oxygen transport or delivery, including the use of erythropoietin-stimulating agents ("**ESAs**") by individual athletes.

3. On 10 August 2017, the IAAF Athlete Passport Management Unit ("**APMU**") after analysis of the ABP Sample produced a report in accordance with the WADA Athlete Biological Passport Operating Guidelines (the "**Guidelines**"), which identified it as Atypical by the adaptive model due to abnormal haematological values. APMU recommended, pursuant to Article 2.3.4 of the Guidelines, that the Athlete be subject to target follow up testing. Accordingly, the AIU organised immediate testing, out-of-competition.

4. On 11 August 2017, the Athlete was asked to provide and provided a urine sample, number A3822854 (the "**A Sample**") which was sent to the World Anti-Doping Agency ("**WADA**") accredited Laboratory in Gent, Belgium (the "**Laboratory**") for analysis for the presence of prohibited substances.
5. On 13 August 2017, the Athlete participated in the Women's 20km Race Walk at the Championships. She did not finish the event, but was subject to in-competition testing and provided a urine sample number A3824112. This sample was also sent to the Laboratory and analysed for the presence of prohibited substances, including ESAs such as recombinant-erythropoietin ("**r-EPO**"). It returned a negative result.
6. On 22 August 2017, the Laboratory reported by contrast the presence of r-EPO in the A sample, provided on 11 August 2017. Erythropoietins such as r-EPO are prohibited substances under S2 Peptide Hormones, Growth Factors, Related Substances, and Mimetics of the WADA 2017 Prohibited List.
7. By letter dated 23 August 2017, the AIU (on behalf of the IAAF) notified the Athlete of the presence of r-EPO in the A Sample, informed her of her right to have the B Sample analysed and invited the Athlete to provide an explanation by 30 August 2017.
8. By e-mail dated 29 August 2017, the Athlete confirmed that she did not know how r-EPO came to be present in the Sample and requested analysis of the B Sample.
9. By e-mail on 7 September 2017, the Athlete cancelled her request for analysis of the B Sample, asserting a lack of funds to meet the cost.
10. By letter dated 12 September 2017, the AIU afforded the Athlete a further opportunity to provide an explanation for the presence of r-EPO in the Sample by no later than 22 September 2017. The AIU did not receive a response.
11. On 22 December 2017, the Athlete was issued with a Notice of Charge pursuant to Article 8.4.1 of the IAAF Anti-Doping Rules ("**ADR**"). The Athlete was invited to respond to the Notice of Charge by no later than 8 January 2018.

12. By letter dated 8 January 2018, the Athlete provided a response to the Notice of Charge, which challenged the validity of the analytical procedure. The Athlete also requested that the matter be determined by way of a hearing before the IAAF Disciplinary Tribunal (the "**Tribunal**").
13. On 9 January 2018, the Athlete forwarded a copy of a letter dated 18 September 2017 from Professor Demetrios Kouretas, PhD, in support of her response to the Notice of Charge.
14. By e-mail of 31 January 2018, the AIU responded to the Athlete's reply to the Notice of Charge. This e-mail included a statement from experts of the WADA accredited laboratory in Seibersdorf, Austria, commenting on the Athlete's response and the letter from Professor Kouretas. The Athlete was invited to admit the ADRVs and accept the Consequences set out in the Notice of Charge or confirm that the matter should proceed to a hearing.
15. On 1 February 2018, the Athlete responded to the e-mail from the AIU and the expert report and confirmed the requirement for a hearing before the Tribunal.
16. On 7 February 2018, a Preliminary Meeting was convened before the Chair of the Tribunal in accordance with Article 8.7 ADR and directions issued to the parties.
17. On 12 April 2018 a hearing was held at the premises of Winston and Strawn, 1 Ropemaker Street, London. Apart from the Chair (assisted by Catherine Pitre of Sport Resolutions), the other two members of the Tribunal, Ms Zapounidou and Professor Kouretas, the representatives of the IAAF Huw Roberts, Tony Jackson and its Counsel Ross Wenzel and their witnesses Professor Gmeiner and Dr Schumacher attended by video link.
18. Since Ms Zapounidou did not have legal representation the Tribunal was especially aware of the need to ensure that no element of the IAAF case simply went by default.

## C. JURISDICTION AND APPLICABLE RULES

### (i) Jurisdiction

#### *The Athlete*

19. Article 1.2 ADR entered into force on 3 April 2017 and states as follows:

“In accordance with Article 16.1 of the IAAF Constitution, the IAAF has established an Athletics Integrity Unit (“**Integrity Unit**”) with effect from 3 April 2017 whose role is to protect the Integrity of Athletics, including fulfilling the IAAF’s obligations as a Signatory to the Code. The IAAF has delegated implementation of these Anti-Doping Rules to the Integrity Unit, including, but not limited to the following activities in respect of International-Level Athletes and Athlete Support Personnel: Education, Testing, Investigations, Results Management, Hearings, Sanction and Appeals. The references in these Anti-Doping Rules to the IAAF shall, where applicable, be references to the Integrity Unit (or to the relevant person, body or functional area within the Unit).”

20. The application of the ADR to athletes, athlete support personnel and other persons is set out in Article 1.7 ADR and provides:

“These Anti-Doping Rules also apply to the following Athletes, Athlete Support Personnel and other Persons, each of whom is deemed, by condition of his membership, accreditation and/or participation in the sport, to have agreed to be bound by these Anti-Doping Rules, and to have submitted to the authority of the Integrity Unit to enforce these Anti-Doping Rules:

- a) all Athletes Athlete Support Personnel and other Persons who are members of a National Federation or of any affiliate organisation of a National Federation (including any clubs, teams associations or leagues);
- b) all Athletes, Athlete Support Personnel and other Persons participating in such capacity in Competitions and other activities organized, convened, authorized or recognized by (i) the IAAF (ii) any National Federation or any member or affiliate organization of any National

Federation (including any clubs, teams, associations or leagues) or (iii) any Area Association, wherever held;

c) all Athlete Support Personnel and other Persons working with, treating or assisting an Athlete participating in his sporting capacity; and

d) any other Athlete, Athlete Support Person or other Person who, by virtue of an accreditation, licence or other contractual arrangement, or otherwise, is subject to the jurisdiction of the IAAF, of any National Federation (or any member or affiliate organization of any National Federation, including any clubs, teams, associations or leagues) or of any Area Association, for purposes of anti-doping.”

21. The applicable rules are the ADR, which apply to all athletes who are members of a National Federation and to all athletes participating in competitions organised, convened, authorised or recognised by the IAAF.

22. At the date of her provision of the A sample, the Athlete was a member of the Greek national federation and a member of the Greek national team entered for the Championships.<sup>1</sup> The Athlete was therefore subject to the ADR pursuant to Article 1.7(a) ADR.

23. The Athlete’s accreditation confirmed her participation in the Championships, a competition organised, convened, authorised and recognised by the IAAF. The Athlete was therefore also subject to of the ADR pursuant to Article 1.7(b) ADR and Article 1.7(d) ADR.

24. The subjection of the Athlete to the ADR was not in issue.

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<sup>1</sup> This is confirmed by the Athlete’s accreditation for the Championships, which was collected by and issued to her, in person, in London on 8 August 2017 at 14:06:58

*The AIU*

25. Article 7.2 ADR confers jurisdiction for results management on the AIU in certain circumstances, including:

"7.2 The Integrity Unit shall have results management responsibility under these Anti-Doping Rules in the following circumstances:

7.2.1 For potential violations arising in connection with any Testing conducted under these Anti-Doping Rules by the Integrity Unit, including investigations conducted by the Integrity Unit against Athlete Support Personnel or other Persons potentially involved in such violations."

26. The Sample was collected pursuant to Testing undertaken by the AIU on behalf of the IAAF. Therefore, as is undisputed by the parties, the AIU had jurisdiction for results management in this matter.

*The Tribunal*

27. The IAAF has established the Tribunal in accordance with Article 1.5 ADR, which provides that the Tribunal shall determine anti-doping rule violations committed under the ADR.

28. Article 8.2(a) ADR provides that the Tribunal shall have jurisdiction over all matters in which:

"(a) An Anti-Doping Rule Violation is asserted by the Integrity Unit against an International-Level Athlete or Athlete Support Person in accordance with these Anti-Doping Rules;"

29. Article 1.9 ADR specifies those athletes that are classified as international-level athletes for the purpose of the ADR as follows:

"1.9 Within the overall pool of Athletes set out above who are bound by and required to comply with these Anti-Doping Rules, each of the following Athletes

shall be considered to be an International-Level Athlete ("**International-Level Athlete**") for the purposes of these Anti-Doping Rules and therefore the specific provisions in these Anti-Doping Rules applicable to International-Level Athletes shall apply to such Athletes:

- (a) An Athlete who is in the International Registered Testing Pool;
- (b) An Athlete who is entered for or is competing in any of the following International Competitions:
  - (i) World Athletics Series Competitions;"

30. The Athlete as a person who was entered for (and competed in) the Championships being part of the IAAF World Athletics Series Competitions was an international-level athlete pursuant to Article 1.9(b)(i) ADR.

31. Furthermore, the Tribunal has the requisite jurisdiction to hear and determine ADRV's alleged against the Athlete *qua* an international-level athlete pursuant to Article 8.2(a) ADR.

32. The jurisdiction of the Tribunal to hear this case was not in issue.

## **(ii) Applicable Rules**

33. Article 2 ADR specifies the circumstances and conduct that constitute ADRVs.

Article 2.1 provides:

### **"2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample**

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



Article 2.2 provides:

**“2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method**

2.2.1 It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his body and that no Prohibited Substance is Used. Accordingly, it is not necessary that intent, Fault, negligence, or knowing Use on the Athlete’s part be demonstrated in order to establish an Anti-Doping Rule Violation under Article 2.1.”

34. In summary Article 2.1.1 ADR and Article 2.2.1 ADR together provide that every athlete has a personal duty to ensure that no prohibited substance enters his or her body and that no prohibited substance or prohibited method is used and is strictly responsible for any prohibited substance or its metabolites or markers found in his or her body.

35. With regard to the presence of a prohibited substance or its metabolites or markers in an athletes sample, Article 2.1.2 ADR provides:

“2.1.2 Sufficient proof of an Anti-Doping Rule Violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete’s A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete’s B Sample is analyzed and the analysis of the Athlete’s B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete’s A Sample; or, where the Athlete’s B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.”

36. With regard to an athlete’s use of a prohibited substance or prohibited method, Article 2.2.2 ADR provides:

“2.2.2 The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited

Substance or Prohibited Method was Used or Attempted to be Used for an Anti-Doping Rule Violation to be committed.”

37. The presence of a prohibited substance or its metabolites or markers in an athlete’s sample is therefore sufficient to establish that an athlete has committed an ADRV pursuant to Article 2.1 ADR. Additionally, the use of a prohibited substance or a prohibited method is sufficient to establish that an athlete has committed an ADRV to under Article 2.2 ADR.

38. With regard to the burden and standard of proof Article 3.1 ADR provides:

“The IAAF or other Anti-Doping Organisation shall have the burden of establishing that an Anti-Doping Rule Violation has been committed. The standard of proof shall be whether the IAAF has established the commission of the alleged Anti-Doping Rule Violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.”

39. Article 3.2 ADR provides that facts relating to ADRVs may be established by any reliable means.

40. In that regard, Article 3.2 ADR also provides:

“3.2.2 Compliance with an International Standard (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the International Standard were performed properly.

3.2.3 WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in compliance with the International Standard for Laboratories. **The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred that could reasonably have caused the Adverse Analytical Finding.** In such an event, the IAAF shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

3.2.4 **Departures from any other International Standard, or other anti-doping rule or policy set out in the Code or these Anti-Doping Rules that did not cause the facts alleged or evidence cited in support of a charge (e.g., an Adverse Analytical Finding) shall not invalidate such facts or evidence.** If the Athlete or other Person establishes the occurrence of a departure from an International Standard or other anti-doping rule or policy set out in the Code or these Anti-Doping Rules that could reasonably have caused the Adverse Analytical Finding or other facts alleged to constitute an Anti-Doping Rule Violation, then the IAAF or other Anti-Doping Organisation shall have the burden to establish that such departure did not cause such Adverse Analytical Finding or the factual basis for the Anti-Doping Rule Violation.”

*(Tribunal's emphasis)*

#### D. MERITS

41. In the Tribunal's view the only issue under this heading which requires resolution is whether the presence of r-EPO in her A sample, was proven by the IAAF, on whom the burden lay to the standard of comfortable satisfaction. The IAAF relied primarily, if not exclusively, on the test carried out by the Laboratory.
42. The Athlete's defence to the Charge depended upon undermining the accuracy of that test on the basis that in the carrying out of that test there was a material departure from the International Standard for Laboratories ("ISL")<sup>2</sup>, a proposition disputed by the AIU.
43. In that context Article 3.2 of the ADR, cited at paragraph 40 above, is pivotal.
44. By reason of Article.3.1 of the ADR, which provides, inter alia, *"Where these Anti-doping rules places the burden of proof upon the Athlete alleged to have committed an Anti-Doping Rule Violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability"*, the Athlete

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<sup>2</sup> which includes all technical documents ISL p.1

had to prove to that standard first a departure from the ISL and further one which could reasonably have caused the AAF. There were in short two hurdles in her path.

45. Page 20 of the Laboratory Documentation Package provides the analytical detail of the confirmation procedures performed by the Laboratory pursuant to the ISL and the relevant Technical Document<sup>3</sup>. It identifies a number of samples in different “lanes” as follows:

- (i) Lane 1: a urine sample prepared by the Laboratory and containing a mix of ESAs;
- (ii) Lane 7: a urine sample prepared by the Laboratory and containing a mix of ESAs;
- (iii) Lane 8: a negative urine sample (a urine sample known to contain no prohibited substances);
- (iv) **Lane 9: the Sample;**
- (v) Lane 10: a negative urine sample (a urine sample known to contain no prohibited substances);
- (vi) **Lane 11: a quality control sample;**
- (vii) Lane 12: a urine sample prepared by the Laboratory and containing a mix of ESAs;
- (viii) Lane 19: a urine sample prepared by the Laboratory and containing a mix of ESAs;
- (ix) Lane 20: a negative urine sample (a urine sample known to contain no prohibited substances).

**(Tribunal’s emphasis)**

46. Dr Gmeiner of the WADA accredited Seibersdorf Laboratory – an expert for the IAAF who said that he had conducted over 40,000 tests on samples for prohibited substances and identified r-EPO in approximately 20 of them – interpreted in a statement dated 25 January 2018 (which he adhered to in his oral evidence) the gel images of the confirmation procedures to the Tribunal’s satisfaction as follows:

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<sup>3</sup> TD2014EPO

- (i) the sample on Lane 9; the sample shows the typical faint area above the endogenous EPO band, indicative of the presence of r-EPO
- (ii) a negative control sample on Lane 10; no faint area is visible above the endogenous EPO band
- (iii) A positive control sample on lane 11 containing r-EPO
- (iv) an ESA mix on lane 12 as an appropriate preparation used as a reference for apparent molecular mass evaluation

He concluded:

“The confirmation analysis as demonstrated by the gel image complies with the procedural requirements of the TD2014EPO”.

- 47. To combat this conclusion. The Athlete relied exclusively on the evidence of Professor Kouretas, an expert toxicologist, a Professor of Toxicology at the University of Thessaly and President of the Hellenic Toxicological Society, whose laboratory (unlike the Seibersdorf Laboratory) did not itself test samples for prohibited substances but who had nonetheless experience over the years of reviewing cases where an adverse analytical finding had been allegedly identified. He asserted in the document dated 26 February 2018 (which served as the Athlete’s Answer and glossed in a later communication dated 7 March 2018) that the Laboratory documentation package revealed *“improper analytical behaviour”* in the lane of positive control sample in the confirmation analysis of the Athlete’s A sample.
- 48. Professor Kouretas’s initially somewhat Delphic observation about *“improper analytical behaviour”* was developed orally into two points, focussed on Lane 11.
- 49. The first point was that the positive control sample which was used - and under the ISL had to be used - to confirm the results of the A sample test was not *“in a comparable concentration range”* to the A sample.
- 50. In the Panel’s view this point depended - as Dr Gmeiner observed - upon reading into the relevant provision’s words which were not there.

That provision<sup>4</sup> stated:

“Confirmation Procedure Requirements:

- Sample (confirmation Aliquot)
- Negative control sample
- Positive control sample containing an appropriate substance (e.g. rEPO, NESP, CERA)
- Appropriate preparation used as reference enabling to define basic, acidic and endogenous areas (IEF) or apparent molecular mass (SDS-PAGE, SARPAGE).

Footnote 6: Positive control samples shall be selected based on the results of the Initial Testing Procedure, which provide indication of what substance is to be confirmed (e.g. rEPO, NESP, CERA). **However, the positive control sample does not necessarily have to match the electrophoretic behaviour of the Sample. For example, different kinds of rEPOs may have different migration patterns on the gel.”**

**(Tribunal’s emphasis)**

51. Accordingly, all that is required of the Positive Control Sample is that it contains an “appropriate substance” e.g. r-EPO, which it indisputably did. There was no additional requirement that it had to be of a particular quantity or concentration or enjoyed any other quality; indeed footnote 6 is to contrary effect.
52. The second point was that the Laboratory had failed to include in its Positive Control sample a test for NESP (another EPO variant) which might have been identified as well in the Athlete’s A sample.
53. The Tribunal accepts that in point of fact no confirmatory procedure was carried out for NESP but does not consider that this omission was in any way aberrant or a departure from the ISP. It can see no reason why the Laboratory should have been obliged (as distinct from chosen) to carry out such procedure for a substance NESP whose presence in the Athlete was only doubtfully (if at all) established when there was convincing evidence - as the laboratory saw it - of the presence of r-EPO. It is generally

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<sup>4</sup> Technical Document p.13

sensible, in the Tribunal's view for anyone who has to prove anything to concentrate on a stronger (and strong) case rather than on, at best, a weak one.

54. The Tribunal interpreted Professor Kouretas's careful approach as one of raising questions about the Laboratory's compliance with the ISL rather than of making a positive case of non-compliance. He scrupulously and expressly adhered to his role as an expert, not an advocate. The Tribunal could not find that his evidence carried the Athlete over the first hurdle, especially when it took into account the persuasive evidence of the AIU's expert witnesses.

55. In specific response to Professor Kouretas, Dr Gmeiner drew the Tribunals attention to para 4.2.2 of the Technical Document<sup>5</sup> which provides:

**"4.2.2.2 Mixed band detected**

- A mixed band consisting of endogenous EPO (uEPO, bEPO) and rEPO is detected: The band shape resembles that of the rEPO plus parts or the total of the uEPO/bEPO band.
- A diffuse or faint area of the band above the corresponding endogenous band is also indicative for the presence of epoetin-a and  $-\beta$  (Fig. 4).
- A combination of a mixed band and single band(s) from other ESAs may also be detected."

56. By reference to this provision Dr Gmeiner wrote on 21 March 2018:

"The criteria of positivity (adverse analytical finding, AAF, for r-EPO like in the present case) are described in WADA TD2014EPO (Section 4.2.2 describes in detail, i.e. if single band(s) (4.2.2.1) or a mixed band (4.2.2.2) is/are detected. In the present case, a mixed band (r-EPO) is clearly visible on lane 9, with a faint area (above the orange cut-off line) just above the endogenous band (below the orange cut-off line). This area is not visible in the negative control urines (lane 8 and 10), but in the positive control sample (lane 11).

The presence of r-EPO in the athlete's sample is consequently identified by the faint area above the orange cut-off line in lane 9, meeting the criteria of the WADA TD2014EPO.

This was the trigger for the Gent laboratory to report an AAF for r-EPO.

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<sup>5</sup> Technical Document p11

Due to the low resolution of the image submitted for evaluation, we have asked for the original tiff file of the confirmation analysis. This clearly confirms the AAF, showing a mixed band on the athlete's lane as well as on the positive control).

57. He adhered to this opinion in his oral evidence.

58. The Tribunal was satisfied with Dr Gmeiner's explanation of the diagrams from the Laboratory analytical Package and concluded that he was right to be confident of the Laboratory's analytical conclusions, especially since it was corroborated, as required<sup>6</sup>, by a second opinion from Dr Naud identified in the Technical Document<sup>7</sup> as qualified for this purpose.

59. Dr Naud wrote<sup>8</sup>:

"According to the documents received on August 16 of 2017 related to the analysis of sample 17-9389 (ITP and confirmation analysis), the data show a profile for the entire sample departing significantly from the profiles known to be of endogenous origin. Although the positive quality control does not represent the amount of recombinant EPO present in the sample, the results comply with the positivity criteria as described in TD2014EPO.

It is justify to conclude that the sample contains recombinant erythropoietin."

60. The Tribunal also accepted that there was support (although not strictly necessary) for the AIU's case from the circumstances which led to the Out-of-Competition test i.e. the suspicious element of the Athletes Biological Passport.

61. The indicia of suspicion were explained by Professor Schumacher in a letter to the AIU dated 8 February 2018 as follows:

"You requested an initial opinion on a single blood value collected from a female athlete on 9.8.2017 as her first sample in the context of the "Athlete's Biological Passport". The "profile" coded **BP1HSQ90** was provided as pdf document print out from ADAMS. I was also informed

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<sup>6</sup> Technical Document p13

<sup>7</sup> Ditto fn 7

<sup>8</sup> Laboratory Package p21



that the athlete tested positive for recombinant human EPO (rhEPO) in a subsequently obtained urine test on 11.8.2017.

When assessing the details of the sample in ADAMS, the athlete declared an altitude stay in Pretoria (1500m) from 1.7.2017 to 1.8.2017 on the Doping Control form. While I have no other laboratory information at my disposal at the time of this evaluation, there is no indication that analytical or other pre-analytical issues might have influenced the results in a way that would render the sample abnormal or influence the result to the disadvantage of the athlete.

While in a usual profile analysis, the adaptive model would provide a **quantitative** assessment of the normality/ abnormality of the profile based on comparison of current data with the previous values of the same athlete, this is obviously not possible in the present case. Therefore (and as usual for the first sample of every passport), an evaluation is made with regards to population averages. From the graph represented in ADAMS, it is clear that the athlete has values outside these population reference ranges for athletes at 99% specificity for haemoglobin (upper limit) and OFF score (upper limit). The reticulocyte percentage (0.43%) is just above the lower population limit (0.41%).

Based on the current scientific literature, the likelihood of observing an OFF score of 131 such as in the present sample in a population of un-doped female endurance athletes is beyond 1:10 000, even when considering altitude exposure as a confounding factor (as declared by the athlete) (1).

From a **qualitative** point of view, it is typical to find the combination of high haemoglobin paired with low reticulocytes (resulting in a high OFF score) assuming blood manipulation with an erythropoietic stimulant. The OFF score is a measure that quantifies the un-physiological combination of high haemoglobin with low reticulocytes (1). Such constellation usually occurs when the body's red cell mass has been artificially increased to supra physiological levels (high haemoglobin) and the organism now tries to downregulate the excess by reducing its own red cell production. This suppression of erythropoiesis is visible through the low number of young, recently produced red blood cells (reticulocytes)."

62. In summary Professor Schumacher confirms that:

- (i) The Athlete's haematological values to be outside of the upper limit of population reference ranges for athletes at 99% specificity for both

haemoglobin (17.0 g/dL) and OFF Score (131.00). It is noted that the Athlete's reticulocyte percentage (0.43%) is just above the lower population limit (0.41%);

- (ii) The likelihood of observing an OFF Score of 131.00 in a population of un-doped female endurance athletes is more than 1:10,000, even when considering altitude exposure as a confounding factor<sup>9</sup>; and
- (iii) It is typical to find the combination of high haemoglobin combined with low reticulocytes when blood has been manipulated by the use of ESAs (such as r-EPO) that has been ceased shortly before the relevant doping control.

63. The Tribunal accepted Professor Schumacher's evidence which he was well qualified to give<sup>10</sup> and which was not itself challenged. It fell outside Professor Kouretas's area of expertise and the Athlete deployed no other means to assault it.

64. Professor Kouretas did raise during the hearing itself the pertinent question of how the positive result of a sample taken on August 11 could co-exist with a negative result of a sample taken (In-Competition) on August 13. The answer, in the Tribunal's view, was this: the very limited quantity of r-EPO found in the Athlete's sample on the former date was explicable by either the product of a micro dose or of the tail end of a larger dose, whose performance enhancing effects could subsist on August 13 even though its half-life had by then expired. This was not an untypical use of EPO.

65. Ms Zapounidou in a statement read and translated for her by Professor Kouretas said that the 2017 World Championship was always to be her last competition and asked rhetorically why in such circumstances she would take a prohibited substances. The Tribunal found that that reasoning unconvincing. It was at least as likely, if indeed not more likely, that precisely because it was her last competition that she could be

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<sup>9</sup> See copy of the Athlete's Doping Control Form which declared a stay at altitude (1500m) from 1 July 2017 to 1 August 2017

<sup>10</sup> An internet search reveals the range of his posts and publications in the field of sports medicine

tempted into an ADRV. The Tribunal's conclusion that the Charge is made out, however, rests on science not psychology.

66. An ADRV by reason of Presence is therefore established to the Tribunal's comfortable satisfaction. Although the charge of ADRV by use adds nothing in terms of the potential sanction (see *infra* at para. 68), the Tribunal is comfortably satisfied that it is established as well. It is well known that EPO, where exogenous, can only be administered by injection and the Tribunal considers it would be surprising, though not impossible, that the person to whom such an injection was administered could be unaware of it. However, critically and in any event, a use charge does not require knowledge of the user. Use, like presence of a prohibited substance, is also a strict liability offence. The conclusion that Ms Zapounidou was using r-EPO is irresistible.

## **E. CONSEQUENCES FOR THE ANTI-DOPING RULE VIOLATIONS**

### **(i) Period of Ineligibility**

67. The Athlete has been charged with committing two ADRVs, namely the presence of r-EPO in the Sample and the use of r-EPO.

68. Article 10.7.4 ADR provides rules applicable to multiple offences committed under the ADR:

#### **"10.7.4 Additional Rules for Certain Multiple Offences**

- (a) For purposes of imposing sanctions under Article 10.7, an Anti-Doping Rule Violation will only be considered a second Anti-Doping Rule Violation if the Integrity Unit can establish that the Athlete or other Person committed the second Anti-Doping Rule Violation after the Athlete or other Person received notice, or after the Integrity Unit made a reasonable attempt to give notice, of the first alleged Anti-Doping Rule Violation. If the Integrity Unit cannot establish this, the Anti-Doping Rule Violations shall be considered together as one single Anti-Doping Rule Violation for sanctioning purposes, and the sanction imposed shall

be based on the Anti-Doping Rule Violation that carries the more severe sanction.”

69. Since the Athlete was not provided notice of the two ADRVs separately, they must, as the IAAF accepts, be considered together as one single violation for the purposes of sanction pursuant to the foregoing provision of the ADR.

70. Article 10.2 ADR provides the sanction to be imposed for anti-doping rule violations under Article 2.1 ADR (presence) and Article 2.2 ADR (use) as follows:

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

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

10.2.1 The period of Ineligibility shall be four years where:

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

71. Since, as already stated, r-EPO is an erythropoietin (EPO), which is listed in S2 of the WADA 2017 Prohibited List and is not a specified substance, the period of Ineligibility must therefore be four years pursuant to Article 10.2.1(a) ADR, unless the Athlete can establish that the anti-doping rule violations were not intentional.

72. The Athlete has not provided any evidence to support a claim that the ADRVs were not intentional or otherwise to explain the presence of r-EPO in her body. There is a line of CAS cases which have held that a failure to establish the origin of a prohibited substance necessarily means that an athlete cannot demonstrate that the violation

was not intentional.<sup>11</sup> Even in another more nuanced line where CAS cases have left open the theoretical possibility that an athlete might be able to rebut the presumption of intentionality without establishing the origin of the prohibited substance, it has been emphasised that this will occur only in the most exceptional of circumstances. In the case of CAS 2016/A/4534 *Villanueva v. FINA*, the Panel referred to the “*narrowest of corridors*”; in the even more recent Award in CAS 2016/A/4919 *WADA v. WSF & Iqbal*, the Panel held that “*in all but the rarest cases the issue is academic*” (para. 66). The circumstances of the present case are far from exceptional.

73. The Tribunal must therefore impose a period of Ineligibility of four years upon the Athlete, pursuant to Article 10.2.1(a) ADR which pursuant to Article 10.10.2 ADR, shall start on the date of this Award. However, the period of provisional suspension from 23 August 2017 up to the date of the Award shall be credited against the total period to be served by the Athlete, pursuant to Article 10.11.3 ADR.

#### **(ii) Disqualification of Results and Other Consequences**

74. Pursuant to Article 10.1.1 ADR, the Athlete’s results that occurred during the Championships shall be disqualified, with all resulting consequences, including the forfeiture of any medals, titles, awards, points, prize and appearance money.

#### **(iii) Costs**

75. The Tribunal is conscious that the Athlete has limited means, certainly compared with the IAAF. Although it has rejected her Defence it casts no doubt on the bona fides of the evidence of Professor Kouretas on which it was uniquely founded. To compel an athlete in such circumstances to make a contribution to the IAAF’s costs would be in fact, if not in form, to impose an additional penalty and might deter other athletes with more substantial defences from availing themselves of the opportunity for a hearing

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<sup>11</sup> See, for example, (i) CAS 2016/A/4377 *WADA v. IWF & Alvarez*, at para. 51; (ii) CAS 2016/A/4662 *WADA v. Caribbean RADO & Greaves*, at para. 36; (iii) CAS 2016/A/4563 *WADA v. EgyNADO & ElSalam*, at para. 50; (iv) CAS 2016/A/4626 *WADA v. Indian NADA & Meghali* and (v) 2016/A/4845 *Fabien Whitfield v. FIVB*.

when charged with ARDV's. The Tribunal therefore considers it appropriate in this case that each party bears its own legal and other costs.

**(iv) Order**

76. For the above reasons the Tribunal orders:

- (i) A period of ineligibility of four years is imposed upon the Athlete, commencing on the date of the Tribunal Award. The period of provisional suspension imposed on the Athlete from 23 August 2017 until the date of this Award shall be credited against the total period of ineligibility;
- (ii) The Athlete's results in the Competition shall be disqualified with all resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money; and
- (iii) Each party shall bear its own costs.

**(v) Publication**

77. The Award shall be Publicly Disclosed by the AIU in accordance with Article 14.3.2 ADR. At a minimum, this means that information regarding this matter shall be placed on the AIU website (or published through other means) for the longer of one month or the duration of the Athlete's period of Ineligibility.

*Michael J Beloff QC*

Michael Beloff QC (Chair)

Dominique Gavage

Francisco Larios

**19 April 2018**



Sport Resolutions (UK)  
1 Salisbury Square  
London EC4Y 8AE

T: +44 (0)20 7036 1966

Email: [resolve@sportresolutions.co.uk](mailto:resolve@sportresolutions.co.uk)  
Website: [www.sportresolutions.co.uk](http://www.sportresolutions.co.uk)

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