CAS 2017/O/5398 International Association of Athletics Federations (IAAF) v. Russian Athletic Federation (RUSAF) & Anisya Kirdyapkina

ARBITRAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr. Manfred Nan, Attorney-at-Law, Arnhem, the Netherlands

In the arbitration between:

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (IAAF), Monaco

Represented by Mr Ross Wenzel and Mr Nicolas Zbinden, Attorneys-at-Law, Kellerhals Carrard, Lausanne, Switzerland

- Claimant -

and

1/ RUSSIAN ATHLETIC FEDERATION (RUSAF), Moscow, Russian Federation

- First Respondent -

and

2/ Ms ANISYA KIRDYAPKINA, Saransk, Russian Federation

Represented by Mr Sergey Afanasyev and Ms Elena Tuzina, Attorneys-at-Law, Saransk, Russian Federation

- Second Respondent -

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I. PARTIES

1. The International Association of Athletics Federations (the "Claimant" or the "IAAF") is the world governing body for the sport of Athletics, established for an indefinite period with legal status as an association under the laws of Monaco. The IAAF has its registered seat in Monaco.

2. The Russian Athletic Federation (the "First Respondent" or the "RUSAF") is the national governing body for the sport of Athletics in the Russian Federation, with its registered seat in Moscow, Russian Federation. The RUSAF is a member federation of the IAAF, currently suspended from membership.

3. Ms Anisya Kirdyapkina (the "Second Respondent" or the "Athlete") is a Russian athlete specialising in race walking (20 kilometers). The Athlete is an International-Level Athlete for the purposes of the IAAF Competition Rules (the "IAAF Rules").

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, as established on the basis of the parties' written and oral submissions and the evidence examined in the course of the present arbitration proceedings and during the two hearings. This background information 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. 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.

5. The Athlete has been charged with violating Rule 32.2(b) of the IAAF Rules: *"Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method"*.

6. The evidence of the Athlete's alleged anti-doping rule violation in the matter at hand is based on a longitudinal analysis of her Athlete Biological Passport (the "ABP") and allegedly involves prohibited blood doping since 25 February 2011.

7. From 15 August 2009 until 8 December 2016, the IAAF collected thirty-five (35) ABP blood samples from the Athlete, two of which (Sample 19 dated 18 January 2013 and Sample 31 dated 11 October 2015) have been considered invalid. Each of the samples was analysed by a laboratory accredited by the World Anti-Doping Agency ("WADA") and logged in the Anti-doping Administration & Management System ("ADAMS") using the Adaptive Model, a statistical model that calculates whether the reported HGB (haemoglobin concentration), RET% (percentage of immature red blood cells – reticulocytes) and OFF-score (a combination of HGB and RET%) values fall within an athlete's expected distribution.

8. The registered values for HGB, RET% and OFF-score in the Athlete's respective samples are as follows:

No.	Date of Sample	HGB (g/dL)	RET%	OFF-score
1.	15 August 2009	12.50	1.43	53.30
2.	16 August 2009	13.50	1.53	60.80
3.	27 July 2010	13.40	0.87	78.04
4.	25 February 2011	13.90	2.34	47.20
5.	10 April 2011	13.20	1.39	61.30
6.	20 May 2011	17.70	1.96	63.00
7.	16 July 2011	13.30	1.49	59.80
8.	30 August 2011	14.70	1.27	79.40
9.	18 October 2011	13.40	1.47	61.30
10.	17 January 2012	12.50	1.59	49.30
11.	18 January 2012	12.50	1.34	55.50
12.	14 April 2012	14.50	1.55	70.30
13.	11 May 2012	14.70	1.09	84.40
14.	10 October 2012	12.60	1.52	52.00
15.	16 October 2012	12.80	1.60	52.10

No.	Date of Sample	HGB (g/dL)	RET%	OFF-score
16.	21 November 2012	14.20	1.22	75.70
17.	9 December 2012	13.20	1.02	71.40
18.	21 December 2012	12.90	1.26	61.70
19.	18 January 2013	13.50	1.54	60.50
20.	12 April 2013	14.20	1.84	60.60
21.	11 May 2013	13.20	1.44	60.00
22.	18 May 2013	14.30	1.94	59.43
23.	6 July 2013	14.10	1.80	60.50
24.	7 August 2013	13.40	1.70	55.80
25.	11 October 2013	12.60	3.11	20.20
26.	16 April 2014	14.40	1.71	65.50
27.	29 April 2014	15.10	1.47	78.30
28.	27 May 2014	14.30	1.85	61.40
29.	11 July 2014	14.60	1.40	75.00
30.	22 October 2014	15.10	1.65	73.90
31.	11 October 2015	13.80	1.64	61.29
32.	15 October 2015	13.90	1.75	59.60
33.	15 September 2015	14.50	0.96	86.20
34.	26 October 2016	14.10	0.99	81.30
35.	8 December 2016	13.50	1.50	61.50

9. On 1 June 2017, three experts with 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: Prof. Giuseppe d'Onofrio, Dr. Yorck Olaf Schumacher and Prof. Michel Audran (the "Expert Panel") analysed the Athlete's ABP on an anonymous basis and concluded that *"it is highly likely that a Prohibited Substance or Prohibited Method has been used and that it is unlikely that the passport is the result of any other cause"* (the "First Joint Expert Opinion").

10. On 12 June 2017, the IAAF Anti-Doping Administrator informed the Athlete that the IAAF was considering bringing charges against her but that such charges would not be brought until she had been given the opportunity to provide an explanation for the alleged abnormalities.

11. On 26 June 2017, the Athlete sent an email to the IAAF Anti-Doping Administrator providing explanations for the alleged abnormalities in her ABP profile. The Athlete denied the use of prohibited drugs and methods and stressed that she did not violate anti-doping rules. Furthermore, she argued that the abnormalities could be explained by 1) an *"ovarian cyst since 2008 (torsion, rupture of the cyst, removal of the ovary 2016)"*; 2) *"pregnancy from 2015, parturition in 2016"*.

12. On 7 July 2017, the Expert Panel issued a joint report (the "Second Joint Expert Opinion"), in which the Athlete's explanations were considered. With respect to the ovarian cysts explanation, the Expert Panel considered that "[i]*n the absence of detailed medical records, the simple mention of the presence of an ovarian cysts with vaguely indicated complications is not sufficient, in our opinion, to explain the abnormal passport features* [...]". Regarding the pregnancy explanation, the Expert Panel considered that all samples collected during and after the pregnancy, viz. samples 31-35, were not among the more suspicious samples. Moreover, even taking out all the samples tainted by the pregnancy of the Athlete, the Expert Panel confirmed that it had no impact on their haematological interpretation of the ABP profile.

13. Consequently, the Second Joint Expert Opinion confirmed the First Joint Expert Opinion, concluding that *"the concise explanations by the Athlete do not explain the abnormalities in her passport. We therefore confirm our previous opinion that it is highly unlikely that this profile is the result of a normal physiological or pathological condition, and it is likely that it was caused by the use of prohibited substances or prohibited methods"*.

14. On 27 July 2017, the IAAF, *inter alia*, notified the Athlete of the alleged anti-doping rule violation, her immediate provisional suspension and her right to request a hearing. In this letter, the IAAF further informed the Athlete that, as RUSAF's membership from the IAAF had been suspended, it took over the responsibility for coordinating the disciplinary proceedings and that her case would be referred to the Court of Arbitration for Sport ("CAS"). The Athlete was offered to choose between the following two procedures:

    (1) "before a Sole Arbitrator of the CAS sitting as a first instance hearing panel pursuant to IAAF Rule 38.3. The case will be prosecuted by the IAAF and the decision will be subject to an appeal to CAS in accordance with IAAF Rule 42; or

(2) *before a CAS Panel as a single hearing, with the agreement of WADA and any other anti-doping organisations with a right of appeal, in accordance with IAAF Rule 38.19. The decision rendered will not be subject to an appeal (save to the Swiss Federal Tribunal).*"

15. On 10 August 2017, the Athlete not only reiterated the content of her email dated 26 June 2017, but also provided a new additional explanation for the abnormalities in her ABP profile, arguing that the "[c]*hanges in the indicators of my biological passport, were showed on the 09 February 2011 and on the 25 September 2013, may be caused by spontaneous abortion in the early stages (miscarriage)*". Furthermore, the Athlete did not provide any position related to her right to request a hearing, nor did she inform the IAAF Anti-Doping Administrator whether she preferred a three-person CAS Panel as a sole instance or a Sole Arbitrator of CAS as a first instance.

16. On 22 August 2017, the IAAF Athletics Integrity Unit ("AIU") granted the Athlete the opportunity to provide "*the full medical file*" corresponding to the alleged miscarriages, should she wish for the Expert Panel to review these documents before a referral to the CAS.

17. On 2 September 2017, the Athlete provided the AIU with medical documents.

18. On 24 October 2017, the Expert Panel issued a joint report (the "Third Joint Expert Opinion"), in which the Athlete's additional explanations were considered, concluding that "*the further documents provided by* [the Athlete] *do not explain the specific aberrant features that we have previously described. We therefore confirm our opinion that it is highly unlikely that this profile is the result of a physiological or pathological condition, and it is likely that it was caused by the use of prohibited substances or prohibited methods*".

19. On 25 October 2018, the AIU granted the Athlete the opportunity to provide an explanation for alleged discrepancies in the documents provided by her, giving the Athlete one final opportunity to accept the anti-doping rule violation and explicitly reserving its right to bring forward a Tampering violation if it formed the view that the documents filed by the Athlete had been fabricated or manipulated. In this respect, the Athlete was provided by a "*Medical records transcription and translation check*" by Ms Alexandra Volkova, a native Russian translator.

20. On 31 October 2017, the Athlete explained the discrepancies, not challenging the "*Medical records transcription and translation check*" by Ms Alexandra Volkova, but reiterating that she had not violated the anti-doping rules.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

21. On 7 November 2017, the IAAF lodged a Request for Arbitration with CAS in accordance with Article R38 of the CAS Code of Sports-related Arbitration (2017 edition) ("CAS Code"). 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. This document contained a statement of the facts and legal arguments and included 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 upon 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 the total period of ineligibility to be served.

(v) All competitive results obtained by the Athlete from 25 February 2011 until 10 October 2015 shall be disqualified, with all resulting consequences (including forfeiture of any titles, awards, medals, profits, prizes and appearance money).

(vi) The arbitration costs be borne entirely by the First Respondent pursuant to Rule 38.3 of the 2016-2017 IAAF Rules or, in the alternative, by the Respondents jointly and severally.

(vii) The IAAF is awarded a significant contribution to its legal costs."

22. On 16 November 2017, the CAS Court Office initiated the present arbitration and specified that, in accordance with IAAF Rule 38.3, it had been assigned to the CAS Ordinary Arbitration Division but would be dealt with according to the Appeals Arbitration Division rules. The parties were further informed that, in accordance with IAAF Rule 38.3, the present case would be submitted to a sole arbitrator, and the Respondents were invited to submit their Answer.

23. On 14 December 2017, the Athlete provided an email with a letter, informing the CAS Court Office *inter alia* that (i) since August 2015, she is not an active athlete anymore, (ii) denying the IAAF's allegations and (iii) requesting to *"postpone this trail to May 2018"* due to her pregnancy.

24. On 22 December 2017, taking into account IAAF's agreement, the CAS Court Office informed the parties that in the event a hearing would be held in this case, it would not take place before May 2018.

25. On 12 January 2018, in accordance with Article R54 of the CAS Code, the CAS Court Office informed the parties that the arbitral tribunal appointed to decide the present matter was constituted by:

- Mr Manfred Nan, Attorney-at-Law in Arnhem, the Netherlands, as Sole Arbitrator

26. On 19 January 2018, on behalf of the Sole Arbitrator, and in the absence of a formal Answer being filed by the Athlete, the CAS Court Office informed the parties that the Athlete's observations provided in her letter attached to her email dated 14 December 2017, were to be understood as the Athlete's Answer (in accordance with Article R55 of the CAS Code). RUSAF did not file an Answer. Furthermore, the parties were

informed that in accordance with Article R55 of the CAS Code, the Sole Arbitrator would proceed with the arbitration and deliver an award.

27. On 31 January 2018, following a request from the CAS Court Office in this regard, the IAAF informed the CAS Court Office of its preference that a hearing be held. The Respondents did not provide their position on this issue.

28. On 2 February 2018, the CAS Court Office informed the parties that the Sole Arbitrator had decided to hold a hearing, suggesting the date of 12 June 2018.

29. On 7 February 2018, the Athlete informed the CAS Court Office of her unavailability on 12 June 2018 *"because this period will be a postnatal and lactation period"*, requesting to hold a hearing at a later date.

30. On 15 February 2018, following an inquiry by the Sole Arbitrator, the Athlete requested to hold the hearing after 16 August 2018, also informing the CAS Court Office that *"because of my financial situation, I unfortunately will not have a possibility to attend the hearing, but I could connect with you in Skype and we could organize a video conference on-line"*.

31. On 16 February 2018, and on behalf of the Sole Arbitrator, the parties were informed that the Athlete was authorized to attend the hearing via Skype.

32. On 22 February 2018, the IAAF informed the CAS Court Office of its preference for a hearing at an earlier date, but that it left *"this matter in the discretion of the Panel"*. The RUSAF did not provide its position on this issue.

33. On 13 March 2018 and after consultation with the parties, and on behalf of the Sole Arbitrator, the CAS Court Office informed the parties that a hearing would be held on 21 August 2018.

34. On 22 May 2018, the IAAF returned a duly signed copy of the Order of Procedure to the CAS Court Office. The RUSAF and the Athlete failed to return duly signed copies of the Order of Procedure.

35. On 21 August 2018, a first hearing was held in Lausanne, Switzerland. At the outset of the hearing, all parties confirmed that they had no objection to the constitution and composition of the arbitral tribunal.

36. In addition to the Sole Arbitrator and Ms Pauline Pellaux, Counsel to the CAS, the following persons attended the hearing:

For the IAAF:

- Mr Ross Wenzel, Counsel;
- Mr Nicolas Zbinden, Counsel;
- Mr Livio Marelli, Counsel;
- Ms Selina von Jackowski, Observer from the lawfirm of Counsel for the IAAF;
- Ms Alexandra Volkova, Interpreter;
- Dr. Yorck Olaf Schumacher, Expert, by video conference.

Although duly invited, RUSAF decided not to attend the hearing.

For the Athlete:

- Ms Anisya Kirdyapkina, the Athlete, by video conference;
- Ms Nadezhda Nikolaevna Pozdnyakova, Interpreter, by video conference.

37. After the opening statements and the start of the examination (by video conference) of Dr. Yorck Olaf Schumacher, expert in sports medicine, expert witness called by the IAAF, the Sole Arbitrator, with the agreement of the IAAF, decided to postpone the hearing until a later date, because the Athlete had to go to the hospital due to sudden illness of her new-born baby.

38. On 3 October 2018, a second hearing was held in Lausanne, Switzerland. At the outset of the hearing, all parties confirmed again that they had no objection to the constitution and composition of the arbitral tribunal.

39. Furthermore, the Athlete provided by email two Russian documents dated 2 October 2018, with translation into English titled *"Lawyer Request No 10 & 11"*, in which the Athlete requests the Minister of Health of Republic of Mordovia and the Chief Executive Officer of Federal State Budgetary Education Institution "*National Medical Research Center for Hematology*" respectively, to provide a medical opinion. Following an objection from the IAAF against the admissibility of these documents, the Sole Arbitrator decided not to admit these documents on file, pursuant to Article R56 of the CAS Code, because of their late filing. No objections were made against this procedural decision.

40. In addition to the Sole Arbitrator and Ms Pauline Pellaux, Counsel to the CAS, the following persons attended the hearing:

For the IAAF:

- Mr Ross Wenzel, Counsel.

Although duly invited, RUSAF decided not to attend the hearing.

For the Athlete:

- Ms Anisya Kirdyapkina, the Athlete, by video conference;
- Mr Sergey Afanasyev, Counsel, by video conference;
- Ms Elena Tuzina, Counsel, by video conference;
- Ms Nadezhda Nikolaevna Pozdnyakova, Interpreter, by video conference;

41. The Sole Arbitrator heard evidence of the following persons:

- Dr. Yorck Olaf Schumacher, expert in sports medicine, expert witness called by the IAAF, by video conference;
- Prof. Giuseppe d'Onofrio, expert haematologist, expert witness called by the IAAF, by video conference.

42. Both expert witnesses were invited by the Sole Arbitrator to tell the truth subject to the sanctions of perjury. The parties and the Sole Arbitrator had the opportunity to examine and cross-examine the expert witnesses.

43. The parties were afforded full opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator.

44. In her closing statements, the Athlete challenged the jurisdiction of the CAS for the first time. The Sole Arbitrator dismissed the Athlete's challenge, based on Article R55 of the CAS Code and Article 186 of the PILA, for being filed late.

45. Before the hearing was concluded, the Athlete and the IAAF expressly stated that they did not have any objection with the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.

46. The Sole Arbitrator confirms that he carefully took into account in his decision all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES

47. The IAAF's submissions, in essence, may be summarised as follows:

- The IAAF's position is that 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) of the IAAF Rules as follows:
  - Sample 4 and sample 25 display a similar constellation of a heavy stimulation of the bone marrow, i.e. the percentage of reticulocytes is high and the haemoglobin concentration is low. The Expert Panel considered that this feature is indicative of a use of an erythropoietic stimulant or a blood withdrawal/loss and excluded anaemia as an alternative cause.
  - In total, the Athlete's ABP displays five outliers, *viz.* one for sample 4 (upper limit of reticulocytes), two for sample 25 (upper limit of reticulocytes and lower limit of OFF score), one for sample 27 (upper limit haemoglobin concentration) and one for sample 33 (upper limit of OFF score).
  - In addition, the sequences for haemoglobin concentration, reticulocytes and OFF score are abnormal at 99.9%.
  - The Expert Panel also noted a seasonal pattern as the Athlete's concentration of haemoglobin is higher in the spring and summer seasons (competitive periods) and often near important competitions, although haemoglobin concentration should usually be lowered during the summer season due to the expansion of the plasma volume to optimise thermoregulation.
- Regarding the Athlete's different purported explanations for the alleged abnormal figures, the IAAF argues that none of these explanations is capable of explaining the abnormalities in the Athlete's ABP.
- In view of the foregoing and, in particular, on the basis of the First, Second and Third Joint Expert Opinion, the IAAF submits that the ABP profile of the Athlete constitutes reliable evidence of blood doping.

- As to the period of ineligibility, the IAAF maintains that Rule 40.6 of the 2013 IAAF Rules may be applied in order to increase the period of ineligibility up to a maximum of a four-year period of ineligibility due to aggravating circumstances, as the evidence indicates that the Athlete (i) used a prohibited substance or a prohibited method on multiple occasions and (ii) was engaged in a doping plan or scheme.

- The IAAF submits that the Sole Arbitrator should impose a period of ineligibility of between two and four years pursuant to Rules 40.2 and 40.6 of the 2013 IAAF Rules.

- The IAAF submits that in accordance with Rule 40.10 of the 2013 IAAF Rules, the period of ineligibility should commence on the date of the (final) CAS award.

- Finally, the IAAF submits that in accordance with Rule 40.8 of the 2013 IAAF Rules, the Athlete's results from 25 February 2011 (*i.e.* the date Sample 4 was taken) until 10 October 2015 (*i.e.* two years from the date sample 25 was taken) shall be disqualified, together with the forfeiture of any titles, awards, medals, profits, prizes and appearance money.

48. Although duly invited, the RUSAF did not submit any position on the merits of the present proceedings.

49. The Athlete's submissions, in essence, may be summarised as follows:

- The Athlete argues that she does not have *"a professional medical education and cannot analyse the results of* [her ABP] *and give a scientific explanation"*, but that the alleged abnormal results may have been caused by ovarian cysts, pregnancy and/or miscarriage.

- The Athlete maintains that (i) she *"did not violate anti-doping rules"*, (ii) she *"did not take prohibited instances and did not use prohibited methods"*, (iii) she *"did not violate the IAAF Code"*, and (iv) she *"provided information and comments within the scope of my competence, without having a professional medical education"*.

- The Athlete submits that, *"when I address to a medical institution, where in 2011 and 2013, I underwent examination and treatment in outpatient-policlinic conditions, where I was observed at a gynaecologist, I was refused to get personal information from a doctor and I was informed about confidentiality because of her retirement and moving to another region. But due to the fact that this issue of providing information regarding witnesses remains open, I will do my best to find this doctor"*.

- The Athlete challenges *"the IAAF's final decision on my potential use of doping and prohibited substances in the periods of 2011 and 2013"*, arguing that *"there is no scientific justification for this situation and a question on this theme considers in the scientific centers of hematology in Russia"*.

- The Athlete further maintains that *"[s]ince August 2015 I do not participate in competitions and in the training process, nor am I an active athlete, I do not cooperate with the* [RUSAF].

V. JURISDICTION

50. The IAAF maintains that the jurisdiction of CAS derives from Rule 38.3 of the 2016-2017 IAAF Rules. As a consequence of its suspension, the RUSAF was not in a position to conduct the hearing process in the Athlete's case by way of delegated authority from the IAAF pursuant to Rule 38 of the IAAF Rules. In these circumstances, it is plainly not necessary for the IAAF to impose any deadline on the RUSAF for that purpose. The Athlete not only expressly stated that she does not cooperate with the RUSAF, but also tacitly consented to the application of Rule 38.3 of the IAAF Rules.

51. Rule 38.3 of the IAAF Rules determines 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's attendance at a hearing, or any other involvement in a case, shall not affect its right to appeal the 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 reasonable 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 a 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."

52. The Sole Arbitrator notes that the Athlete is an International-Level Athlete and that the RUSAF is indeed prevented from conducting a hearing in the Athlete's case within the deadline set by Rule 38.3 of the IAAF Rules. The Sole Arbitrator confirms that the IAAF was therefore 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 confirmed the jurisdiction of CAS based on this Rule by having signed the Order of Procedure, and neither the Athlete nor the RUSAF filed any timely objections.

53. Indeed, in respect of the Athlete's late objection against the jurisdiction of CAS, the Sole Arbitrator finds that the party who challenges the jurisdiction of CAS should do so before entering into the merits of the CAS proceedings. Once it has submitted its Answer and expressed itself on the merits of the case, it is deemed to have accepted the jurisdiction and is therefore no longer admitted to raise the defence of lack of jurisdiction (*"Einlassung auf das Verfahren"*, see BERTI/SCHNYDER in: HONSELL *et al.*, *IPRG Kommentar*, Art. 190 N.32; DFT 120 II 155 at c.3a; DFT 121 III 495 at c.6d; POUDRET/BESSON, *Comparative law of international arbitration*, 2nd ed., para.

796.; MAVROMATI, *Selected issues related to CAS jurisdiction in the light of the jurisprudence of the Swiss Supreme Court*, Bulletin TAS/CAS Bulletin 1/2011, p. 34; MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, p. 254).

54. 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 of the CAS Code.

VI. APPLICABLE LAW

55. The IAAF maintains that the procedural aspects of these proceedings shall be subject to the 2016-2017 edition of the IAAF Rules and the substantive aspects of the asserted anti-doping rule violations shall be governed by the 2010-2011 and 2012-2013 editions of the IAAF Rules, which sets of rules are identical in all material respects, being in force at the time of the alleged violations. To the extent that the IAAF Rules do not deal with a relevant issue, Monegasque law shall apply (on a subsidiary basis) to such issue.

56. The RUSAF, nor the Athlete put forward any specific position in respect of the applicable law.

57. Article R58 of the Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

58. The "applicable regulations" within the meaning of Article R58 of the CAS Code are the rules and regulations of the IAAF. This principle is also reflected in IAAF Rule 42.22 (2011-2012 and 2012-2013) (which is identical to IAAF Rule 42.23 (2016-2017)), which provides, *inter alia*, as follows:

"22. In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Anti-Doping Regulations). In the case of any conflict between the CAS rules currently in force and the IAAF Constitution, Rules and Regulations, the IAAF Constitution, Rules and Regulations shall take precedence."

59. The "rules of law chosen by the parties" within the meaning of Article R58 of the CAS Code that apply subsidiarily are the laws of Monaco. This follows from IAAF Rule 42.23 (2011-2012 and 2012-2013) (reflected in IAAF Rule 42.24 (2016-2017)), which provides as follows:

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

60. The Sole Arbitrator observes that it is not disputed that the proceedings are primarily governed by the IAAF Rules, and subsidiary by Monegasque law.

61. Pursuant to the legal principle of *tempus regit actum*, the Sole Arbitrator is satisfied that procedural matters are governed by the regulations in force at the time when the proceedings were initiated. As such, whereas the substantive issues are governed by the 2010-2011 and 2012-2013 editions of the IAAF Rules, procedural matters are governed by the 2016-2017 version of the IAAF Rules.

62. It also follows from the above that the IAAF Rules must be interpreted and applied in light of Monegasque law, which applies subsidiarily.

VII. MERITS

A. The Main Issues

63. The main issues to be resolved by the Sole Arbitrator are the following:

i. Did the Athlete violate Rule 32.2(b) of the 2010-2011 and 2012-2013 IAAF Rules?
a) Can the irregular blood values in the Athlete's ABP be explained by ovarian cyst or pregnancy?
b) Can the irregular blood values in the Athlete's ABP be explained by miscarriage?
c) Conclusion
ii. If so, what sanction shall be imposed on the Athlete?

i. Did the Athlete violate Rule 32.2(b) of the 2010- 2011 and 2012-2013 IAAF Rules?

64. The Sole Arbitrator observes that the following general regulatory framework is relevant as to the merits of the case at hand.

65. The relevant parts of Rule 32 of the 2010-2011 and 2012-2013 IAAF Rules, dealing with issues of substantive law, read as follows:

"RULE 32 Anti-Doping Rule Violations

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:

[...]

(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."

66. While the burden of proof is – according to Swiss law – a question of substantive law, the standard of proof is a question of procedural law (see CAS 2017/A/5045 para. 83). The Sole Arbitrator notes that the rules governing the burdens and standards of proof are in all materially relevant respects identical in the 2010-2011, 2012-2013 and 2016-2017 editions of the IAAF Rules. Rules 33(1), (2) and (3) of the 2016-2017 IAAF Rules, read as follows – as relevant:

"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. This 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 Biological Passport and other analytic information. (...)"

67. The Sole Arbitrator observes that in its attempt to establish an anti-doping rule violation of the Athlete under IAAF Rule 32.2(b), the IAAF relies on conclusions drawn from longitudinal profiling as shown by the Athlete's ABP. The IAAF focusses on an abnormal sequence in HGB, RET% and OFF-score values in the Athlete's ABP with a probability in excess of 99.9%, and three Joint Expert Opinions, supported by the statements and explanations given by Prof. d'Onofrio and Dr. Schumacher at the hearing.

68. In the First Joint Expert Opinion, the following conclusion was reached by the Expert Panel:

"In our view, the data of the athlete bears the following abnormal features for which no explanation is available to date:

1. Sample 25 (11.10.2013) displays high reticulocytes and one of the lowest haemoglobin concentrations of the profile. This constellation indicates a heavy stimulation of the bone marrow such as observed after the use of an erythropoietic stimulant and/or blood withdrawal/blood loss. In the documentation for this sample (APMU documentation package), the specific question about blood loss is answered negatively. Analytical factors are also unlikely to explain this abnormality. This result was obtained far from any competition.

2. Sample 4 (25.2.2011): A similar constellation to the one observed in sample 25 described above (high reticulocytes), although to a lesser degree.

3. Seasonal pattern: The athlete displays higher haemoglobin values during spring and summer (the competitive season), and often near important races, which is unlikely to be physiological and likely represents increased red cell mass during these periods [...]. *Usual physiological regulation lowers haemoglobin during summer in athletes and normal subjects due to expansion of plasma volume to optimise thermoregulation* [...].

Based on these facts and the information available to date, it is our unanimous opinion that in the absence of an appropriate physiological or pathological explanation, the likelihood of the abnormalities described above being due to blood manipulation such as the withdrawal of blood for later reinfusion and/or the use of an erythropoietic stimulant is high. On the contrary, the likelihood of environmental factors or a medical condition causing the described pattern is low.

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

69. On 26 June 2017, the Athlete informed the IAAF as follows:

"Me, [the Athlete], *confirm receipt of the notification from the IAAF. On the issue of the possible initiation of an investigation into the case of my potential anti-doping rule violation, I am sending to you my comments.*

I did not violate the anti-doping rules. I did not use prohibited drugs and methods. Take into account that I do not have a professional medical education and can not analyse the results of a blood passport and give a scientific explanation. Additionally, I inform you that these indicators of my biological passport may be caused by the following diseases:

1. *ovarian cysts since 2008 (torsion, rupture of the cyst, removal of the ovary 2016)*
2. *Pregnancy from 2015, parturition in 2016*

If necessary, I can provide a medical justification.

In addition, I inform you that a timely in-depth medical examination could indicate the cause of the change in the blood passport, but given the limitation period, it is impossible to prove the distortion of my biological passport.

I also inform you that since August 2015 I have not participated in competitions and in the training process, nor am I an active athlete in connection with the pregnancy and the birth of a child.

I ask to take this information into account."

70. After having been provided with the Athlete's email dated 26 June 2017 with explanations for the alleged abnormalities in her ABP, the Expert Panel concluded as follows in the Second Joint Expert Opinion:

"In summary, the concise explanations by the Athlete do not explain the abnormalities in her passport. We therefore confirm our previous opinion that it is highly unlikely that this profile 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."

71. On 10 August 2017, the Athlete provided the IAAF with additional explanations and medical documentation. The Athlete's additional explanations are as follows:

"I, [the Athlete], *confirm receiving of the IAAF sanctions agreement.*

On the issue of my potential anti-doping rule violation, I inform you that I did not violate the anti-doping rules. I did not use prohibited drugs and methods and did not violate the IAAF code.

Taking into account that the following information concerns my personal life, I ask the expert commission to consider this information within the limits of confidentiality.

Changes in the indicators of my biological passport, were showed on the 09 February 2011 and on the 25 September 2013, may be caused by spontaneous abortion in the early stages (miscarriage).

Additionally:

- ovarian cyst since 2008 (torsion, rupture of the cyst, removal of the ovary 2016)

- pregnancy from 2015, parturition in 2016

If necessary, I can provide medical justification.

I also inform you that since August 2015 I have not participated in competitions and in the training process, I'm not an active athlete and I do not cooperate with the All-Russian Athletics Federation and ask you not to include a letter (ARAF) in the mailing and send it to my personal address.

Given the foregoing, I sincerely believe that you make the right decision, which will affect my further personal life, career."

72. After having been provided with the Athlete's additional explanations for the alleged abnormalities in her ABP supported by medical documents, the Expert Panel concluded as follows in the Third Joint Expert Opinion:

"In summary, the further documents provided by [the Athlete] do not explain the specific aberrant features that we have previously described. We therefore confirm our previous opinion that it is highly unlikely that this profile is the result of a physiological or pathological condition, and it is highly likely that it was caused by the use of prohibited substances or prohibited methods."

73. The Athlete, in her Answer, argues that she did not violate anti-doping rules and as such did not take prohibited substances or prohibited methods. Although the Athlete, in her Answer, does not specifically put forward explanations for the alleged abnormal values in her ABP as she did in her emails dated 26 June 2017, 10 August 2017 and 2 September 2017, she purports that she provided information and comments within the scope of her competence, referring to her medical examination and treatment in 2011 and 2013 (*"in outpatient-policlinic conditions, where I was observed at a gynaecologist, I was refused to get personal information from a doctor and I was informed about confidentiality because of her retirement and moving to another region. But due to the fact that this issue of providing information regarding witnesses remains open, I will do my best to find this doctor"*). As such, the Sole Arbitrator understands that the Athlete reiterated the explanations made in her emails to the AIU, and that the alleged abnormal results may have been caused by ovarian cyst, pregnancy and/or miscarriage. The different explanations invoked by the Athlete will be dealt with in more detail below.

a) Can the irregular blood values in the Athlete's ABP be explained by ovarian cyst or pregnancy?

74. The Athlete argues in her initial email dated 26 June 2017 that the alleged abnormal results in her ABP *"may be caused by - ovarian cyst since 2008 (torsion, rupture of the cyst, removal of the ovary 2016) – pregnancy from 2015, parturition in 2016"*.

75. At the second hearing, the arguments of the Athlete were discussed by counsel for the Athlete and the experts called by the IAAF, in particular by Dr. Schumacher.

76. With regard to the Athlete's explanations, the Expert Panel concluded as follows in the Second Joint Expert Opinion:

"Ovarian cysts are a common benign medical condition consisting in the presence of a membranous sac containing liquid in the ovary. They are frequently asymptomatic and can be discovered as an incidental finding at the time of a pelvic ultrasonography, or they can cause a variety of mild symptoms such as pain and discomfort. Rupture or torsion of ovarian cysts can be associated with severe pain, peritoneal inflammation and bleeding (generally self-limiting). In the absence of detailed medical records, the simple mention of the presence of an ovarian cysts with vaguely indicated complications is not sufficient, in our opinion, to explain the abnormal passport features summarized above.

Pregnancy, on the other hand, can be associated with a decrease in haemoglobin, (mainly secondary to expanded plasma volume) and increase in reticulocytes. In the BPE301I3 passport, five samples were collected during or after the pregnancy period

indicated in the Athlete's letter (samples 31-35). Sample 31 is not valid for technical reasons. Samples 32 to 35 are not included among the more suspicious samples (which are nn. 25 and 4, as well as samples with relatively high haemoglobin in summer collected during the competition season). We have further invalidated pregnancy and post-pregnancy samples in the ABP-profile: this does not have any effect on the adaptive model output [Status: Atypical (sequence HGB, sequence OFFs)], as well as on our hematological interpretation [...]. *We do confirm that the above mentioned abnormal features concerned the period 2009-2014 and are still visible after invalidation of the pregnancy-related samples."*

77. At the hearing Dr Schumacher confirmed the conclusions set out in the Second Joint Expert Opinion.

78. The Sole Arbitrator observes that the Athlete did not produce any expert evidence contradicting the content and the conclusions of the Second Joint Expert Opinion and, in fact, did not produce any evidence at all corroborating the proposition that she suffered from ovarian cysts in the first place.

79. In addition, the Sole Arbitrator notes that the Athlete refers to her pregnancy in 2015, but observes that samples 4 and 25 were taken in 2011 and 2013. The Sole Arbitrator is convinced that the abnormal features present in the Athlete's ABP between 25 February 2011 and 11 October 2013 cannot have been caused by the Athlete's pregnancy in 2015.

80. Consequently, the Sole Arbitrator finds that the irregular blood values in the Athlete's ABP between 25 February 2011 and 11 October 2013 cannot be explained by ovarian cysts or pregnancy as contended by the Athlete.

b) Can the irregular blood values in the Athlete's ABP be explained by miscarriage?

81. In her additional explanations by email dated 10 August 2017, the Athlete maintained that the "[c]*hanges in the indicators of my biological passport, were showed on the 09 February 2011 and on the 25 September 2013, may be caused by spontaneous abortion in the early stages (miscarriage)".* Further, the Athlete stated that she would be able to *"provide a medical justification".*

82. In reply to AIU's request to provide the full medical file corresponding to the mentioned miscarriages, including all clinical records, the Athlete provided the AIU with the following documents:

- An undated letter, in which the Athlete expresses: *"I am sending you a photo of my medical outpatient card of the medical institution (Women's consultation No. 3 of the State budgetary organization of health of the Republic of Mordovia "Maternity Hospital"), where I underwent survey and treatment in outpatient and polyclinical settings. Regarding your request, I translated the text from the outpatient card of a gynaecologist, ultrasound (appendix 1,2,3 – in the enclosure)."*

- One file with Russian text and the English translation of medical documents concerning February 2011 (Appendix 1);

- One file with Russian text and the English translation of medical documents concerning September 2013 (Appendix 2);

- One file with photographic copies of original medical documents in Russian ("medical patient card" of a hospital located in Mordovia, 8 pages (Appendix 3).

83. In the Third Joint Expert Report, the Expert Panel argued as follows in this respect:

- With regard to the authenticity of the documents filed by the Athlete: *"We note that the documents do not contain any clear reference to a doctor or institution's name. Moreover, it is surprising that the test for determination of beta-human chorionic gonadotropin (HCG) is not referred to in the medical documentation. This test is a standard test typically performed in the event of a pregnancy related pathology such as a suspected spontaneous abortion."*

- With regard to the medical facts: "*Now* [the Athlete] *seems to associate her atypical blood values in both samples 4 and 25 with two episodes of early misbirth/miscarriage after about 5 weeks of pregnancy, which were associated with moderate loss of bloody material from the genital tract and were observed in both cases two weeks after the diagnostic suspect of miscarriage.* [...] *In samples 4 and 25 of the profile, no anemia was present. The "moderate" loss of bloody material from the genital tract is highly unlikely to cause persistent anemia and could not have caused the increased reticulocyte percentage. A physiological acceleration of red cell production could have taken place only as a consequence of important blood loss, capable of substantially reducing the level of circulating HB and the oxygen availability to tissues, while HB in samples 4 and 25 is within normal limits. In the medical documents, the bloody excreta are described as "moderate", without any mention of medical complication or truly hemorrhagic losses (methorragia), and there are no laboratory results from the hospital available to indicate any hematological abnormality. Increased reticulocytes in samples 4 and 25 were very likely independent from the values of HB of 13.9 and 12.6. This evidence is further supported by the observation that in the passport, a number of values of HB of 12.5 or 12.6 g/dl, (identical or lower than the 12.6 recorder for sample 25), do not show any increased reticulocytes* [...]. *On the contrary, the isolated increase of reticulocytes in the absence of anemia is fully compatible with a scenario of exogenous erythropoietic stimulation with recombinant erythropoietin or another ESA."*

84. The Sole Arbitrator understands that, according to the Expert Panel, the two miscarriages could potentially lead to an increased RET%. However, as the medical documents provided by the Athlete only refer to "*moderate loss of bloody material from the genital tract*" without complications or hemorrhagic losses, while no anemia was present in samples 4 and 25, the Expert Panel maintains that the two miscarriages could not have influenced the increased RET% levels in Sample 4 and 25.

85. The Sole Arbitrator has no reason to doubt about the interpretation of the Expert Panel, which analysis appears credible and reliable to the Sole Arbitrator.

86. Indeed, the Sole Arbitrator is not convinced that the Athlete suffered from significant blood loss that may have resulted in decreased HGB levels, and increased RET% levels.

87. After being confronted with the Third Joint Expert Report, the Athlete had the opportunity to contest the conclusions reached by the Expert Panel, but she did not do so.

88. Consequently, in view of all the above, the Sole Arbitrator finds that the irregular blood values in the Athlete's ABP cannot be explained by any miscarriage of the Athlete.

c) Conclusion

89. 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 (see VIRET, Evidence in Anti-Doping at the Intersection of Science and Law, 2016, p. 735; LEWIS / TAYLOR (Eds.), Sport: Law and Practice, 2014, para. C.126; Estelle de la Rochefoucauld, a brief review of the procedural and substantive issues in CAS jurisprudence related to some Russian Anti-Doping cases, CAS Bulletin 2018/1, p. 28; CAS 2014/A/3561 & 3614, para. 279; CAS 2015/A/4006, para. 103; CAS 2016/O/4481, para. 133; CAS 2016/O/4464, para. 148). Further, IAAF Rule 33.3 (2016-2017) explicitly mentions *"the Athlete Biological Passport"* as an example of a reliable means of evidence.

90. This is not to say that no criticism on the ABP is permitted or that the reliability of the evidence provided by the ABP in a specific case cannot be reproached, it is however at least indicative that the credibility of the ABP system as a whole is not to be mistrusted easily. The Sole Arbitrator hence finds that the ABP system is to be presumed valid, unless convincing arguments are made that a specific element of the system does not operate satisfactorily.

91. As the Athlete only argues that *"there is no scientific justification for this situation and a question on this theme considers in the scientific centers of hematology in Russia"*, the Sole Arbitrator considers that in the absence of any specific evidence being submitted or arguments being advanced by the Athlete, the Sole Arbitrator finds that there is no reason not to rely on the evidence provided by the ABP in this specific matter.

92. Nevertheless, the Sole Arbitrator concurs with the following considerations of the Sole Arbitrator in CAS 2016/O/4464 (paras 140 *et seq.*) according to which an anti-doping organization is required to establish – in addition to the testing results – a "doping scenario":

> *"The Sole Arbitrator is however mindful of the warnings expressed in legal literature that a pitfall to be avoided is the fallacy that if the probability of observing values that assume a normal or pathological condition is low, then the probability of doping is automatically high (VIRET, Evidence in Anti-Doping at the Intersection of Science and Law, 2016, p. 763, with further references to Dr Schumacher and Prof d'Onofrio 2012, p. 981; Sottas 2010, p. 121) and that it has been submitted in this context that "if the ADO is not able to produce a "doping scenario" with a minimum degree of credibility ("density"), the abnormality is simply unexplained, the burden of proof enters into play and the ADO's case must be dismissed since there is no evidence pleading in favour of the hypothesis of "doping" any more than for another cause." (VIRET, Evidence in Anti-Doping at the Intersection of Science and Law, 2016, p. 774).*
>
> *This view has indeed also been adopted in CAS jurisprudence and the Sole Arbitrator finds that another CAS panel summarised it nicely by stating that "abnormal values are (for the purposes of the ABP) a necessary but not a sufficient proof of a doping violation" (CAS 2010/A/2235, para. 86). Although such panel continued by emphasising that it is not necessary to establish a reason for blood manipulation, the*

panel noted the coincidence of the levels with the athlete's racing schedule and stated the following:

"As Dr Sottas convincingly explained, in the same way as the weight of DNA evidence said to inculpate a criminal is enhanced if the person whose sample is matched was in the vicinity of the crime, so the inference to be drawn from abnormal blood values is enhanced where the ascertainment of such values occurs at a time when the Athlete in question could benefit from blood manipulation." (CAS 2010/A/2235, para. 102; see also CAS 2016/O/4481, para. 138).

93. The Sole Arbitrator agrees with these considerations and, as such, concludes that from the mere fact that an athlete cannot provide a credible explanation for the deviations in his or her ABP it cannot automatically be deduced that an anti-doping rule violation has been committed. Rather, the deviations in the ABP are to be interpreted by experts called to put into the balance various hypothesis that could explain the abnormality in the profile values.

94. As such, the Sole Arbitrator finds that although the Athlete was not able to provide a credible non-doping related explanation for the abnormal values in her ABP as a whole, he reiterates that this does not automatically mean that the abnormal values are necessarily to be explained by doping. Rather, the Sole Arbitrator needs to be convinced that the abnormal values are caused by a "doping scenario", which does not necessarily derive from the quantitative information provided by the ABP, but rather from a qualitative interpretation of the experts and possible further evidence.

95. In respect of Sample 4 and 25, the Expert Panel determined as follows in the First Joint Expert Opinion on the basis of a qualitative assessment of the evidence:

"Sample 25 (11.10.2013) displays high reticulocytes and one of the lowest haemoglobin concentrations of the profile. This constellation indicates a heavy stimulation of the bone marrow such as observed after the use of an erythropoietic stimulant and/or blood withdrawal/blood loss. In the documentation for this sample (APMU documentation package), the specific question about blood loss is answered negatively. Analytical factors are also unlikely to explain this abnormality [...]

Sample 4 (25.2.2011): A similar constellation to the one observed in sample 25 described above (high reticulocytes), although to a lesser degree.

Seasonal pattern: The athlete displays higher haemoglobin values during spring and summer (the competitive season), and often near important races, which is unlikely to be physiological and likely represents increased red cell mass during these periods. [...]

it is our unanimous opinion that in the absence of an appropriate physiological or pathological explanation, the likelihood of the abnormalities described above being due to blood manipulation such as the withdrawal of blood for later reinfusion and/or the use of an erythropoietic stimulant is high. On the contrary, the likelihood of environmental factors or a medical condition causing the described pattern is low.

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

96. In the Second Joint Expert Opinion, the following is concluded from a qualitative perspective:

"We refer to our previous Joint Evaluation, submitted on 1.7.2017 for the details of the abnormalities which characterize this profile. In brief, the main abnormal features of the BPE301I3 passport include the combination of high reticulocytes and low haemoglobin in samples 4 and 25, indicating a stimulation of red cell production such as observed after the use of an erythropoietic stimulant and/or blood withdrawal or haemorrhage, as well as an unphysiological blood pattern characterized by higher haemoglobin during spring and summer and often near important races.

[…]

In summary, the concise explanations by the Athlete do not explain the abnormalities in her passport. We therefore confirm our previous opinion that it is highly unlikely that this profile 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."

97. In the Third Joint Expert Opinion, the following is concluded from a qualitative perspective:

"We refer to our previous Joint Evaluation, submitted on 1.7.2017 for the description of the two most suspicious abnormalities in this profile (increased reticulocytes with normal or slightly decreased haemoglobin in samples 4 and 25).

[…]

the isolated increase of reticulocytes in the absence of anemia is fully compatible with a scenario of exogenous erythropoietic stimulation with recombinant erythropoietin or another ESA. Such scenario has been demonstrated in several studies of experimental ESA administration to healthy subjects […].

In summary, the further documents provided by [the Athlete] *do not explain the specific aberrant features that we have previously described. We therefore confirm our previous opinion that it is highly unlikely that this profile is the result of a physiological or pathological condition, and it is highly likely that it was caused by the use of prohibited substances or prohibited methods"*

98. Whereas the Athlete argues that there is no scientific justification for potential use of doping and prohibited substances in the relevant periods of time, the IAAF submits that – based on the three expert reports – the ABP profile of the Athlete constitutes reliable evidence of blood doping/manipulation, which is manifest in endurance sport.

99. The Sole Arbitrator notes that there is no reason to deviate from the content of and the conclusions drawn in the three expert reports.

100. Indeed, importantly, the Sole Arbitrator notes that Sample 4 was taken one day before the start of a competition (*i.e.* Sochi, 20 km race walking). Sample 25 was however not taken shortly prior to a high-level competition or in temporal vicinity to a competition.

101. At the hearing, Dr Schumacher confirmed his opinion that a seasonal pattern exists, referring to Figure 1 of the First Joint Expert Opinion:

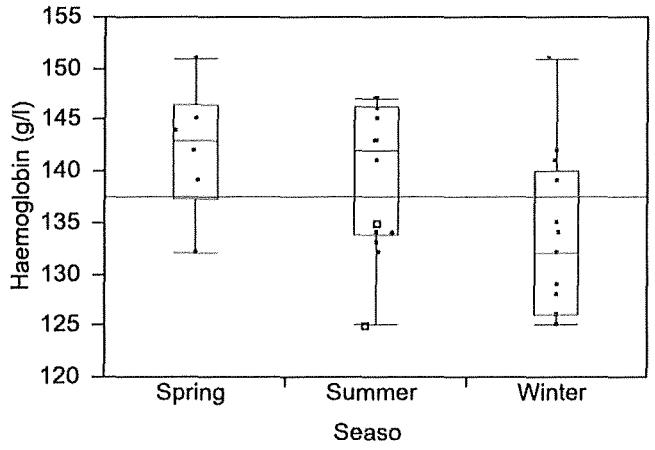

Figure 1: Haemoglobin values of the athlete (vertical axis) depending on the season (horizontal axis).

102. The Sole Arbitrator has no doubt about the veracity of Figure 1 as set out above. The Figure corroborates the IAAF's conclusion that the Athlete's HGB levels were generally higher in Spring and Summer, than in Winter.

103. The Sole Arbitrator notes that certain exceptions to this generalisation exist (i.e. Sample 30 taken on 22 October 2014 shows a particularly high level of HGB for a sample taken in Winter, Sample 1 taken on 15 August 2009 shows a particularly low level of HGB for a sample taken in Summer).

104. Notwithstanding these exceptions, the Sole Arbitrator notes that these two exceptions were taken either before or after the period during which the IAAF considers that the Athlete doped, and therefore do not discredit the Expert Panel's conclusion that the Athlete's HGB levels were indeed generally higher in Spring/Summer than in Winter.

105. The Sole Arbitrator sees no reason to doubt the Expert Panel's conclusion that such variation in HGB levels between Spring/Summer and Winter is "*unlikely to be physiological and likely represents increased red cell mass during these periods*" as "[u]*sual physiological regulation lowers haemoglobin during summer in athletes and normal subjects due to expansion of plasma volume to optimize thermoregulation*".

106. The Sole Arbitrator finds that the above findings are further supported by the fact that the samples taken between 25 February 2011 and 11 October 2013 (i.e. the period between Sample 4 and 25) with the highest HGB levels are Samples 6, 8 and 13. All three samples were taken on the eve before the Athlete competed in a race (i.e. 21 May 2011 Olhao 20 km race walking, 31 August 2011 Daegu 20 km race walking, 13 May 2012 Saransk 20 km race walking). Sample 8 of 31 August 2011 stands out in particular as this sample was taken on the eve of the 20 km race walking event at the IAAF World Championships.

107. Based on this, the Sole Arbitrator is satisfied to accept that a seasonal pattern exists and that the Athlete was engaged in a doping scheme between 25 February 2011 and 11 October 2013.

108. As such, all evidence on file points in the direction that blood doping/manipulation by the Athlete is the only remaining and – when assessed individually – also the only plausible and likely explanation for the abnormal blood values in the Athlete's ABP.

109. On the basis of all the above, the Sole Arbitrator is comfortably satisfied by the qualitative assessment of the Athlete's ABP by the Expert Panel, and finds that the Athlete committed an anti-doping rule violation, *i.e.* the IAAF succeeded to establish that the abnormal values in the Athlete's ABP are caused by a "doping scenario".

110. Consequently, the Sole Arbitrator finds that the Athlete violated Rule 32.2(b) of the 2010-2011 and 2012-2013 IAAF Rules.

ii. If an anti-doping rule violation was committed, what sanction shall be imposed on the Athlete?

111. The Sole Arbitrator observes that Rule 40.2 of the 2010-2011 and 2012-2013 IAAF Rules determines the following:

"The period of Ineligibility imposed for a violation of Rules 32.2(a) (Presence of a Prohibited Substance or its Metabolites or Markers), 32.2(b) (Use or Attempted Use of a Prohibited Substance or Prohibited Method) or 32.2(f) (Possession of Prohibited Substances and Prohibited Methods), unless the conditions for eliminating or reducing the period of Ineligibility as provided in Rules 40.4 and 40.5, or the conditions for increasing the period of Ineligibility as provided in Rule 40.6 are met, shall be as follows: First Violation: Two (2) years' Ineligibility."

112. Rule 40.5(b) of the 2010-2011 and 2012-2013 IAAF Rules determines as follows:

"No Significant Fault or Negligence: If an Athlete or other Person establishes in an individual case that he bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Rule may be no less than eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Rule 32.2(a) (Presence of a Prohibited Substance), the Athlete must establish how the Prohibited Substance entered his system in order to have the period of Ineligibility reduced."

113. Rule 40.6 of the 2010-2011 and 2012-2013 IAAF Rules determines as follows:

"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."

114. In its written submissions, the IAAF argues that a period of ineligibility of between two and four years shall be imposed, which was specified more particularly at the hearing to a period of ineligibility of three years. The Athlete submits that no such period of ineligibility is warranted, without however specifying why such period of ineligibility would not be appropriate.

115. The Sole Arbitrator finds that solely denying the use of a prohibited substance or a prohibited method, without submitting any further arguments, cannot be considered as a starting point for discussing any reduction of the customary period of ineligibility.

116. The Athlete in no way established that the abnormal blood values in her ABP were caused by circumstances for which the Athlete bore no significant fault or negligence. If the Athlete's explanations regarding ovarian cysts, pregnancy and miscarriage were upheld, there would simply be no anti-doping rule violation.

117. Consequently, given that these arguments of the Athlete were dismissed, the Sole Arbitrator finds that the Athlete is not entitled to any reduction of the otherwise applicable period of ineligibility of two years.

118. Turning his attention then to the question of whether the "standard" period of ineligibility of two years shall be increased due to aggravating circumstances, the Sole Arbitrator notes that, according to the IAAF, such aggravating circumstances are present and consist of (i) the use of a prohibited substance or prohibited method on multiple occasions; and (ii) engaging in a doping plan or scheme.

119. In respect of the use of a prohibited substance or prohibited method on multiple occasions, the IAAF argued that *"Samples 4 and 25, which were collected in 2011 and 2013 respectively, display features of erythropoietic stimulation, that the Expert Panel held as fully compatible with the use of EPO. Moreover, the Athlete's blood values indicate a counter-physiological seasonal variation."* In respect of a doping plan or scheme, the IAAF argued that *"the use of blood doping techniques – which necessarily*

involves advice and support from medical personnel and other third parties – has consistently been held by CAS to constitute a doping plan or scheme".

120. The Sole Arbitrator finds that based on the evidence before him, which he considers to be reliable, the Athlete acted intentionally when using prohibited substances or methods between 25 February 2011 and 11 October 2013, and as such was engaged in blood doping more than once over the course of two years, seven months and fourteen days.

121. The Sole Arbitrator therefore finds that the Athlete indeed used prohibited substances or prohibited methods on multiple occasions and that this indeed amounts to a doping plan or scheme. In the opinion of the Sole Arbitrator, this is to be considered as an important aggravating factor in determining the appropriate period of ineligibility to be imposed on the Athlete.

122. Bearing in mind the gravity of the aggravating circumstances and in view of the lack of any mitigating circumstances submitted by the Athlete, the Sole Arbitrator finds that a period of ineligibility of two years is too lenient and should be increased.

123. The question to be answered is therefore what period of ineligibility would be appropriate in the specific circumstances of the Athlete's case.

124. The IAAF referred to two CAS awards (i.e. the "Dominguez-case" (CAS 2014/A/3561 & 3641) and the "Bekele-case" (CAS 2013/A/3080) which it considered more or less comparable to the circumstances in the present case. In the former a period of ineligibility of three years was imposed, whereas in the latter a two years and nine months period of ineligibility was imposed.

125. The Sole Arbitrator observes that the aggravating circumstances in the "Dominguez-case" and the "Bekele-case" are somewhat less aggravating in comparison with the circumstances in the present case.

126. In the "Dominguez-case" the aggravating circumstances consisted, *inter alia*, of two samples reflecting abnormal values, which samples correlated with the timing of two major athletics events, while the athlete was found guilty of using prohibited substances or prohibited methods over a period of less than a year. The Athlete is found guilty of using prohibited substances or prohibited methods over a period of two years, seven months and fourteen days and Sample 4 relates to a competition. The Sole Arbitrator notes that also Samples 6, 8 and 13 contain elevated HGB levels (although just not exceeding the 99.9% specificity threshold for HGB in the Athlete's ABP) and were taken on the eve of sporting competitions in which the Athlete competed, including the Daegu IAAF World Championships in 2011.

127. The CAS panel in the "Bekele-case" imposed a period of ineligibility on the Athlete of two years and nine months, considering that the established culpability of the athlete related only to a single year and to the targeting of two competitions within that year.

128. Consequently, in comparison with the periods of ineligibility imposed on other athletes in ABP cases, the Sole Arbitrator finds that the IAAF's request to impose a three-year period of ineligibility on the Athlete is indeed appropriate taking into account the severity of the Athlete's misbehaviour.

129. The Sole Arbitrator finds that, for practical reasons and in order to avoid any eventual misunderstanding, the period of ineligibility shall start on 27 July 2017, the date of commencement of the provisional suspension, and not on the date of the award.

130. Finally, turning his attention to the disqualification of the Athlete's results, the Sole Arbitrator observes that Rule 40.8 of the 2010-2011 and 2012-2013 IAAF Rules determines as follows:

"In addition to the automatic disqualification of the results in the Competition which produced the positive sample under Rules 39 and 40, all other competitive results obtained from the date the positive Sample was collected (whether In-Competition or Out-of-Competition) or other anti-doping rule violation occurred through the commencement of any Provisional Suspension or Ineligibility period shall be Disqualified with all of the resulting Consequences for the Athlete including the forfeiture of any titles, awards, medals, points and prize and appearance money."

131. The Sole Arbitrator notes that it is not in dispute between the parties that a "fairness exception" applies.

132. The IAAF suggests to apply fairness by limiting the period of disqualification to the period between both evidences of doping expressly identified by the Expert Panel, i.e. sample 4 of 25 February 2011 and sample 25 of 11 October 2013, and for a period of two years from the latter sample, i.e. from 11 October 2013 until 10 October 2015, because the Athlete would have been declared ineligible for at least such period had the positive finding arisen at the time of the collection of sample 25.

133. The Athlete did not make any suggestion as to how this situation should be dealt with.

134. The Sole Arbitrator observes that the present case is not one regarding a specific "positive sample", it is however a case that falls under Rule 40 of the IAAF Rules, as a consequence of which the Athlete's competitive results are nevertheless subject to disqualification. A complicating factor in this respect is that an anti-doping rule violation established on the basis of an ABP does normally not determine when the violation of Rule 32.2(b) of the IAAF Rules was committed exactly, but rather that based on all the evidence available it must be concluded that a violation was committed during a certain period. This difficulty has already been identified in CAS jurisprudence (CAS 2010/A/2235, para. 116).

135. The Sole Arbitrator deems it appropriate to impose a period of disqualification of results as he is convinced that the Athlete doped and because the main purpose of disqualification of results is not to punish the transgressor, but rather to correct any unfair advantage and remove any tainted performances from the record (LEWIS / TAYLOR (Eds.), Sport: Law and Practice, 2014, para. C.162, with further references).

136. In the present case, as set out *supra*, the Sole Arbitrator is satisfied to accept that the Athlete used prohibited substances or a prohibited method and that she was engaged in a doping plan or scheme between 25 February 2011 and 11 October 2013.

137. The Sole Arbitrator notes that pursuant to the literal wording of Rule 40.8 of the IAAF Rules all the competitive results of the Athlete as from the moment the positive sample

was collected until her provisional suspension (27 July 2017) was pronounced would have to be disqualified, *i.e.* a period of more than six years and five months.

138. Although there is no positive sample in the matter at hand, the Sole Arbitrator finds that Sample 4 can be equated to a positive sample and that the date of collection of this sample is therefore decisive for the commencement of the disqualification of the Athlete's results, i.e. there is no indication on file suggesting that the Athlete used prohibited substances or prohibited methods before such date.

139. The second sample that is particularly relevant in this case is Sample 25 of 11 October 2013 as this is, according to the IAAF, the last sample that is indicative of doping, to which the Sole Arbitrator agrees.

140. The Sole Arbitrator finds that fairness indeed demands that Rule 40.8 of the IAAF Rules is not applied strictly in the matter at hand.

141. The Sole Arbitrator, considering that the Athlete was engaged in a doping scheme between 25 February 2011 and 11 October 2013, finds it adequate and proportionate to disqualify the results of the Athlete achieved in the period between 25 February 2011 and 11 October 2013.

142. Given that the IAAF does not request that all the results of the Athlete are disqualified, but only the results achieved until 10 October 2015, the final question to be addressed by the Sole Arbitrator is therefore whether the Athlete's results between 11 October 2013 and 10 October 2015 should also be disqualified or whether this would be in violation of the fairness principle.

143. The IAAF requests to apply fairness by analogy to retesting cases, where certain results obtained after the anti-doping rule violation are left untouched. The IAAF indicated that the policy of the IAAF in retesting cases is that the disqualification is for such period as the disqualification would have been if the sanction would have been pronounced at the time of the anti-doping rule violation, the *rationale* being that the athlete would not have been able to achieve these results had the result management process started immediately.

144. The Sole Arbitrator however notes that should the results management process have started immediately the Athlete would have been imposed only a ban and not a disqualification period plus a ban.

145. The Sole Arbitrator further notes that in retesting cases there is a clear reason why the result management process started late, whereas no such reason is present here.

146. The Sole Arbitrator indeed observed that although Sample 25 was already collected on 11 October 2013, the result management process only commenced shortly before 1 June 2017, the latter being the date of the First Joint Expert Opinion, whereas, upon inquiry of the Sole Arbitrator at the hearing, no valid explanations were provided for the late start of this process. Counsel for the IAAF merely indicated that analysing an ABP takes time. The Sole Arbitrator however finds that this is no compelling excuse for commencing anti-doping proceedings only three years and eight months after the last sample indicative of doping was provided.

147. There is no valid justifications put forward by the IAAF in this respect, while the consequences of such delay for the Athlete are severe (i.e. if the results management process had started within a reasonable period after 11 October 2013, and assuming the same period of ineligibility would have been imposed as the Sole Arbitrator does now, the Athlete would already have fully served her three year period of ineligibility by now). Further and as previously underlined (supra, para. 135), the main purpose of disqualification of results is not to punish the transgressor, but rather to correct any unfair advantage and remove any tainted performances from the record. Considering that no doping has been established after 11 October 2013, that no responsibility of the Athlete in the delay in the results management has been established and that the Athlete is *in casu* already imposed a two-year disqualification period and a three-year ban, the Sole Arbitrator finds that it would not be fair to also disqualify the Athlete's results between 12 October 2013 and 10 October 2015.

148. As a consequence, the Sole Arbitrator finds that a period of ineligibility of three years is to be imposed on the Athlete and that the results of the Athlete achieved in the period between 25 February 2011 and 11 October 2013 are to be disqualified, including the forfeiture of any titles, awards, medals, points and prize and appearance money.

VIII. COSTS

149. Article R64.4 of the CAS Code provides as follows:

> *"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators, the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties."*

150. Article R64.5 of the CAS Code reads as follows:

> *"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties."*

151. Rule 38.3 seventh sentence of the 2016-2017 IAAF Rules determines that the hearing of a case as the present before CAS shall proceed *"at the responsibility and expense of the Member* [...]".

152. The IAAF requested that the arbitration costs are entirely borne by RUSAF, or, in the alternative, by the Respondents jointly and severally and that IAAF is awarded a significant contribution to its legal costs.

153. Taking into account the outcome of the arbitration and considering Rule 38.3 of the 2016-2017 IAAF Rules, the Sole Arbitrator sees no other possibility than to rule that RUSAF shall bear the arbitration costs in an amount that will be determined and notified to the parties by the CAS Court Office.

154. Furthermore, pursuant to Article R64.5 of the CAS Code, the complexity and outcome of the proceedings as well as the conduct and the financial resources of the parties shall be considered. In this respect, the Sole Arbitrator notes that the IAAF's claim has been accepted in all respects. As to the conduct of the Parties, the Sole Arbitrator is mindful that the Athlete did not admit the anti-doping rule violations in spite of the IAAF's inquiries and thereby forced the IAAF to initiate the arbitral proceedings in the CAS. Furthermore, the Respondents did not request a hearing but the IAAF did and two hearings had *in fine* to be held further to unexpected circumstances during the first one. With respect to the financial resources of the Parties, the IAAF appears to have more financial means than the Athlete. In light of the relevant elements, the Sole Arbitrator finds it reasonable that the Respondents shall pay, jointly and severally, a contribution to the IAAF's legal fees and expenses in the amount of CHF 3,000. In addition, RUSAF and the Athlete shall bear their own legal fees and expenses.

155. The present award may be appealed to CAS pursuant to Rule 42 of the IAAF Rules.

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ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The claim filed on 7 November 2017 by the International Association of Athletics Associations against the Russian Athletic Federation and Ms Anisya Kirdyapkina is partially upheld.

2. A period of ineligibility of three years is imposed on Ms Anisya Kirdyapkina starting from 27 July 2017.

3. All results of Ms Anisya Kirdyapkina since 25 February 2011 are disqualified through to 11 October 2013, including forfeiture of any titles, awards, medals, points and prize and appearance money obtained during this period.

4. The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne in their entirety by the Russian Athletic Federation.

5. The Russian Athletic Federation and Ms Anisya Kirdyapkina are ordered to pay, jointly and severally, CHF 3,000.00 (three thousand Swiss Francs) to the International Association of Athletics Federations as a contribution towards its legal fees and expenses. The Russian Athletic Federation and Ms Anisya Kirdyapkina shall bear their own legal fees and expenses.

6. All other and further prayers or requests for relief are dismissed.

Seat of arbitration: Lausanne
Date: 1 February 2019

THE COURT OF ARBITRATION FOR SPORT

Manfred Nan
Sole Arbitrator