SPORT RESOLUTIONS (UK)

SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/Adhocsport/262/2019

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

Before:

Michael J Beloff QC (Chair)

BETWEEN:

International Association of Athletics Federations ("IAAF")

Anti-Doping Organisation

-and-

Elena Ikonnikova

Respondent

DECISION

A. Introduction

1. The Claimant, the International Association of Athletics Federations ("**IAAF**"), is the International Federation governing the sport of Athletics worldwide.[1] It has its registered seat in Monaco.

2. The Respondent, Ms. Elena Ikonnikova (the "**Respondent**"), was at the material time an Athlete Support Personnel[2] under the ADR and the Anti-Doping Coordinator for the Russian Athletics Federation ("**RusAF**" or "the **Federation**").

3. On 16 August 2019 the Respondent was charged by the AIU with failure to comply with the IAAF Anti-Doping Rules ("**ADR**"), in particular, for (i) failing to comply with the terms of a Demand issued to her on 17 May 2019 ("the **Device Demand**") and (ii) failing to comply with an Order of the Disciplinary Tribunal ("the **Order**") issued in a Ruling dated 15 July 2019 ("the **Ruling**") following the determination of an objection to the Demand filed by the Respondent ("the **Non Compliance charges**").

4. In summary the Respondent denies the Non Compliance charges on the basis that compliance with the Device Demand and the Order would involve her in breaches of Russian law and expose her to a real risk of prosecution.

5. In summary the Athletics Integrity Unit ("**AIU**") denies that the Respondent's compliance would breach Russian law or expose her to real risk of prosecution but that, if (*quod non*) it did, it would not excuse her failure to comply but would at most affect the sanction.

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[1] The IAAF (now renamed World Athletics) is represented in these proceedings by the Athletics Integrity Unit ("**AIU**") which has delegated authority for results management and hearings on behalf of the IAAF pursuant to Article 1.2 of the IAAF Anti-Doping Rules.

[2] Athlete Support Personnel: any coach, trainer, manager, authorised athlete representative, agent, team staff, official, medical or para-medical personnel or any other person working with, treating or assisting an Athlete participating in, or preparing for, Competition in Athletics.

B. Applicable Rules[3]

6. Article 5.10 ADR provides the AIU with authority and jurisdiction to conduct investigations in accordance with the requirements of the World Anti-Doping Code ("**WADC**") and the International Standard for Testing and Investigations ("**ISTI**") into matters that may evidence or lead to the discovery of evidence of anti-doping rule violations.

7. The ADR also provide the AIU with a number of investigative mechanisms to meet its duty to conduct investigations into potential anti-doping rule violations efficiently and effectively. This includes requiring Athletes and other Persons subject to the jurisdiction of the ADR to attend before the AIU for interview, to provide hard copy or electronic files and/or records and/or to provide any electronic storage device(s) that the Head of the AIU reasonably believes may have relevant information stored upon them that may evidence or lead to the discovery of evidence of anti-doping rule violations:

> *"5.10.5 Without limiting the foregoing, pursuant to Article 5.10.4, the Head of the Integrity Unit may require an Athlete or other Person to:*
>
> *(a) attend before the Integrity Unit for an interview, or to answer any question, or to provide a written statement setting out his knowledge of any relevant facts and circumstances;*
>
> *(b) provide (or procure to the best of his ability, the provision by any third party) for inspection, copying and/or downloading any records in hardcopy or electronic format, that the Head of the Integrity Unit reasonably believes may contain relevant information (such as itemised telephone bills, bank statements, ledgers, notes, files, correspondence, e-mails, messages, servers);*
>
> *(c) provide (or procure to the best of his ability, the provision by any third party) for inspection, copying and/or downloading any electronic storage device in which the Head of the Integrity Unit reasonably believes relevant information may be stored (such as cloud-based servers, computers, hard drives, tapes, disks, mobile telephones, laptop computers, tablets and other mobile storage devices)."*

8. In addition, Article 5.10.7 ADR provides the Head of the AIU with authority to request that any information, record, article or thing be provided to the Integrity

[3] Neither the ADR as being the applicable rules, their content or that they apply to the Respondent are in issue in these proceedings.

Unit immediately, where he reasonably believes that such items are capable of being damaged, altered, destroyed or hidden.

9. The provision expressly provides that electronic storage devices or electronically stored information shall be deemed to meet this criterion and that the purpose for requiring such items to be provided immediately is in order to preserve the evidence that may be contained on them.

10. The ADR also by way of balance provide the recipient of a Demand under Article 5.10.7 ADR with a right to make an objection to it by requesting a review by the Chairperson of the Disciplinary Tribunal ("The **Chair**") within 7 days. However, the recipient's right to submit an objection to the Demand does not obviate the requirement to comply with the Demand and immediately provide any information, record, article or thing to the AIU in order to preserve the evidence.

11. Where an Athlete or other Person refuses or fails to comply immediately with a Demand, Article 5.10.7(b) ADR expressly provides that the consequences in Article 12 ADR shall apply.

12. In addition, Article 7.8.4 ADR expressly provides that the consequences in Article 12 ADR shall apply where an Athlete or other Person fails to produce the information, record, article or thing and any copy, or download of the same, following a determination by the Chair (or his delegate) that there is a reasonable belief basis to the Demand:

> *"7.8.4 Where the chairperson of the Disciplinary Tribunal or his delegate determines that there is a reasonable belief basis to the Demand, then if the Athlete or other Person fails to produce the information, record, article or thing and any copy or download of the same, the consequences in Rule 12 apply."*

13. Furthermore, Article 12 ADR specifies that the Disciplinary Tribunal shall impose such sanctions for non-compliance as it sees fit, which may include a period of ineligibility during which the Athlete or Athlete Support Person shall not be eligible to participate in Athletics.

C. Factual Background

I. AIU Investigation and Federation Demand

14. In accordance with Article 5 ADR, the AIU opened an investigation into explanations advanced by Mr Danil Lysenko, the well-known Russian high jumper ("the **Athlete**") for his Whereabouts Failures (the "**Investigation**"). In the course of conducting the Investigation with the assistance of the Russian Anti-Doping Agency ("**RUSADA**"), the AIU discovered evidence that the Athlete had committed a violation of Tampering under Article 2.5 ADR by submitting forged medical documents to the AIU ("the **Lysenko violation**").

15. [redacted]

16. On 25 April 2019, the President of the Federation attended the offices of the AIU in Monaco for interview in the context of the Investigation and in accordance with a Demand for interview that had been served on him by the Head of the AIU on 16 April 2019 pursuant to Article 15.8.4 ADR.

17. During the course of this interview, the President of the Federation was issued with a Demand on the Federation ("the **Federation Demand**"), which obliged RusAF to:

    17.1. provide (or procure to the best of its ability the provision by any third party) for inspection, copying and/or downloading, any records or files, in hardcopy or electronic format that the Head of the Integrity Unit believes in good faith may contain relevant information;

    17.2. provide (or procure to the best of its ability the provision by any third party) for inspection, copying and/or downloading, any electronic storage device (such as cloud based servers, computers, hard drives, tapes, disks, mobile telephones, laptop computers, tablets and other mobile storage

devices) in which the Head of the Integrity Unit believes in good faith relevant information may be stored;

17.3. provide passwords, login credentials and other identifying information required to access electronically stored records that are the subject of a Demand; and

17.4. procure the full co-operation of its office holders, employees, servants, agents, consultants and contractors in responding to the Federation Demand.

18. In particular, based on the findings of the Investigation, the Head of the AIU confirmed in the Federation Demand that he had formed a reasonable belief that:

18.1. relevant information may be stored on the email and document servers of RusAF used between 31 March 2018 and 25 Aril 2019 (including cloud-based servers, hard drives, tapes, disks or other storage devices, including back-up tapes/disks/copies) ("**the relevant email and document servers**");

18.2. relevant information may be stored on mobile storage devices and electronic communications devices (such as mobile telephones, tablets, personal computers, laptop computers, USBs and hard drives) that were the property of RusAF and used by any of the persons referred to in the Federation Demand (including the Respondent) in connection with their professional role between 31 March 2018 and 25 April 2019 ("**the relevant devices**").

19. To facilitate the execution of the Federation Demand, the AIU arranged for representatives of RUSADA to attend the premises of RusAF on 26 April 2019 to accept on behalf of the AIU the provision of the relevant email and document servers and the relevant devices with the assistance of forensic imaging professionals in connection with the associated technical elements.

20. The President of RusAF, on behalf of the Federation, did not object to the Federation Demand; in countersigning the Federation Demand, he provided his

express, written consent to its execution. However, for operational reasons, the AIU was unable to execute the Federation Demand on 26 April 2019 as agreed with the President of RusAF on 25 April 2019.

21. On 15 May 2019, the Head of the AIU wrote to the President of RusAF with an update on the Federation Demand. This correspondence confirmed that the Federation Demand would be executed on 16 May 2019 and facilitated by RUSADA acting with the assistance of forensic imaging professional from IB Group in relation to the technical aspects of the Federation Demand.

22. In the absence of the President of the Federation, the Executive Director of RusAF, Mr Alexander Parkin, gave his express written undertaking that the President of the Federation would do everything in his power to facilitate the implementation of the Federation Demand by RUSADA on 16 May 2019.

23. At 10:00am on 16 May 2019, representatives of RUSADA attended the offices of RusAF in Moscow, Russia, accompanied by representatives of IB Group to execute the Federation Demand on behalf of the AIU.

24. Pursuant to the reasonable belief set out by the Head of the AIU in the Federation Demand, and in accordance with Article 15.8.4 ADR, the Federation was obliged to provide (or procure to the best of its ability the provision by the Respondent) the Respondent's relevant devices.

25. Whilst the Respondent provided access to a computer for inspection, copying and downloading pursuant to the Federation Demand, she failed to hand over her mobile telephone(s) on the basis that it was her personal property and did not belong to RusAF.

26. In particular, the Respondent also raised concerns about personal data held on her mobile telephone that did not relate to her professional role/capacity (such as bank details, personal photographs and personal data of third parties) being disclosed to third parties as a breach of Russian law and information being used for "*unknown purposes*".[4]

[4] In an e-mail 17 May 2019 at 13:21.

27. The AIU seeking to address the Respondent's concerns, made a final proposal designed fully to protect the Respondent's interests in relation to personal data stored on her mobile telephone(s) while achieving compliance with the Federation Demand:

(i) at a mutually convenient date and time, under the full oversight and presence of the Applicant, a single image (copy) of her mobile telephone would be taken by representatives of IB Group using standard Cellebrite or Oxygen Forensics Detective imaging technology, or similar. The image would be sealed securely and would not be accessed, copied or duplicated;

(ii) at a subsequent mutually convenient date and time, the image would be accessed and examined by three persons, being (i) the Applicant, (ii) a RUSADA representative with knowledge of the case and an understanding of the information and evidence of relevance to the Investigation, and (iii) a representative from IB Group;

(iii) during this examination of the image, date restrictions and key word searches, numbers, phrases and images would be identified by the AIU (i) to reduce the propensity for irrelevant information to be accessed, copied or examined and (ii) to ensure that all information and/or evidence of relevance to the Investigation (including any deletions or manipulations that may have been made by the Applicant) can be identified, isolated and copied into a case evidence folder; and

(iv) upon completion of the examination of the image, the case evidence folder alone would be preserved and placed onto a separate storage medium for viewing and downloading by the AIU as it considers necessary for the purposes of the Investigation;

(v) the original single image of the Applicant's mobile telephone (including all personal data contained on it) would then be stored securely to the satisfaction of the Applicant, the RUSADA appointed person and the representative of IB Group pending the outcome of the Investigation and any related disciplinary proceedings. The image would be sealed securely and would not be accessed, copied or duplicated without further order;

(vi) a full chain of custody and supporting documentation would be established for each step of the process described; and

(vii) following the completion of the process described, the Applicant's mobile telephone would be returned to her with all personal data on it left intact.

("the **Current Proposal**")

28. The Respondent did not agree to the Current Proposal. Instead, she maintained that she would only give access to her mobile telephone under her own supervision and control and would herself determine what screenshots of relevant evidence and/or information (messages and emails) were to be taken and forwarded to the AIU.

II. The Device Demand

29. On 17 May 2019 the Respondent, having failed to provide her mobile telephone pursuant to the Federation Demand and the Current Proposal of 16 May 2019, the Head of the AIU Unit issued a Demand to the Respondent ("the **Device Demand**") pursuant to Article 5.10.5(c) ADR for the inspection, copying and/or downloading of her electronic storage devices, including, without limitation, the Respondent's mobile telephone(s), in the context of the Investigation.[5]

30. The Device Demand specified that the Respondent was to contact a RUSADA representative and present her electronic storage devices (including her mobile telephone(s)) for inspection, copying and/or downloading by forensic imaging professionals by no later than 13:00 Moscow Standard Time on the same date.

31. The Respondent was also required to comply immediately, in particular, to preserve any evidence stored upon her electronic storage devices in accordance with Article 5.10.7 ADR.

32. However, the Respondent failed to comply with the Device Demand. Instead, the Respondent sent two e-mails to the AIU on 17 May 2019; the first in Russian and the second comprising an English translation of the first.

33. In summary, these e-mails confirmed that the Respondent did not agree to provide her electronic storage devices immediately in accordance with the Device Demand. The Respondent referred to the circumstances of the previous day where she had provided full data from her computer (in the context of the Federation Demand) and had made alternative proposals for the provision of her mobile telephone but in her presence, and for information to be copied from her mobile telephone based on a search of keywords and parameters relevant to the Investigation.

34. The Respondent also referred to concerns highlighted the previous day relating to the security and protection of her personal data and also to the transfer of

personal data (including that of third parties) outside of Russia in alleged breach of national law.

35. Accordingly, the Respondent failed to provide her mobile telephone(s) for inspection, copying and downloading in accordance with the Device Demand, which therefore could not be executed on 17 May 2019.

III. The Objection to the Device Demand

36. On 20 May 2019, the Respondent sent an e-mail to the AIU in Russian followed by a translation of this e-mail together with the Respondent's objection to the Device Demand filed in accordance with Article 5.10.7(c) ADR.

37. On 24 May 2019, the Respondent filed an objection to the Device Demand which stated the following:

"I object to the Demand and request a review by the Chairperson of the Disciplinary Tribunal based on the following reasons:

1. *The Russian Constitution (art. 23) guarantees the right to the **inviolability of private life, personal and family secrets**; the **right to privacy of correspondence**, of telephone conversations, postal, telegraph and **other messages**.*

2. *According to the effective Russian laws personal data may be disclosed only by a consent of the person whom these data relates to and it is strongly prohibited to give/disclose personal confidential information to third parties and to send it abroad (art. 6 of Federal Law "On Personal Data" N 152-FZ dated 27.07.2006).*

Violation of these rules may entail civil, administrative and criminal liability provided by effective Russian legislation (art. 24 of Federal Law "On Personal Data" N 152-FZ dated 27.07.2006; art. 137 of Russian Criminal Code, art. 13.11 of Russian Code of Administrative Offences).

At my personal smartphone I keep:

*- **my personal private and confidential information** (including private pictures, private correspondence and notes) which is not related to my professional activities which I do not intend to disclose because of purely private nature of this information;*

*- **sensitive financial information** such as passwords from my bank accounts and other bank documents which are not related to my professional activities;*

*- most importantly, personal information related to my relatives, friends, acquaintances, **who did not authorize me for disclosure of their personal information.***

*Taking into account the above **I cannot violate the strict prohibitions provided by Russian law** and do not intend to let copying my private information which is not related to my professional activities."*

38. The Respondent also amplified these arguments in submissions to the Tribunal dated 19 June 2019. In summary, these submissions included that:

    38.1. the Device Demand was unreasonable and disproportionate in the circumstances;

    38.2. the Device Demand contradicts the mandatory rules of Russian law and fulfilment of the Current Proposal would result in severe negative consequences for the Respondent in Russia (including potential criminal liability); and

    38.3. taking into account its contradiction to the Russian law regarding personal data protection, the Device Demand and the Current Proposal contradict the rules of the mandatory International Standard for the Protection of Privacy and Personal Information.

39. The Respondent requested that the Device Demand be set aside or adjusted in order that the Respondent could comply with it within the confines of Russian law.

IV. <u>The Order</u>

40. On 15 July 2019 in my capacity as Chair[6], I issued a ruling on the Objection filed by the Respondent ("the **Ruling**").

41. At paragraph 71, *et seq.* of the Ruling, I held that the single issue for my determination, i.e., whether there was a reasonable belief basis to the Device Demand, could not seriously be gainsaid:

    "71. Pursuant to the Rules, literally read, there is only one issue for me to determine, that is to say whether there is a reasonable belief basis to the demand. If there is, it must be complied with by the person to whom it is directed; if there is not it can be ignored -indeed the AIU is not permitted to pursue it (although

[6] the parties having agreed that I should by myself constitute the Panel

presumably if - unlikely as that may be - that person may voluntarily do that which the demand required).

72. If that were both the start and end of my enquiry there could be only one conclusion: the Applicant must comply with the demand. It is clear to me – and indeed it is not as such disputed by the Applicant - that the AIU has a reasonable basis for believing that the Applicant's mobile telephone contains information which may evidence or lead to the discovery of evidence of an ADRV. That the AIU in point of fact entertains such belief is not-and cannot seriously be gainsaid. For my part I consider that such belief is reasonable on the basis set out in the next paragraph.

73. As the AIU stated in its Response:

(i) As was made clear in the Device Demand, the Athlete admitted in interview with the AIU that the explanation and medical documents for his Whereabouts Failures were forged and that the same were produced and submitted to the AIU with the assistance, aid, encouragement, conspiring, cover up and complicity of representatives of RusAF. Further, evidence obtained by the AIU, including from the Athlete and the RusAF President, indicated that the Applicant, along with other senior office holders, servants, agents or employees of RusAF, was either involved in an initial meeting to discuss the Athlete's Whereabouts Failures or was involved in the process of provision of documents and/or explanations to the AIU, by or on behalf of the Athlete, in relation to his Whereabouts Failures or in communications regarding the same.

(ii) The Applicant has accepted in interview with the AIU that she was present at the initial meeting of RusAF representatives that was referred to by the Athlete.

(iii) The Applicant also accepts that she uses her mobile telephone for professional purposes."

42. Moreover, I also dismissed the Respondent's arguments in the Objection *inasmuch* as it referred to allegedly superior laws that purportedly limited the reach of the ADR including the Russian Constitution, Russian domestic laws on privacy and confidentiality as well as on principles embedded in the European Convention on Human Rights ("ECHR'') (privacy and property) stating in words articulated in parallel proceedings [redacted] but which were applied also to the Respondent's case:

"75. *There is a wealth of authority to sustain the AIU's key argument that in international sport all who are bound by the sport's rules must in fairness be treated equally thereunder irrespective of the idiosyncrasies of national jurisdictions Peñarol v. Bueno, Rodriguez & PSG, CAS 2005/A/983 & 984, para 24 CONI, CAS 2000/C/255, para 56) In Foschi v FINA, CAS 96/156, para*

10.2.4 para 147 Valcke v FIFA, CAS 2017/A/5003, para 265, Mong Joon Chung v. FIFA, CAS 2017/A/5086, at para 189 ICC v Ikope ICC Disciplinary Tribunal,5 March 2019.at para 6.16.

76. *Moreover, as a price to pay for participation in the sport under consideration it is habitual for participants to waive the rights that they might otherwise enjoy under national or other law e.g. ICC v Ikope at para 6.18. see here to like effect the unambiguous ADR 5.10.6 which, for convenience I repeat "Each Athlete or other Person waives and forfeits any rights, defences and privileges provided by any law in any jurisdiction to withhold any information, record, article or thing requested in a Demand." [7]To the extent that the Applicant might otherwise be able to rely on rights conferred by Russian law, the ECHR or other law, she has forfeited an ability to do so. It is, moreover, Monagesque, not Russian law, which informs the ADR (compare ICC v Ikope para 6.17) and it has not been argued that Monagesque law validates the Applicants objection. (Nor I would add can I detect any tension between the relevant provisions of the ADR and the demands made thereunder with either. the ISTI or the ISPPPI)*

77. *I accept that to waive rights is one thing; to claim immunity from criminal law quite another. The key question in the context of the Objection is, as it seems to me, whether a person such as the Applicant can decline to comply with what would otherwise be under the ADR a valid and proper demand for information, whether contained in an electronic device or otherwise, on the basis that to do so would expose that person to criminal sanctions under domestic law - the high watermark of her Objection?[8]*

78. *This discrete issue was addressed obiter in ICC v Ikope where, however, the relevant domestic law, the Constitution of Zimbabwe did not on the evidence available to the Panel expose Mr Ikope to the risk of prosecution if he complied with the ICC's demand to inspect his mobile telephone.*

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[7] See to like effect Article 20.1 "These Anti-Doping Rules are sport rules governing the conditions under which sport is played. Aimed at enforcing anti-doping principles in a global and hamonized manner, they are distinct in nature from criminal and civil laws, and are not intended to be subject to or limited by any national requirements and legal standards applicable to criminal or civil proceedings."

[8] I so say because risk of exposure to civil suit is obviously less serious though, I naturally acknowledge, serious enough.

79. *The Panel there observed: "Indeed were such law to prohibit Mr Ikope or any similarly circumstanced Participant from so doing it might put at risk Zimbabwe's membership of the ICC since a sport such as cricket, which is played all over the world, "is a global phenomenon which demands globally uniform standards".*

80. *The same considerations must apply mutatis mutandis, to RusAF. RusAF's membership of the IAAF is currently suspended for well known reasons; but it could not sensibly be readmitted as a member if it (and those who act for it) were able to claim that rules, in particular, if not only, the ADR which apply to all other members did not apply to it. Article 1.5 of the ADR starts with the words, so far as material "These Anti-Doping Rules[9] shall apply to the IAAF and to each of its National Federations...All National Federations.. shall comply with the Anti-Doping Rules ...'"Article15.2 provides: ''It is a condition of membership of the IAAF that each National Federation shall comply with these Anti-Doping Rules''[10]*

81. *In any event while the Applicant refers on general terms to the provisions of Russian law said potentially to expose the Applicant to "civil administrative and even criminal liability''- the word 'even' is not without significance, (Reply para 53 (4))[11]-. she does not explain with sufficient clarity or necessary detail why the Current Proposal would be inconsistent with any Russian law, let alone involve a breach of criminal law. I have carefully considered the Current Proposal which seems to me carefully designed to minimize, if not eliminate, the chances of any breach of confidentiality or invasion of privacy of the Applicant herself or of third parties (such as her adopted child) which are matters in which the AIU can have no interest whatsoever. Any residual threat to such interest seems to me to be more apparent than real and I would require more strongly substantiated and precisely focussed argument than is presently before me to persuade me that even with all its safeguards, compliance with the Current Proposal, which has an eminently virtuous purpose, would in reality (even if in theory) expose the Applicant to redress under any Russian or other law relied on by her. or by preventing her for acceding to the Current Proposal potentially render RusAF not compliant with the ADR.*

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[9] Defined in Article 20.4 Definitions.

[10] Note also Article 16; SANCTIONS AGAINST NATIONAL FEDERATIONS, inter alia, "breach of ..obligations under Article 15..." (Article 16.1(a))

[11] See too her reference to "possible (sic) criminal prosecution and liability" Reply para 54.

82. The AIU considers the Current Proposal to be fully secure and one that wholly meets the Applicant's concerns and the requirements of the Device Demand, whilst at the same time preserving any relevant information and/or evidence in the matter and safeguarding the integrity of the ongoing Investigation. In particular, using such a method, the Applicant can be satisfied that any personal data contained on her mobile telephone that is either not related to the Applicant's professional activities or is not relevant to the Investigation would not be given to any third party or sent abroad. I agree. The Current Proposal is no more than is required but certainly it is no less. To the extent that its proportionality fell for evaluation by me I would give it a clean bill of health.

83. I am not unhappy to reach this conclusion. There is a wealth of authority to support the AIU's argument that provisions such as those which underpin the current Device Demand are necessary to preserve, protect and promote integrity in sport given that sports bodies lack the coercive powers conferred by legislation on public authorities Mong Joon Chung v. FIFA CAS 2017/A/5086, at para 189, ICC v Ikope at para 16ff.

84. I have, of course, no knowledge myself of what (if any) information relevant to the Investigation the Applicant's mobile telephone may contain. The Current Proposal is itself intended to discover whether such information exists and, if so, in what form. It is however crystal clear to me that the subject matter of the Investigation raises serious questions of major moment to the sport of track and field and it would be a matter for regret if the Investigation were compelled to be less than thorough due to circumstances beyond the AIU's control."

43. I concluded that the Current Proposal was proportionate and ordered as follows ("the **Order**"):

*"86. The Applicant (ie **for present purposes the Respondent'')** is required to comply with the Device Demand in the form of the Current Proposal within 7 days of the date of my decision or expose herself to the consequences set out in ADR Article 12"*

44. On 16 July 2019, the AIU wrote to the Respondent and informed her the Objection had been rejected by me. The AIU further stated that the Respondent was to confirm a convenient date and time between Tuesday 16 July 2019 and

Tuesday 23 July 2019 on which she would attend the offices of IB Group to comply with the Order.

45. On 17 July 2019, the Respondent sent an e-mail to the AIU repeating her objections to the Demand that had already been determined by me.

46. On 18 July 2019, the AIU replied to the Respondent's e-mail of 17 July 2019 and confirmed that she was obliged to comply with the Order, or otherwise (as itself provided in the Order) expose herself to the consequences in Article 12 ADR. The AIU confirmed that it had made arrangements on multiple dates for the Respondent to comply with the Order and invited her to attend the offices of IB Group in Moscow in order to do so.

47. The Respondent failed to respond to the AIU's correspondence dated 18 July 2019 and also failed to comply with the Order.

48. On 23 October 2019, the Respondent filed her Answer in this matter ("the **Answer**") asserting that the arguments put forward by the AIU are "*not legally valid*" and submits that compliance with the Device Demand and the Order "*create imminent and grave risks for the Respondent in Russia*" that justify her admitted failures to comply with them on the basis that the Respondent's smartphone contains (i) personal data of minor children, (ii) personal intimate photos of friends and relatives of the Respondent, (iii) medical data regarding third parties, (iv) contact of Russian government officials and (v) commercially sensitive information related to third parties ("private matters") and that Russian Federal Law "On Personal Data" N152-FZ dated 27 July 2006 and Clause 1 of Article 137 of the Russian Criminal Code means that transfer of data as specified above in accordance with the Device Demand and the Order would be "*illegal under Russian law and will entail risk on criminal liability for the Respondent*" especially given the effect of compliance on the rights of third parties.

49. On 21 November 2019 the Respondent was also separately charged by the AIU with several further violations of the ADR (including anti-doping rule violations) concerning her individual involvement in the Lysenko violation, which also involved several other personnel of the Russian Athletics Federation ("**RusAF**"), namely (i) Tampering or Attempted Tampering and (ii) Complicity, and with other

violations of the ADR including refusing and/or failing to report an anti-doping rule violation and refusal or failure to cooperate with investigations ("the **Associated Charges").** She has failed to respond to those Charges and in accordance with the applicable rules, is therefore deemed to have accepted the Charge and acceded to the consequences specified therein.

50. On 10 February 2020 the AIU filed its reply relying on an independent expert opinion of Mr Drew Holiner concerning the putative application of Russian law in particular the Federal Law "On Personal Data" ("the **Russian personal data law**") relied on by the Respondent to justify her failure to comply with the Device Demand and the Order.

    Mr Holiner concluded in summary:

    50.1. The Federal Law "On Personal Data" would not regulate the collection or submission of evidence in the course of an anti-doping investigation; and

    50.2. Even assuming that the Federal Law "On Personal Data" would apply to the respondent's circumstances, the legislation contains an applicable exemption that would permit the transfer of data (including sensitive personal data) on the Respondent's smartphone in the manner set out in the Device Demand.

51. Moreover, in relation to the alleged risk of liability under the Russian Criminal Code were the Respondent to comply with the Device Demand, Mr Holiner concluded in summary:

    51.1. The Respondent's transfer of data under the Device Demand would fall within the scope of the exemption in Article 6 of the Federal Law "On Personal Data" and would therefore not be unlawful; and

51.2. Even assuming *arguendo* that there were no applicable exemption(s) justifying the transfer of data by the Respondent pursuant to the Device Demand, the information contained on the Respondent's smartphone would not qualify as a "*personal or family secret*" as set out in Article 137 of the Russian Criminal Code and its transfer would therefore not be unlawful.

52. Mr Holiner also concluded that the risk of any criminal (or administrative) prosecution or civil suit would have been further diminished by the terms of the "Current Proposal".

53. On 18th February 2020, pursuant to sundry directions, an adjourned hearing into the Non Compliance Charges was held before me at the office of Sport Resolutions. The AIU was represented by Ross Wenzel and Tony Jackson, who attended by video conference from Monte Carlo and Switzerland. The Respondent was represented by Valentin Borodin, who attended by video conference from Moscow. The only witness Drew Holiner attended by video conference from Los Angeles. Ms Kylie Brackenridge of Sport Resolutions efficiently, organised the arrangements.

D. MERITS

54. Although as Mr Borodin contended the case turned substantially on issues of Russian law these only arguably arose if the Respondent's smartphone actually contained personal data.

55. As to fact it is notable that (i) the Respondent had relied on objections other than personal data during her communications with the AIU in May/June 2019 (ii) the objection based on personal data had been increasingly elaborated in that correspondence and reached its full flowering only in the Answer. However the Respondent was not called to give evidence, in particular, to verify the facts set out in the Answer.

56. Mr Borodin stated that Russian practice did not require her direct testimony. Even assuming that to be so, these proceedings are not conducted according to Russian practice and the Respondent's absence necessarily diminished the weight that could be given to the factual assertions in the Answer not least because it disabled the AIU from cross-examining her.

57. As to law, (i) while Mr Borodin was himself qualified to pronounce on matters of Russian law he duplicated the roles of advocate and expert. Therefore, he lacked the appearance of independence which was crucial to the latter role; (ii) Mr Holiner, the only lawyer who is, it seems, a member both of the English and the Russian bars was also so qualified but was both apparently as well as actually independent.

58. Both Mr Borodin and Mr Holiner agreed that it was the Russian personal data law (i.e. the Federal Law "On Personal Data" N 152-FZ dated 27.07.2006) which required consideration.

59. For his part Mr Borodin accepted that, given the guarantees to protect privacy in the Current Proposals (ii)-(vii), the Current Proposal (i) could solely but (he contended) sufficiently be relied upon by the Respondent. This provided (I repeat for ease of understanding) that "*at a mutually convenient date and time, under the full oversight and presence of the Applicant, a single image (copy) of her mobile telephone would be taken by representatives of IB Group using standard Cellebrite or Oxygen Forensics Detective imaging technology, or similar. The image would be sealed securely and would not be accessed, copied or duplicated".*

60. Mr Borodin relied on the broad definition of processing in the Russian data law which provided at Article 3(1):

"*personal data processing is any action (operation) or a set of actions (operations) performed using automation tools or without using such tools with personal data, including* ***collection****,* ***recording****, systematization,* ***accumulation****,* ***storage****, clarification (updating, changing),* ***extraction****, use,* ***transfer*** *(****distribution****, provision, access), depersonalization, blocking, deletion, destruction of personal data"*; personal data being described in the same provision ''as *any information relating directly or indirectly to a*

certain or determined individual (subject of personal data)""and contended that on that basis the "imaging" (copying) by the IB representatives of information from smartphone (demanded by AIU) should be regarded as "personal data processing".

61. However I accept Mr Holiner's point that the definition of processing had itself to be construed in the context of the Russian personal data law which in substance transposes into Russian law the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg, 28.I.1981) (the **'Data Protection Convention'**) and regulates the processing of personal data by automated means, or processing by non-automated means where the processing by its nature corresponds to processing by automated means, i.e. such processing which "*allows, in accordance with a given algorithm, to search for personal data recorded on physical media and contained in file cabinets or other* ***systematic collections of personal data****, and (or) access to such personal data*" (Article 1(1)) (emphasis added).

62. In my view whereas the IB group representatives would certainly be processing the data within the literal and uncontextualised meaning of that definition, it was unclear why the Respondent by the mere act of handing over her smartphone to them would be herself engaged in such processing. In my view the Respondent was not a data controller involved in any systematic collection of data; rather she, as best I understand her activity, took on an ad hoc basis a diverse series of photographs and compiled other data on a similar basis. It would seem bizarre if, for example, she had by virtue of such actions to be subject to such obligations of a data controller e.g. to publish a formal data processing and protection policy (Article 18.1 of the Personal Data Law).

63. I accept, however that, not least because she would have known the use which would be made of her smartphone by those IB Representatives, the Respondent was carrying out acts preparatory or ancillary to their processing (and indeed aiding and abetting it) and am prepared to assume, for the purposes of this award, that this would be sufficient to make her liable (other conditions being satisfied) for breaches of that law.

64. Mr Holiner to buttress his threshold argument, relied on the decision of the Constitutional Court in the Navalny case (which he referred to but did not show me). He submitted that the Court there held that the Personal Data Law does not apply to the gathering, examination or storage of information in the course of a Russian criminal investigation, since this did not involve the processing of personal data within the meaning of Article 1(1) of the Personal Data Law[12].

65. Given the notorious political sensitivity of the Navalny case I would be hesitant to extrapolate anything said in it to entirely different circumstances e.g. the collection of data by an external private disciplinary agency which, as Mr Borodin argued, provided no clear analogy. Nor is it immediately apparent to me, without further exegesis, why the activities of the Russian criminal investigators do not involve systematic collection of data within the meaning of Article 1(1).

66. However even if, contrary to my preferred view, the Russian personal data law applied at all to the Respondent's case, it contained a series of readily appreciable public interest defences both in relation to processing of general data and in relation to personally sensitive data.

67. Article 6(1)(2) of the Personal Data Law, provides

"The processing of personal data is permitted in the following cases: [where] the processing of personal data is necessary to achieve aims prescribed by an international treaty of the Russian Federation or a law in order to […] perform […] obligations that have been imposed on the [data] controller by Russian Federation legislation."

68. Article 26 of the Federal Law "On Physical Culture and Sport" (the 'Sport Law' provides, insofar as relevant,[13] that:

> "2. The prevention of doping in sport and the battle against it shall be carried out in accordance with Russian anti-doping rules […] and anti-doping rules adopted by international anti-doping organisations (hereinafter, 'anti-doping rules'). […]

[12] *Application of Navalny*, Constitutional Court, 29 September 2011, no. 1251-O-O

[13] I abstain from quoting Article 24 which governs athletes, but not athlete support personnel.

9. The [Ministry of Sport] shall, with the aim of implementing measures to prevent doping in sport and to battle against it […] shall adopt Russian anti-doping rules".

69. On 9 August 2016, the Ministry of Sport of the Russian Federation, acting expressly on the basis of Article 26 of the Sport Law and the UNESCO International Convention against Doping in Sport 2005 (the '**UNESCO Anti-doping Convention'**), adopted the Russian Anti-doping Rules. Paragraphs 1.3.3.1 and 1.3.3.3 of the Russian Anti-doping Rules provides inter alia as follows:

"1.3.3.1. [These] Rules shall extend to the following persons:

a) all athletes who are citizen or residents of the Russian Federation […];

b) **all of an athlete's personnel working**, rendering medical assistance **and supporting [those] athletes indicated in subparagraph 1.3.3.1(a) and participating or preparing to participate in sporting competitions**. (emphasis added)

1.3.3.3. Athletes and other persons listed in this section may also be subject to the rules of other anti-doping organisations (for example, in the case of athletes at the international level, these are the anti-doping rules of an international federation). These [Russian Anti-doping] Rules do not have the aim of limiting the liability of athletes or other persons under the rules of anti-doping organisations to the jurisdiction of which they are also subject. Questions of division of powers to conduct results management shall be determined in accordance with the [World Anti-doping] Code."

70. None of the above was, as such, disputed by Mr Borodin. In my view it is indeed clear that Russia, in compliance with its international treaty obligations under the UNESCO Anti-doping Convention, through the Sport Law and the Russian Anti-doping Rules has imposed a legal obligation upon athletes and athlete support personnel within its jurisdiction to comply with the anti-doping rules of international anti-doping organisations, e.g. World Athletics, to which they are subject where the latter are acting within their jurisdiction. This would include a demand to produce an electronic storage device pursuant to Article 5.10.5 of the ADR. Although Mr Borodin argued that performance of this obligation could not override third party rights, I do

not detect in the language of the salient provisions any basis for reading them down in this way.

71. It follows, in my view, that the transfer of personal data pursuant to the Device Demand, even if it were otherwise to fall within the scope of the Personal Data Law, would have fallen within the exception prescribed at Article 6(1)(2) of the same law.

72. The Respondent argues that the alleged sensitive nature of certain items of information relating to third parties contained in her smartphone meant that it enjoyed special protection. I agree that some of the personal data that the Respondent claims is found in her personal smartphone, e.g. such as relates to the health of third parties, if correctly described, would arguably fall within a special category of personal data enjoying stronger protections[14], and therefore subject to fewer exceptions, under the Personal Data Law.

73. However, as to this, Article 10(2)(6) of the Personal Data Law also permits the processing of such special categories of personal data where this is "necessary to establish or exercise the rights of a subject of personal data or third parties, as well as in connection with the administration of justice".

74. Two alternative exceptions therefore fall to be considered either of which, if engaged, would be sufficient for the AIU's purposes.

75. In my view the downloading of images from the Respondent's personal smartphone for the purpose of obtaining information strictly relevant to an anti-doping investigation conducted by an international authority whose jurisdiction is recognised under Russian law would fall within the exception above relating to the rights of third parties i.e. the AIU in so far as it policed the ADR.

76. Alternatively, such action would be 'in connection with the administration of justice.' There was some debate between the experts as to whether the administration of justice referred to the justice administered by the Russian domestic courts only. In the absence of any such limiting definition within the personal data law itself - and I

[14] Article 10 of the Personal Data Law states that personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, fall within this category.

was shown none - I see no reason to confine it in the way contended for by Mr Borodin.

77. Mr Borodin argued by reference to section 118 of the Russian constitution that any reference to the "administration of justice" was only to justice administered by the official Russian courts; and not to the justice administered by arbitral or disciplinary bodies. I prefer Mr Holiner's submission that the section, in so far as applicable, was designed to exclude justice administered by ad hoc arbitrary bodies not by lawful arbitral bodies or, materially, by disciplinary bodies enforcing the World Anti-Doping Code, given that their jurisdictions are expressly recognized in Russian law as set out in paragraph 69 above.

78. The Respondent also asserts that it is 'strongly prohibited' (sic) to transfer confidential personal data abroad, in this case to the AIU in Monaco. I find no foundation for this assertion. Article 12(1) of the Personal Data Law provides that the ordinary national regime governing processing of personal data also applies to data transfers to the territory of another Contracting Party to the Data Protection Convention, which includes Monaco, and other countries that secure adequate data protection that have been recognised as such by ministerial order. Although such transfers may be prohibited or limited, this may be done only on such conventional and well recognized grounds (as protection of the constitutional order, morality, health, rights and interests of the citizenry, national security and defence). No relevant prohibition or limitation has been identified by the Respondent or Mr Borodin.

79. Crucially Article 137 of the Criminal Code prescribes criminal responsibility for the "**Unlawful** collection or dissemination of information about a person's private life amounting to personal or family secrets without his consent...." [emphasis added].

80. Therefore to attract criminal responsibility the dissemination of information about a person's private life must be unlawful, a proposition confirmed both by the Plenary Supreme Court[15] and the Constitutional Court[16] and not disputed by Mr Borodin.

[15] Resolution of the Plenary Supreme Court date 25 December 2018, No. 46, para. 1

[16] *Application of Suprun*, Constitutional Court, no. 1253-O, 28 June 2012

81. In addition, the dissemination of information that does not amount to a 'personal or family secret' does not attract criminal responsibility. 'Private life' in the context of Article 137 of the Russian Criminal Code, has been defined by the Russian Constitutional Court[17] as follows:

> "[T]he concept of 'private life' includes that area of human activity that relates to a separate person, touches only him and is not subject to control by society and the State if it is of a lawful nature… Accordingly, only the person himself is entitled to determine which information relating to his private life should remain secret, and therefore the collection, storage, use and dissemination of such information, which has not been entrusted to anyone, shall not be permitted without that person's consent, as required by the Russian Constitution." [emphasis added].

82. In this case, a substantial part of the information of third parties referred to by the Respondent in her Answer would not amount to 'personal or family secrets' under the test identified by the Constitutional Court, either due to the nature of the information (e.g. passport details, commercial contracts, driver's licenses, etc.) or the circumstances in which it was obtained (e.g. photos taken in public places)[18].

83. For all the above reasons the compulsory precondition of unlawfulness required to criminalize dissemination of details of a person's private life is not satisfied in this case.

84. Mr Holiner fairly said *"Of course, I cannot exclude the possibility that a third party might nevertheless exercise its procedural rights to bring a criminal complaint or a civil action if it learned of the disclosure and considered that its rights had been infringed and the disclosure could have been lawfully avoided"* and Mr Borodin astutely seized upon this concession.

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[17] *Ibid*.

[18] I am less impressed by Mr Holilner's argument that some of it was voluntarily disclosed by the relevant third parties to the Respondent without any apparent obligation to maintain its secrecy which seems to me to invert the normal rule that consent for disclosures of what is clearly in the private sphere must be positively given and cannot be inferred from silence.

85. I need not consider further the possibilities of a civil claim[19] since Mr Borodin sensibly focussed on the intrinsically more serious risk of a criminal prosecution as providing the excuse for the Respondent's non compliance. Although he emphasised the genuineness of the Respondent's perception of the risk of such prosecution in my view the touchstone must be the objective reality of such risk rather than the subjective perception of the Respondent in so far as such perception was on the evidence misconceived.

86. Mr Borodin and Mr Holiner were at one that Russian prosecuting authorities had a discretion as to whether and when to prosecute, and whereas a complaint might trigger an investigation it would not automatically trigger a charge.

87. As to this

(i) I find it unlikely in the extreme that a third party (or his or her representative) whose image was downloaded, (for example, a parent of a child who had been photographed in a private pose by the Respondent) would ever become apprised of the processing at all, given the confidentiality of these proceedings and the scope for redaction of any award I make.

(ii) even if such parent did become so apprised and did in consequence make a complaint to a prosecuting body I would estimate the chances of a consequent prosecution infinitesimal. (a) In my view, as set out above, the Respondent would not have been involved in any unlawfulness; (b), at a time when RusAF are seeking readmission to membership of World Athletics but are facing continued concern about the performance of their obligations under the WADC, facts of which I can take judicial notice, for someone to be prosecuted because she complied with her own obligations thereunder or its derivative the ADR, would not promote RusAF's cause; it would indeed clearly damage it.

[19] Though Mr Holiner's report dealt, persuasively with this issue.

(iii) The degree of disclosure contemplated in Current Proposal (i) would be minimal; residual privacy concerns were protected by the remainder of the Current Proposals.

(iv) While Mr Borodin astutely confronted Mr Holiner with the latter's critical words about the Russian justice system at a time when he was himself representing Yukos, in my view there can be no read across between two such disparate situation as those of a commercial giant whose assets were appropriated by the state for what were claimed to be political reasons and those of a single athletic official.

(v) Russian law, as is common ground, recognizes at Article 55(4) of the Constitution the principle of proportionality. It provides "The rights and freedoms of man and citizen may be restricted by federal law only to the extent necessary to protect the constitutional order, morality, health, the rights and legal interests of other, the national defence and state security". In my view compliance with the Device demand and the Order would be proportionate since neither exceeded the legitimate purpose of the ADR and any interests, if any, of third parties of the kind relied on would be overridden by the need to ensure enforcement of the ADR.

88. Mr Borodin argued more generally that the Respondent had a sincerely held belief that her compliance with the demands would expose her to prosecution and that this was "compelling justification" within the meaning of Article 12 ADR. In this context I remind myself of the jurisprudence on the phrase "compelling justification". As was said in Ikope, a decision of the ICC Disciplinary Tribunal, which also concerned a refusal to comply with a demand for information on a mobile device, and a purported reliance on what was said to be superior domestic law''.

> *"61. Furthermore the concept of "compelling justification" is not unique to the Code. It is to be found, for example, in the IAAF anti-doping regulations where it can be deployed, if available to justify refusal to take a doping test. In the recent case of IAAF v Bett Ad Hoc Sport 178/2018, 212/2018, the Panel, borrowing on CAS jurisprudence, said this at paragraph 94:*

*(i) "If the Athlete can prove on a balance of probability that his act was compellingly justified, his rejection of the test will be excused"; **Brothers v FINA**, CAS 2016/A/4631, para. 76.*

*(ii) The existence vel non of such justification shall be determined objectively, the issue is not "whether the Athlete was acting in good faith, but, whether objectively he was justified by compelling reasons to forego the test". **Troicki v ITF**, CAS 2013/A/3279, para. 9.15.*

*(iii) The phrase "compelling justification" in Article 2.3 ADR must be construed "extremely narrow[ly]", because otherwise testing efforts would be completely undermined. See e.g., **Wium v IPC**, IPC Management Committee decision dated 7 October 2005, para 3: "an efficient out-of-competition testing programme can only work if the boundaries of "compelling justification" are kept extremely narrow. Only truly exceptional circumstances should be allowed to justify refusal to submit to testing."*

*(iv) For this purpose the athlete must show that the failure to provide a Sample, was unavoidable. See e.g., **Jones v WRU**, NADP Appeal Tribunal decision dated 9 June 2010, para. 57: "The phrase "compelling justification" connotes that the reason for an athlete refusing must be exceptional, indeed, unavoidable". See also SDRCC DT 07-0058 **CCES v Boyle**, decision dated 31 May 2007, para. 53."*

62. The Tribunal will adopt a similarly rigorous approach, mutatis mutandis, to its assessment of whether Mr Ikope can avail himself of this defence.

63. Accordingly the Tribunal must reject Mr Ikope's reliance on the privacy interests of himself and those with whom he communicated by means of his mobile device for the following reasons:

(i) Those interests can always be prayed in aid and, if they amounted to compelling justification, would deprive these articles of the Code of any utility.

(ii) As a matter of general law common to many democratic jurisdictions the right to privacy is not absolute and must yield to more potent public interests such as the suppression of crime or other cognate misconduct[20].

(iii) In any event the carefully drawn SOP, which has clearly been vetted by lawyers who are expert in human rights, requires downloaded material to be treated with sensitivity; the ACU will only search for material indicative of a breach of the Code. It has no concern with other matters and could not, even were it to wish to do so, make use of them by publication or

[20] See e.g. the European Convention on Human Rights Article 8.2.

otherwise. Mr Marshall emphasised that the ACU's investigators are trained to look for particular phrases which have an aroma of suspicion in this context. Reference to money making, would, the Tribunal infers, be potentially relevant, references to sex not.

(iv) A potential intrusion on a participant's privacy is in any event the price that a participant must pay for his participation in the sport.

(v) A participant retains the right to refuse to permit the intrusion, albeit at the price, potentially, of further participation in the sport."

89. Not only does the Respondent not establish any "compelling justification within the hallowed meaning of that concept" the facts, as I find them, lead me to the conclusion that her defence to the demands is a concoction devised to avoid exposing material on her telephone which would itself evidence the involvement of her and others in RusAF in the Lysenko violation. I have already mentioned that the Respondent sought to rely on her objection to the Device Demand on matters distinct from those of alleged intrusion on third party privacy interest. She questioned without good reason the credentials of the IB representatives (at paragraph 18). She suggested implausibly that Mr Nicholson, head of AIU investigations, had on 16th May 2016 agreed a process which would have left the decision as to what to download from her smartphone in her own hands (at paragraphs 21-22). I have already mentioned too the elaboration of her third party privacy interest defence. None of these matters encourage me to accept Mr Borodin's bold submission that at all material times the Respondent wished to co-operate with the investigation. On the contrary they evidence prima facie a wish on her part not to co-operate which is put beyond reasonable doubt by the Respondent's failure to advance any defence to the Associated Charge. I accept Mr Borodin's submission that the Non Compliance charge and the Associated Charge must be separately evaluated; but it does not follow that I can simply ignore the latter and its implications for the former.

90. Pursuant to the foregoing, I find that the Respondent failed to comply with the ADR, in particular:

(a) for failing to immediately provide her electronic storage devices (including her mobile telephone) for inspection, copying and downloading by the Integrity Unit in accordance with Article 5.10.7 ADR and the Device Demand on 17 May 2019 ("the **First Failure**") ; and

(b) for failing to comply with the Order as set out in the Ruling dated 15 July 2019 in accordance with Article 7.8.4 ADR ("the **Second Failure**").

without compelling or any justification.

E. SANCTION[21]

91. Where an Athlete or other Person refuses or fails to comply immediately with a Demand, Article 5.10.7(b) ADR expressly provides that the consequences in Article 12 ADR shall apply.

92. In addition, Article 7.8.4 ADR expressly provides that the consequences in Article 12 ADR shall apply where an Athlete or other Person fails to produce the information, record, article or thing and any copy, or download of the same following determination by the Chairperson of the Disciplinary Tribunal (or his delegate) that there is a reasonable belief basis to the Demand.

93. If as I find the Respondent has failed to comply with the provisions of the ADR set out above, then Article 12 ADR provides that I have discretion to impose such sanctions as I see fit:

ARTICLE 12 DISCIPLINARY PROCEEDINGS FOR NON-COMPLIANCE

12.1 Where an Athlete or other Person refuses or fails without compelling justification to comply with any provision of these Anti-Doping Rules, but such refusal or failure does not fall within any of the anti-doping rule violations defined in Article 2, the Athlete or Athlete Support Person shall not be deemed to have committed an Anti-Doping Rule Violation and he shall not be subject to any of the Consequences set out in Articles 9 and 10. However, disciplinary proceedings may be brought against him before the Disciplinary Tribunal in accordance with

[21] On this I did not have the benefit of specific argument by Mr Borodin since he concentrated his fire on whether the respondent is guilty of any failures to comply with the demands at all but I shall assume that he would urge me to impose as slight as sanction as I can in good conscience having regard to my findings on breach.

> *Article 8, and if the Disciplinary Tribunal finds that there has been such refusal or failure without compelling justification then* ***it shall impose upon the Athlete or Athlete Support Person such sanctions as it sees fit (which may include, if it sees fit, a period during which the Athlete or Athlete Support Person shall not be eligible to participate in the sport)****.*

94. The AIU aptly submits that in exercising this discretion, I must determine the relative seriousness of the offence to arrive at the appropriate sanction, including identifying any aggravating or mitigating factors.

95. Where the CAS has had cause to consider 'failure to cooperate' offences, it is clear that such offences are considered to be of a serious nature, e.g. *Moon Joon Chung v. FIFA, CAS 2017/A/5086* and *Valcke v. FIFA, CAS 2017/A/5003*.[22]

96. The AIU submits, therefore that I should impose a significant sanction, including a substantial period of Ineligibility during which the Respondent shall not be eligible to participate in Athletics.

97. The principle behind the investigative provisions of the ADR, including the requirement to provide electronic storage devices to the AIU immediately as set out in Article 5.10.7 ADR, is based *inter alia* on the need to preserve evidence of anti-doping rule violations. The AIU argue that those who are innocent have nothing to hide and, conversely, and by inference, that those who seek to hide something may have their reasons for doing so. I would accept that argument if the epithet 'unjustifiable' were inserted before 'reasons'.

98. I accept too that intent behind the investigatory provisions of the ADR are clear. In the absence of any coercive powers of investigation (such as law enforcement may have), the AIU is entirely dependent on the agreement or consent of an Athlete or Athlete Support Person to cooperate fully with the investigations that it undertakes.

99. The nature of the offence in failing to comply with the Device Demand is at odds with the imperatives underpinning the investigative provisions of the ADR and

[22] Where the CAS upheld the sanctions imposed by the FIFA Ethics Committee of six years for a violation of Article 20 of the FIFA Code of Ethics plus a four-year sanction for infringements of Article 16, 18, 19 and 41 of the FIFA Code of Ethics (total 10 years).

undermine the AIU's limited investigative means, to assist in the enforcement of the ADR.

100. In addition, the AIU submits it would be counterintuitive and perverse if a person who fails to comply with the ADR receives a lighter sanction than would be the case if an offence under the ADR had ultimately been discovered through an investigation successfully conducted by the AIU.[23] I accept that for me to endorse such a situation would encourage non-cooperation.

101. In the context of investigations to determine whether an Athlete has ingested a prohibited substance (i.e. the collection of a sample), an Athlete who refuses and/or fails to cooperate with that investigation (by not providing a sample) will receive the same sanction as an Athlete who intended to cheat by using a prohibited substance, i.e., the equivalent to the highest ban that would apply, a period of Ineligibility of four years. The rationale is obvious: if an Athlete could get a smaller sanction when he/she has a prohibited substance in his/her system by simply failing and/or refusing to provide a sample, then cheats could easily avoid proper punishment. I am impressed by the analogy.

102. Likewise, in the context of investigations for other anti-doping rule violations under the ADR (especially non-analytical violations that do not involve the presence or use of prohibited substances), a failure and/or refusal by any Person, following a valid Demand, to hand over any record, file, article or thing that is the subject of a Demand, and which may evidence or lead to the discovery of evidence of an anti-doping rule violation - including in particular (where requested) their electronic storage devices such as mobile telephones - gives rise to an obvious inference that the Person has committed the anti-doping rule violation.

103. Hence, I accept that the starting point in considering the sanction for failing to comply with a Demand, and where a Person has failed to hand over their

[23] This same principle applies to sanctions for a violation of Article 2.3 ADR for a refusal or failure to submit to Sample collection, whereby the maximum sanction of four years ineligibility is imposed as a mandatory consequence for these violations (see Article 10.3.1) subject to reduction down to two years if in circumstances of a failure to submit to sample collection, the Athlete or other Person can demonstrate that this failure was not intentional per Article 10.2.3 ADR.

electronic storage device(s), including their mobile telephone, must be the severest consequences that could have been imposed under the ADR, relative to the anti-doping rule violation(s) for which the applicable Person is under investigation.

104. The AIU therefore submits that, where in this particular instance, the Investigation relates to potential violations of Article 2.5 ADR (Tampering or Attempted Tampering), which would lead to a mandatory period of Ineligibility of four (4) years[24], then a period of Ineligibility of at least four (4) years must be imposed on the Respondent for her failure to comply with the Device Demand and to provide her electronic storage devices, including her mobile telephone, to the AIU on 17 May 2019.[25]

105. [redacted]

106. The AIU submits that the Respondent's conduct in failing to comply with the ADR has not just prevented the discovery of evidence of anti-doping rule violations by the Respondent herself, but potentially by other representatives of the Federation.

107. The Respondent's failure to comply with the ADR in this context is therefore significantly aggravated compared to circumstances that involve anti-doping rule violations committed by a single individual and it is cogently argued that this justifies a significant increase in any period of Ineligibility above the minimum of four (4) years referred to above.

108. Furthermore, the AIU submits with equal cogency that the Respondent's failure to comply with the Order is an additional significant aggravating factor that should

[24] Pursuant to Article 10.3.1 ADR

[25] In ***Professional Tennis Integrity Officers ("PTIOs") v. Barlaham Zuluaga Gaviria*** similar circumstances existed where a tennis player refused to provide his mobile telephone to investigators upon demand issued in the context of the Tennis Anti-Corruption Programme ("**TACP**"). The Anti-Corruption Hearing Officer, Prof Richard H. McLaren concluded that the player's conduct in *inter alia* failing to cooperate with the investigation and to provide his mobile telephone pursuant to a demand amounted to the conduct of the most serious nature and imposed the maximum sanction possible under the TACP, a period of ineligibility of three years.

necessarily increase the sanction beyond the starting point of four (4) years referred to above. A formal order of this Tribunal axiomatically ought to be respected unless there are compelling reasons for not doing so which in this case there are not. I made an unequivocal ruling that the Respondent's objections to the Demand were ill founded and ordered that she comply with the Device Demand in the form of the Current Proposal. The Respondent manifestly ignored the Order and has to date still failed to comply with it.

109. In addition, I remind myself that that the Respondent is an experienced anti-doping practitioner and no mere tyro. She was indeed the Anti-Doping Coordinator for the Federation. Her misconduct in failing to comply with the Order is therefore particularly serious, especially given her particular knowledge, experience and responsibilities.

110. In short in her capacity as an advocate for the anti-doping rules and their particular requirements, the Respondent should rather have acted as a role-model rather than a rebel in terms of her compliance and cooperation.

111. In all those aggravating circumstances I impose a period of Ineligibility of eight (8) years to commence on the date of the award in accordance with the principle set out in the ADR for the commencement of periods of ineligibility for anti-doping rule violations.[26]

112. This decision may be appealed to the CAS in accordance with Article 13 ADR and its subsections.

F. ORDER

113.

a) I determine that the Respondent failed to comply with the ADR, in particular:

i. for failing to immediately provide her electronic storage devices (including her mobile telephone) for inspection, copying and

[26] See Article 10.10 ADR

downloading by the Integrity Unit in accordance with Article 5.10.7 ADR and the Device Demand on 17 May 2019 ("the **First Failure**") ; and

ii. for failing to comply with the Order as set out in the Ruling dated 15 July 2019 ("the **Second Failure**") in accordance with Article 7.8.4 ADR.

b) I impose a period of Ineligibility of eight (8) years upon the Respondent in accordance with my discretion under to Article 12 ADR; and

c) I award a contribution to the IAAF's legal and other costs incurred in relation to these disciplinary proceedings under Article 12 ADR in the sum of USD 1,000 since I have found the defence advanced to be colourable and the consequent need to deal with it demanding in terms of time and legal resource.

Michael J Beloff QC

Michael J Beloff QC

Chair

London

06 March 2020

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

T: +44 (0)20 7036 1966

Email: resolve@sportresolutions.co.uk
Website: www.sportresolutions.co.uk