

Tribunal Arbitral du Sport  
Court of Arbitration for Sport

**CAS 2019/A/6587 Badminton World Federation v. Kate Jessica Foo Kune**

## **ARBITRAL AWARD**

**delivered by the**

## **COURT OF ARBITRATION FOR SPORT**

**sitting in the following composition:**

President: Mr. Romano F. Subiotto QC, Avocat in Brussels, Belgium and Solicitor-Advocate in London, United Kingdom  
Arbitrators: Mr. Mark Hovell, Solicitor in Manchester, United Kingdom  
Ms. Blondel Thompson, Barrister in Birmingham, United Kingdom

**in the arbitration between**

**Badminton World Federation, Malaysia**

Represented by Mr. Thomas Delaye Fortin, BWF Head of Legal and Governance

**Appellant**

**and**

**Kate Jessica Foo Kune, Mauritius**

Represented by Mr. Martin Dahl Pedersen and Mr. Rune Morthorts, Attorneys-at-Law, in Denmark

**Respondent**

## **I. INTRODUCTION**

1. This appeal is brought by the Badminton World Federation against the decision of the Badminton World Federation Doping Hearing Panel (the “Doping Hearing Panel”), issued on October 21, 2019. The Doping Hearing Panel found that Ms. Kune committed an anti-doping rule violation (“ADRV”) following an adverse analytical finding for 1-androstenedione, an exogenous anabolic androgenic steroid prohibited under section S1.1A of the WADA 2019 Prohibited List, but that Ms. Kune bore “*no fault or negligence*” for the ADRV and thus imposed no period of ineligibility.

## **II. THE PARTIES**

2. The Appellant, the Badminton World Federation (the “BWF” or the “Appellant”) is the world governing body for the sport of badminton, recognized by the International Olympic Committee (“IOC”) and the International Paralympic Committee (“IPC”).
3. The Respondent, Ms. Kate Jessica Foo Kune (the “Athlete” or the “Respondent”), a professional badminton player from Mauritius, born in Moka, Mauritius, on 29 March 1993. The Appellant has been registered with the BWF since 2006 (BWF ID 42679) and has a ranking of over one hundred (100) in the BWF World Ranking.
4. The Appellant and the Respondent are referred to collectively as the “Parties”.

## **III. BACKGROUND**

### **A. Factual Background**

5. Below is a summary of the relevant facts and allegations, based on the Parties’ written submissions, pleadings, and evidence adduced thus far, that have led to this appeal. Additional facts and allegations found in the Parties’ written submissions, pleadings, and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to elucidate its reasoning.
6. On 28 April 2019, during the 2019 African Badminton Championships in Port Harcourt, Nigeria (the “Championships”), the Athlete provided a urine sample to a doping control officer (“DCO”) from the National Anti-Doping Organisation of Nigeria. The sample was split into two separate bottles with reference numbers A-4246120 and B-4246120. The Athlete signed a doping control form, where she declared to have consumed “*Vitamins, Salt Water Solution, Amoxycillin*” and confirmed that she had “*no comment*” on the procedure to obtain her sample.
7. The DCO completed the doping control process at 20:05. There was no agreement between the Nigeria Anti-Doping Committee and a courier service provider to have the samples collected at the venue. Therefore, the DCO took possession of the samples and stored them in an unlocked refrigerator in his hotel room.

8. On 29 April 2019, the DCO personally sent both samples to the WADA-accredited laboratory in Doha (Qatar). However, the samples were returned to the sender by customs.<sup>1</sup> On 3 May 2019, the samples were sent to the WADA-accredited laboratory in Bloemfontein, South Africa (the "Laboratory"), for testing in accordance with the procedures set out in the International Standard for Laboratories. On 7 May 2019, the Laboratory received the samples.
9. On 23 May 2019, the Laboratory provided its report on the A Sample which found an adverse analytical finding ("AAF") for 1-androstenedione (the "Prohibited Substance"), as per WADA TD2015IDCR. The Prohibited Substance is an Exogenous Anabolic Androgenic Steroid listed in section "*SI.1A Exogenous Anabolic Androgenic Steroids*" of the WADA 2019 Prohibited List.
10. On 12 June 2019, the BWF formally notified the Respondent of the AAF in the A Sample, in line with Article 7 of the BWF Anti-Doping Regulations ("BWF-ADR"). The BWF also informed the Respondent that:
  - she could have the B Sample analyzed;
  - according to BWF records, she did not have a Therapeutic Use Exemption ("TUE") to justify the presence of 1-androstenedione in her system;
  - she was being charged with a violation of Article 2.1 of the BWF-ADR for the presence of 1-androstenedione in the A Sample and Article 2.2 of the BWF-ADR for use of 1-androstenedione;
  - the BWF would assert a period of ineligibility of four (4) years for her anti-doping rule violation ("ADRV"); and
  - she should provide an explanation for the AAF by midnight (Kuala Lumpur time) on 23 June 2019 failing which she would be provisionally suspended from participating in any BWF sanctioned competition, in accordance with Article 7.9.1 of the BWF-ADR, prior to the rendering of a final decision.
11. On 22 June 2019, through her legal representative, the Respondent:
  - denied the charges;
  - requested the B Sample to be analyzed at a new WADA-accredited laboratory of her choice;
  - alleged that the sample collection was not undertaken in accordance with the WADA International Standard for Testing and Investigations ("ISTI") for two reasons ("ISTI Departures"): (i) the vessel used to collect the sample was touched several times by the doping control officer and (ii) the Athlete, together with other athletes, were left unsupervised during the sample collection and medal ceremony (the Athlete allegedly provided a partial sample before leaving

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<sup>1</sup> While this information was not disclosed in the decision of the BWF Doping Hearing Panel, it was stated in the subsequent BWF Appeal Brief.

the doping control room to attend the medal ceremony, and only returned “*roughly half an hour later*”); and

- requested an expedited final hearing and that no provisional suspension be imposed.

12. On 4 & 9 July 2019, respectively, the BWF and the Respondent submitted their arguments for a provisional hearing before the BWF Doping Hearing Panel (the "DHP").

#### **B. Proceedings before the BWF Doping Hearing Panel**

13. On 10 July 2019, the DHP conducted a provisional hearing, pursuant to Articles 7.9.3 and 7.9.3.1 of the BFW-ADR, based on the Parties' written submissions. The DHP was not satisfied, on the balance of probabilities, that the alleged ISTI Departures had occurred and could have reasonably caused the ADRV, or that the ADRV was likely to have involved a contaminated product. As a result, the DHP decided to impose a provisional suspension on the Respondent.

14. On 5 August 2019, the Laboratory provided the result of the B Sample analysis, which confirmed the A Sample result. This result was shared with the Respondent on 6 August 2019.

15. On 21 October 2019, following a video hearing, the DHP rendered a decision (the "Appealed Decision") stating the following:

1. *“Ms. Kate Jessica Foo Kune (BWF ID 42679) has violated Article 2.1 of the BWF Anti-Doping Regulations and committed an anti-doping rule violation.*
2. *The results obtained by Ms. Kate Jessica Foo Kune (BWF ID 42679) during the All African Championship shall automatically be disqualified.*
3. *Ms. Kate Jessica Foo Kune (BWF ID 42679) bore no fault or negligence for the anti-doping rule violation and thus no period of ineligibility shall be implemented.*
4. *The parties shall bear their own costs and expenses for this matter.*
5. *This decision shall be made public.”*

16. Generally speaking, in coming to its decision, the majority of the three-person DHP determined that the Athlete demonstrated on the balance of probabilities that during the Championships, she consumed water that was deliberately spiked with 1-androstenedione. The majority also found that the Athlete is “*more likely than not*” to be a victim of malicious sabotage by the Mauritius Badminton Association (the “MBA”), Mr. Raj Gaya, or an associate of the MBA or Mr. Gaya, considering the following:

- *“Foo Kune’s involvement as an “instrumental” witness in the BWF ethics case against Gaya;*

- *BWF’s position that Foo Kune “may have been a victim of sabotage, or repercussions”;*
- *the timing of the ADRV, being six (6) months after the BWF Ethics Decision;*
- *Foo Kune trains in Denmark and only had contact with MBA officials at the Championship;*
- *the Referee Report which states that no random draws were required, and no players were tested or identified to be tested during the Championship;*
- *the oral and written evidence of Mungroo;*
- *the MNC Minutes and MBA Letter, both suggesting that the MBA is protecting Gaya;*
- *the motive to seek revenge and to tarnish her credibility as a witness in the ICAC case against Gaya; and*
- *the media releases and official statement by the MBA of confidential information on Foo Kune’s positive test.”*

17. Additionally, the majority of the DHP held that the Athlete consumed water which she had carefully kept inside her backpack and only left under the care of her team manager (a MBA-elected official), when she was called to the court. The Athlete had exercised utmost caution as can be required from someone in her position to ensure that her water was not spiked.

#### **IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

18. On 11 November 2019, the BWF filed its Statement of Appeal with the Court of Arbitration for Sport (the “CAS”) against the Respondent – with respect to the Appealed Decision – in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (“Code”). In its Statement of Appeal, the BWF nominated Mr. Mark Hovell as arbitrator.

19. On 21 November 2019, the BWF filed its Appeal Brief in accordance with Article R51 of the Code.

20. On 11 December 2020, the Respondent nominated Ms. Blondel Thompson as arbitrator.

21. On January 7, 2020, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, confirmed the constitution of the Panel as follows:

President: Mr. Romano F. Subiotto QC, Avocat in Brussels, Belgium and Solicitor-Advocate in London, United Kingdom

Arbitrators: Mr. Mark Hovell, Solicitor in Manchester, United Kingdom

Ms. Blondel Thompson, Barrister in Birmingham, United Kingdom

22. On 14 January 2020, the Respondent filed its Statement of Defence in accordance with Article R55 of the Code.
23. On 15 May 2020, the Parties signed and returned the Orders of Procedure to the CAS Court Office
24. On 27 May 2020, a hearing was held by video conference. The Appellant was represented by Mr. Thomas Delaye Fortin, BWF Head of Legal and Governance and called no witnesses. The Respondent attended the hearing by video conference and was assisted by Mr. Martin Dahl Pedersen and Mr. Rune Morthorst. The Respondent's personal friend, Ludik Milan, attended the hearing as an observer.
25. The Panel heard evidence from:
  - Ms. Kate Jessica Foo Kune – the Respondent;
  - Mr. Bassir Mungroo – witness called by the Respondent.
26. Before the hearing was concluded, both Parties expressly stated that they did not have any objection with the procedure adopted by the Panel. They confirmed that their right to be heard had been respected.
27. On 5 June 2020, the CAS notified the Parties that following the conclusion of the hearing and during the Panel's deliberations, certain questions surfaced that required further consideration and clarification. On agreement of the Parties, the Panel retained Prof. Martial Saugy from the University of Lausanne to act as an independent expert for the review of the laboratory results associated with the Athlete's urine sample. The Parties reserved their right to make observations on the outcome of such report.
28. On 7 September 2020, Prof. Saugy filed his observations with the CAS Court Office who, in turn, invited the Parties to comment on Prof. Saugy's findings.
29. On 11 September 2020, the Parties filed their observations on Prof. Saugy's findings. Included therewith was a request from the BWF that Prof. Saugy respond to additional inquiries.
30. On 14 September 2020, at the direction of the Panel, Prof. Saugy was invited to respond to follow-up questions on his initial report.
31. On 18 September 2020, Prof. Saugy filed his follow-up observations with the CAS following the Panel's additional questions. Prof. Saugy's additional remarks were subsequently forwarded to the Parties.

## **V. JURISDICTION**

32. Article R47 of the Code provides as follows:

*"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the*

*Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.”*

33. In this case, the jurisdiction of CAS, which is undisputed and is confirmed by the signature of the Order of Procedure, is derived from Article 13.2.1 of the BWF-ADR. This article makes CAS exclusively competent for appeals involving International-Level Players or International Events and provides as follows:

*“In cases arising from participation in an International Event or in cases involving International-Level Players, the decision may be appealed exclusively to CAS.*

34. According to Article 13.2.3 of the BWF-ADR, the BWF, as relevant international federation for the sport of badminton, has legal standing to appeal. Therefore, as the Athlete is an International-Level Player, this appeal was properly filed before CAS.

35. Pursuant to Article R57 of the Code, the Panel has full power to review the facts and the law and to hear the case *de novo*. Furthermore, the Panel may issue a new decision which replaces the decision challenged, or may annul the decision and refer the case back to the previous instance. As a previous CAS Panel has outlined:

*“this Panel is not bound by the findings of the Tribunal, however well reasoned they are. More specifically, this Panel has full power to examine de novo the Player's actions, and the evidence before it, in order to verify whether the Player's plea of [no fault or negligence], dismissed by the Tribunal [upheld by the DHP in this case], is grounded or not. Such exercise is linked to the appellate structure of CAS proceedings” (CAS 2016/A/4643, Sharapova v. ITF, at para. 63).*

36. Accordingly, the Panel holds that it has jurisdiction pursuant to Article R59 of the Code. The Panel is, however, limited by the principle of *ne eat iudex ultra petita partium*, according to which it cannot do more than is requested of the Parties.

## **VI. ADMISSIBILITY**

37. Article R49 of the Code provides as follows:

*“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.”*

38. In accordance with Articles R47 and R48 of the Code, the Appellant filed its Statement of Appeal on 11 November 2019 against the decision rendered by the DHP on 21 October 2019.

39. In accordance with Article R51 of the Code and hence within ten days following the expiry of the time limit for the appeal, the Appellant filed its Appeal Brief on 21 November 2019.

40. In accordance with Article R55 of the Code, and following an agreed-upon extension of time, the Respondent filed her Answer on 14 January 2020.

41. It follows from the above that the Appeal is admissible.

## VII. APPLICABLE LAW

42. Article R58 of the Code provides as follows:

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

43. In the present case, the applicable regulations for the purposes of Article R58 of the Code are those contained in the BWF-ADR. Furthermore, the provisions of Chapter 12 of the Swiss Private International Law Statute (“PILS”) shall apply, to the exclusion of any other procedural law.

## VIII. SUBMISSIONS OF THE PARTIES

44. The Parties' submissions are summarized below. The Panel confirms that it has carefully considered in its award all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarized or referred to in the following outline of the Parties' positions and the ensuing discussion on the merits.

### A. The Appellant's Submissions

45. In its Statement of Appeal, the Appellant requested relief as follows:

- *“The BWF's appeal is admissible.*
- *The decision rendered by the DHP dated October 21, 2019 in the matter of Ms. Foo Kune is set aside.*
- *Ms. Foo Kune is sanctioned in accordance with the provisions of the ADR. Any period of ineligibility effectively served (whether imposed on, or voluntarily accepted by, Ms Foo Kune) before the entry into force of the CAS award, shall be credited against the total period of ineligibility.*
- *All competitive results obtained by Ms. Foo Kune from and including April 28, 2019 are disqualified, with all resulting consequences (including forfeiture of any medals, points and prizes).”*

46. The Appellant submitted its agreement with the DHP's decision that the Athlete committed an ADRV, leading to the disqualification of her competitive results at the

Championships. The Appellant further accepted that the Athlete was able to establish that the ADRV was not intentional and did not challenge that finding of the Appealed Decision.

47. However, the Appellant argued that the Athlete did not establish the origin of the Prohibited Substance, which it considered a “*pre-condition*”, “*per the definitions*” of the concepts of “*no significant fault or negligence*” or “*no fault or negligence*”. Therefore, the Appellant submitted the applicable period of ineligibility to be of two years, as provided for in Article 10.2.2. of the BWF-ADR.

- The Appellant believed evidence establishing that a scenario is possible is not enough to establish the origin of the prohibited substance and referenced three CAS awards (CAS 2014/A/3820 WADA v. Damar Robinson & JADCO case; CAS 2010/A/2230 International Wheelchair Basketball Federation v UK Anti-Doping and Simon Gibbs; CAS OG 16/25 WADA v. Yadav & NADA).
- The DHP ignored the *sine qua non* condition that the origin of the substance be established to warrant the application of Article 10.4 of the BWF-ADR. The Appellant reasoned that: “*To date, the Player has not provided any concrete evidence on how the Prohibited Substance may have entered her body. Instead, the Player has relied on potential motives and circumstantial evidence to put forward a scenario. It is however not supported by any commencement of proof. In view of the foregoing, the BWF submits that the Player has failed to establish the origin of the Prohibited Substance in her sample.*”
- Therefore, the Athlete did not establish the origin of the Prohibited Substance in her urine sample, for she failed to show on the balance of probabilities (i) how the Prohibited Substance entered her body and (ii) how an ill-intentioned individual could have deliberately spiked her food or drinks with the Prohibited Substance.

48. The Appellant’s subsidiary position was that “*no fault or negligence*” may apply, if the Panel were to accept that the Athlete met the burden of proving the origin of the Prohibited Substance and that on the balance of probabilities an ill-intentioned individual deliberately spiked her consumables with the Prohibited Substance.

- The Appellant noted, from official Comments to the World Anti-Doping Code, that “*no fault or negligence*” applies in “*exceptional circumstances*”:

*“[...] for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete’s personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete’s food or drink by a*

*spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.5 based on No Significant Fault or Negligence."*

- To further demonstrate that Article 10.4 of the BWF-ADR applies only in the most exceptional cases, the Appellant referenced the following CAS jurisprudence: CAS 2005/A/847 Hans Knauss v. FIS, CAS 2005/A/990 Pobedonostsev v. IIHF, CAS 2009/A/ 1926 ITF v. Gasquet, and CAS 2013/A/3370 Union Cycliste Internationale (UCI) v. Jack Burke & Canadian Cycling Association (CCA).

49. In addition, the Appellant elaborated on the factual background of certain events that transpired before the ADRV. The Appellant noted that at the end of 2017, the BWF launched an investigation into alleged wrongdoing by an individual from Mauritius, Mr. Gaya, who previously held offices with the BWF, the Badminton Confederation of Africa (the "BCA"), and the MBA.

- The BWF's investigation culminated in a decision by the BWF Ethics Hearing Panel (the "EHP") on 21 November 2018, through which Mr. Gaya was banned from performing any function in badminton for life and ordered to pay a fine of US \$50,000.
- Mr. Gaya was found guilty of misappropriating funds, failing to act in an ethical and honest manner, and bringing the sport into disrepute.
- In suspending Mr. Gaya for life, the EHP relied on the testimonies of the Athlete and Mr. Mungroo.
- Since the conclusion of the EHP case, the BWF is aware that the Athlete has been collaborating with her country's Independent Commission Against Corruption in its investigation against Mr. Gaya.
- The BWF is also aware that the MBA has banned for life Mr. Mungroo, apparently for "*blowing the whistle*" to the BWF about Mr. Gaya's wrongdoing, and Mr. Mungroo was present as a witness for the Athlete during first instance before the DHP.

50. In its Appeal Brief's conclusion, the Appellant summarized its reasoning for the requested relief as follows:

- *"The ADRV is not disputed between the parties. The only question is as to the applicable consequences for that violation.*
- *Whereas the BWF is willing to accept that the violation is not intentional within the meaning of the BWF-ADR, the Player has failed to establish the origin of "1-androstenedione" in her sample. Accordingly, the Player cannot benefit from*

*the provisions on No Fault or No Significant Fault, and must therefore be sanctioned with a two-year period of ineligibility.*

- *Even if the Panel were to accept that origin had been established, the Player has failed to provide concrete and satisfactory evidence to show that she was the victim of deliberate spiking of her consumables by an ill-intentioned individual. Accordingly, Articles 10.4 and 10.5 on No (Significant) Fault or Negligence should not find application in this case.*
- *The BWF wishes to emphasize that its objective, in the context of this appeal, is also to shed some light on the circumstances surrounding the positive control. As such, the BWF is willing to accept any new evidence that the Player may put forward in the context of this procedure, even if it was not considered or brought up in first instance. Furthermore, the BWF is open to re-evaluate its position on whether such new evidence would allow the Player to establish that sabotage took place, or any other mitigating circumstance.”*

## **B. The Respondent’s Submissions**

51. In its Answer, the Respondent requested that the Panel uphold the Appealed Decision or alternatively, impose a period of ineligibility of less than two years.
52. The Respondent had no comment on the discussion of “*intent*”, since the Appellant did not contest the DHP’s conclusion that the ADRV was not committed intentionally. In the event “*intent*” became a topic under the CAS proceedings, the Respondent reserved the right to argue her case.
53. The Respondent’s Answer focused on the applicability of Articles 10.4 or 10.5 of the BWF-ADR to the present case. No distinction was made between the two articles, as they both cover the same facts.
54. Contrary to the Appellant’s position, the Respondent submitted that she proved on a balance of probabilities the origin of the Prohibited Substance. In that regard, the Advisory Opinion CAS 2005/C/976 & 986, states that although the WADA Code imposes on the athlete a duty of utmost caution to avoid a prohibited substance from entering their body, the sanctioning bodies, in their endeavors to defeat doping, should not lead to unrealistic and impractical expectations on athletes.
55. The Respondent explained why an accidental contamination of her supplements or her food and water consumed during the Championships was not possible.
  - The Athlete was no longer in possession of the substances declared on the doping control form (saltwater solution, vitamins, and amoxicillin). It was not possible to identify the batch numbers for the relevant products, rendering actual testing of the products for 1-androstenedione impossible. Nonetheless, on the basis of their packaging, the Respondent contacted the manufacturers about the possibility of these products containing the Prohibited Substance: All manufacturers confirmed that contamination was not a possibility, that the products do not contain 1-androstenedione, and that anabolic steroids are not produced at their factories/laboratories.

- It was dangerous to leave the tournament area, so that the Athlete had no choice but to accept the risk that food or water provided by the organizers of the Championships might have been contaminated. The Athlete and her counsel investigated whether the food or water provided in Nigeria could possibly have been contaminated with 1-androstenedione. It was not possible to produce any evidence to substantiate such theory.
- The DHP reached the same conclusion that the Athlete displayed the utmost care in avoiding contamination, for she only drank water from sealed bottles and ate only the food provided by the organizers.

56. Having precluded both deliberate and accidental ingestion, the Respondent submitted that the ADRV must have occurred because of sabotage during the Championships orchestrated by the MBA, Mr. Gaya, or an associate of either, *“as an attempt to taint her credibility or as an act of vengeance”*. The Respondent listed the following considerations to substantiate this claim:

- The Athlete was, and still is, one of the key witnesses in said case involving Mr. Gaya, and the connection between said case and the present proceedings has been made not only by the Athlete but also by Mr. Mungroo, former president of the MBA.
- In a letter of 29 June 2019 to the Appellant, Mr. Mungroo voiced his concerns about the development in the pending doping case against the Athlete as follows: *“In my opinion I feel that Kate Foo Kune could have been trapped as the MBA is trying hard to penalize all those who assisted BWF in their investigation against Gaya being myself a victim of the MBA. As per the press reports, the test was carried out during a tournament where a full Mauritian delegation was present including an elected member of the MBA who acted as team manager. Another elected member had his son in the team there as well. I do not have any proof of the above matter but I believe that considering this unique circumstances, it is the duty of the BWF to protect all individual including athletes or officials who collaborated as witnesses in a BWF investigation. One may find it very strange, 6 months after the BWF decision regarding Raj Gaya’s case, one of the main witness (Kate Foo Kune) has failed a doping test (in Africa and while she was in an official delegation of Mauritius) and the other witness myself (has been suspended for life by the MBA only because I provided information to BWF with regards to the Raj Gaya case.)”*
- The timing of the ADRV, being six months after the BWF Ethics Decision regarding Mr. Gaya.
- The referee report from the Championships, which stated that no random draws were required, and no players were tested or identified to be tested during the Championships.
- The MBA is protecting Mr. Gaya, both by banning Mr. Mungroo and by finding, in its internal investigation into Mr. Gaya, no wrongdoing and the said investigation was concluded before the BWF Ethics Hearing against Mr. Gaya.

- The most likely explanation for the ADRV is that the Athlete's water had been spiked while out of the Athlete's sight together with the Athlete's backpack, when called to the court. All the Mauritian player's backpacks, including the Athlete's (with water), were left in the case of the MBA's team manager, Mr. Appiah. This is confirmed by one of the other players from the Mauritius delegation.
  - Furthermore, from a fairness and proportionality perspective, legitimate victims of sabotage are in a difficult position and often find themselves without any direct means to establish that an act of sabotage occurred - the very purpose of sabotage is to leave the victims unable to prove it. The relevant question in such situations is, therefore, what burden of proof should victims have to discharge to prove their innocence. In this case, the Athlete lifted such burden of proof.
57. On a further note, the Respondent questioned the credibility of the MBA's comments on the present proceedings in a letter to the Appellant dated 5 December 2019. The MBA denied all allegations and any association with Mr. Gaya, notwithstanding that such association should be obvious, as Mr. Gaya was banned for life from badminton. Mr. Mungroo is still banned by the MBA, without having provided any reasoning for such ban and the MBA has ignored the Appellant's request for due process in such proceedings.
58. There is no precedent case law at BWF or CAS which resembles the exceptional circumstances of this case, and much of the jurisprudence and case law presented by the BWF must be disregarded as it shares no similarities with the present case.
- Instead, guidance can be drawn from both TAS 2014/A/3475 and CAS 2011/A/2384+2386. As set out in both CAS 2009/A/1926+1930, CAS 2011/A/2384+2386 and CAS 2017/A/5296, the relevant test, when several scenarios are put forward as to how the prohibited substance could have entered the athlete's body, is whether the panel is satisfied that the athlete's explanations are more likely than not to be true, i.e. the likelihood that the circumstances alleged did in fact occur is equal to or greater than 51%.
59. Therefore, Article 10.4 or 10.5 of the BWF-ADR do apply to the relevant case as the Respondent did not know or suspect, and could not reasonably have known or suspected, that even though she exercised the utmost caution, she had used or been administered 1-androstenedione. Thus, the sanction should be reduced to no period of ineligibility, as found in the Appealed Decision.
60. In addition, the Respondent elaborated on the facts and circumstances surrounding the case as follows:
- The Athlete normally trains in Holbæk, Denmark, and has little to do with her national association, the MBA. She is one of the best female badminton players from the African continent and a recognized and well-known athlete in her home country. She has been tested for doping multiple times and has never tested positive for any prohibited substance.

- Inevitably, this case has attracted some attention from the media in Mauritius and Africa. The case has been leaked several times during the initial proceedings even though only the MBA was informed of its existence – “*the specific reasoning for the leak is, naturally, clear, but it could be argued that someone has an interest in such story getting out*”.

61. The Respondent’s submissions are summarized as follows:

- “*That the Player bore "No Fault or Negligence" or "No Significant Fault or Negligence" in the ADRV.*
- *The ADRV was not caused by accidental contamination. Instead, the ADRV was caused, even though the Player displayed the utmost care, by deliberate contamination or sabotage in an attempt to discredit her and lessen the credibility of any further testimonies she would give in the Gaya investigation or as an act of vengeance for her involvement in said investigation.*
- *The potential culprit is not to be deemed as a person within the Player’s circle of associates as she had no personal entourage with her during the African Championship, she was only a part of the Mauritian delegation.*
- *Considering the facts and arguments above, the decision rendered by the DHP should be upheld.”*

**C. The Respondent’s Supplemental Submissions and the Appellant’s Response**

62. On April 3, 2020, the Respondent submitted the following supplemental bundle of exhibits in support of its defense:

*“K11: Email from 12 July 2019*

*K12: Results from Jeux des jeunes élites 2019 (attachment to K11)*

*K13: Email correspondence 19 November 2019 to 28 February 2020*

*K14: Letter 19 November 2019 to Ministry of Youth Empowerment Sports and Recreation (attachment to K13)*

*K15: Email correspondence from 19 December 2019 to 19 February 2020*

*K16: KFK's budget (attachment to K15)*

*K17: Email correspondence from 8 December 2019 to 15 March 2020*

*K18: Invoice from Kiwi.com (attachment to K17)*

*K19: Result from KFK's doping test 26 January 2020*

*K20: Letter from BWF to MBA of 9 March 2020”*

63. The Respondent's new exhibits can be summarized as follows:

- The Athlete has been replaced by the daughter of Mr. Appiah (the MBA-elected team manager during the Championships when the ADRV took place). Evidence brings into doubt the sporting merit behind that replacement decision in line with the Respondent's previous submission before the DHP: *"Appiah supports Gaya, and has a personal interest or motive that she tests positive as his daughter is next in line to replace her in a major badminton tournament in Mauritius"*.
- The Athlete sought from the MBA reimbursements for certain tournaments to allow for funding for further tournaments that are critical for the 2020 Tokyo Olympic qualification (which has been postponed due to the COVID-19 pandemic). She sent reminders on numerous occasions but without response.
- The Athlete's most recent doping test of 26 January 2020 in Holbæk showed that both blood and urine tests were negative.
- On March 9, 2020, the BWF proposed to seek an independent judgement from CAS on the ENGA decision to confirm Mr. Mungroo's status as a *"persona non-grata from the MBA"* – on the grounds of questionable due process and bias on the part of the MBA. The BWF offered to cover the CAS fees for the procedure and sought confirmation for CAS referral, from the MBA, by 20 March 2020.

64. On 29 April 2020, the Appellant commented on the Respondent's additional exhibits as follows:

- *"In the absence of context, we would assume that the supplemental exhibits aim to demonstrate that the athlete has a difficult relationship with her national federation. Our position would nevertheless remain the same: without concrete evidence on the origin of the Prohibited Substance, the conditions for application of either "No Fault or Negligence" or "No Significant Fault or Negligence" are not fulfilled, and the athlete should not benefit from a reduction beyond the one that we conceded could apply for "lack of intention"*.
- *The supplemental exhibits, even if they suggest a difficult relationship between the athlete and her national federation, do not make the athlete closer to establishing the origin of the substance on the balance of probabilities. We would refer the panel here to the same CAS cases that were quoted in our Appeal Brief, i.e. CAS 2014/A/3820 (WADA v. Robinson & JADCO), CAS 2010/A/2230 (IWF v. UKAD & Gibbs), and CAS OG 16/25 (WADA vs. Yadav & Nada)."*

#### **D. Request for an Independent Expert Opinion**

65. Article R44.3 of the Code provides as follows:

*"If it deems it appropriate to supplement the presentation of the parties, the Panel may at any time order the production of additional documents or the examination witnesses, appoint and hear experts, and proceed with any other procedural step. The panel may*

*order the parties to contribute to any additional costs related to the hearing of witnesses and experts."*

66. Accordingly, pursuant to Article R44.3 of the Code, the Panel enjoys a margin of discretion and may appoint and hear experts only if it deems appropriate.
67. The Panel found it necessary to appoint an expert in view of the circumstances of the present case.
68. Therefore, the Panel sought Prof. Saugy's independent expert opinion as to whether the analytics (e.g. concentration, substances, compounds, etc.) of the Athlete's urine sample are compatible with intentional spiking of the Athlete's water bottle during the period of the Championships (22-28 April 2019). Additionally, the Panel asked whether 1-androstenedione is commercially available for purchase and if so, in what form (liquid, power, capsule, etc.).
69. Prof. Saugy's opinion was based on the Laboratory's estimation of the concentration of the Prohibited Substance to be ca. 0.6 ng/ml in the Athlete's urine sample. This small concentration may be due to the recent intake of a small dose of 1-androstenedione or due to the queue excretion of a normal dose which has been taken several days before the test. By reference to results from an excretion study from Delbecke *et al* in 2003, a concentration of 0.6 ng/ml would be found 6-7 days after the intake of a dose of 100 mg 1-androstenedione.<sup>2</sup>
70. Prof. Saugy stressed that it is "*impossible*" for a scientist, purely on the basis of a urinary concentration, to differentiate the voluntary intake by the Athlete of the Prohibited Substance from the intake of the same substance through her water bottle, which has been intentionally spiked by another person.
71. Nonetheless, if the amount of 1-androstenedione which was absorbed by the Athlete was less than 100 mg (20-50 mg for example, but still a significant amount), one may expect the excretion time to find 0.6 ng/ml in the urine to be less than 6 days. This could decrease to 3 to 4 days, which is again completely inside the duration of the Championships.
72. Prof. Saugy confirmed that the Prohibited Substance is commercially available through several specialized websites and is generally sold in form of capsules or tablets. Additionally, he affirmed that a bottle of water can be spiked with 1-androstenedione by adding directly to the water the powder extracted from the capsule or the powder obtained by grinding the tablet. A water solution by dissolving the powder in a small amount of water may also be prepared. Therefore, "*technically*", it is possible to add the Prohibited Substance to a bottle of water.
73. All manufacturers confirmed that the products the Athlete took in the past seven days (saltwater solution, vitamins, amoxicillin) do not contain the Prohibited Substance and that anabolic steroids are not produced at their factories. Notwithstanding this, Prof. Saugy opined that "*is well known today that many nutritional supplements are*

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<sup>2</sup> F Delbecke, P. Van Eenoo, W. Van Thuyne, N Desmet: Prohormones and sport; J. Steroid Biochem Mol Biol 83 (2003):245-251.

*contaminated with prohibited substances. It has been even shown that even a regular well controlled NSAIDs medicament was the diuretic hydrochlorothiazide*".<sup>3</sup> The tolerance in purity of the active compound can accept a contamination of less than 1 %. This acceptable contamination with another product may lead to an AAF with small concentration like the one found in the present case. An independent analysis of these supplements would be needed to rule out the hypothesis of contamination.

74. Ultimately, Prof. Saugy concluded that the following three scenarios appear “*plausible*”, from a scientific point of view:
- Intentional intake of a significant amount of 1-androstenedione (20-100 mg) 3-6 days before the urine collection;
  - Involuntary intake of the same amount through a spiked water bottle (sabotage) 3-6 days before the urine collection.
  - The recent intake of a supplement contaminated with a small dose of 1-androstenedione.
75. The Appellant suggested putting forward three additional questions to Prof. Saugy, pertaining to whether adding powder of the Prohibited Substance in water can alter its taste/smell, would dissolve at room temperature, and/or change the water’s appearance.
76. The Respondent commented that intentional intake had already been ruled out in the initial proceedings and was not disputed in these proceedings. Testing of a contaminated product would not ensure that the product, at the time of the testing, was contaminated with 1-androstenedione; it would still be a hypothesis only. Additionally, the Respondent objected toward raising additional questions, because the Athlete had already explained that “*the bottle was not transparent neither could she smell or taste anything differently as she had already mixed her water with salt water solution or water soluble vitamins which adds both taste and colour to the water*”.
77. The Respondent re-submitted that the most likely explanation for the ADRV is intentional spiking of her water by a person outside her circle of trust during the Championships.
78. The Appellant agreed with the independent expert findings supporting a scenario where absorption took place during the tournament in Nigeria (whether intentionally or not), but asked the Panel to review the entire factual outline and decide whether, on the basis on the preponderance of probabilities, the Respondent was able to establish the origin of the Prohibited Substance.
79. In response to the Appellant’s additional questions, Prof. Saugy submitted the following opinion, premised on an experiment conducted by himself, which does not give an absolute and unique answer but “*the most probable*” one:

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<sup>3</sup> Hemlin et al, 2016: Detection of the diuretic in a doping control urine as the result of NSAIDS tablet contamination. For Sci Int. 267, 166-172.

- We can assume that the active ingredient itself (1-androstenedione) is dissolved in water, but the most important part of the powder contained in a capsule is poorly dissolved in water at room temperature, even after an energetic mix of the bottle.
- Dissolved 1-androstenedione powder changes the visual appearance of the water. If, however, the water contained in the athlete's bottle already contained a colored isotonic solution, the powder would not appear differently of the other ingredient of the sport's drink.
- The taste and the smell of dissolved 1-androstenedione when added to water strongly depends on the excipient and generally not directly on the active ingredient. In the case of the experiment conducted by Prof. Saugy, the smell and the taste were slightly acidic and bitter, comparable of what can be experienced after the addition of an aspirin in water.

## IX. MERITS OF THE APPEAL

80. Pursuant to Article 2.1 of the BWF-ADR:

*“2.1.1 It is each Player's personal duty to ensure that no Prohibited Substance enters his or her body. Players are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Player's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.*

*2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Player's A Sample where the Player waives analysis of the B Sample and the B Sample is not analyzed; or, where the Player's B Sample is analyzed and the analysis of the Player's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Player's A Sample; or, where the Player's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.*

*2.1.3 Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Player's Sample shall constitute an anti-doping rule violation.*

*2.1.4 As an exception to the general rule of Article 2.1, the Prohibited List or International Standards may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.”*

- The Comment to Article 2.1.1 of the BWF-ADR adds that an ADRV “is committed under this Article without regard to a Player's Fault” and has thus been referred to in various CAS decisions as “*Strict Liability*”. The principle that a “*Player's Fault is taken into consideration in determining the*

*Consequences of this anti-doping rule violation under Article 10*” has consistently been upheld by CAS.

- The Comment to Article 2.1.2 of the BWF-ADR adds that “*The Anti-Doping Organization with results management responsibility may, at its discretion, choose to have the B Sample analyzed even if the Player does not request the analysis of the B Sample*”.

81. The Parties do not dispute the DHP’s finding that the Athlete committed the ADRV unintentionally, warranting the application of Article 10.2 of the BWF-ADR. Therefore, this Panel does not examine this aspect of the Appealed Decision.
82. Accordingly, the starting period of ineligibility is two years, subject to any potential reduction or suspension.
83. The question for this Panel to consider is whether the DHP has improperly applied “*no fault or negligence*” (Article 10.4 of the BWF-ADR), eliminating the period of ineligibility in full. In reaching this conclusion, the Panel needs to consider whether the DHP has erred in concluding that the source of a prohibited substance in an athlete’s sample is not *sine quo non* proof of absence of intent. In this regard, the Panel shall also consider the Appellant’s argument that proof of the origin of a prohibited substance (on the balance of probabilities) is a precondition for the application of Article 10.4 or 10.5 of the BWF-ADR.

**A. Standard of Proof**

84. The applicable standard of proof is a mere balance of probability. The threshold for satisfying this standard of proof is substantially less than proof of beyond reasonable doubt and less than the “*comfortable satisfaction*” standard of proof. It is therefore not necessary to achieve a degree of absolute certainty with regards to the origin of the Prohibited Substance in the Athlete’s urine sample, nor a degree of certainty that would be required for the Panel to be “*comfortably satisfied*”. Balance of probability, as implied in its name, requires one scenario to be more likely than another, albeit not by way of “*mere speculation*”.

**B. Origin of Prohibited Substance**

85. The Panel read and carefully weighed various arguments on whether the source of a prohibited substance in an athlete’s sample is *sine quo non* proof of absence of intent.
86. In this regard, this Panel respectfully acknowledges that the CAS jurisprudence expresses two distinct views on this issue (CAS 2016/A/4662, and CAS 2016/A/4377).
87. As in CAS 2017/A/5017, the Panel is of the view that the drafters of the WADA Code intended to leave the door open for an athlete to prove absence of intent even if he or she does not know, and therefore cannot show, how the prohibited substance entered the athlete’s body.
88. The Panel recalls that any ambiguous provisions of a disciplinary code must in principle be constructed *contra proferentem* and in accordance with the statement in CAS 94/129:

*"The fight against doping is arduous and it may require strict rules. But the rule makers and the rule appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorized bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders."* (CAS 94/129, para. 34)

89. The Panel agrees with the DHP's conclusion, "*based on the fundamental principle of interpretation, i.e. that rules must be applied according to their spirit, the proof of source of the 1-androstenedione is not mandatory for Foo Kune to prove that her ADRV was not intentional*".
90. The Panel was likewise persuaded by various CAS jurisprudence (e.g. CAS 2017/A/5112) that an athlete seeking to discharge the presumption of intent does not necessarily have to show exactly how the prohibited substance entered their sample.
91. Accordingly, the Panel agrees with the DHP that it is not absolutely necessary for the Athlete to show the origin of the Prohibited Substance to establish the absence of intent.
- This is supported by commentators, such as Antonio Rigozzi and Ulrich Haas: "*The 2015 Code does not explicitly require an Athlete to show the origin of the substance to establish that the violation was not intentional. While the origin of the substance can be expected to represent an important or even critical, element of the factual basis of the consideration of an Athlete's level of Fault, in the context of Article 10.2.3, panels are offered flexibility to examine all the objective and subjective circumstances of the case and decide if a finding that the violation was not intentional.*"<sup>4</sup>
  - In a similar vein, CAS 2017/A/5022, found that proof as to how the prohibited substance entered the athlete's body is a mandatory prerequisite in order to benefit from the fault-related deductions, but it is not strictly required in order to prove absence of intent.

### **C. Inapplicability of No (Significant) Fault or Negligence**

92. As explained above, an athlete, who successfully establishes absence of intent, may have the period of ineligibility eliminated or further reduced if he or she can establish, on a balance of probability, how the prohibited substance entered his or her body and either: (i) that he or she bears "*no fault or negligence*"; or (ii) that he or she bears "*no significant fault or negligence*".
93. The questions for this Panel to consider are whether the Athlete established on the balance of probabilities (i) the origin of the Prohibited Substance and (ii) that she bore "*no (significant) fault or negligence*".

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<sup>4</sup> Antonio Rigozzi and Ulrich Haas, Breaking Down the Process for Determining a Basic Sanction Under the 2015 World Anti-Doping Code" (International Sports Law Journal, (2015) 15:3-48).

94. Article 10.4 of the BWF-ADR provides for the elimination of the period of ineligibility where there is “*no fault or negligence*” as follows:

*“If a Player or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.”*

95. The Comment to Article 10.4 of the BWF-ADR adds that Articles 10.4 and 10.5 “*apply only to the imposition of sanctions*” and “*in exceptional circumstances, for example where a Player could prove that, despite all due care, he or she was sabotaged by a competitor*”. Article 10.4 would not apply in the following circumstances:

*“(a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Players are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination);*

*(b) the Administration of a Prohibited Substance by the Player’s personal physician or trainer without disclosure to the Player (Players are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and*

*(c) sabotage of the Player’s food or drink by a spouse, coach or other Person within the Player’s circle of associates (Players are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink).*

*However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.5 based on No Significant Fault or Negligence.”*

96. The Athlete must demonstrate how the Prohibited Substance entered her system to sustain a plea of “*no (significant) fault or negligence*”. The Panel reiterates the relevant CAS jurisprudence:

- CAS 2010/ A/230: *“To permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination - two prevalent explanations volunteered by athletes for such presence - do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body.”*
- CAS 2017 / A/4962: *“The raising of an unverified hypothesis is not the same as clearly establishing the facts.”*
- CAS 2006/ A/1067: *“The Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred. Unfortunately, apart from his own words, the Respondent did not supply any actual evidence of the specific circumstances in which the unintentional ingestion of cocaine occurred.”*

- CAS 2011/A/2645: "*the athlete may establish how the Specified Substance entered the body by "balance of probability." In other words, a panel should simply find the explanation of an athlete about the presence of a Specific Substance more probable than not.*"
97. The Respondent explained why an accidental contamination of her supplements or her food and water consumed during the Championships was not possible. Instead, the Respondent submitted that the AAF resulted by way of the malicious sabotage by the MBA or Mr. Gaya, or an associate of either. In particular, she asserted that her team backpack had been left out-of-sight several times during the Championships and that the most likely explanation for the AAF is that her water was intentionally spiked without her knowing during this period.
98. In the Panel's view, the Athlete's assertion just cited, devoid of sufficiently supporting evidence, falls short of a cogent explanation of how 1-androstenedione appeared in her urine, and fails to meet the requisite burden of proving how the Prohibited Substance entered her system.
99. The Panel recalls jurisprudence where an allegation of sabotage and/or "*no fault or negligence*" were considered:
- sabotage of a supplement in the course of manufacture (CAS 2015/A/4129);
  - sabotage of a fellow competitor (CAS 2016/A/4627 & CAS 2016/A/4628);
  - sabotage of an ex-member of the athlete's entourage (CAS 2014/A/3475);
  - administration of the prohibited substance by the treating doctor in an emergency (CAS 2005/A/990, CAS 2005/A/951, CAS 2006/A/1041, CAS 2008/A/1452);
  - ingestion of meldonium for medical reasons (CAS 2016/A/4889); and
  - ingestion of cocaine by kissing a third party (CAS 2017/A/5296, CAS 2009/A/1926 & 1930).
100. The Panel understands that there is no precedent at the BWF nor at CAS of a case bearing similar facts to the case at present, i.e. that an athlete alleges sabotage by a former official whom they testified against in an ethics case which led to that former official being banned (for life). The Panel notes that TAS 2014/A/3475 bore certain similarities to the case at present.
101. The Panel, similar to the majority of the DHP, is guided by CAS 2009/A/1926 & 1930 and CAS 2017/A/5296 that an athlete only needs to show that one specific way of ingestion is marginally more likely than not to have occurred to demonstrate on the balance of probability, the proof regarding the means of ingestion. At the same time, the Panel recalls the following three CAS awards:
- CAS 2014/A/3820 WADA v. Damar Robinson & JADCO case: "*In order to establish the origin of a Prohibited Substance by the required balance of*

*probability, an athlete must provide actual evidence as opposed to mere speculation".*

- CAS 2010/A/2230 International Wheelchair Basketball Federation v UK Anti-Doping and Simon Gibbs: *"To permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination - two prevalent explanations volunteered by athletes for such presence - do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body."*
- CAS OG 16/25 WADA v. Yadav & NADA: The Panel *"found the sabotage(s) theory possible, but not probable and certainly not grounded in real evidence"*. Ultimately, *"the nature and quality of the defensive evidence put forward by the athlete, in light of all the facts established, must be such that it leaves the tribunal actually satisfied (albeit not comfortably so) that the athlete's defence is more likely than not [to be] true"*.

102. In line with CAS jurisprudence cited above, the Athlete would have had to adduce specific evidence on how the substance entered her body to the extent that the Panel could have found the explanation more probable than not.
103. In the present case, the scientific analysis of independent expert Prof. Saugy undermined the Athlete's allegation of sabotage. The Panel finds it improbable that the Athlete could not have detected the altered appearance, taste, and smell of her water if e.g. it had been spiked with 1-androstenedione powder extracted from a commercially available capsule.
104. The Panel is likewise not persuaded that such detection was not possible due to having previously mixed the water with vitamins – for if such explanation was accepted, it would effectively serve as *carte blanche* to intentional doping. In addition, this explanation implies that the Athlete did not drink from sealed water bottles at all times, thereby falling short of displaying the type of *"utmost care"* required by an Athlete. Therefore, the Panel must fiercely reject this explanation.
105. For the sake of completeness, the Panel notes that, were the Athlete's theory of sabotage at all credible, she would surely at least have stated in her written submissions and not only casually mentioned at the oral CAS hearing, the following two important details:
  - that her badminton equipment bag was distinguishable from other athletes' bags by way of carrying distinct sponsor logos – of which Mr. Gaya was aware of, and
  - that she did not only drink from sealed water bottles (as improperly assumed by the DHP), given that she mixed her water with vitamins.
106. Accordingly, the Panel must reject the Athlete's unsubstantiated theory of sabotage and concludes that the DHP improperly applied Article 10.4 of the BWF-ADR to the present case.

**D. Sanction**

107. This Panel observes that the legal system built for sports-related cases shall be maintained separate from other sets of rules, built for criminal or civil law cases. As a consequence, the sanctions applied for sports cases shall be applied according to the Code, taking into consideration all the specific circumstances of the case and no consideration relating to criminal or civil law.
108. In the case subject to this Panel's attention, the Parties do not dispute that the Athlete committed the ADRV unintentionally.
109. This Panel observes that where there is intent there is necessarily fault or negligence – and although the inverse is not necessarily true (where there is no intent there may or may not be “*no fault or negligence*”), the circumstances of the case do not warrant the applicability of “*no (significant) fault or negligence*”, by reason of failing to establish the origin of the Prohibited Substance.
110. In this Panel's view, any reduction of the ineligibility period of two years is thus disproportionate to the offence committed, especially taking into consideration that the ADRV involved a non-specified substance.<sup>5</sup>
111. In accordance with Article 10.2 of the BWF-ADR, the Panel imposes on the Athlete an ineligibility period of two years:
- “10.2.1 The period of Ineligibility shall be four years where:*
- 10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Player or other Person can establish that the anti-doping rule violation was not intentional.*
- 10.2.1.2 The anti-doping rule violation involves a Specified Substance and BWF can establish that the anti-doping rule violation was intentional.*
- 10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.”*
112. Furthermore, in accordance with Article 10.11 of the BWF-ADR, the two-year period of ineligibility shall start on the date of this decision.
113. Finally, in following Article 9 of the BWF-ADR, an anti-doping rule violation in *Individual Sports* in connection with an in-competition test automatically leads to disqualification of the result obtained in that competition with all resulting consequences, including forfeiture of any medals, points and prizes. The Panel notes that the Athlete competed in the singles category during the Championships and therefore, all results obtained in this event, including any associated medals, points and prizes are disqualified.

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<sup>5</sup> In contrast with specified substances, non-specified substances cannot benefit from any non-doping explanation for being in an athlete's body. See 2015 World Anti-Doping Code, Ado Reference Guide, July 2015, Section 10.1, p. 24 (“*specified substances are more susceptible to a credible, non-doping explanation; non-specified substances do not have any non-doping explanation for being in an athlete's system*”).

114. Notwithstanding the foregoing, the Panel notes that the Athlete subsequently tested negative on other doping controls, including as recent as her doping control on 26 January 2020 in Holbæk, following the Championships. Given the isolated nature of the positive test giving rise to this violation, the Panel is confident that the ADRV did not impact any of her subsequent performances and for this reason, does not disqualify any further results earned by the Athlete between the Championship and the date of this decision.

#### **E. The Panel's Conclusion**

115. The Panel finds that in the present case, the Athlete failed to establish on the balance of probabilities how the Prohibited Substance entered the urine sample. Consequently, any plea of “*no (significant) fault or negligence*” must be rejected.

116. As a result, the Panel upholds the Appeal.

#### **X. COSTS**

117. Article R65.2 of the Code provides as follows:

*“Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS.”*

118. Moreover, Article R65.3 of the Code provides as follows:

*“Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award and without any specific request from the parties, 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 the outcome of the proceedings, as well as the conduct and financial resources of the parties.”*

119. Pursuant to Article R65.3 of the Code, in making its determination with respect to granting a contribution towards the legal fees and other expenses of the prevailing party, the Panel has to consider the complexity and the outcome of the arbitration as well as the conduct and the financial resources of the parties.

120. In this respect, the Panel notes that the BWF's Appeal has been upheld. As a result, the Appellant is the prevailing party. Considering that the BWF is a well-resourced international federation who agreed to pay in full the fee for the independent expert and already provided the Athlete with financial support for her legal counsel (and noting that the BWF was represented by its in-house counsel), the Panel exercises its discretion and decides that the Appellant and the Athlete shall bear their own legal fees and expenses.

## ON THESE GROUNDS

### The Court of Arbitration for Sport rules that:

1. The appeal filed by the Badminton World Federation against the decision rendered by the BWF Doping Hearing Panel on 21 October 2019, is upheld.
2. The decision issued by the Badminton World Federation Doping Hearing Panel on 21 October 2019, is partially set aside.
  - Ms. Kate Jessica Foo Kune has violated Article 2.1 of the BWF Anti-Doping Regulations and committed an anti-doping rule violation.
  - Ms. Kate Jessica Foo Kune is suspended for two (2) years as from the date of this decision in accordance with Article 10.1 of the BWF Anti-Doping Regulations, with credit given for any period of ineligibility already served.
  - The results obtained by Ms. Foo Kune during the All African Championships on 28 April 2019 shall automatically be disqualified, pursuant to Article 9 of the BWF Anti-Doping Regulations.
3. The present arbitration procedure shall be free of charge, except for the CAS Court Office Fee of CHF 1,000 (one thousand Swiss francs), which has already been paid by the Badminton World Federation and is retained by the CAS.
4. Each party shall bear its own legal and other costs.
5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland  
Date: 15 December 2020

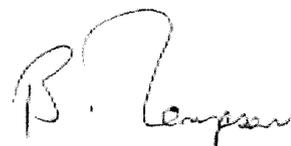
## THE COURT OF ARBITRATION FOR SPORT



Mark Andrew Hovell  
Arbitrator



Romano Subiotto QC  
President of the Panel



Blondel Thompson  
Arbitrator