

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

Before:

Michael Beloff QC (Chair)

Monty Hacker

Dennis Koolgaard

BETWEEN:

WORLD ATHLETICS

Anti-Doping Organisation

-and-

RUTH JEBET

Respondent

DECISION OF THE DISCIPLINARY TRIBUNAL

A. Introduction

1. The Claimant, World Athletics, is the governing body of the sport of Athletics worldwide. It is represented in these proceedings by the Athletics Integrity Unit ("**AIU**") which has delegated authority for results management and hearings on its behalf pursuant to Article 1.2 of the 2017 edition of the IAAF Anti-Doping Rules ("**ADR**").
2. The Respondent, Ms. Ruth Jebet (the "**Athlete**") is a 22-year-old middle-distance runner from Kenya who competes for Bahrain. She is the current Olympic champion in the 3000m steeplechase discipline.
3. These proceedings concern the consequences to be imposed on the Athlete for the admitted presence of recombinant erythropoietin ("**r-EPO**"), a Non-Specified Prohibited Substance, in a urine sample collected Out-of-Competition on 1 December 2017, for which the Athlete has been charged with violations of the ADR.
4. The Athlete denies intentional administration of the non-specified substance and relies on Article 10.5.2 ADR in asserting that she has acted with No Significant Fault or Negligence in order to reduce the period of Ineligibility to be imposed for her admitted anti-doping rule violations ("**ADRV**") to two years in lieu of the mandatory four year period of Ineligibility for which the AIU contends. She also seeks to claim credit for prompt admission in reliance on Articles 10.6.3 and Article 10.10.2(b) ADR.

B. Factual Background

5. On 1 December 2017, the Athlete provided a urine Sample coded A3099149 at an Out-of-Competition test (the "**Test**") in Kapsabet, Kenya (the "**Sample**").
6. Analysis of the Sample carried out by the World Anti-Doping Agency ("**WADA**") accredited laboratory in Stockholm, Sweden (the "**Laboratory**") on 19 December 2017 revealed the presence of r-EPO i.e. an Adverse Analytical Finding ("**AAF**") and this result was entered into the Anti-Doping Administration & Management System ("**ADAMS**") on 21 December 2017.

7. r-EPO is a Non-Specified Prohibited Substance listed in the WADA 2017 Prohibited List under the category S2 Peptide Hormones, Growth Factors, Related Substances, and Mimetics.
8. On 4 February 2018, representatives of the AIU visited the Athlete at her home address in Kenya and requested that the Athlete accompany them to a nearby hotel in order for confidential matters to be discussed. The Athlete agreed to do so.
9. At the hotel, the Athlete was provided with a copy of a Notice of Allegation dated 24 January 2018, which informed her of the AAF and confirmed that she was subject to a Provisional Suspension, effective immediately, in accordance with Article 7.10.1 ADR.
10. On 5 February 2018 - time having been given to the Athlete to consider the Notice of Allegation - the Athlete and a Mr Togom ("**Mr Togom**"), variously described by her as her husband or boyfriend, met with the representatives of the AIU. The Athlete denied using r-EPO (or any Prohibited Substances) but gave then no explanation for why r-EPO was detected in her Sample. The Athlete was reminded that she had a further nine (9) days in order to provide her explanation to the AIU and to confirm if she would like the B Sample analysed.
11. On 15 February 2018, the Athlete requested copies of the enclosures to the Notice of Allegation with which she had not yet been provided. These were sent to the Athlete by reply the same day. The AIU informed the Athlete that she had until 19 February 2018 to provide her explanation and to confirm whether she wished the B Sample should be analysed.
12. On 19 February 2018, the AIU received correspondence from the Athlete dated 16 February 2018 asking the AIU to contact the Athlete's National Federation and her manager. The Athlete did not again give any explanation for the AAF or request that the B Sample be analysed.
13. On 20 February 2018, the AIU provided the Athlete with a Notice of Charge for violations of Article 2.1 ADR and Article 2.2. ADR pursuant to Article 8.4.2 ADR

(the "**Charge**") and invited her to confirm how she wished to proceed with the matter by no later than 2 March 2018.

14. On 2 March 2018, the AIU received a response dated 1 March 2018 from the Athlete to the Charge (the "**Response**"). The Athlete explained, inter alia

"I have 21 years old and I don't know about all these medicines and supplements, but I have to inform you that the last time I took some tablets and injection given by Nicholos Togom for therapeutic use he says it's good for regeneration, but I don't know that these medicines are prohibited.

For sure you found this substance in my urine and I am responsible of [sic] my body but never I had taken this substance intentionally."

15. On 5 March 2018, the AIU wrote to the Athlete and confirmed that it understood, on the basis of the Response, that the Athlete did not dispute the finding and accepted that r-EPO was present in the Sample; but considered that in circumstances where the Athlete had stated that she did not act intentionally, the matter should be referred to the Disciplinary Tribunal (the "**Tribunal**") for determination.

16. On 8 March 2018, the AIU received a copy of a statement given by the Athlete at Kapsabet Police Station at 16:00 on 27 February 2018 (the "**Police Statement**").

17. On 28 March 2018, a telephone Preliminary Meeting took place before Mr Michael Beloff QC, the Chairman of the Tribunal (the "**Chairman**") to set procedural directions for the determination of the matter. The Athlete was afforded until 3 April 2018 to supplement the Response in writing. Specifically, the Athlete was requested to elaborate on her explanation for the AAF for example, by providing dates/times of injection, as well as the substance(s) administered, why she took them, and, as precisely as possible, what Mr Togom had said to her about the substances, and what his relationship, personal and/or professional was to her. The Athlete was also asked to confirm whether she admitted the anti-doping rule violations, but wished to dispute the Consequences on the basis that she had not acted intentionally. Alternatively, the Athlete was to provide by the same date her full written explanation for the AAF and set out how the matter was to proceed.

18. On 28 March 2018, the AIU received correspondence from the Athlete's then lawyers, Morgan Sports Law ("**Morgans**"), requesting *inter alia* extension to provide the Athlete's formal written response to the Charge.
19. On 3 April 2018, Morgans contacted the Tribunal and requested the suspension of the deadline for the Athlete to supplement her Response to the Charge until they had received a reply to their correspondence to the AIU dated 28 March 2018 and were able to take instructions from the Athlete. The Chairman granted the suspension
20. On 6 April 2018, the AIU wrote to Morgans confirming *inter alia* that the Athlete had until Friday 13 April 2018 to:
 - 20.1. provide the AIU with a full written account of her explanation for the AAF (as set out in summary in the Response and further detailed in the Police Statement);
 - 20.2. make written submissions to the AIU in relation to both the seriousness of the violations and/or her level of Fault for the purposes of applying Article 10.6.3 ADR;
 - 20.3. confirm in writing whether or not she wished to seek a suspension of any period of Ineligibility to be imposed by providing Substantial Assistance (Article 10.6.1 ADR).

The AIU also confirmed that a meeting would take place between the respective parties' lawyers and that it would report the position of the parties to the Tribunal within 7 days following the date of that meeting.

21. On 13 April 2018, the AIU received correspondence from Morgans requesting an extension to provide the requested information until 27 April 2018.
22. On 17 April 2018, the AIU replied to Morgans' correspondence dated 13 April 2018 and proposed a meeting in London in the week commencing 30 April 2018 to determine how the matter should proceed.

23. On 27 April 2018, the AIU received from Morgans (without prejudice and in part) the information requested in its correspondence dated 6 April 2018 including a chronology of events leading up to the AAF and beyond (the "**Chronology**") in support of the Police Statement. In summary, the Police Statement and the Chronology included the following information:

23.1. On 15 June 2017, the Athlete was given a sealed package to take from Baku, Azerbaijan, to her home in Kenya by a Mr Noussair, described as her physiotherapist ("**Mr Noussair**"). The Athlete enquired as to the contents of the package *"because I [she] did not want to carry anything that may bring about problems at the Airports"*. Mr Noussair told the Athlete that the package contained *"multivitamins"*. The Athlete maintained that she did *"not suspect anything fishy because he [Mr Noussair] was among the many around me who works day and night for my success in sports"*;

23.2. In July 2017, Mr Noussair visits Ms Jebet's home in Kapsabet, Kenya, on four occasions. On the first three occasions, Mr Noussair collected the parcel that he requested her to take to Kenya following the Baku Games, and then returns it (sealed). On the final visit, Mr Noussair does not return the parcel, and instead, brought a package that contained three vials, a syringe and a needle. Ms Jebet asked about the purpose of the vials and equipment;

23.3. The Athlete's house and the rooms of Mr Noussair and the Athlete's then coach Mr Saad Shadad ("**Mr Shadad**") were searched by anti-doping officials and police following information received about doping. However, according to the Athlete's statement *"Unfortunately, the officers did not find the box containing some medicines which was in my seating [sitting] room that belonged to Mr Shamir [Mr Noussair]"* during the search;

23.4. There was a breakdown in the relationship between Mr Noussair and Mr Shadad;

23.5. On 26 November 2017, the Athlete received a phone call from Mr Noussair enquiring if she had arrived in Kenya safely following the Athlete's

attendance at the IAAF Awards in Monaco. Mr Noussair also enquired whether a problem with the Athlete's hamstring had healed and the Athlete informed him that she was still experiencing pain. Mr Noussair informed the Athlete that the tubes that he had earlier given her to keep for him were "*the solution to the problem*" and asked to speak to Mr Togom about what to do;

23.6. On 30 November 2017, Mr Togom injected the Athlete "*right on my [her] leg where I [she] was feeling pain*" according to the instructions given to him by Mr Noussair;

23.7. When the Athlete received notification (in the manner set out above) that the Sample had tested positive she explained

"It was at this particular moment that I learnt [sic] that the medicine that were in my house and directed to use by Mr Shamir [Mr Noussair] was not genuine. I also flashed back and remembered that immediately he learnt [sic] that I had used the medicine he wrote me a short test message "Good Luck".

From my observation I believe Mr Shamir [Mr Noussair] wanted to make sure he punishes Mr Saad [Mr Shadad] and thus falling victim. I have never and intends [sic] never to use any drugs that can compromise my talent, I have always been very [...] but due to trust I fall into a trap. That's all I would wish to state for now."

(the "**Allegations against Mr Noussair**")

24. On 11 May 2018, the parties' lawyers met in person in London, to commence without prejudice discussions concerning the determination of the matter. Following this meeting, they agreed to meet again a few weeks later once the Athlete was able to set out her position on how the matter should proceed.

25. On 13 August 2018, the AIU put the Allegations against Mr Noussair to Mr Noussair himself. He denied, inter alia, giving the Athlete a package in Baku or ever giving (or recommending) that she take any injections.

26. On 19 October 2018, the parties' lawyers met again in London. Morgans agreed that they would continue to seek documentary evidence to corroborate the Athlete's explanation for the AAF and would meet again once their enquiries had progressed.
27. On 30 November 2018, the lawyers met in London, and agreed to meet again in the period 17-19 December 2018 to determine how the matter should proceed.
28. On 18 December 2018, Morgans confirmed that they were awaiting instructions on several requests and requested that the meeting with the AIU be postponed until those requests had been satisfied.
29. On 9 January 2019, Morgans confirmed that they remained without instructions.
30. On 31 January 2019, following correspondence from the AIU dated 14 January 2019, Morgans confirmed that they remained without instructions and that they had sought clarity on whether they remained instructed by the Athlete in relation to this matter.
31. On 6 February 2019, Morgans confirmed that they remained instructed.
32. On 17 June 2019, the AIU provided Morgans with a copy of an expert opinion by Professor Giuseppe d'Onofrio dated 11 June 2019 (the "**Expert Opinion**") concerning abnormalities detected in the Athlete's Athlete Biological Passport ("**ABP**").
33. On 2 July 2019, after further exchanges concerning the determination of the matter on a without prejudice basis, Morgans confirmed that they were no longer acting on behalf of the Athlete in relation to this matter.
34. On 11 July 2019, the AIU wrote to the Athlete confirming its understanding that she was no longer legally represented and requested urgent confirmation of how she wished to proceed with the Charge. The Athlete failed to respond.
35. On 12 July 2019, the AIU contacted the Athlete by telephone and follow up e-mail correspondence seeking her views before 19 July 2019 on how the matter was to proceed. The Athlete failed to respond.

36. On 26 July 2019, the AIU wrote to the Athlete and copied the Tribunal secretariat requesting confirmation of how the matter should proceed by no later than 2 August 2019.
37. On 2 August 2019, the Tribunal secretariat confirmed that the Athlete had requested *pro-bono* legal representation.
38. On 12 August 2019, the Tribunal secretariat confirmed that the Athlete was now represented by Ms. Stephanie David, Barrister, 39 Essex Chambers ("**Ms David**").
39. On 21 October 2019, the parties' lawyers attended a Preliminary Meeting before the Chairman to set procedural directions for the determination of the matter. Ms David (for the Athlete) agreed to provide the Athlete's summary response to the Charge in accordance with Article 8.4.4 ADR by no later than 23 October 2019.
40. On 23 October 2019, the AIU received the Athlete's summary response to the Charge. The Athlete confirmed that she:
 - 40.1. admitted the presence of r-EPO in the Sample and the use of r-EPO (albeit unintentionally);
 - 40.2. waived her right to the analysis of the B Sample because she could not afford the costs or the instruction of an independent expert;
 - 40.3. disputed the consequences to be imposed upon her and that she would rely on Article 10.5.2 ADR to demonstrate that she had acted with No Significant Fault or Negligence for her admitted anti-doping rule violations.
41. On 28 October 2019, the AIU filed its Brief.
42. On 2 December 2019, the Chairman ordered the AIU to make certain disclosure requested by the Athlete.
43. On 16 December 2019, the Athlete filed her Answer Brief.
44. On 7 January 2020, the AIU filed its Reply Brief.

45. On 29 January 2020 a hearing was held at the offices of Sport Resolutions before a Panel consisting of the Chairman, who participated in person, Mr Monty Hacker and Mr Dennis Koolaard, who participated by video link. Mr Wenzel and Mr Jackson appeared in person for the AIU. Ms David appeared in person for the Athlete. The Panel heard from Professor d' Onofrio, Mr Noussair and the Athlete by video link. The Panel was assisted by Ms Kylie Brackenridge in place of Ms Roxana Weich who had handled the matter up till then.

C. APPLICABLE RULES

46. No jurisdictional issues arise in this matter as to the roles of the AIU, the Tribunal or the applicability of the ADR to the Athlete. It is accordingly necessary only to refer to the rules relevant to the Charge. It is not in dispute that according to WADA's Prohibited List, r-EPO is not a "*Specified Substance*".

47. Although the AIU formally charged the Athlete with violations of Article 2.1 and 2.2 ADR, the AIU made it clear at the hearing that it primarily charged the Athlete with a violation of Article 2.1 ADR (presence), while a violation of Article 2.2 ADR (use) was only raised subsidiarily as a fall back option in case the "presence" violation could not be established. The AIU did not charge the Athlete with multiple violations in the sense described in Article 10.7 ADR.

48. The "presence" of r-EPO in the Sample is acknowledged by the Athlete, as a consequence of which a violation of Article 2.1 ADR (presence) is established. There is therefore no need for the Panel to resort to or consider Article 2.2 ADR (use).

49. Article 10.2 ADR provides the sanction to be imposed for anti-doping rule violations under Article 2.1 ADR as follows:

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

The period of Ineligibility to be imposed for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6 that is the Athlete or other Person's first anti-

doping rule violation shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

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

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes or other Persons who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct that he knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk.

D. MERITS

50. There is a risk in doping violation cases that copious reference to authorities and the drawing of comparisons with the facts of other decisions can overcomplicate analysis and prevent the wood being seen for the trees. While the Panel appreciates the industry and scholarship of counsel for both parties, in its view the issues in this case can be simply identified and their resolution turns on fact, not law, which is all but sufficiently identified in the relevant articles of the ADR set out above.
51. The scheme of these Articles is clear:
- (1) The presumptive sanction for a proven or admitted presence and/or use case of a Non-Specified substance such as r-EPO is four years Ineligibility.
 - (2) If the athlete who bears the burden can establish, on the balance of probabilities that the violation was not intentional, the sanction can be reduced to a minimum of two years Ineligibility.

- (3) Given the special definition of intent in the ADR for the athlete to succeed in that exercise s/he must establish that s/he did not know that the conduct s/he engaged in constituted an ADRV or that there was a significant risk that it might constitute or result in an ADRV and manifestly disregarded that risk (the latter being more difficult to establish than the former).
 - (4) If the athlete succeeds in that exercise s/he can either eliminate (by proving also on the balance of probabilities no fault or negligence ("**NFN**") under Article 10.4 ADR) or reduce that period (by proving to the same standard No Significant Fault or Negligence ("**NSFN**") under Article 10.5 ADR).
 - (5) If, however, the athlete fails in that exercise s/he is *ex hypothesi* unable to rely on NFN or NSFN since an intentional violation is inconsistent with an absence of any significant (or *a fortiori*) any fault or negligence.
52. Reduced to its essential elements the Athlete's case is that the presence of r-EPO in her sample is explained by an injection received from Mr Togom (the "**Togom Injection**") of what was believed to be "multivitamins" or "painkillers" on 30 November 2017 on the instruction of Mr Noussair, prior to collection of the Sample on 1 December 2017 (the "**Athlete's explanation**").
53. It is therefore unnecessary to consider whether there are, and if so what, circumstances in which an athlete can establish lack of intent without prior proof of the source of the prohibited substances present in his or her body. The Athlete does not pray in aid any such circumstances; she claims to have identified the source i.e. the Togom Injection. It is also unnecessary to consider alternative scenarios to the Athlete's explanation. The Athlete does not pray in aid of other possible scenarios. The only issue before the Panel is whether the Athlete's explanation is on the balance of probabilities correct, which in this case is a synonym for true since that explanation could not, given its nature, be the product of misunderstanding.

54. The Panel after careful consideration of the evidence rejects the Athlete's explanation for a number of reasons;

- (1) The Doping Control Form (the "DCF") signed by the Athlete at the time of the test contains the familiar box which requires as follows:

"DECLARATION OF MEDICAMENTS SUPPLEMENTS: List of any prescription/non-prescription medications or supplements, including vitamins and minerals, taken over the past seven days (including substance, dosage and when last taken)"

The Athlete failed to record in the DCF the Togom Injection, notwithstanding that it was allegedly administered within the "past seven days". She therefore cannot realistically and indeed does not claim to have forgotten it. The injection was, according to her, given for therapeutic purposes and, contained vitamins or painkillers (her testimony is not entirely consistent in this respect) and so fell fairly and squarely within the disclosure requirement. She therefore cannot realistically and indeed does not claim otherwise. She is an experienced international athlete who had previously, as is common ground, been subject to numerous tests: in her letter of 1 March 2018 she says that she was tested about 20 times for urine, which is consistent with the ADAMS record. In the same letter she says *"As a professional athlete I know the rules of IAAF and WADA and I also have knowledge concerning the list of prohibited substances my manager send me each year the newest list."* She therefore cannot realistically and indeed does not claim to have been unaware of her obligations to give full details as required in the box. Indeed she did make a reference in the same box to a product called "Isotar".

She has given two explanations for that failure to record. The first, in her statement annexed to the Answer Brief, was that she had been reassured by Mr Noussair that *"there was no problem and it (i.e. the injection) would have no impact on me"*; that of course is not the test for disclosure. Moreover the explanation not only ignores the language of that requirement; it is at odds with her practice, exemplified in that same DCF and other DCFs signed by her included in the hearing bundle, where she **does** record to taking of benign medicaments or supplements. The second, in her oral evidence, was that she

feared to record it lest it excite the suspicion that she had deliberately doped. This explanation poses a problem in itself since it would naturally prompt the question why she had recently submitted so willingly and so incuriously to an injection which she recognized might be suspicious. In the Panel's view the inconsistency between the two explanations for the omissions in the DCF is itself telling and fatally undermines the value of each.

- (2) The Athlete was made aware of the results of the sample analysis on 4 February 2018, receipt of which she acknowledged in her letter of 16 February 2018. However, in that letter she made no reference to the Togom Injection¹.

In point of fact, despite sending other letters in February 2018 to the AIU, the first time she mentioned the Togom Injection to the AIU was in the Response (dated 1 March 2018) although oddly in less elaborate terms than in the Police Statement dated 24 February 2018.

The Athlete testified at the hearing that when she was confronted with the positive test, she immediately thought about the Togom Injection. If she was aware, as on her own evidence she was, that the injection was a potential source of the AAF, there was no reason not to mention it at the earliest opportunity. When questioned by the Panel as to why she had not done so, she could give no reason. The Panel was pressed by Ms David with the considerations (i) that the Athlete had not yet had the benefit of legal advice, and (ii) that the AIU had expressly given her time subsequent to her letter of 16 February 2018 to provide a written explanation, but in the Panel's view neither seems adequately to explain why if she thought the Togom Injection was the reason for the AAF, she did not say so at once. In light of the Athlete's testimony the Panel finds that this is not a case where an athlete confronted with an AAF for which s/he has no immediate explanation and asks for, and may need, time to investigate the possible causes.

¹ Nor, according to the AIU, had she or Mr Togom done so in the meetings on 4th and 5th February 2018, rather they maintained that they had no explanation for the AAF at all. Since, however the Panel had no direct evidence from the AIU representatives about these meetings, it prefers to rely upon the indisputable written record before it.

The Panel concludes that she did not proffer her explanation promptly because in fact there was no Togom Injection, for the purposes of treatment of an injury as alleged by the Athlete. The description of the purposes of the Togom Injection was a later concoction. Such injection may well, of course, have taken place for doping purposes; it is after all indisputable that something was responsible for the presence of EPO in the Athlete and an injection or injections is the likeliest explanation.

- (3) The Athlete's assertion that Mr Noussair instigated the Togom Injection by a telephone call was at odds with the available evidence. The WhatsApp record of calls made by Mr Noussair to the Athlete on the 27 November and 28 November are "*annule*" (cancelled). When asked what the proposed subject matter of the calls would have been, Mr Noussair stated that they would have concerned a proposed training trip for the Athlete in Morocco. As to this, the Athlete had claimed in the Police Statement that Mr Noussair was "insisting" (sic) that she go to train in Morocco. The WhatsApp messages show that, on the contrary, it was the Athlete who was interested in such a trip and that Mr Noussair was happy to assist her. The "good luck" message sent by Mr Noussair was plausibly explained by him to relate to a forthcoming race for the Athlete and not, as she had suggested less plausibly, a reaction to the information that she had had the injection, because the WhatsApp message is dated 9 January 2018, whereas the Togom Injection on the Athlete's version of events allegedly took place on or around 30 November 2017.
- (4) As to the Allegations against Mr Noussair, he has consistently and comprehensively denied them (as he has the Togom Injection itself). See (i) his answers to Morgans questions posed in an email dated 18 June 2018; (ii) a redacted version of the transcript of his interview with the AIU that took place on 13 August 2018 (the unredacted version of which was, with Ms David's agreement, disclosed to the Panel, pursuant to which the Panel confirmed that no pertinent elements of the transcript were redacted); (iii) his oral evidence before the Panel. The Athlete's Allegations against Mr Noussair are themselves somewhat bizarre, pregnant with unresolved questions, and on their face savour more of fiction than fact. To give but only example, the Panel cannot

understand why Mr Noussair should have taken an unopened package back and forth from Kenya.

As to Ms David's suggestion that Mr Noussair had at least admitted knowledge of the Athlete's injury was shown to be based on an error in the text as transcribed. While it is true that Mr Noussair's statement that he was not in Kenya for five months after Baku and hence could not have instigated the injection ignores the fact that his absence would not have prevented him from communicating with the Athlete by telephone from Morocco, the evidence suggests no such communication (see paragraph 54(3) above). Mr Noussair's statement that the Athlete's explanation makes no sense because she is an elite Athlete was, in the Panel's view, far from "incomprehensible" as Ms David argued; Mr Noussair was simply making the point consistent with his other evidence that elite athletes do not look to masseurs for treatment for an injury.

- (5) There was no corroboration of the Athlete's explanation or of the Allegations against Mr Noussair, although it seems that Morgans were doing their best over several months to find some. In particular, there is no real evidence to support either. The Athlete says that a Police search in July 2018 of her house failed to find a package, which she claims was there; and that she was asked by Mr Noussair to dispose of the syringe and vials after their use; (which if her evidence was true should itself have set alarm bells ringing) but the Panel declines to accept such convenient excuses. Mr Togom and Mr Shadad have not been willing, for whatever reason, to testify before the Panel.

55. The AIU also relied on what were said to be inconsistencies in the versions of the Athlete, Mr Togom and Mr Shadad said to show that their collective story was false;

- (i) The call by Mr Noussair recommending the injection as a cure for her injury was said by her to the police to have been made on 26 November 2017, while Mr Togom in his statement to the police refers to 27 November 2017 as the date the phone call with Mr Noussair took place and that "*the last time*" he injected her was on the 30 November 2017.

- (ii) The Athlete said that she had received one injection. Mr Togom in his statement to the police said that the injected administered on 30 November 2017 was "the last" i.e. not the only-time he had injected.
- (iii) In her statement annexed to the Answer Brief the Athlete says that Mr Togom spoke to Mr Noussair who told him to administer an injection with the contents of the package. In her oral testimony she said that it was she who extracted the contents of the package.
- (iv) The statements given to the police by both the Athlete and Mr Shadad were recorded as referring to an arm strain rather than a hamstring injury.
- (v) The Athlete was apparently uncertain as to her relationship with Mr Togom - husband or boyfriend.
- (vi) In the Police Statement the Athlete stated that the last time Mr Noussair picked up the parcel she had allegedly taken for him from Baku to Kenya he did not bring it back, but instead brought "*some three tubes containing some liquids which he claimed were multi-vitamins*", whereas she claimed in her testimony before the Panel that it concerned painkillers.
- (vii) In the Police Statement the Athlete alleges to have taken a parcel for Mr Noussair from Baku to Kenya on 15 June 2017, whereas Mr Togom in his statement to the police maintains that he and the Athlete had informed the BAA how the Athlete "*had gone to Monaco for an award occasion and how Samir [Mr Noussair] had given some drugs in form of a parcel to carry for him back to Kenya on the 22nd day of November, 2017*".

56. The Panel was pressed with the familiar argument that if the trio had conspired to fabricate a false exculpatory version of events, they would have told a seamless story, not one with the odd knot or misplaced thread; but in the Panel's preferred view if that version were otherwise credible (which for reasons already explained it was not) such minor inconsistencies would not by themselves fatally undermine it. In particular arm strain was far more likely to be an erroneous transcription of a reference to hamstring rather than proof that the Athlete was confused as to whether her injury was to her leg or arm; it is the former which is the limb primarily

responsible for athletic achievement. The Athlete's apparent uncertainty as to the nature of her relationship with Mr Togom have been the product of linguistic or cultural factors, or simply function of a desire for personal privacy; and Mr Togom mattered not in terms of the credibility of her explanation, but on any view such inconsistencies could not actually support the Athlete's explanation.

57. Professor d' Onofrio was called by the AIU apparently as a precaution against the possible degradation of the B sample, if analysed, through lapse of time so producing a negative result. In any event the B sample was not analysed and by the time of the hearing his role was simply to assess the probability from a scientific point of view of the Athlete's explanation for the AAF. Since it was sufficient for the Athlete's purposes that he found that explanation "*unlikely*" i.e. left open the possibility that it was correct, the Panel need spend little time on it. On the first review of 10 January 2017 where he had only samples 1-4 in the chart below he had found the picture "*fully compatible with continuous altitude exposure*". On the second review on 7 December 2017 with samples 5-6 as well he had found the ABP "*suspicious*" and recommended further tests. On the third and final review dated 11 June 2019 with samples 7-8 as well he favoured the AIU explanation of deliberate doping.

58. The basis for his conclusion can most simply be illustrated by the chart below.

No.	Date of Sample	HGB (g/dL)	RET%	OFF-score
1.	21 July 2014	15.0	1.43	78.30
2.	19 August 2015	14.7	1.36	77.03
3.	9 November 2016	15.4	1.42	82.50
4.	14 December 2016	15.7	0.73	105.70

No.	Date of Sample	HGB (g/dL)	RET%	OFF-score
5.	8 August 2017	15.8	0.80	104.00
6.	29 November 2017	16.8	1.39	97.30
7.	11 December 2017	15.2	2.30	61.00
8.	20 December 2017	16.3	1.22	96.70

59. The key statistics were the HGB of sample 6, higher than those in the previous samples, but unexplained by any alteration in altitude of the Athlete's residence or training; and the RET% in sample 7 which should, if the EPO were endogenous have reduced rather than increased. As regards sample 8 he said that the HGB was still high but the reticulocytes are decreasing "*to normal as expected a few weeks after the end of a exogenous stimulation*". Prof. d'Onofrio also concluded in his expert report that the increase in reticulocytes observed in Sample 7 on 11 December 2017 is also perfectly consistent with a new ESA stimulation carried out several days before, but he explained during the hearing that he considered it unlikely that the effects visible in Sample 7 were the result of a single administration of r-EPO.
60. Ms David was able to show that Professor d' Onofrio had mistakenly referred to the first instead of the second scientific article attached to his expert report. However, that did not undermine his conclusion that "*altitude is not the cause of the hematological abnormalities of this passport, in particular Sample 6 and Sample 7.*" Ms David also made a valiant attempt to cast doubt on the laboratory data on which Professor d' Onofrio relied; she pointed out correctly that its introduction states that the integrity of the parcel in which the Sample was transported was "*compromised*" but that this was met by the subsequent statement that nonetheless "*sample integrity was verified*". She pointed out correctly that initial analyses of the Sample were rejected due to "*failed repeatability criteria*" but the analyses relied on were carried out on other occasions in accordance with the WADA guidelines.

61. It follows that the Athlete has not discharged the burden which lay upon her to establish that her ADRV was not intentional. Her denials and her previous clean record cannot by themselves carry any weight. Even if (*quod non*) her explanation were credible, her conduct (in allowing an injection of an unknown and unidentified substance to be administered to her by and at the behest of unqualified persons without even a perfunctory verification, still less without consulting a qualified medical person) would plainly satisfy the two constituent elements of indirect intention under Article 10.2.3 ADR. She would have had no reason to place her trust in Mr Noussair in a matter of this kind. The facts speak for themselves; legal authority is scarcely needed (though, in the Panel's view the relevant authorities speak with one voice in favour of the AIU and against the Athlete).
62. In those circumstances there is simply on either premise no scope at all for the Athlete to rely on NSFN to reduce her otherwise prescribed four -year period of Ineligibility
63. Furthermore the Athlete cannot rely upon a (prompt) admission under Article 10.6.3 ADR to reduce that period either. The Article provides, so far as material;

Prompt Admission of an Anti-Doping Rule Violation after being confronted with a Violation sanctionable under Article 10.2.1 ...*An Athlete or other Person potentially subject to a four-year sanction under Article 10.2.1.....may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete or other Person's degree of Fault, by promptly admitting the asserted Anti-Doping Rule Violation after being confronted with it, upon the approval and at the discretion of WADA and the Integrity Unit.*

64. It is a condition precedent to the application of that Article that there be a prompt admission of the ADRV itself: its palpable purpose is to save time and cost under Article 10.6.3 ADR but even if that condition is satisfied any reduction of the period of Ineligibility (down to the two year minimum) is at the discretion of the AIU (and WADA) depending on the seriousness of the violation and the Athlete's degree of fault.
65. There is no doubt that the Athlete eventually admitted to the ADRV, but it is doubtful when she definitely did so and if this could still be qualified as "prompt".

The Panel doubts that the athlete's letter of 1 March 2018, upon which the Answer brief relied (Paragraph 10) constituted a clear admission, and the AIU's response indicated an absence of complete certainty as to whether it was but even if it was, it was, by implication, revoked in Morgans' letter of 28 March 2018. In that letter Morgans appears to be approbating and reprobating, trying to avoid making this specific admission/s called for in the Chair's directions of the same date.

66. However the AIU's email to the Athlete dated 12 July 2019 at 15.35 stipulated that the Athlete could "*choose to admit that your sample contained EPO and to describe how that happened to the Integrity Unit. In these circumstances, it may also be possible for the length of any ban to be reduced, but this will depend on the information that you provide concerning how the EPO came to be present in your sample*". The Panel infers from that e-mail (i) it was not clear to the AIU at that stage whether or not the Athlete admitted to the ADRV, but (ii) the AIU was of the view that the Athlete could still seek to rely on Article 10.6.3 ADR².
67. The Athlete then apparently confirmed by telephone on the same day that she admitted that EPO was present in her Sample, as recorded in the AIU's email dated 12 July 2019 at 22.06 summarising what it understood to have been said by the Athlete during the call.
68. In circumstances where the AIU had itself extended the period for an admission, in the Panel's view it would be estopped from contending that the admission during the call was other than prompt, even if given the lapse of time between the Athlete being first confronted with the allegation of an ADRV and the call it would not naturally be so. Nonetheless even on the premise that there was a prompt admission it is clear from the AIU's stance before the Panel that it was not prepared to reduce the four year sanction under Article 10.6.3. in the exercise of its discretion. The Panel agrees that a reduction was not in the circumstances appropriate for the following main reasons:

² as the AIU had previously indicated (see AIU letter dated 6 April 2018), but which, despite several meetings between counsel for the Athlete and counsel for the AIU, did not procure an express admission.

- (i) the ADRV was committed intentionally, the Athlete's level of Fault was therefore very high;
- (ii) intentional use of r-EPO is a serious offence;
- (iii) the Athlete took about one and a half years to admit to the ADRV, and rejected several invitations from the AIU to do so earlier;
- (iv) the prolonged discussions with Morgans prior to the Athlete's admission increased delays and costs.

69. The Panel therefore concludes that the ADRV committed by the Athlete was intentional for the purposes of Article 10.2.3 ADR and Article 10.2.1(a) ADR and that it must impose a period of Ineligibility of four-years under Article 10.2 ADR, commencing as from the date of the present decision. However, the period of Provisional Suspension imposed on the Athlete from 4 February 2018 until the date of the Tribunal Award shall be credited against the total period of Ineligibility.

70. Pursuant to Article 10.8 ADR, competitive results obtained from the date the Sample in question was collected through to the start of any Provisional Suspension or Ineligibility period shall be Disqualified (with all of the resulting consequences, including forfeiture of any medals, titles, ranking points and prize and appearance money), unless the Disciplinary Tribunal determines that fairness requires otherwise. The Athlete advanced no arguments as to why fairness would require a deviation from the default rule and the Panel finds that no such circumstances can be identified.

71. The Panel is adverse to making a costs order pursuant to Mr Wenzel's assertion on the basis of Article 8.9.3 ADR against an athlete where its substantive decision has deprived such athlete of the opportunity to exploit his or her sporting talents to make money. While in this case it concludes that the Athlete's defence was deceitful, it is inclined to the view that it was more likely to have been Mr Togom and/or Mr Shadad who, within their different roles, were in a position of power vis-a-vis the Athlete rather than the Athlete herself to have been primarily responsible for its development. It would in those circumstances be inequitable for the Athlete herself to pay costs to the AIU.

72. The Panel recognizes that the Athlete laboured under substantial handicaps in mounting her defence. Her original lawyers, Morgans, withdrew from the case since the BAF who had been meeting their fees, ceased to do so (according to the Athlete because no progress was being made). The BAF offered no other support. She never had the funds available to incur the costs of an analysis of the B sample. The key witnesses whom she asserted would have corroborated key parts of her testimony, Mr Togom and Mr Shadad, had cut all contact with her; Ms David had had to press for disclosure of material from the AIU which in the Chairman's view was always disclosable (and was in the event disclosed), but the Panel is satisfied that none of these matters deprived the Athlete of a fair opportunity to make a defence. Ms David, acting pro bono, could have done no more for the Athlete's defence than she did; and the Panel is grateful for her assistance; but, in its firm view, the Athlete never had a viable defence to the charge.
73. This decision may be appealed to the CAS in accordance with Article 13 ADR and its subsections.

ORDER

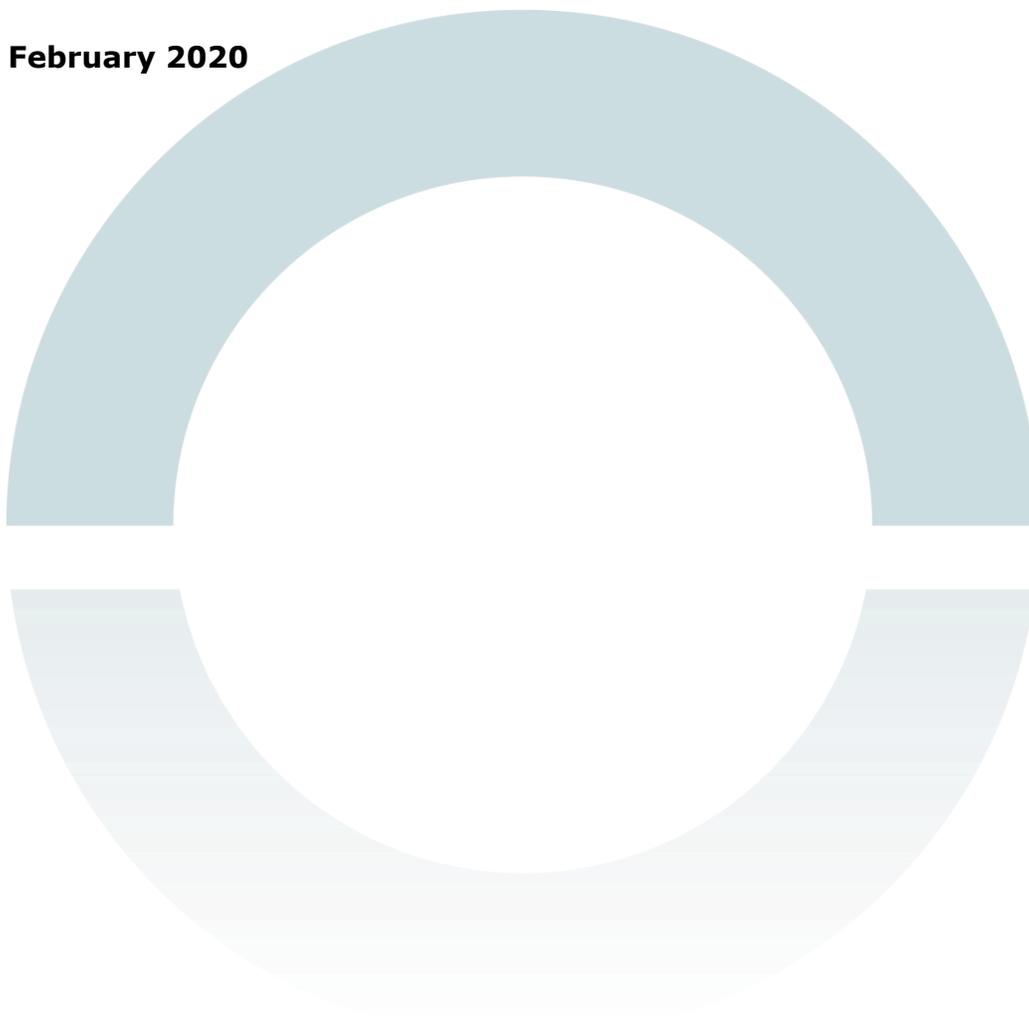
74. The Panel
- (i) Finds that the Athlete has committed an anti-doping rule violation pursuant to Article 2.1 of the 2017 IAAF Anti-Doping Rules.
 - (ii) Imposes a period of Ineligibility of four-years upon the Athlete under Article 10.2.1(a) ADR, commencing on the date of its Award in accordance with Article 10.10.2 ADR. The period of Provisional Suspension imposed on the Athlete from 4 February 2018 until the date of the Tribunal Award shall be credited against the total period of Ineligibility
 - (iii) Orders the disqualification of all results obtained by the Athlete between 1 December 2017 and 4 February 2018 with all resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money.

Michael J Beloff QC

Michael J Beloff QC Chair (on behalf of the Panel)

London, UK

13 February 2020





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