CAS 2015/O/4128 International Association of Athletics Federation (IAAF) v. Rita Jeptoo

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Mr Ulrich Haas, Professor of Law in Zurich, Switzerland
Arbitrators:	Mr Alan John Sullivan QC, Barrister in Sydney, Australia
	His Honour James Robert Reid QC, Hampshire, United Kingdom
Ad hoc Clerk:	Mr Tom Asquith, Barrister in London, United Kingdom

in the arbitration between

International Association of Athletics Federation (IAAF), Monaco

Represented by Mr. Jonathan Taylor and Ms. Elizabeth Riley, Bird & Bird LLP, London, United Kingdom

Claimant

and

Rita Jeptoo, Eldoret, Kenya

Respondent

I. PARTIES

1. Ms Rita Jeptoo (the "Athlete") is an international level, long-distance athlete. She was born on 15 February 1981. She has competed for some time at an elite international level. In both 2013 and 2014 she won both the Boston and Chicago marathons.

2. The International Association of Athletics Federation (the "IAAF") is the world governing body for athletics, recognized as such by the International Olympic Committee. One of its responsibilities is the regulation of athletics, including, under the World Anti-Doping Code ("WADC"), the running and enforcing of an anti-doping programme.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the Parties' written and oral submissions, pleadings and evidence adduced. Additional facts and allegations found in the Parties' 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 explain its reasoning.

B. Events in 2014

4. On 21 April 2014, the Athlete won the Boston marathon with a time of 2:18:57, setting a new course record. Urine samples were collected from her on 19 and 21 April 2014, which tested negative for recombinant erythropoieitin ("rEPO"). As part of the IAAF's Athlete Biological Passport ("ABP") programme, a blood sample was collected from her on 17 April 2014.

a) The car accident in August

5. It is undisputed between the Parties that in mid-August 2014, while on a training run, the Athlete was run off the road by a passing vehicle. She was treated for minor injuries at the Kapsabet Medicare Centre, and given a solution by intravenous drip and some painkillers. She recovered quickly and was able to resume her training shortly after.

6. The doctor that treated the Athlete was Dr. Kalya. It is disputed between the Parties whether or not the Athlete was in contact with Dr. Kalya before the car accident. The Athlete denies this ("*only started dealing with Dr. Kaplya from the date of the accident*"). The IAAF, on the contrary, submits that the Athlete already knew Dr. Kalya well before this incident. The Parties further disagree as to whose idea it was to get the Athlete treated at the Kapsabet Medicare Centre. According to the Athlete, it was her assistant coach, Mr. Daniel Cheribo who roposed to drive there. The IAAF submits that it was the Athlete herself that wanted to receive treatment at the Kapsabet Medicare Centre.

b) The time between the car accident and the 25 September 2014

7. The Parties are also in disagreement about what happened between the car accident and 25 September 2014. The IAAF submits that the Athlete trained hard and well for the Chicago marathon, which was to take place in October 2014. The IAAF notes that according to the contemporaneous logs of Mr Berardelli, the head coach of her management company, Rosa & Associates:

- On 17 September 2014, the Athlete completed a 17.1km training run.
- On 19 September 2014, the Athlete completed six 4km training runs.
- On 22 September 2014, the Athlete completed a 35km training run.

8. According to the Athlete, Dr. Kalya contacted her regularly in order to know how she was recovering from the accident. The Athlete submits that in the month of September she was feeling unwell and weak, and contacted Dr. Kalya in order to get an appointment. Dr. Kalya – according to the Athlete – came to Eldoret to see her. The Athlete met him in the doctor's car and asserts that Dr. Kalya suspected her to have either malaria or typhoid. Dr. Kalya took a blood sample from her and told her that he would notify her of the blood testing results within 40 – 50 minutes. The Athlete returned home to her house. Dr. Kalya then called her by phone about an hour later and told her, as suspected, that she had malaria and typhoid. Furthermore, Dr. Kalya told her that "*the lab test also showed that she had a low blood count ... that needed to be corrected.*" Following this phone call, the Athlete submits that she met Dr. Kalya again in a clinic in Barngetuny where he gave her "tablets". In addition, Dr. Kalya "*recommended an injection for the typhoid*". Finally, Dr. Kalya recommended a (further) injection in order to speed up recovery and "*to boost* ... [her] *blood levels*". She consequently received two injections. According to the Athlete, she did not know at that time that she had been injected with rEPO by Dr. Kalya.

c) The sample on 25 September 2014

9. On 25 September 2014 at about 10.30am, a urine sample (sample 3061577) was collected from the Athlete in an Out-of-Competition test. The doping control form lists Kapsabet as the place where the doping test was performed. The doping control form is signed by the Doping Control Officers (Mr. Paul Scott and Ms. Elizabeth Scott), as well as the Athlete.

d) Events since 25 September 2014 until the end of 2014

10. On 12 October 2014, the Athlete won the Chicago marathon with a time of 2:24:35. On the same day a urine sample was collected from the Athlete (which tested negative for r-EPO), as well as an ABP blood sample.

11. On 24 October 2014, the Laboratoire Suisse d'Analyse du Dopage (the "Laboratory") submitted a test report in relation to the urine sampled on 25 September 2014 (the "A Sample"). The test report stated that rEPO was found in the A Sample. rEPO is a prohibited substance under the 2014 WADA Prohibited List. Its presence in an athlete's sample constitutes an anti-doping rule violation.

12. On 28 October 2014, AK notified the Athlete of the adverse analytical finding. AK's letter to the Athlete informed her that she had been provisionally suspended from 30 October 2014. It said that she was required to provide her written explanation for the finding. It also said that she had a right to request an analysis of the sampled urine (the "B Sample").

13. Also on 28 October 2014, the Athlete's manager (Mr Rosa) and her coach (Mr Berardelli) called the Athlete from Italy to seek an explanation as to how rEPO entered her system. Mr Rosa and Mr Berardelli recorded the conversation and the CAS Panel has been provided with a transcript.

14. In addition, on 28 October 2014, the IAAF charged the Athlete with the presence and use of rEPO in violation of IAAF Anti-Doping Rules ("ADR") 32.2(a) and (b), and provisionally suspended her from competition, with effect from 30 October 2014, pending a determination of the charge. In accordance with ADR 38.7, it referred the matter to AK to pursue the charge against the Athlete.

15. On 30 October 2014, the Athlete provided a handwritten statement. In that statement, she made the following points:

    - On 17 August 2014, she had been suffering from an injury from an accident. She had gone to a hospital called Kapsabet Medical where she was treated.

    - She was injected by the doctor who prescribed two injections. She considered it a treatment because of the agony she was in at that time.

    - On 12 September 2014, she suffered from another illness, which the doctor said was malaria. She said this was a result of tremendous weakness during training. She was prescribed medicine for malaria.

    - On 17 September 2014, she had grown weaker and returned to the doctor who told her she had typhoid. The doctor prescribed her three injections, which she completed on 23 September 2014. He also gave her some tablets, which were prescribed for one month.

    - After 23 September 2014, she resumed her training as usual in the course of preparing for the Chicago marathon which was to be on 12 October 2014.

    - She denied using any illegal medication to help her in any way.

16. On 4 November 2014, a hearing took place involving AK and the Athlete before the AK Panel (the "Tribunal").

17. Still on 4 November 2014, the Athlete wrote to AK to say that she would like her B Sample analysed. She said she would like to attend in person and be accompanied by her legal representative. The hearing was adjourned and was subsequently resumed on 15 January 2015.

18. On that same day, 4 November 2014 (but updated on 6 November 2014), the Athlete's agent, Mr Federico Rosa gave an interview to a Mr Mario Fraioli which was to be found on a public website (www.competitor.com).

19. Also on 4 November 2014, AK wrote to the IAAF notifying the IAAF that there had been a hearing that day and that the Athlete had i) provided a written explanation for the adverse finding and ii) wished to have an analysis of the B Sample.

20. From 17 to 19 December 2014, the B Sample was analysed. In an email to AK dated 19 December 2014, the IAAF stated that the laboratory in Lausanne had confirmed the finding in the A Sample.

C. Events in 2015

21. On 5 January 2015, the IAAF sent an email to AK attaching a report from the Laboratory regarding the events of 17 December 2014, on which day the Athlete attended the Laboratory. The IAAF indicated that it found the Athlete's conduct to be unacceptable.

22. In particular, the Laboratory had stated in its letter, dated 21 December 2014, that the Athlete had tried to take test tubes containing the B Sample in her hands, disturbing the procedure.

23. Also on 5 January 2015, AK wrote to the Athlete saying that the B Sample confirmed the finding in the A Sample. It said that she was required to attend a second hearing on 15 January 2015. The two charges presented against the Athlete were:

- Presence of a prohibited substance in an Athlete's sample contrary to ADR 32.2(a).
- Use by an Athlete of a prohibited substance contrary to ADR 32.2(b).

a) The AK hearing

24. On 15 January 2015, the hearing between the Athlete and AK before the Tribunal resumed. In this hearing (for which there is a partial transcript, translated into English), the Athlete was heard and questioned in relation to the doping control test performed on 25 September 2014. According to the transcript of the hearing the Athlete declared that she did not know how the banned substance got into her system (p 20); that after she got injured in the car accident she "*saw a doctor in a small clinic in Kapsabet* [because she had back issues]. *The doctor in the clinic gave me a drip. He said that the drip was because I had lost lots of water ... He also gave me two injections, one for tetanus and the other for pain*" (p. 20); she declared that she got an injection from a doctor called Kiptanui, when she "*had typhoid and malaria ... [t]wo three days before the samples were collected*".

25. It appears from a letter written by AK to the IAAF dated 16 January 2015 that that hearing was adjourned so that what in fact happened on 17 December 2014 at the Laboratory could be further investigated. The Athlete's counsel had apparently asked for further investigations. The Athlete had said that there had been an attempt by the technician at the Laboratory to mix up the samples during the analysis of the B Sample. AK sought clarification from the IAAF regarding the application of the rules with regard to the new anti-doping rules having become effective from 1 January 2015.

26. On 21 January 2015, the Laboratory wrote to the IAAF setting out its position. It denied any improper mixing of samples during the analysis of the B Sample though it conceded that the Athlete had raised this point at the time.

27. On 22 January 2015, AK wrote to the Athlete enclosing the Laboratory's response of 21 January 2015. It notified the Athlete of a final hearing to take place on 26 January 2015.

28. On 26 January 2015, the Athlete provided the AK with a document prepared by a Mr John Velzian dated 26 January 2014 (presumably an error for 2015). Mr Velzian is a former regional director for the IAAF. The letter reads – inter alia – as follows:

> ".. *I wish to state catergorically* (sic) *that I accept without any reservation whatsoever that Rita tested positive to the prohibited hormone EPO. What I cannot accept .... that she had full knowledge of what drug to take ... I am totally convinced that this prohibited hormone which can only be administered by injection, was done by one or more others. The all important question is was this done with or without her knowledge ...*"

29. The Athlete also handed up some alleged prescriptions. The three documents (that are hardly legibly) are dated "*15/Aug/14*", "*Sep/14*" and "*20/09/14*". The first two refer explicitly to the Athlete and are signed by Dr. Kalya. The last one mentions a "Lab report". It is the Athlete's aunt, Ms Anne Lagat, who got these prescriptions via email from Dr. Kalya.

30. On 27 January 2015, AK wrote to the Athlete stating that she had been found guilty of a doping offence. AK imposed a two-year sanction on the Athlete as from 25 September 2014. With regard to ADR 40.1, AK cancelled the Athlete's results for her last competition which was the 2014 Chicago marathon. Further, she forfeited all titles, awards, medals, points, prize and appearance money from that race. She was advised to take matters of anti-doping very seriously, failing which any offences in the future would attract more severe sanctions.

b) The Appealed Decision

31. As noted above, the hearing before the Tribunal took place on 4 November 2014 and 15, 26 and 27 January 2015. The Tribunal heard oral evidence from the Athlete, her aunt Anna Lagat, Mr Berardelli, Mr Rosa and her ex-husband, Mr Noah Busienei.

32. The Tribunal's reasoned decision is dated 30 January 2015 (the "Appealed Decision"). We set out the following paragraphs which record the Athlete's evidence at the hearing in relation to the central issue in that case, namely the explanation for the ingestion of prohibited substances.

> *13. She was questioned at length as to how the substance could have been injected into her body considering that EPO is not a substance which can be swallowed. She was unable to give a specific answer but related an incident which took place in August 2014 when she said she was hit by a vehicle whilst they were on a morning run. She was taken by her assistant coach one Mr. Cheribo to a clinic at Kapsabet where she was treated by one Dr. Stephen Tanui. She stated that she was put on a drip but she did not know exactly what medication she was given. On being questioned, she confirmed that she did not report the accident to the policy and could not produce any records of the accident or the medical records to show that she was treated or the type of medicine prescribed. She did not call Cheribo to corroborate*

the accident and the treatment. Asked whether she had gone back [to] the medical facility to establish the kind of treatment she had received since learning of the positive test, she stated that she has not. She gave no reasons for the apparent lack of inquiry on this serious issue.

14. On 27th January 2015 through the efforts of her Advocate Gladys Boss Shollei, Rita produced some prescriptions which were said to have been given at Kapsabet and Eldoret. We have perused the records and observed that they bear no name of a Doctor or the hospital and neither do they explain or demonstrate how the prohibited substance entered into Rita's body.

15. Rita also testified that she had been injected at Eldoret by the same doctor on other occasions in September 2014 when she was said to be suffering from Malaria and typhoid. Once again she did not produce any medical records to corroborate the testimony and the Panel was unable to test the veracity of this testimony or indeed establish whether EPO entered her body through the alleged injections. As stated above a prescription was produced on 27th January 2015. It was written on and dated in September 2014 without the name of a doctor or the medical facility and is in our view of no evidentiary value in terms of proving and/or determining how the substance entered her body.

33. The Tribunal noted at paragraph 24 of the Appealed Decision that this was the Athlete's first anti-doping offence. It is also found that there were no aggravating circumstances. Accordingly, the maximum period of ineligibility was two years. The Tribunal went on to consider whether the Athlete was entitled to an elimination or reduction of the period of ineligibility based on exceptional or special circumstances.

34. The Tribunal, at paragraph 33, stated that the Athlete's explanation of how the rEPO may have entered her body without her knowledge or because of the actions of some Doctors without her consent did not entitle her to an elimination or reduction because she had not adduced evidence to support that contention, which she should have done. The Tribunal based that finding on the following:

- The Athlete had not demonstrated that Dr Rotich or Dr Kalya were responsible for the ingestion of the prohibited substance into her body. The medical documents provided by the Athlete did not show the names or stamps of Dr Rotich, Dr Kalya or any other Doctor who prescribed them and neither did the medicines prescribed have any connection with rEPO.

- In light of the Athlete's knowledge of doping as an International-Level Athlete and being subjected to numerous tests and notwithstanding the submission that she was of limited education, they found it very unlikely that rEPO could have been injected into her system without her knowledge or was a result of sabotage by her husband or a doctor as alleged. The Tribunal said "*There was simply no evidence to support this theory and our view is that she in fact concealed the manner in which the substance entered her body. It is instructive to note that whereas before the Panel she stated that the Doctor who had treated her was Dr Stephen Kalya, the testimony from her Manager Dr Rosa is that she in fact mentioned a Dr. Rotich. Consequently instead of offering assistance she concealed pertinent facts.*"

35. At paragraph 35, the Tribunal found that "*Rita was not truthful in demonstrating, to the satisfaction of this panel, how the substance entered her body. Her mere uncorroborated and /or speculative guesses or explanations are simply insufficient to establish any exceptional or special circumstance entitling her to a reduction of the sanction.*"

36. At paragraph 36, the Tribunal found the Athlete guilty of an anti-doping violation and imposed a period of ineligibility of two years from 30 October 2014.

37. At paragraph 37, the Tribunal considered the complaint by the Laboratory regarding the Athlete's conduct during the process of the analysis. The Tribunal deplored the conduct and noted that it would ordinarily aggravate an offence and attract additional sanction. However, the Tribunal noted the Athlete's plea for leniency through her counsel and considered the apology given both orally and in writing. In light of the Athlete's remorse, the Tribunal chose not to punish her for improper conduct.

c) The Medical Report

38. In an email dated 19 February 2015 to the Athlete's aunt (Ms Anne Lagat), Mr Velzian forwarded a draft document entitled "Medical Report". This document had been partially filled out by Mr Velzian based on the information that had been given to him. The purpose was – according to Mr Velzian – to get a strong appeal by obtaining official medical documentation concerning the Athlete's treatment on paper. The document stated – inter alia – that the Athlete had visited a medical institute on 15 September 2014 and that the reason for the visit was "*profuse bleeding from a road accident*" and contained the following diagnosis "*severe loss of blood - Blood count down from 12g/dc to life threatening count of 4.3g/dc*". On the draft medical report it stated "*urgent Please complete what you can. Write clearly. I will convert to printed document*". In the cover email to Ms Lagat, Mr Velzian wrote as follows: "*please complete what you can. The Medicare must do the rest.*"

39. With email dated the same day, Ms Lagat forwarded the "Medical Report" back to Mr Velzian. The document had been filled out in handwriting. It is not clear who authored this additional information. The handwritten information provided on the form states – inter alia – that the medical institute which the Athlete visited was "Kapsabet Medicare", that the visit took place on 15 September 2014 at "8 AM", that the name of the doctor was "Stephen Kiplagat Kalya" and that the Athlete was – *inter alia* – injected with a dose of EPO. The document further stated that the Athlete re-visited the doctor on 20 September 2014 because she was suffering from both malaria and typhoid and that she was given "*oral medication*", but no injection.

40. Mr Velzian then typed the handwritten information provided to him on to the document entitled "Medical Report" and reformatted it. In particular, he deleted the part stating "*urgent Please complete what you can. Write clearly. I will convert to printed document*", since now the document contained all the information required. He then sent the document back to Ms Lagat to get it signed by the doctor who treated the Athlete.

41. Based on the (unsigned) "Medical Report" that had been drawn up by Mr Velzian (with the information provided by others) the Athlete on 20 February 2015 wrote a letter to the IAAF advising the latter that she "*had been injected* [with rEPO] *at the Kapsabet Medicare Centre where she was diagnosed as being in a life threatening condition as a*

result of the blood that she had lost in a road accident [and that it] … *was beyond any doubt that this injection … was solely for medical purposes … and had absolutely nothing to do with the claim that it was being used as a performance enhancing drug*". Attached to this letter was a reformatted "Medical Report" redacted by Mr Velzian. The Medical Report submitted to the IAAF only contained information in relation to a visit of 15 September 2014 to the clinic.

42. With email dated the same day, the IAAF forwarded the letter of the Athlete together with the attached "Medical Report" to AK stating as follows:

> "*Please see attached email we just received from Ms Jeptoo's legal counsels. The recourse to what we believe to be fabricated medical explanations from Kenyan athletes cannot be longer tolerated … We would kindly ask you to take immediate action against the doctor and to report this to the Minister of Sport/Health for further investigations and sanctions. We take this matter very seriously and will not hesitate to seek an increased sanction against the athlete would this explanation prove to be fabricated.*"

43. Furthermore, the IAAF responded to the Athlete's letter on 23 February 2015 saying – inter alia – as follows:

> "… *any appeal against AK's decision of 27 January 2015 will have to be filed (exclusively with the Court of Arbitration for Sport (CAS)) … Please be aware that in light of (i) the athlete's new medical explanation (ii) her behaviour at the B sample analysis and (iii) the numerous inconsistencies in her defence, the IAAF is now seriously considering filing an appeal with the CAS against the 2-year sanction applied by AK in order to seek an increased 4-year sanction on the grounds of aggravating circumstances under IAAF Rule 40.6 (a).*"

44. With letter dated 24 February 2015, AK – following IAAF's letter – made inquiries concerning the "Medical Report" with the Chief Executive Office of the Medical Practitioners & Dentists Board.

45. In an email dated 30 March 2015 to Ms Lagat, Mr Velzian expressed his surprise following a "*long meeting with Rita and the Lawyers*". He had previously thought that during the second visit of the Athlete at the Kapsabet Midicare Centre she had not been given an injection. "*Today, however, we were informed by Rita that she did have an injection at this time*". Mr Velzian, thus, advised Ms Lagat that "*it is of great significance to our case … that we know exactly what this injection contained*".

46. Ms Lagat tried to get the Medical Report signed by Dr. Kalya. However, this proved to be difficult. According to her she had "ambushed him" by driving up to Kapsabet and queuing up with the other patients. Eventually, however, she got the medical report stamped and signed by Dr. Kalya.

47. With letter dated 10 April 2015, the Chief Executive Officer of the Medical Practitioners and Dentists Board responded to the AK's inquiries that "*the facility mentioned in the* ["Medical Report"] *(Kapsabet Medicare Centre) is not registered nor licensed by the Board to offer medical services [and that] … the doctor whose name appears as Dr.*

Stephen Kiplagat Kalya does not appear in our records of registered medical and dental practitioners ...".

d) The ABP finding

48. rEPO can only be detected within a fairly short window of hours or days. In order to get around this problem, WADA and its stakeholders have developed the ABP. The ABP is an instrument aiming at the discovery of potential anti-doping rule violations ("ADRV"), based on longitudinal monitoring of relevant individual values of markers in an athlete's blood. Six ABP samples have been collected from the Athlete between 11 April 2012 and 10 October 2014. Sample 5, however, was eliminated from the ABP, having been declared invalid by the experts because the sample was not analyzed within 48 hours of collection.

49. Based on the analytical results of the ABP samples, a panel of experts (the "Expert Panel") issued a joint evaluation on 25 September 2015, in accordance with ADR 8.29. The joint report of the Expert Panel states that each of the three experts had evaluated the data individually and delivered an independent initial review and concluded that the blood parameters measured in sample 4 (collected in 17 April 2014) were "*compatible with exogenous erythropoietic stimulation. Other pathological conditions ... are quite unlikely*". In respect of sample 6 (collected on 10 October 2014) the joint report states that the data "*is even more indicative of erythropoietic stimulation and is not compatible with other physiologic conditions.*"

50. The Athlete was first informed about the findings of the Expert Panel after the IAAF filed its Appeal Brief on 10 November 2015 (which CAS sent to the Athlete and AK on 12 November 2015).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT ("CAS")

51. On 13 March 2015, the Athlete filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the IAAF and AK under reference number CAS 2015/A/3978. Within her statement of appeal, the Athlete suggested that this procedure be referred to a three-member panel and nominated Mr Alan John Sullivan QC as arbitrator.

52. Separately, on that same day, 13 March 2015, the IAAF filed its own Statement of Appeal with the CAS against the Athlete and AK in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code") under reference number CAS 2015/A/3979 with respect to the Appealed Decision. In its statement of appeal, the IAAF suggested that this appeal be referred to a Sole Arbitrator.

53. On 2 April 2016, the parties agreed, in principle, to consolidate the two procedures (2015/A/3978 and 20157A/3979).

54. On 13 April 2015, the IAAF nominated Hon. Robert Reid as arbitrator. Later that same day, AK agreed to the IAAF's nomination of Hon. Reid as arbitrator.

55. On 5 May 2015, the Athlete filed her Appeal Brief in CAS 2015/A/3978. Attached to her Appeal Brief was, inter alia, a list of documents on which she relied as evidence, including

her sworn affidavit in support of appeal, as well as the Medical Report signed by Dr. Kalya.

56. On 16 June 2015, the Athlete withdrew her appeal in case CAS 2015/A/3978. A termination order with respect to this appeal was later rendered on 26 June 2016.

57. On 23 June 2016, in accordance with Article R54 of the Code, the President of the Appeals Arbitration Division confirmed that Panel appointed to decide case CAS 2015/A/3979 was as follows:

President:	Prof. Ulrich Haas, Professor of Law, Zurich, Switzerland
Arbitrators:	Mr. Alan John Sullivan QC, Barrister, Sydney, Australia
	Hon. Robert James Reid QC, West Liss, United Kingdom

58. On 2 July 2015, the IAAF proceeded to file a Request for Arbitration against the Athlete in accordance with Article R38 of the Code. This ordinary arbitration was issued reference number 2015/O/4128. Within its filing, the IAAF suggested that this procedure be referred to the same panel as in case CAS 2015/A/3979.

59. On 14 August 2015, the Respondent having agreed to the Claimant's proposal to refer this procedure to the Panel in CAS 2015/A/3979, the CAS Court Office, on behalf of the Deputy President of the Ordinary Arbitration Division, confirmed that this procedure would be referred to the Panel set forth in para. 57 above. In this respect, the two procedures were hereinafter handled simultaneously for procedural economy.

60. On 10 November 2015, IAAF filed its Statement of Claim in accordance with Article R44.1 of the Code.

61. On 4 December 2015, AK filed its Answer/Response in accordance with Articles R55 and R44.1 of the Code.

62. On 7 December 2015, the law firm acting for the Athlete advised the CAS Court Office that it was having difficulties getting instructions from the Athlete and, thus, requested an extension of the time limit to file the answer. Furthermore, the letter advised as follows: "*In the event we are unable to obtain instructions from our client we will formally be notifying the court of our withdrawal from acting in this matter.*"

63. On 7 December 2015, the Panel granted the Athlete an extension of time to file her Answer/Response until 11 December 2015.

64. On 14 December 2015, the law firm acting for the Appellant informed the CAS Court Office that it is "*unable to continue to represent the Athlete in any further proceedings ... because of the difficulty of getting timely instructions from our client on the conduct of her case*".

65. On 14 December 2015, the CAS Court Office acknowledged receipt of the law firm's letter dated 14 December 2015 and requested that it provide the CAS Court Office with the appropriate contact details for the Athlete so that the CAS would be able to contact her in the future. Furthermore, the CAS Court Office confirmed that no Answer/Response had been received from the Athlete either in this appeal or procedure CAS 2015/A/4128.

66. In a further letter dated 15 January 2016, the CAS Court Office reiterated its request to the (former) law firm for the Athlete to provide it with the requested contact details. Such contact information was later provided.

67. On 21 January 2016, the CAS Court Office asked the Parties whether they requested a hearing to be held in this matter.

68. On 25 January 2016, both the IAAF and KA declared their preference for a hearing to be held.

69. On 26 January 2016, the Athlete confirmed her preference for a hearing.

70. On 24 February 2016, the CAS Court Office informed the Parties that a hearing would be held in this appeal, and would be heard together with case CAS 2015/A/3979. The Panel proposed 28 or 29 April 2016 for the hearing.

71. On 7 March 2016, the CAS Court Office forwarded a legal aid application form to the Athlete.

72. On 8 March 2016, the CAS Court Office acknowledged the availability of the IAAF and AK for a hearing on either of 28 and 29 April 2016. The Athlete did not state her unavailability, and per the CAS Court Office's such silence would be considered a party's availability on such proposed dates.

73. On 15 March 2016, the CAS Court Office informed the Parties that the hearing would be held in Lausanne on 29 April 2016 and invited the parties to announce their attendees.

74. On 24 March 2016, the IAAF announced its list of attendees for the hearing. Neither AK nor the Athlete announced any attendees.

75. On 30 March 2016, new counsel for the Athlete entered an appearance on her behalf.

76. On 5 and 6 April 2016, the Athlete and AK, respectively, were again invited to provide a list of the persons that will attend the hearing on their behalf.

77. Separately, on 5 April 2016, the Athlete was granted an order on legal aid was awarded to the Athlete, which provided her with, inter alia, financial assistance for CAS arbitration costs, assistance for her own costs, costs of witnesses, experts, and interpreters, and assistance by pro bono counsel.

78. The next day, on 6 April 2016, new counsel for the Athlete entered an appearance with the CAS Court Office.

79. On 7 April 2016, the Athlete provided a list of persons that would attend the hearing on her behalf. Furthermore, the Athlete informed the Panel that she may announce further witnesses at a later stage. Moreover, the Athlete requested leave to file a supplementary submission.

80. With letter dated 7 April 2016, the CAS Court Office invited IAAF and AK to comment on the Athlete's request.

81. On 15 April 2016, the Athlete's representatives informed the Panel that they would participate in the hearing by way of video-conference. They also said that they had discovered some other key witnesses which would assist in building the Athlete's defence, and requested until 22 April 2016 to provide such statements. They also asked for permission to file supplementary submissions on behalf of the Athlete by the same day.

82. On 18 April 2016, the IAAF agreed to the Athlete's request to file a supplemental submissions but objected to her request to file further evidence, which might require the adjournment of the hearing. The IAAF also drew the Panel's attention to a recent decision of the UK National Anti-Doping Panel (*UK Anti-Doping v Skafidas*, issued on 22 February 2016).

83. Later that same day, on 18 April 2016, AK informed the CAS that it did not oppose the Athlete's request for leave to submit further materials, but suggested that it would be necessary to adjourn the hearing.

84. On 19 April 2016, the CAS Court Office advised the Parties that – having considered the Parties' respective positions –the Athlete was permitted to file a supplemental submission (together with further witness statements) no later than 22 April 2016. In addition, the CAS Court Office advised the Parties that the IAAF and AK would be given an opportunity to address such supplemental submission at the hearing.

85. On 20 April 2016, the Athlete's counsel wrote to CAS expressing concern about the voluminous nature of the evidence in this procedure, which they had recently received. They then sought an adjournment of the hearing so that they could have more time to prepare the Athlete's case.

86. The CAS Panel agreed to the Athlete's request to adjourn the hearing. A new hearing was the scheduled for 7 July 2016.

87. On 10 May 2016, IAAF and to the Athlete informed the CAS as to which persons would attend the hearing and, in the case of the IAAF, those witnesses who would be available, if needed. The next day, 11 May 2016, AK provided a list of its attendees.

88. On 13 May 2016, the Athlete's counsel informed the Panel they now had in their possession four signed witness statements (including one from the Athlete) as well as other evidence. However, they said some other evidence was outstanding, but obtaining such evidence was outside of their control. They asked for another two-week extension to obtain and admit such evidence.

89. On 16 May 2016, the IAAF agreed to a two-week extension only on the condition that the announced, new evidence in the Athlete's possession be filed immediately. In turn the IAAF asserted that no further evidence should be accepted after this extension and moreover, that the IAAF have until 23 June 2016 to file a response on such new evidence.

90. Later that day, 16 May 2016, the Athlete objected to the IAAF's letter of the same day, in particular the contention that the evidence which they had should be filed immediately. The Athlete asserted that the evidence given by the witnesses and accompanying documents was inter-related and it would not be helpful to file the evidence in stages.

91. Also on 16 May 2016, AK stated that they did not object to the Athlete's request for a two-week extension. They also asked for a further three weeks from receipt of the Athlete's documents to file any further submissions.

92. On 18 May 2016, the Panel directed the Athlete to file all documents in her possession by 20 May 2016 and all other documents be filed as soon as possible thereafter but, in any event, by no later than 1 June 2016. The Panel made clear that this was the last and final extension granted to the Athlete and that the Respondents' deadlines to respond, if any, would be decided after receipt of the Athlete's new materials.

93. On 2 June 2016, the Athlete filed supplemental submissions.

94. On 7 June 2016, the Panel granted the Respondents a ten-day deadline to file any responsive submissions.

95. On 20 June 2016, the IAAF filed responsive submissions. On 21 June 2016, the IAAF filed a witness statement from a Mr Arnold Thomas.

96. On 21 June 2016, the Athlete asked for permission to file further submissions in response to the IAAF's responsive submissions within one week.

97. On 21 June 2016, the IAAF wrote to the Athlete and AK proposing a draft schedule for the hearing.

98. On 23 June 2016, the Panel declined the Athlete's request to file further submissions.

99. On 27 June 2016, the Athlete expressed concern to the Panel that her right to a fair hearing had been violated. In particular, the Athlete again asked for the chance to file further written submissions. She also asserted that the IAAF failed to produce evidence in its possession and asked for an order that the IAAF produce all communications between the IAAF and Mr Federico Rosa, as well as all communications between the IAAF and Mr Claudio Berardelli in relation to the Athlete. Additionally, the Athlete asked the Panel to compel the IAAF administrator Mr Thomas Capdevielle to attend the hearing. Moreover, the Athlete criticized the conduct of the IAAF in various ways, including their counsel's letter of 21 June 2016. They also questioned the Panel's impartiality, inter alia in relation to the provision of legal aid to the Athlete.

100. The Athlete also asked the Panel to reconsider her Legal Aid Award, including that her travel costs be paid in advance rather than in arrears. Finally, the Athlete's counsel asked that the Panel consider appointing new counsel for the Athlete to take over her defence, given counsel's apprehension of Panel's impartiality and to the extent the Panel did not deem it necessary to address all the issues raised by the Athlete in such letter.

101. On 28 June 2016, the CAS Court Office, on behalf of the Panel, responded to the Athlete's 27 June 2016 letter, inter alia, as follows:

- The Panel rejected the Athlete's request to file a second response.
- The Athlete's request for the IAAF to make further disclosures was rejected.
- The IAAF was to make Mr Capdevielle available by telephone during the hearing.

- For matters relating to legal aid, the Athlete was to contact the CAS Court Office, not the Panel.

102. The Panel could not, as requested, issue an explicit statement clarifying its role and position concerning the determination of weight and relevance of evidence before the hearing itself. The request was premature.

103. The Panel would continue to preside over the proceedings in an impartial and independent manner.

104. All other procedural issues would be discussed with the Parties at the outset of the hearing.

105. On 29 June 2016, the Athlete informed the CAS that its witness, Ms Lagat, had yet to communicate her exact whereabouts on the date of the hearing.

106. On 30 June 2016, CAS Counsel Office requested that the Athlete keep the Panel apprised of any information about Ms Lagat's availability for participation at the hearing. The CAS Court Office also reiterated that any questions concerning legal aid should be directed to the CAS Court Office only, as the Panel had no involvement in the Athlete's legal aid award and nor could it opine on whether the Athlete should seek new counsel.

107. On 1 and 4 July 2016, the IAAF and AK, respectively, signed and returned the Order of Procedure in this appeal.

108. On 4 July 2016, the Athlete's counsel informed the Panel that the facility selected by the Athlete to host her participation in the hearing by videoconference would in fact be closed on 7 July 2016, as this was a public holiday to celebrate the end of Ramadan.

109. That same day, 4 July 2016, the Athlete sought clarification from the Panel with respect to its response to paragraphs 27) to 37) and requests numbered 8, 9 and 10 in her letter of 27 June 2016, which related to legal aid and whether new counsel should be appointed.

110. Later on 4 July 2016, the CAS Court Office wrote to the Parties noting the Athlete's list of witnesses and her proposed recommendations as to the order and allocation of time for cross-examination of the IAAF's witnesses. The letter also enclosed a hearing schedule. The letter also made clear that the hearing would proceed in Lausanne on 7 July 2016. The Athlete was informed that it was her responsibility to either attend the hearing in person or to make arrangements for another office/facility to host her and her team. The Parties were also told that the hearing would start at 8.30 am and that all statements of witnesses not participating in the hearing would be taken on file.

111. Also on 4 July 2016, AK wrote to the Panel asserting that considering the Athlete's position, especially the possibility of her counsel stepping down, it was very difficult for AK to proceed with its plans for to be represented in Lausanne. AK expressed its concern about progressing with a case where one of the Parties repeatedly expressed concerns about the lack of fairness in the procedure and where it appeared that certain matters critical to that party's participation may not have been satisfactorily addressed. They said they would rather prefer for the matter to be adjourned.

112. On the same day, the Panel responded to the Parties saying that the hearing on 7 July 2016 would proceed as previously agreed and known to the Parties since 4 May 2016. The Panel also noted that the CAS Court Office would separately respond to the Athlete's concerns about legal aid.

113. On 5 July 2016, the Athlete explained that 7 July 2016 had recently been designated a public holiday by the Kenyan government. The holiday was to mark the end of Ramadan and to celebrate the religious day of Idd Ul Fitr, which did not have a fixed date on the Islamic calendar. Accordingly, the Athlete and her counsel asserted that they were not aware that 7 July 2016 would be a public holiday when it agreed to the hearing date in May 2016. They were disappointed that the IAAF and the Panel expected the Athlete's witnesses to participate at the hearing on a public holiday. Two of the key witnesses were Muslim. It was disrespectful to require them to participate in a hearing on a day of religious observance. It was unreasonable to deny the other witnesses the chance to use a public holiday as they saw fit. The Kenyan Judiciary, on which the Athlete relied upon for an official translator, would be closed for business and they could not force a government officer to work on a public holiday. The host facility for videoconference had offered the Athlete another day to access its video conference facilities and technical services. The Athlete could not require them to keep their facilities open on a public holiday. No other arrangements could be made at such short notice. The Athlete then reiterated various complaints about legal aid funding and also alleged myriad violations which prevented the Athlete from receiving a fair hearing. At the end of the letter, the Athlete's counsel said that they withdrew as the Athlete's counsel and invited CAS to appoint new counsel for the Athlete.

114. In response, on 5 July 2016, the CAS Court Office acknowledged counsel's withdrawal from the procedure and advised that all future correspondence would be sent to the Athlete (and her aunt, Ms Lagat). With the same letter, the Parties were advised that the hearing would proceed as scheduled on 7 July 2016.

115. On 6 July 2016, the CAS Court Office wrote to the Parties noting the Athlete's email of the same day which had said she intended to attend the hearing alone and that she requested new counsel. The Athlete was asked to confirm whether she would attend in-person or by video-telephone and, if the latter, to provide relevant contact details. Furthermore, the letter stated as follows: "... *with respect to her request for new counsel, Ms Jeptoo is asked to contact* [CAS Counsel] *by telephone ... as soon as possible to discuss her options in this regard.*"

116. Since the Athlete did not contact the CAS Court Office by telephone (or otherwise) by close of business on 6 July 2016, the CAS Court Office informed the Parties that it had tried several times to get into contact by telephone with the Athlete, but could not get hold of her and therefore was only able to leave voice mail. The CAS Court Office informed the Athlete that in case she wished to speak with the CAS Court Office, she was invited to provide an available telephone number prior to the start of the hearing.

117. Finally, in the later evening of 6 July 2016, the Athlete emailed the CAS Court Office following which CAS Counsel contacted the Athlete by telephone. The CAS Court Office acknowledged the contents of the conversation by email later than evening, which states as follows: "*Dear Ms. Jeptoo, Thank you for speaking with me this evening. I want to confirm again that the Panel will call you tomorrow at 8.30 Swiss time at the below*

telephone number. Your brother is invited to assist you with any translation, subject to the Panel's discretion."

118. A hearing was held in Lausanne on 7 July 2016. The Panel was assisted by Mr. Brent J. Nowicki, CAS Counsel. The Appellant was represented by Mr Jonathan Taylor and Ms Elizabeth Riley. AK did not appear or otherwise make any contact with the Panel. The Panel contacted the Athlete at the inception of the hearing, as announced. She asserted that was not represented by counsel and handled the call by herself. After disrupting the procedure repeatedly and after being advised that she must abide by the procedural hearing calendar, the Athlete hung up. The Panel contacted her on the telephone one more time and again explained the course of the proceedings to her. The Athlete continued to disrupt the hearing and hung up once again. The Panel had the impression when conversing with her that she sufficiently understood English to understand and follow the directions of the Panel, or at the very least ask questions and/or state any relevant objections.

119. During the hearing, the CAS heard the oral testimony of the following:

- Mr Thomas Capdevielle, senior manager of the IAAF Medical & Anti-Doping Department,

- Mr Paul Scott and Ms Elizabeth Scott, the Doping Control Officers that submitted the Athlete to sample collection on 25 September 2016 and

- Mr Olaf Schumacher, one of the members of the Expert Panel.

120. At the close of the hearing, the IAAF informed the Panel that its right to heard had been fully respected.

121. On 13 July 2016, the CAS Court Office, on behalf of the Parties, informed the Parties as follows:

(1) Under separate cover, the CAS Court Office will provide Ms. Jeptoo with a list of pro bono counsel who may be able to assist her. To the extent Ms. Jeptoo wishes to engage such pro bono counsel (or any other such counsel), she will be asked to provide a power of attorney to this extent within seven (7) days.

(2) To the extent Ms. Jeptoo engages counsel (pro bono or otherwise), the Panel will produce a copy of the hearing recording on the evidence and pleading submissions from the hearing to the parties and invite the Respondents to file post-hearing submissions strictly limited to the evidence on file and in response to the oral submissions made by the IAAF at the hearing. Anything beyond this scope will not be permitted.

(3) To the extent Ms. Jeptoo does not engage counsel (pro bono or otherwise), or otherwise inform the CAS Court Office that she would like to file a post-hearing submission without the assistance of counsel, the Panel will proceed to render an award in these procedures and it will be deemed confirmed that Ms. Jeptoo waives her right to seek counsel and file a post-hearing submission.

(4) To the extent Athletics Kenya wishes to file a post-hearing submission - irrespective of whether Ms. Jeptoo obtains new counsel – it is invited to inform the CAS Court Office within three (3) days.

122. That same day, 13 July 2016, the CAS Court Office sent the Athlete a list of pro bono counsel (including all relevant contact information) and instructed her to contact such counsel to determine their availability to assist her, without delay, and upon deciding on new counsel, provide the CAS Court Office with a power of attorney within seven (7) days.

123. On 15 July 2016, AK informed the Panel of its desire to file a post-hearing submission.

124. On 19 July 2016, the Athlete informed the CAS Court Office that she selected new pro bono counsel to assist her and provided the name of such counsel accordingly.

125. On 20 July 2016, the CAS Court Office confirmed the Athlete's selection of new counsel and requested that the Athlete provide a power of attorney.

126. On 28 July 2016, having heard nothing from the Athlete or her new counsel, the CAS Court Office contacted the Athlete's newly announced pro bono counsel by telephone to determine the Athlete's status in this procedure. Such pro bono counsel informed the CAS that, indeed, the Athlete never contacted him and that he was not representing the Athlete. Consequently, by letter that same day, the CAS Court Office, on behalf of the Panel, wrote to the parties informing them that such new counsel had never been contacted by the Athlete, that no power of attorney had been filed with the CAS, and therefore, it was determined by the Panel that the Athlete did not want new pro bono counsel and rejected the Panel's offer to file a post-hearing submission.

127. On 1 August 2016, the Athlete's aunt, Ms. Legat, sent an email to the CAS apologizing for the delay in contacting a new pro bono counsel and asked for further time to provide a power of attorney.

128. On 4 August 2016, the CAS Court Office reiterated the Panel's direction to the Athlete concerning the post-hearing procedure and thereafter invited the Athlete to contact pro bono counsel, or any other counsel so desired, to advise her accordingly.

129. On 31 August 2016, CAS sent the recording of the evidentiary proceedings and oral pleadings of the IAAF to AK, and invited them to file any comments strictly limited to the contents of the evidentiary proceeding and the IAAF's oral pleadings. It advised AK that any response exceeding the permitted scope of the post-hearing briefs would be disregarded.

130. In the same letter dated 31 August 2016, CAS noted that the Athlete had not engaged new pro bono counsel or otherwise inform the CAS Court Office of any desire to file a post-hearing submission without the assistance of counsel. The letter said CAS inferred from this conduct that she had rejected the CAS Panel's offer (in its letter dated 13 July 2016) for her to file a post-hearing submission.

131. On 1 September 2016, Ms Jeptoo advised the Panel that "*we are still requesting for the pro bono lawyer ....*"

132. On 8 September 2016, the CAS Court Office acknowledged receipt of the Athlete's email and advised her that – in accordance with the previous letters dated 13 and 28 July 2016 – it was Ms Jeptoo's obligation to contact and secure the services of the pro bono lawyer and that an inquiry to the previously announced counsel revealed that he had never been contacted by her.

133. On 26 September 2016, the CAS Court Office advised the Parties that no post-hearing briefs have been received from AK within the prescribed deadline and that, therefore, it was considered that AK waived the Panel's invitation to file such submissions.

IV. SUBMISSIONS OF THE PARTIES

A. The IAAF's submissions

134. In its Statement of Claim dated 10 November 2015, the IAAF requested relief as follows:

- To find that the Athlete has committed an ADR 32.2(e) anti-doping rule violation of Attempted Tampering, in that the explanation provided by the Athlete to the IAAF and CAS of her adverse analytical finding for rEPO in her sample dated 25 September 2014 as knowingly false/fraudulent, and the 'Medical Report' she filed in purported corroboration of that explanation was fabricated;

- To impose an eight year period of ineligibility under ADR 40.8(a)(iii), with such period to start running on the day after expiry of the period of ineligibility applicable to the Athlete's first anti-doping rule violation (which period of ineligibility will be finally determined in CAS 2015/A/3979); and

- Exercising its powers under CAS Code Article R64.5, to order the Athlete to pay all of the CAS arbitration costs of these proceedings and a contribution towards the costs that the IAAF has incurred in these proceedings.

135. The IAAF's submissions, in essence, may be summarized as follows:

(a) The Athlete's explanations for how the rEPO had entered her system had differed significantly:

a. In the telephone conversation on 28 October 2014 with Mr Rosa and Mr Berardelli, the Athlete had explained that she has received injections from a doctor to assist with her blood in mid-September 2014.

b. In her written explanation dated 30 October 2014, the Athlete had referred to a car accident in mid-August 2014; receiving medication for malaria on 12 September 2014; and receiving three injections for typhoid, the last one on 23 September 2014.

c. On 15 January 2015, the Athlete speculated that her estranged husband may have tarnished her name because she refused to give him money. She also mentioned:

i. Visiting a small clinic in Kapsabet because of "back issues" noting that the doctor gave her a drip to rehydrate her and injections for tetanus and pain.

ii. That she had not seen any other doctor between 25 September 2014 and 12 October 2014.

iii. Receiving injections from a doctor 'Kiptanui' for typhoid and malaria two or three days before the sample was taken, but said that she was not given a prescription and that she did not ask what he had injected her with.

iv. Going to a clinic because of an accident, but gave no further details, other than acknowledging that she had never reported any accident.

d. On 20 February 2015, the Athlete's lawyers wrote to the IAAF, indicating that the Athlete intended to appeal the Tribunal's decision "*based entirely on proven medical records which clearly show that the synthetic hormone EPO found in her system when she subjected herself to an out of competition Anti-Doping Test, was the remains of what she had been injected at the Kapsabet Medicare Centre where she was diagnosed as being in a life threatening condition as a result of the blood she had lost in a road accident.*" The Athlete's lawyers enclosed a copy of a "Medical Report" in support of their letter which stated that the Athlete was examined on 15 September 2014 by a Dr Stephen Kiplagat Kalya, due to "[p]rofuse bleeding from a road accident"; that Dr Kalya had diagnosed "[s]evere loss of blood. Blood count down from 12g/dl to life threatening count of only 4.3g/dl"; and that he treated her with 2000 units of Erythropoietin by intravenous infusion as well as painkillers (Paracetamol) and a multivitamin (Vitamax).

e. In CAS 2015/A/3978, the Athlete's representatives filed an Appeal Brief on 5 May 2015 challenging the adverse analytical finding and, in the alternative, also seeking elimination of any sanction for No (or No Significant) Fault or Negligence on the basis that the rEPO was administered as "life-saving treatment" for injuries suffered in a car accident on 15 September 2014. In support of her case, the Athlete provided i) a sworn witness statement attesting to a car accident on 15 September 2014 and ii) a "Medical Report" from the Kapsabet Medicare Centre, which was similar to but different from the one which had been sent to the IAAF on 20 February 2015.

(b) ADR 32.2(e) makes the following an anti-doping rule violation:

> ***Tampering or Attempted Tampering with any part of Doping Control:*** *Conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or attempting to interfere with a Doping Control official, providing fraudulent information to the IAAF, Member or an Anti-Doping Organisation, or intimidating or attempting to intimidate a potential witness.*

(c) The Athlete had breached ADR 32.2(e) by:

a. Making a sworn statement asserting an "innocent" explanation of an adverse analytical finding that the Athlete knew to be false.

b. Providing a "Medical Report" to corroborate that explanation that the Athlete knew to be fabricated.

(d) In support of the IAAF's contentions:

a. There was no credible documentary evidence to support the Athlete's claim. The Athlete failed to file any report with the police about any car accident on 15 September 2014, even though she said she suffered injuries which nearly killed her. There were no contemporaneous records of treatment for injuries. The "Medical Report" filed with the Appeal Brief was dated 14 April 2015 (i.e. 7 months after the alleged incident) and was patently incredible.

b. The evidence did not support (but instead contradicted) the suggestion that the Athlete suffered serious injuries/blood loss in mid-September 2014. Neither Mr Rosa (the Athlete's Manager) nor Mr Berardelli and Mr Cheribo (her coaches) recalled such an accident. The two doping control officers who collected her sample on 25 September 2014 denied the Athlete informed them of any accident, contrary to what the Athlete says. The doping control officers at the Chicago Marathon on 10 October 2014 also say that the Athlete did not mention to them any loss of blood in the last three months.

c. The Athlete had given her coach and manager the real explanation on 28 October 2014 (see above).

d. The Athlete made no mention of any September 2014 car accident or injuries in her evidence before the Tribunal.

e. The Athlete's ABP Profile confirms that the Athlete was receiving rEPO not only before the 2014 Chicago Marathon but also before the 2014 Boston Marathon earlier in the year.

(e) There was no excuse for the Athlete's conduct.

(f) Upholding the Attempted Tampering charge would not infringe the Athlete's legal rights.

(g) As to sanction, the applicable period of ineligibility should be eight years, because:

a. This would be the Athlete's second anti-doping rule violation.

b. ADR 40.8(a) provides that:

For an Athlete or other Person's second anti-doping rule violation, the period of ineligibility shall be the greater of:

i) six months;

ii) one-half of the period of ineligibility imposed for the first anti-doping rule violation without taking into account any reduction under Rule 40.7; or

iii) twice the period of ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation without taking into account any reduction under Rule 40.7.

c. If treated as a first offence, Attempted Tampering would attract a period of ineligibility of four years (see ADR 40.4). Applying ADR 40.8(a)(iii) results in a period of four years.

d. No factors entitle the Athlete to any mitigation of sanction under ADR 40.7, since she did not admit the Attempted Tampering violation and has not provided any Substantial Assistance.

(h) Further as to sanction, the period of ineligibility should run consecutively with any period of ineligibility found CAS 2014/A/3979. Otherwise an undeserved windfall would be obtained.

B. The Athlete's submissions

136. The Athlete's submissions may be summarized as follows:

a. She was no longer certain whether the car accident took place on 15 August 2014 or 15 September 2014. As to the lack of police report, the athletes do not carry recording equipment or telephones when training. Responsibility for following up with the vehicle's driver lay with the assistant coach, Mr Cheribo, but he did not appear to have done anything.

b. Her estranged husband had been violent towards her and had a vendetta against her. He might have had something to do with the Athlete's failed doping test.

c. The responsibility for the previous discrepancies in dates of the accident and the Athlete's subsequent treatment could be traced back to Dr Kalya.

d. The information found on the second page of handwritten notes sent by Dr Kalya to Ms Lagat suggested that Dr Kalya provided the Athlete with medication on 15 August 2014 after the accident.

e. In subsequent communications, Dr Kalya informed Ms Lagat that he treated the Athlete on 15 September 2014 following an accident and that he had administered an EPO injection on this date.

f. Dr Kalya was not clear about the dates of subsequent visits made by the Athlete though his handwritten notes suggested two visits in September 2014, one on *"Sep/14"* and one on *"20/09/14"*.

g. From the above it was likely that the accident took place on 15 August, not September 2014.

h. The IAAF had a pre-conceived notion that the Athlete was at fault and failed to consider the possibility of foul play by Dr Kalya. This was evidence of bad faith on the IAAF's part.

i. The Athlete only had contract with Dr Kalya from the point of her accident. The IAAF alleged a relationship between the Athlete and Dr Kalya from as early as April 2014 but there was no evidence to support this proposition save for Doping Control Forms, based on which the IAAF alleged it was no coincidence that the "Dr Kalia" named on those forms was the same person as the Dr Kalya who treated the Athlete after the accident. The matter required further investigation, in relation to who gave the name of Dr Kalya, since athletes are not allowed to fill in their own doping control forms and the Athlete has no recollection of a Dr Kalya being a doctor during her doping control test.

j. There was evidence to suggest that Dr Kalya did not have license to practice medicine or to operate the Kapsabet Medicare Centre. His efforts to treat athletes without his having qualifications indicated he sought to exploit the weak medical and anti-doping systems in Kenya. His provision of the wrong dates to Ms Lagat suggested her was trying to cover up his own wrong-doing. He has been arrested and is being held in custody but his location was unknown.

k. Mr John Velzian now acknowledged that he had made a grave mistake with regards to the formulation of the Kapsabet medical reports.

l. The Athlete's English is far from perfect. The language barrier has caused problems, most seriously at the laboratory in Lausanne.

m. The Athlete's former legal team made grave legal misinterpretations and errors which compounded the Athlete's unfortunate circumstances. They were unfamiliar with anti-doping issues and the grounds for filing an appeal to reduce or eliminate a sanction for an anti-doping violation. The IAAF has taken advantage of the ill-informed (and since aborted) appeal of the Athlete's to form the basis of their case against the Athlete. It would be unfair to punish the Athlete for the same.

n. The IAAF had abused the court's process by taking a very adversarial approach. Rather than repeatedly ask the Athlete to provide disclosure and for CAS to order the Athlete to do so, they should have taken steps to investigate themselves.

o. The limited period over which the Athlete has been subject to blood tests (from 2012 to 2014) could not possibly give an accurate prediction of her upper and lower limits. Her long term doctor, Dr Khan, considers the Athlete's range to be normal.

p. In 2011 to 2013, the Athlete underwent various stressful circumstances such as domestic violence and court proceedings against her ex-husband. The IAAF's analyses of her blood do not take these into account. Nor was the Athlete asked to explain why her hemoglobin levels steadily increased from 2013.

q. The IAAF has purposefully failed to disclose aggravating circumstances at the first instance hearing. The IAAF knew about alleged abnormalities in the Athlete's ABP profiling but chose not to disclose the same at that stage.

r. The analysis of the Athlete's urine sample was not performed sufficiently quickly. Had the results been released in good time the Athlete would not have been allowed to complete in the Chicago marathon, which would have avoided later inconveniences such as adjustments of results.

s. The IAAF purposefully did not require the Athlete to file her whereabouts. Mr Berardelli has said that this was part of a ploy by the IAAF to catch the Athlete doping.

t. The IAAF was guilty of inaction towards unscrupulous opportunists. Instead of acting, the IAAF waits for athletes to fall into the wrong hands and then forces the athletes to "cooperate" or otherwise use the athletes as an "example".

u. The Athlete had not fabricated any documents or issued any instructions to any of her legal counsel to make false statements on her behalf with the intention of subverting justice.

v. The IAAF had not made any direct nexus between the Athlete and the reports that they alleged indicated widespread doping in Kenya.

137. The IAAF's response to these submissions can be summarised as follows:

- The Athlete now admitted that the accident was on 15 August, not September 2014. But in other respects, she was still not telling the truth.

- She says she met Dr Kalya for the first time in August 2014. But in April 2014 at the Boston marathon she had said she knew her doctor was a Dr Kalya.

- Mr Cheribo says it was the Athlete who asked to go, after the accident in August 2014, not to the local hospital but to the Kapsabet Medical Centre.

- Her haemoglobin tests taken by Dr Khan are irrelevant as a) they were not taken in accordance with the WADA ABP Guidelines and b) the key abnormal value is the RET% of 2.5%.

- The Athlete was well aware the blood-boosting injections were illicit, hence she did not mention the injections, for example at the AK hearing on 15 January 2015 nor on 26/27 January 2015.

- She had not been confused about the date of the accident on 30 October 2014 when she prepared a statement with her brother, which statement correctly noted the accident was in August 2014, not September.

- She withheld from Mr Velzian the fact that Dr Kalya had given her three blood-boosting injections in September 2014.

- Accordingly, she concealed receiving rEPO injections in both April 2014 and in September/October 2014.

V. JURISDICTION

138. As noted above, the usual course for a set of first proceedings would be for them to be heard first by the Tribunal. However, ADR 38.19 provides that cases asserting anti-doping rule violations may be heard directly by CAS with no requirement for a prior hearing, with the consent of the IAAF, the Athlete, WADA, and any anti-doping organization which would have had a right to appeal a first hearing decision to CAS. In this case, all relevant stakeholders have provided that consent. Furthermore, in their abundant correspondence with the CAS, the Parties have never contested the jurisdiction of the CAS. Consequently, the Panel finds that it has jurisdiction to hear this case.

VI. OTHER PROCEDURAL ISSUES

139. According to Articles R57(4) and R44.5(3) of the Code if a party fails to appear at the hearing, the Panel can nevertheless proceed with the hearing and deliver the award. The Panel avails itself of these provisions of the Code on which the Parties have agreed. Furthermore, in doing so the Panel does not breach any procedural rights of the Athlete. In particular, the Panel in continuing the proceedings and conducting the hearing did not violate the Athlete's right to be heard.

140. By 8 March 2016, the Parties had confirmed their availability for a hearing on 29 April 2016. On 15 March 2016, CAS wrote to the Parties to confirm that the hearing would take place on 29 April 2016. The reasons for why this hearing was adjourned are set out above. The CAS Court Office helped at the time to secure another lawyer for the Athlete, adjourned the hearing, allowed for further submissions, and further extended the deadlines in order to facilitate the Athlete's defence. By 4 May 2016, the Parties had confirmed their availability for a hearing on 7 July 2016. The circumstances in which the Athlete's new counsel decided to withdraw from representing the Athlete are set out above also. It was the Athlete's choice not to come to the place where the hearing was held in Lausanne. The Athlete had been advised repeatedly by the CAS Court Office that there was a possibility of applying for further legal aid to secure travel costs. The Athlete/Counsel for the Athlete chose not to apply for further legal aid and to attend the hearing only by video conference. It was, thus, up to the Athlete/Counsel for the Athlete to make arrangements in order to secure attendance by video conference or telephone. Only three days before the hearing the Athlete's counsel informed the CAS Court Office that it could not use the pre-arraigned facilities for the video conference because of a public holiday. This is rather surprising considering that the date of the hearing had been fixed in accordance with the Athlete already on 4 May 2016. It did not appear from this

letter that it was impossible to secure alternative places for attending the hearing either by phone or video, especially considering that both telephone and Skype were free available options. Consequently, the Panel invited the Athlete to communicate the coordinates for an alternative venue. Apparently, no efforts were made by the Athlete and/or her counsel to secure another place for video conferencing or attendance by phone. Instead, by a letter dated 5 July 2016 counsel for the Athlete withdrew from representing the Athlete. It is, in principle, the Athlete's responsibility to find and secure legal representation. This obligation cannot be shifted to the Panel. This is all the more true considering that – even though being repeatedly invited to do so – the Athlete did not in a timely manner contact the CAS Court Office to discuss what alternative arrangement could be made.

141. The Panel then enabled the Athlete to participate by telephone at the hearing. The Athlete, however, disrupted again the course of the proceeding that had been previously explained to her. This is all the more troubling considering that the Panel had the impression that the Athlete understood perfectly well the explanations given to her by the Panel. It was the Athlete's choice to hang up (twice) and not participate at the hearing via telephone. In view of all of the above, the Panel is satisfied that the Athlete and her counsel manoeuvred themselves into this situation. The Panel will not permit that unfounded assertions of violation of the right to be heard to be used to disrupt and delay the smooth-running of these proceedings. Consequently, the Panel finds that by continuing these proceedings without the participation of the Athlete it did not breach the Athlete's right to be heard.

VII. APPLICABLE LAW

142. IAAF Rule 42.23 provides as follows:

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

143. This case is not an appeal. The IAAF contends that nonetheless ADR 42.23 should be applicable. The CAS Panel agrees because the purpose of the direct appeal to CAS is to shortcut the otherwise applicable procedure. However, the substantive outcome of the shortcut should not differ from the outcome of the otherwise applicable procedure. Therefore, ADR 42.23 must apply by analogy.

144. Pursuant to ADR 42.24, the governing law shall be Monegasque law. However, the IAAF rules in question are to be interpreted in a manner harmonious with other WADC compliant rules.

145. The seat of the arbitration is Lausanne, Switzerland. Accordingly, procedural issues are governed by the CAS Code and Swiss Private International Law Act ("PILA").

VIII. MERITS

146. According to ADR 32.2(e) (2015 rules) tampering constitutes an anti-doping rule violation ("ADRV"). Tampering is defined as "*Conduct which subverts the Doping Control process ...*" Doping Control is defined as "*All steps and process from test distribution planning to ultimate disposition of any appeal ....*" Consequently, tampering can also cover an athlete's behaviour in the course of a first instance or appeal hearing. A broad range of behaviours may qualify as "tampering". ADR 32.2(e) provides a non-exclusive list of examples in this respect such as "*intentionally interfering or attempting to interfere with a Doping Control official, providing fraudulent information ... or intimidating or attempting to intimidate a potential witness.*"

A. Principles of general application

147. It follows from the above examples that whether certain behaviour qualifies as tampering must be assessed in the individual context. The behaviour must be such that it possibly impacts on the "Doping Control process". Whether this is the case depends on the stage of the specific "Doping Control process". In this context it must be noted that the athlete has a right to a first-instance hearing and a right to make submissions therein. Furthermore, the athlete has a right to appeal the first-instance decision and to make any submission that he or she deems appropriate to defend him or herself. In addition, the Athlete is allowed in his or her defence to concentrate on or advance in particular arguments that are beneficial to his cause. Exercising these procedural rights, therefore, does not constitute tampering from the very outset. Thus, the starting point here differs completely from the decision submitted by IAAF (SR/NADP/507/2015 (*UKAD v. Skafidis*) dated 22 February 2016). In that decision a witness (and not the athlete charged with the anti-doping rule violation) gave false testimony.

148. Furthermore, it should be noted that the adversarial procedure provided – in particular – before the CAS enables the other party to put the athlete's submission to a test by, for example, cross-examining the testimony given by the athlete and / or his or her witnesses and experts. The technical arrangement of the process before the first-instance tribunal and before the CAS are, thus, such that the outcome of the process is not easily affected by the submissions of one of the Parties. Instead, the adversarial system ensures, in principle, that false, inaccurate or incomplete testimony by one party can be rebutted by reliable evidence of the other party. The adversarial process is, thus, an important instrument in truth-finding. In summary, the Panel finds that in view of the above any behaviour of the athlete in the judicial proceeding before a first instance or appeal body must meet a high threshold in order to be qualified as tampering within the meaning of the above provision.

149. The Panel feels comforted in its (restrictive) view when looking at the previous version of the IAAF Rules. Under these rules "*deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation*" qualified as an aggravating factor when imposing a period of ineligibility on the Athlete. Here too, the CAS jurisprudence displayed reticence when treating an athlete's procedural behavior as an aggravating behavior, since the sword of Damocles of an increased sanction in a case where a panel is not prepared to accept the athlete's submission would render his or her defense and, thus, access to justice disproportionately difficult. This is all the more true since a

comparable sanction is not foreseen for the sports organization charging the athlete with an ADRV.

150. These concerns have been expressed, in particular, in the case 2013/A/3080, where the panel found as follows (para 70 *et seq.*):

> *"As to the question whether Ms Bekele has been shown to have engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation, the view of the Panel is that for this factor to be brought into play an athlete must have done more than put the prosecuting authority to proof of its case. In light of the above, the Panel deems that it is not sufficient to establish an aggravating circumstance the mere fact that an athlete has relied on factors which are found not to be sufficient to explain the anomalies in his or her APB. If there were circumstances which showed to the comfortable satisfaction of the Panel that the threshold of what can be deemed to be a legitimate procedural defence is clearly exceeded, then this factor would be relevant. However, it was not suggested during the appeal that there was any principle of Monegasque law (the relevant law) which rendered it unlawful to take such a defence into account as an aggravating factor.*
>
> *The position in this case was that the Athlete advanced various facts which she suggested could be responsible for the results found on the analysis of the various Samples. Although it was suggested that there were inconsistencies and improbabilities in the Athlete's account of her whereabouts over the summer of 2010 and the bout or bouts of malaria she claimed to have suffered, the subject was not explored in any detail by the IAAF at the hearing. For example, it appeared at one stage that the IAAF might have been going to suggest that the supposed medical records produced on behalf of the athlete were not what they purported to be, but this point was not pursued.*
>
> *The further point which arose was that it could have been suggested that the cessation of the use of a Prohibited Substance or Method somewhere between one and three weeks before the events which the athlete was targeting amounted to deceptive conduct to avoid detection. The same point arose in CAS 2012/A/2773 IAAF and Hellenic Amateur Athletic Association v Kokkinariou, on which the IAAF placed great reliance. The Sole Arbitrator did not find it necessary to determine the point in that particular case but observed at para 129:*
>
> > *'The Sole Arbitrator notes that most, if not all, doping practices are timed to avoid detection. As a result, an aggravating circumstance is likely to require a further element of deception. However, since IAAF Rule 40.6 is already engaged, this point may be left open in this case.'*

151. The Panel concurs with the view expressed in CAS 2013/A/3080. The Panel holds that the threshold of legitimate defence is trespassed and, thus, a "*further element of deception*" is present where the administration of justice is put fundamentally in danger by the behaviour of the athlete. This is the case where a party to the proceedings commits a criminal offence designed to influence the proceedings in his or her favour. That such

situations are intolerable can also be followed from Art. 123 of the Swiss Code on Procedure before the Federal Tribunal or Art. 328 of the Swiss code of Civil Procedure. According to these provisions a decision that has *res judicata* effect and, thus, is no longer appealable through ordinary means of recourse can be nevertheless squashed and annulled if it has been reached through a criminal offence to the detriment of the other party. A decision – even if *res judicata* – cannot be upheld, if it is the result of criminal behaviour. The Swiss Federal Tribunal stated in this respect as follows (ATF 118 II 199, 202):

> "*... if an award relies on factual findings distorted by criminal behaviour .. in disregard of the real situation without fault, the absence of any reassessment would consecrate a clear violation of the fundamental principles pf procedure.*"

152. Whether lying as party in a proceeding constitutes a criminal offence can be left unanswered here. It appears from the expert opinion of Mr Arnaud Zabaldano provided by the IAAF that this is not the case according to Monegasque law (page 2). Also the authorities submitted by the Claimant with respect to Swiss law (albeit with respect to criminal proceedings) appear to go in the same direction. In any case forging a document for the use of a judicial proceeding is a criminal offence not only in Monegasque law (see p. 2 of the expert report provided by Mr Arnaud Zabaldano, p. 2) but also under Swiss law (see Art. 251 of the Swiss Criminal Code). This surely exceeds the above threshold of legitimate defense.

B. The Application of the above principles to the Case at hand

153. In application of the above general principles to the case at hand the Panel finds that the Athlete has committed tampering (within the meaning of the ADR) when submitting the forged document in the CAS 2015/A/3978. It cannot be upheld in the favour of the Athlete that she – at this moment in time – no longer relies on the forged Medical Report. This does not constitute withdrawal from the criminal attempt to alter or impact the Doping Control process, since the Athlete did not withdraw the forged document in these proceedings voluntarily, but only when she was confronted with overwhelming evidence by the IAAF that her whole defence was totally made up.

154. To conclude, the Panel finds that the Athlete committed tampering according to ADR 32.2(e) (2015).

C. The Appropriate Sanction

a. The overall context of the ADRV committed by the Athlete

155. The submission of the forged document by the Athlete in CAS 2015/A/3978 did not occur as an isolated incident, but is the culminating peak in an overall strategy of the Athlete to cover up or hide the taking of prohibited substances by her and to prevent the competent authorities from issuing the appropriate sanctions. This strategy was employed by the Athlete from the very moment the adverse analytical finding was communicated to her in 2014. In this respect the Panel notes in particular that:

- The Athlete hid her relationship with the EPO-doctor Kalya from her manager and coach (see the transcript of the phone call of 28 October 2014 in which she referred to seeing a Dr Rotich, and did not mention Dr Kalya). Two days later she submitted two handwritten statements (30 October 2014) to AK, in which the account of facts differed considerably from the version told 2 days before. In particular, there was no mentioning anymore that the injections had been made to boost her blood levels.

- It further appears from the evidence on file that there was an issue with the Athlete trying to disrupt the analysis of the B sample in the Lausanne laboratory on 17 December 2014.

- In the hearing before the Tribunal of AK the Athlete then submitted that she did not know how the banned substance got into her blood (see transcript p. 20). After the Appealed Decision concluded that the Athlete had not provided any evidence about how the rEPO had entered her system, a Medical Record was forged in order to prove that the rEPO had been given to the Athlete in the context of a treatment for a life-threatening treatment. It appears to be undisputed between the Parties that the document is forged and that it was submitted in the CAS 2015/A/3978 on behalf of the Athlete. The Athlete submits that she was not aware of the forgery and that the Medical Records were drawn up without her involvement. In particular, the Athlete says that the Medical Record was the result of wrong information being provided by Dr Kalya to Ms Lagat who forwarded the information to Mr Velzian who then prepared the document. The Panel is not persuaded by this account. Instead, it appears to the Panel that the (forged) Medical Record was drawn up as a direct consequence of the Appealed Decision and that this document constituted the core of the Athlete's appeal in the CAS 2015/A/3978. It is impossible that this (forged) document was not discussed with the Athlete and submitted without her knowing or being involved. This is all the more true, since the sworn witness statement submitted by the Athlete in the bundle of the Appeal Brief in the CAS 2015/A/3978 (First WS) explicitly states that "*the contents of the Appeal brief ... have been interpreted and explained to me* ...". The Panel also notes that the First WS contains a number of submissions which are simply untrue (and designed to cover up her taking rEPO to enhance her performance). The Athlete – e.g. – states in the First WS explicitly that she had been hit by a car on 15 September 2014, that she was rushed into hospital on that day for treatment, that she informed the Doping Control Officers on 25 September 2015 of the accident and that she was still taking medicine for her pain and that she only later found out that while being treated on 15 September 2014 she had been injected with rEPO. All of this is false. The witness statement by the Athlete dated 11 May 2016 (Second WS) again contains a number of inaccuracies that are not coincidental, but were made in order to disguise the true course of the events. The disruptive behaviour of the Athlete and / or her defence team continued also thereafter and culminated in the Athlete's counsel withdrawing from representing her only a couple of days prior to the hearing and in the Athlete's disruptive behaviour on the phone during the part of the hearing in which she participated. It appears to the Panel that also this behaviour by the Athlete had the sole purpose of preventing the administration of justice in this case from occurring.

156. To conclude, therefore, the Panel finds that the decision by the Athlete to avoid the proper adjudication of the ADRV at any costs (of which the submission of the forged documents is the culminating peak) was taken already back in 2014.

b. The temporal scope of application of ADR 32.2(e) (2015)

157. ADR 32.2(e) (2015) entered into force on 1 January 2015. The legal situation before that point in time was different.

(i) Comparison between the "old" and "new" IAAF rules

158. Tampering constituted already under the (2014) ADR a doping offense under ADR 32.2e). In the (2014) ADR "Tampering" was defined as "*Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing, misleading or engaging in any fraudulent conduct to alter results or to prevent normal procedures from occurring; or providing fraudulent information.*" Irrespective of whether or not this definition covered also a particular procedural behaviour of the athlete during the course of the first instance or appeal procedure, it was common practice under the old IAAF rules not to charge such behaviour as a separate ADRV. Instead, such behaviour was only taken into account when deciding on the period of ineligibility of the ADRV that was being concealed, because "*deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation*" constituted aggravating circumstances according to ADR 40.6 (2014). Such aggravating circumstances could lead to an increase in sanction from 2 up to 4 years of ineligibility under the old IAAF rules.

159. ADR 40.6 (2014), thus, was a *lex specialis* in cases in which the athlete tried to avoid the proper adjudication of his or her ADRV, i.e. "tampered" with the judicial proceedings. Consequently, according to the old IAAF Rules, avoiding adjudication of a previously committed ADRV did not qualify as a "second offence". Instead, it was an aggravating factor in determining the consequences of the "first offence".

160. The interpretation followed here is backed also by the IAAF. The latter has – at least in the past – always sought in comparable cases an increase in sanction according to ADR 40.6, rather than charging the athlete with a separate ADRV for tampering (cf. e.g. CAS 2013/A/3080). It is exactly this policy that the IAAF originally also pursued in the present case. This is evidenced by the IAAF letter dated 23 February 2015, in which Thomas Capdevieille wrote to counsel of the Athlete as follows:

> *"Please be aware that in light of (i) the athlete's new medical explanation (ii) her behaviour at the B sample analysis and (iii) the numerous inconsistencies in her defence, the IAAF is now seriously considering filing an appeal with the CAS against the 2-year sanction applied by AK in order to seek an increased 4-year sanction on the grounds of aggravating circumstances under IAAF Rule 40.6 (a).*"

161. Furthermore, this is corroborated by Mr Thomas Capdevielle's email to AK dated 20 February 2015 where he states that "*we take this matter very seriously and we will not hesitate to seek an increased sanction against the athlete should this explanation prove to be fabricated*". Again, the IAAF made reference to increased sanctions contained in ADR 40.6 (2014) and not to a separate tampering charge according to IAAF Rule 32.2(e).

162. Under the new IAAF rules the legal situation has changed dramatically. There is no longer a provision that provides a moving scale to increase the otherwise applicable sanction in

case of aggravating circumstances. Consequently, as of 1 January 2015, i.e. as of the entry into force of the new 2015 ADR there is no *lex specialis* for "*deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation*" any longer. Under the new rules, therefore, such behaviour (as long as it exceeds the required threshold of legitimate defense) can only and must be assessed according to the provision on tampering.

(ii) The differing consequences between the old and the new rules

163. The change of the legal framework from the 2014 to the 2015 edition of the ADR has serious consequences when calculating the applicable period of ineligibility. While under the old rules (2014) the maximum period of ineligibility in the context of aggravating circumstances was 4 years, the charging with a separate tampering offence under the new (2015) rules leads to a significant increase in sanction. This is because avoiding adjudication of an ADRV now counts as a second offence (where a first offence is found proven).

164. ADR 40.8(a) (2015) provides for a second offence that:

> *For an Athlete or other Person's second anti-doping rule violation, the period of Ineligibility shall be the greater of:*
>
> *(i) six months;*
>
> *(ii) one-half of the period of Ineligibility imposed for the first anti-doping rule violation without taking into account any reduction under Rule 40.7; or*
>
> *(iii) twice the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation without taking into account any reduction under Rule 40.7.*
>
> *The period of Ineligibility established above may then be further reduced by the application of Rule 40.7.*

165. Accordingly, the period of ineligibility, according to ADR 40.8(a)(iii), would be up to 8 years for an athlete engaged in tampering with the judicial process.

c. What version of the ADR is to be applied in the case at hand?

166. Considering that an application of the current ADR (2015) leads to a significantly higher period of ineligibility compared to the application of the previous ADR (2014) in force, the question arises which version of the IAAF rules shall apply to the case at hand.

167. At first sight it appears that – since the fabricated document was submitted by the Athlete in 2015 – the current ADR should apply. Looking, however, at the fabricated document in isolation would not be in line with the true course of events (see supra no. 142 *seq.*). As stated already the Athlete was engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation as of the point in time when she was confronted with the Adverse Analytical Finding ("AAF"). The submission of the

false Medical Report in 2015 is not a new event triggering a separate course of events. Instead, it is the culminating point of a sad story of lies, fraud, deceit and intentional interferences (see also the incident at the Laboratory) that is part of a plan and scheme to avoid the proper adjudication of the ADRV at any costs. This plan, however, had been already initiated in 2014, intensified with the opening of disciplinary proceedings against her in 2014 and was then carried over into 2015. Therefore, the Panel finds that considering all of the above, in particular that the true course of events (of which the submission of the falsified report is only one sub-aspect) began and are rooted already in 2014, the application of the old rules (2014) is warranted also to incidents that happened in 2015, but which are embedded in what the Panel sees as a linear sequence of events forming a single course of action.

168. Under the old (IAAF) rules, however, avoiding proper adjudication of an ADRV even though constituting tampering was not charged as a separate (second) offence, but was – for the purpose of establishing the proper period of ineligibility – taken only into account as an aggravating factor when adjudicating a first offense. Since the first offense is not part of the matter in dispute in CAS 2015/O/4128, the Panel is prevented from issuing a separate period of ineligibility for tampering in the case at hand. Instead, the Panel finds that the appropriate period of ineligibility has been exhaustively dealt with by applying ADR 40.6 in the case CAS 2015/A/3979.

169. For the sake of good order, the Panel wished to emphasise that had the Athlete submitted the forged document as an isolated event in 2015, the Panel would have qualified this behaviour not only as tampering, but would have issued a separate period of ineligibility for this ADRV in line with the provisions for a second offence.

IX. COSTS

170. Article R64.5 of the CAS Code provides that:

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

171. In this claim, the IAAF has succeeded in the characterisation of the Athlete's behaviour as tampering (which was a matter it specifically sought by way of relief in its statement of claim). However, it failed with its request to impose a separate period of ineligibility (which is a matter the IAAF also specifically sought by way of relief in its statement of claim). Thus, the costs of the proceedings shall be equally shared by the Parties. There shall be no contribution to costs for either side.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The request for arbitration filed by the International Association of Athletics Federation on 10 November 2015 is partially upheld.

2. Ms Rita Jeptoo has committed an anti-doping rule violation according to IAAF Rule 32.2(e).

3. The International Association of Athletics Federation's request that Ms Jeptoo be sanctioned with an eight-year period of ineligibility for a second anti-doping rule violation is dismissed.

4. The costs of these proceedings, which shall be specified and communicated separately by the CAS Court Office, shall be borne equally by the International Association of Athletics Federation and Ms. Jeptoo.

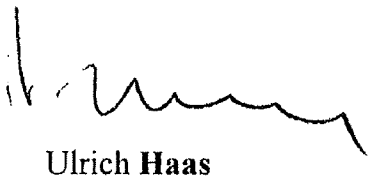
5. Each party shall bear their own legal fees and expenses incurred in these proceedings.

6. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Award issued on 26 October 2016

THE COURT OF ARBITRATION FOR SPORT



Ulrich **Haas**
President of the Panel