



**Arbitration CAS 2016/A/4840 International Skating Union (ISU) v. Alexandra Malkova, Russian Skating Union (RSU) & Russian Anti-Doping Agency (RUSADA), award of 6 November 2017**

Panel: The Hon Michael Beloff QC (United Kingdom), President; Mr Hans Nater (Switzerland); Mr Jeffrey Benz (USA)

*Skating (short track speed skating)*

*Doping (tuaminobheptane)*

*Consumption out-of-competition of substance prohibited in-competition only*

*Assessment of the level of fault*

*Principle of equal treatment*

*Threshold for review by CAS panel of sanction imposed in first instance*

1. The taking out-of-competition of a substance prohibited in-competition only does not constitute itself doping or illicit behaviour. The violation is not the ingestion of the substance, but the participation in competition while the substance (or its metabolites) is still in the athlete's body. The illicit behaviour lies in the fact that the athlete returned to competition too early, or at least earlier than when the substance taken out of competition had cleared his/her system for drug testing purposes in competition.
2. As regards the level of fault by the athlete it has to be taken into account that requiring from an athlete in such cases not to ingest the substance at all would lead to enlarging the list of substances prohibited at all times to include the substances contained in the in-competition list. It follows from this that if the substance forbidden in-competition only is taken out-of-competition, the range of sanctions applicable to the athlete is from a reprimand to 16 months (because, in principle, no significant fault can be attributed to the athlete). However, exceptions to this general rule have to be made in cases where an athlete could easily have made the link between the intake of the substance and the risks being run, *e.g.* where the product is a medicine designed for a therapeutic purpose. This is because in this scenario, a particular danger arises that calls for a higher duty of care, as medicines are known to have prohibited substances in them.
3. Whereas the principle of equal treatment is not a circumstance envisaged in the definition of No Significant Fault as a circumstance to be taken into account in the assessment of its degree and the appropriate sanction consequent upon it, the principle and rationale for it is generally accepted as part of the *lex ludica*.
4. When reviewing the sanction imposed by a tribunal of first instance the sanction imposed has to be "*grossly disproportionate*" for a CAS panel to substitute it by a new sanction rather than for it to show deference to the expertise of the body from whom an appeal is brought. The threshold for review is the same whether the sanction imposed by the tribunal of first instance is too high or too low.

## **I. INTRODUCTION**

1. This is an appeal by the International Skating Union against decisions of RUSADA and the Russian Skating Union (“the Decisions”) imposing a three month ineligibility sanction on Ms Malkova for an admitted anti-doping rule violation (“ADRV”).

## **II. PARTIES**

2. The International Skating Union (the “Appellant” or the “ISU”) is the international governing body for the sport of skating.
3. Ms Alexandra Malkova (the “First Respondent” or Ms Malkova) is a Russian national level short track speed skater.
4. The Russian Skating Union (the “Second Respondent” or the “RSU”) is the national governing body for the sport of skating.
5. The Russian Anti-Doping Agency (the “Third Respondent” or the “RUSADA”) is the national anti-doping authority for Russia.

## **III. FACTUAL BACKGROUND**

### **A. Background Facts**

6. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence before and at the hearing. Additional facts and allegations found in the parties’ written submission, 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.
7. On 18 March 2016, Ms Malkova, then eighteen years old, was tested on the occasion of the Russian National Short Track Championships in Sterlitamak, Russia (“the Competition”), and her sample sent for analysis to the WADA accredited laboratory in Barcelona, Spain.
8. On 26 April 2016, the ISU received the results of Ms Malkova’s sample which had been found to contain, inter alia, Tuaminoheptane.
9. Tuaminoheptane belongs to a class of S6b specified stimulants and is prohibited in competition according to the 2016 WADA prohibited list.

**B. Proceedings at national level**

10. On 26 April 2016, Ms Malkova was provisionally suspended by RSU pending her explanations for the adverse analytical finding (“AAF”).
11. On 17 June 2016, Ms Malkova provided to RUSADA her explanation for the presence of Tuaminoheptane in her body (“the Explanation”)

*“Explanation*

*I would like to inform you that substance has got into my body through Rinofluimucil drops. I remember that Doctor prescribed them to me in my childhood. I was ill with sinusitis at the end of February 2016. I have not had the opportunity to visit my doctor and used Rinofluimucil drops in order to recover. I knew that these drops are included in the prohibited list substances as well as that these drops cannot be used during competitions period. Actually, in our national calendar there was no competitions in the period from January 7 to 17 March 2016. I stopped using this medication two weeks before National Short Track Speed Skating Championships, which held on March 17-20, 2016”.*

12. On 29 July 2016, RUSADA issued its decision:

*“Athlete name: Malkova Alexandra  
Nationality: Russian  
Sport/Discipline: Skating  
Substance: Meldonium, tuaminoheptane  
Code no: A 3075059  
Sampling date: 18.03.2016  
Sanction: 3 months of ineligibility (26.04.2016 – 25.07.2016)*

*The Athlete explained that the prohibited substance 2tuaminoheptane2 had got into her body in February 2016, in the period of acute sinusitis, in connection with the admission of the drug “Rinofluimucil”. This drug was prescribed by a doctor otolaryngologist, the athlete used it regularly for several years in the out-of-competition period. The athlete explained that she knew that the drug was in the Prohibited List and was not allowed to receive in-competition, which is why she stopped taking this drug two weeks before the start of the Championship of Russia, which took place from March 17-20, 2016.*

*Disciplinary Anti-Doping Committee considers that the athlete could prove a minor fault of negligence in taking a prohibited substance”.*

13. On 7 September 2016, the Executive Committee of the RSU issued its decision:

*“AGENDA*

*On the facts of violation of anti-doping rules of the ISU and WADA Anti-Doping Code Alexandra Malkova*

RESOLVED

1. Agree with the decision of the Association of the Russian Anti-Doping Agency "RUSADA" against Malkova A. specified in the letter number AA-1675 from 31.08.2016 and recognize athlete has committed a violation of para. 2.1 All-Russian Anti-Doping Rules.
2. Apply to the athlete sanction of disqualification for a period of 3 (three) months, taking into account that the term designated disqualification expires 07/25/2016.
3. Cancel Alexandra Malkova results achieved by it at the Russian Championships in short track, held from 17 to 20 March 2016 Sterlitamak (Bashkortostan), and give instructions to the Chairman of Technical Committee for Short Track to check the cancellation procedure and the results of changes in the final protocol of the competition.

*The quorum for taking decisions on the agenda issues of the day there.*

*The decision was taken by majority vote".*

14. On 11 October 2016, RUSADA provided its explanation of its decision to ISU as required by ISU rule 7.13.2. It said, so far as material:

*"Merits of the Decision*

***Tuaminoeptane (S6 of S4 of WADA Prohibited list 2016)***

*Skater explained that the prohibited substance entered her body through the use of a drug Rinofluimutsil recommended by her physician. She also confirmed that the use of this drug was not intended to improve her sport performance. Athlete regularly used this drug in recent years. Committee believes that the fault of skaters is obvious, as she knew that the substance is included in the list of prohibited drugs. However, she stopped using this medicine two weeks before the competition beginning that proves the absence of desire to improve sport results. Skater was able to prove a minor fault or negligence.*

*In this way, Committee adopted a decision on the possibility of reducing the standard sanction of a two-year period of disqualification of up to 3 months taking into account the guilt of the athlete and in accordance with p 10.5.1.1 Anti-doping Rules and research of all documents attached to this case".*

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

15. On 28 October 2016, in accordance with Articles R47 *et seq.* of the Code of Sports-related Arbitration ("the Code"), the Appellant filed its statement of appeal with the Court of Arbitration for Sport ("the CAS"). The Appellant designated the statement of appeal as its appeal brief, pursuant to Article R51 of the Code.
16. On 22 November 2016, RSU filed its Answer pursuant to Article R51 of the Code.
17. On 23 November 2016, RUSADA filed its Answer pursuant to Article R51 of the Code.

18. On 17 July 2017, in the absence of objection from the ISU and with the approval of the Panel RUSADA filed a Supplementary Answer pursuant to Article R51 of the Code.
19. The First Respondent failed to file an answer.
20. In accordance with Article R57 of the Code, the parties and witnesses, to the extent set out below, participated in the hearing which was held on 19 July 2017 at the CAS Headquarters.

There were present:

**The Panel**

The Hon Michael J Beloff QC (President)

Dr Hans Nater (Arbitrator)

Jeffrey Benz (Arbitrator)

assisted by Daniele Boccucci, CAS Counsel

**For the ISU**

Dr B. Pfister, Counsel

Christine Cardis, ISU Anti-doping Administrator

**For RUSADA**

Graham Arthur, solicitor.

Ms Malkova and RSU did not appear at the hearing.

At the outset of the hearing the parties present confirmed that they had no objection to the composition of the panel and at its conclusion that their right to be heard on an equal basis had been fully respected.

**V. SUBMISSIONS OF THE PARTIES**

**A. The Appellant**

21. The ISU submitted in essence as follows.
  - (1) The Respondents did not contend that Ms Malkova was guilty of no fault or negligence (NF).
  - (2) Accordingly, absent proof by Ms Malkova of no significant fault or negligence (NSF) Article 10.2.2. of the Rules required a 2-year period of ineligibility.
  - (3) Ms Malkova had failed to prove NSF.

- (4) Even if, as Ms Malkova claimed, she had ceased to use Rinofuimicil 14 days before the competition, given her knowledge that Rinofluimucil contained Tuaminoheptane her failure to make any enquiry as to whether it was safe to do so amounted to “gross negligence”.
- (5) Even if, as Ms Malkova further claimed, she was unable to visit her own doctor, she could at least have made such enquiry of an appropriately qualified person by telephone.
- (6) the Decisions did not adequately address the issues as to Ms Malkova’s degree of fault or negligence.
- (7) Fidelity to the WADC and fairness to other female speed skaters required application of the standard 2-year ineligibility sanction.
- (8) 3 months’ ineligibility was disproportionately low.

22. In its statement of appeal/appeal brief, the ISU made the following request for relief:

1. *“The appeal for Appellant is admissible.*
2. *The appeal for Appellant is admissible.*
3. *The decision rendered by the Disciplinary Anti-Doping Committee of RUSADA on July 9, 2016 (Decision N 08/2014), and the decision of the Executive Committee of RUS dated September 7, 2016, in the matter of Alexandra Malkova are set aside.*
4. *Alexandra Malkova is sanctioned with a two year period of ineligibility starting on the date on which the CAS award enters into force. Any period of ineligibility and/or provisional suspension effectively served by Alexandra Malkova before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
5. *All competitive results obtained by Alexandra Malkova from March 17, 2016, through the commencement of the ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.*
6. *The arbitration costs shall be borne jointly by the Respondents”.*

#### **B. The First Respondent**

23. Ms Malkova made no submissions and no request for relief.

#### **C. The Second Respondent**

24. The RSU submitted in essence as follows:

- (1) According to para 5 part 10 of Article 26 of the Federal Law “On physical culture and sports in the Russian Federation” No 211 of 21.07.2014 the all-Russian sports federations are obliged to apply sanctions based on and in pursuance of a decision of a corresponding anti-doping association with regards to a violate of anti-doping rules by athletes.
  - (2) The RSU Executive Committee reviewed the formal aspect of the case, the documents supplied by RUSADA and athlete’s personal explanations. Experts or specialists of other independent organizations were not engaged.
  - (3) The RSU Executive Committee considered the fact of Tuaminoheptane usage by Ms A. Malkova (as a component of Rhinofluimucil) as proven since the athlete confirmed it herself.
  - (4) Assessing the degree of guilt the RSU Executive Committee took into account RUSADA recommendations as well as the fact that Rhinofluimucil had been prescribed to the athlete by an otolaryngologist during out-of-competition period, and considered it justified to apply a 3-months disqualification proposed by RUSADA.
25. In its answer, the RSU made no request for relief but wrote only that it was *“interested in an independent and impartial investigation of Ms Malkova’s case and is ready to agree to any justified decision with regard to a change in Ms Malkova’s disqualification period”*.

#### **D. The Third Respondent**

26. RUSADA submitted in essence as follows:
- (1) While Ms Malkova knew that Rinofluimucil contained Tuaminoheptane, she did not intend to use it in competition but used it out of competition for therapeutic purposes.
  - (2) Ms Malkova reasonably believed 2 weeks to be sufficient for Tuaminoheptane to be excreted, given that it was an element in a nasal spray freely available over the counter without prescription and used by children.
  - (3) Ms Malkova had used Rinofluimucil previously and had never tested positive.
  - (4) A young athlete, such as Ms Malkova, could not be expected to know the precise excretion time of Tuaminoheptane.
  - (5) Ms Malkova lacked the education on anti-doping available to members of the national team.
  - (6) There was no evidence as to what the response would have been of any expert of whom Ms Malkova had made enquiry. Absent such evidence the Panel could not assume that it would have been helpful.

(7) Case law both of CAS and other sports disciplinary bodies suggested that the tariff for Tuaminoheptane was not out of line with the Decisions. The principle of equal treatment of athletes required broad parity of sanction.

(8) NSF had been shown and the sanction imposed in the Decision being not disproportionately low should be immune from review by CAS.

27. In its answer, RUSADA made the following request for relief:

(1) *“The Appeal filed by the International Skating Union (ISU) on 28 October 2016 against Ms Alexandra Malkova, Russian Skating Union and the Russian Anti-Doping Agency “RUSADA” concerning the decision taken by RUSADA Disciplinary Anti-Doping Committee on 7 July 2016 and confirmed by the Russian Skating Union on 7 September 2016 is dismissed.*

(2) *Decision of the RUSADA Disciplinary Anti-Doping Committee is upheld.*

(3) *ISU shall bear all costs of the proceedings and reimburse RUSADA’s expenses”.*

#### **E. Generally**

28. The Panel will make further reference to the parties’ submissions in the analysis of merits below. It confirms that it has considered all the submissions made by the parties in writing or orally whether or not referred to in this award.

#### **VI. JURISDICTION**

29. Article R47 of the Code provides as follows:

*“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body”.*

30. The Appellant relies on Articles 8.4.5, 13.2.2 and 13.2.3 of the ISU Anti-Doping Rules as conferring jurisdiction on the CAS. The jurisdiction of the CAS is not contested by any of the Respondents and is confirmed by the signature of the present order.

31. In the view of the Panel jurisdiction is established.

#### **VII. ADMISSIBILITY**

32. Article R49 of the Code provides as follows:



*“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against”.*

33. The grounds of the Decision were notified to the Appellant on 11 October 2016. The Appellant’s statement of appeal was filed within 21 days of the Appealed Decision. Admissibility was not contested by any of the Respondents.
34. In the view of the Panel the appeal is admissible.

### **VIII. APPLICABLE LAW**

35. Article R58 of the Code provides as follows:

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

36. The applicable regulations are the ISU Rules and the Russian anti-doping rules both based on WADC 2015. Since the ISU is domiciled in Switzerland Swiss law applies subsidiarily.
37. The material provisions of the ISU rules (which, given its congruence with other applicable regulations, will be cited for convenience) are as follows:

#### **ARTICLE 2 ANTI DOPING RULE VIOLATIONS**

*The following constitute anti-doping rule violations*

##### **2.1 Presence of a Prohibited Substance or its Metabolites or Markers in a Skater’s Sample**

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

#### **ARTICLE 10 SANCTIONS ON INDIVIDUALS**

##### **10.1 Disqualification of Results in the Event during which an Anti-Doping Rule Violation Occurs**

*An anti-doping rule violation occurring during or in connection with an Event may, upon the decision of the ISU Disciplinary Commission, lead to Disqualification of all of the Skater’s results obtained in that Event, with all Consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.*

*10.1.1 If the Skater establishes that he or she bears No Fault or Negligence for the violation, the Skater’s individual results in the other Competitions shall not be Disqualified, unless the Skater’s results in*

*Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Skater's anti-doping rule violation.*

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

*The period of Ineligibility for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:*

10.2.1 *The period of Ineligibility shall be four years where:*

10.2.1.2 *The anti-doping rule violation involves a Specified Substance and the ISU can establish that the anti-doping rule violation was intentional.*

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

**10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence**

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

**10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence**

10.5.1 *Reduction of Sanctions for Specified Substances for Violations of Article 2.1.*

10.5.1.1 *Specified Substances*

*Where the anti-doping rule violation involves a Specified Substance, and the Skater or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Skater's or other Person's degree of Fault.*

10.5.2 *Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1.*

**Definitions**

**Fault**

*Any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar,*

would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.

### ***No Fault or Negligence***

*The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.*

### ***No Significant Fault or Negligence***

*The Athlete or Other Person's establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.*

## **IX. MERITS**

38. It is common ground that:

- It is a fundamental rule that an athlete is responsible for what goes into his or her body - the so-called duty of utmost caution.
- The standard period of ineligibility for an Anti-Doping rule violation contrary to Article 2.2.1 is two years under Article 10.2.2.
- That standard sanction can be reduced if the athlete can show, inter alia, NSF.
- NSF is the only basis for a reduction relied on by the Respondents.
- The burden of proving that an athlete has shown NSF lies upon the athlete to the standard of balance of probabilities. Article 3.1.
- In so far as Ms Malkova, in order to engage a plea of NSF, had to establish how the prohibited substance entered into her system, she had done so.
- The concept of NSF assumes that the existence of some measure of fault does not deprive the athlete of the opportunity to raise this ground *i.e.* NSF for reduction:

CAS 2016/A/4643 at §82 *“a period of ineligibility can be reduced based on NSF only in cases where the circumstances justifying a deviation from the duty of exercising the ‘utmost caution’ are truly exceptional and not in the vast majority of cases. However, in the panel’s opinion the bar should not be set too high for a finding of NSF. In other words, a claim of NSF is (by definition) consistent with the*

*existence of some degree of fault and cannot be excluded simply because the athlete left some ‘stones unturned’”.*

See also CAS 2005/C/976 & 986 “*endeavours to defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with*” (§73).

- The governing principles by which a plea of NSF can be assessed are those enunciated by CAS in its decision CAS 2013/A/3327 (Whilst these principles related to the application of Article 10.4 of the WADC, 2009, they are incorporated into the application of WADC 2016: see CAS 2016/A/4643 §97 and CAS 2015/A/4059 §153).
  - Every case where NSF is relied on must be considered on its merits: CAS 2013/A/3327 §76, CAS 2016/A/4643 §82, CAS 2015/A/4059 §88.
  - The taking by Ms Malkova of a product containing Tuaminoheptane out of competition was itself permissible: her fault lay in not taking steps to ensure that Tuaminoheptane was not out of her system by the time she competed.
39. Given that “*all cases are very fact specific and no doctrine of binding precedent applies to the CAS jurisprudence*” CAS 2016/A/4643 §82, it is, in the Panel’s view, dangerous to pray in aid tariffs imposed in other cases as distinct from any principles set out in them. Previous decisions vouched for by RUSADA are particularly suspect since there is a natural tendency for such a body to adhere to its own case law. CAS 2011/A/2645 §87 and §88 contrasting the 8 circumstances favourable and 6 adverse to the sportsman concerned perfectly illustrates how difficult and dangerous an attempted read across from one case to another may be.
40. In CAS 2013/A/3327 the following guidance, potentially material to the present appeal, was given:

“§74 ... aa) *The objective element of the level of fault*

*At the outset, it is important to recognise that, in theory, almost all anti-doping rule violations relating to the taking of a product containing a prohibited substance could be prevented. The athlete could always (i) read the label of the product used (or otherwise ascertain the ingredients), (ii) cross-check all the ingredients on the label with the list of prohibited substances, (iii) make an internet search of the product, (iv) ensure the product is reliably sourced and (v) consult appropriate experts in these matters and instruct them diligently before consuming the product.*

§75 *However, an athlete cannot be reasonably expected to follow all of the above steps in every and all circumstances. Instead, these steps can only be regarded as reasonable in certain circumstances.*

...

b. *For substances prohibited in-competition only, two types of cases must be distinguished:*

- i. *The prohibited substance is taken by the athlete in-competition. In such a case, the full standard of care described above should equally apply.*

- ii. *The prohibited substance is taken by the athlete out-of-competition (but the athlete tests positive in-competition). ...*

*The difference in the scenario (b ii) where the prohibited substance is taken out-of-competition is that the taking of the substance itself does not constitute doping or illicit behaviour. The violation (for which the athlete is at fault) is not the ingestion of the substance, but the participation in competition while the substance itself (or its metabolites) is still in the athlete's body. The illicit behaviour, thus, lies in the fact that the athlete returned to competition too early, or at least earlier than when the substance he had taken out of competition had cleared his system for drug testing purposes in competition. In such cases, the level of fault is different from the outset. Requiring from an athlete in such cases not to ingest the substance at all would be to enlarge the list of substances prohibited at all times to include the substances contained in the in-competition list. [...]. It follows from this that if the substance forbidden in-competition is taken out-of-competition, the range of sanctions applicable to the athlete is from a reprimand to 16 months (because, in principle, no significant fault can be attributed to the athlete). The Panel would, however, make two exceptions to this general rule. The principle underlying the two exceptions is that they are instances of an athlete who could easily make the link between the intake of the substance and the risks being run. The two exceptions are:*

*α [...]*

*β Where the product is a medicine designed for a therapeutic purpose. Again, in this scenario, a particular danger arises, that calls for a higher duty of care. This is because medicines are known to have prohibited substances in them. [...].*

*bb) The subjective element of the level of fault*

**§76. Whilst each case will turn on its own facts, the following examples of matters which can be taken into account in determining the level of subjective fault can be found in CAS jurisprudence (cf. also LA ROCHEFOUCAULD, CAS Jurisprudence related to the elimination or reduction of the period of ineligibility for specific substances, CAS Bulletin 2/2013, p. 18, 24 et seq.):**

- a. An athlete's youth and/or inexperience (see CAS 2011/A/2493, para 42 et seq; CAS 2010/A/2107, para. 9.35 et seq.).*
- b. Language or environmental problems encountered by the athlete (see CAS 2012/A/2924, para 62).*
- c. The extent of anti-doping education received by the athlete (or the extent of anti-doping education which was reasonably accessible by the athlete) (see CAS 2012/A/2822, paras 8.21, 8.23).*
- d. Any other "personal impairments" such as those suffered by:*
  - i. An athlete who has taken a certain product over a long period of time without incident. That person may not apply the objective standard of care which would be required or that he would apply if taking the product for the first time (see CAS 2011/A/2515, para 73).*

- ii. ***An athlete who has previously checked the product's ingredients.***
- iii. *An athlete is suffering from a high degree of stress (CAS 2012/A/2756, para 8.45 seq.).*
- iv. *An athlete whose level of awareness has been reduced by a careless but understandable mistake (CAS 2012/A/2756, para 8.37).*

cc) *Other factors*

§77 *Elements other than fault should – in principle – not be taken into account since it would be contrary to the rules. Only in the event that the outcome would violate the principle of proportionality such that it would constitute a breach of public policy should a tribunal depart from the clear wording of the text”*

(emphases added).

41. The Panel highlights those factors, mentioned in CAS 2013/A/3327, potentially material to Ms Malkova's case while also noting that CAS 2013/A/3327 concerned an athlete who did not take sufficient care to check what he was ingesting, and was in consequence ingesting a prohibited substance, whereas Ms Malkova knew what she was taking, but erroneously thought that it was no longer in her system by the time of the Competition.
42. While Ms Malkova gave no evidence before the Panel as to the circumstances in which she took (or ceased to take) Rinofluimucil before the competition, the Panel is disposed to treat the Explanation as her evidence both because it was an exhibit to the ISU appeal brief and adduced by ISU, indeed specifically relied upon by it in support of the Appeal for what it did or did not say, and because Ms Malkova might forgivably have assumed that RUSADA and RSU, as experienced bodies, would have carriage of the defence to the Appeal and determine what evidence should be adduced and how.
43. Given that the purpose of the Explanation was to explain to RUSADA circumstances material to (and, if possible, in mitigation of) her AAF, the Panel interprets it to mean that she ceased to use Rinofluimucil 14 days before competition in order to ensure that Tuaminoheptane was no longer in her system by the time of the Competition. That was certainly the interpretation given to it in the Decisions.
44. In Ms Malkova's favour are the following matters:
  - She did at least have awareness that the medication she was taking contained a prohibited substance (see again the contrast with CAS 2013/A/3327, para 38 above).
  - Albeit she was an adult, not a minor, in the scheme of the rules she had only just passed the threshold of adulthood.
  - She took the Rinofluimucil for therapeutic, not performance enhancing purposes.
  - Given her medical history she might well have been the beneficiary of a TUE, had she applied for one.

- She had used Rinofluimucil on previous occasions, and never previously tested positive.
  - It may safely be assumed that she is unlikely to have had the degree of training in anti-doping given to skaters in the national team.
  - She did at least address the key issue, *i.e.* for how long she could safely use Rinofluimucil in advance of the competition.
  - The period of abstinence from use of Rinofluimucil prior to the competition which she determined to be safe was not obviously absurd; nor did ISU adduce any expert evidence to contrary effect.
  - Other cases (if not all of them) involving positive tests for Tuaminoheptane do appear to envisage sanctions measured in months; 3 months is not wholly aberrant; 18 months appears near the upper limit. As was said in CAS 2011/A/2615 at §92 “*In determining as an international body the correct and proper sanction, CAS panels must also seek to preserve coherence between the decisions of different federations in comparable cases in order to preserve the principle of equal treatment of athletes in different sports*”. Albeit equal treatment is not a circumstance envisaged in the definition of NSF as a circumstance to be taken into account in assessment of its degree and the appropriate sanction consequent upon it, the principle and rationale for it is generally (like the principle of proportionality instanced in CAS 2013/A/3327), accepted as part of the *lex ludica*.
45. The Panel considers that in all the circumstances listed above, the standard suspension of two years should be reduced in the case of Ms Malkova, so that her period of ineligibility should be 20 months from the date of her suspension, *i.e.* 26 April 2016. The Panel has no doubt that, if the test for permitting CAS to substitute a sanction for that imposed by the tribunal of first instance be that it was “*grossly disproportionate*” (see CAS 2009/A/1870, para 125; CAS 2016/A/4501, para 513), it is satisfied in the present case: in the Panel’s view the threshold for review must be the same whether the sanction is too high (the more usual grounds for an appeal) or too low. If, as it is sometimes said, in different language but ultimately to the same effect, it is free to make its own assessment of the appropriate sanction in a *de novo* hearing but sensibly showing “*the deference shown to the expertise of the body from whom an appeal is brought*” (CAS 2015/A/4338, para 51), this is not a case where it would be sensible to show such deference or in consequence alter what would otherwise be its conclusion on suspension as set out above. In its firm opinion the cases which RUSADA used as justification for a presumptive 3-month tariff for inadvertent use of Tuaminoheptane should not be taken for the future as providing appropriate guidance in analogous cases.
46. In addition to the period of ineligibility, the results obtained by Ms Malkova between 17 March 2016 (first day of the Russian Championships in short track, during which the doping control took place) and the beginning of the suspension (26 April 2016) must be disqualified, with all of the necessary consequences including forfeiture of any medals, points and prizes.

## ON THESE GROUNDS

### The Court of Arbitration for Sport rules:

1. The appeal filed by the International Skating Union on 28 October 2016 against the decision rendered by RUSADA on 29 July 2016 and the decision rendered by the Executive Committee of the Russian Skating Union on 7 September 2016, is upheld.
  2. The decision rendered by RUSADA on 29 July 2016 and the decision rendered by the Executive Committee of the Russian Skating Union on 7 September 2016, are set aside.
  3. Ms Malkova is sanctioned by 20 months ineligibility with effect from 26 April 2016.
  4. All competitive results obtained by Ms Malkova between 17 March 2016 and the beginning of her period of ineligibility shall be disqualified, with all of the consequences including forfeiture of any medals, points and prizes.
- (...)
7. All other motions or prayers for relief are dismissed.