



Arbitration CAS 2016/O/4883 International Association of Athletics Federations (IAAF) v. Russian Athletic Federation (ARAF) & Petr Trofimov, award of 17 May 2017

Panel: Prof. Jan Paulsson (France), Sole Arbitrator

Athletics (race walking)

Doping (abnormalities detected in the Athlete's Biological Passport (ABP))

CAS jurisdiction under Rule 38.3 IAAF ADR

Applicable law

Establishment of a violation of "use" of a prohibited substance

Period of ineligibility based on aggravating circumstances

Fairness exception applicable to the disqualification of results

1. Where a national federation is suspended by IAAF, the latter is not in a position to conduct a hearing in a doping case. Against this background, pursuant to Rule 38.3 of the IAAF Anti-Doping Rules (ADR), IAAF can take over the responsibility for coordinating the relevant disciplinary proceedings regarding an international-level athlete and refer directly the matter to the CAS for a hearing subject to an appeal to CAS in accordance with Rule 42 of IAAF ADR. In this regard, where the proceedings are based on a request for arbitration for the conduct of a first instance hearing and do not involve an appeal against a decision rendered by a sports-related body, they are considered as ordinary arbitration proceedings, within the meaning, and for the purposes, of the CAS Code. However, in accordance with Rule 38.3 of the IAAF ADR, these proceedings are handled in accordance with CAS rules applicable to the appeal arbitration procedure without reference to any time limit for appeal.
2. In accordance with the principle of *tempus regit actum*, those regulations in force at the time of the alleged acts apply, with respect to the substantive aspects of the case. In applying this principle, ABP cases are generally treated as a single anti-doping rule violation based on samples collected over an extended period of time. In accordance with Rule 49.1, and given that in the particular case the athlete's alleged anti-doping rule violation would have occurred in 2009-2013, this arguably results in the application of Chapter 3 of the 2012 IAAF Rules (in force as of 1 November 2011) to substantive aspects of the case, unless an earlier version of the IAAF Rules can be shown to apply as *lex mitior*. Additionally, a 'fairness exception' inheres the 2012 IAAF Rules regarding assessment of sanctions. Accordingly, application of the 2012 IAAF Rules, which read literally do not require that sanctions be fair or proportionate, does not prejudice the athlete's case relative to the 2015 IAAF Rules (which include a fairness exception in explicit terms). Procedural matters are governed by regulations in force at the time of the procedural act in question, i.e., the 2016-2017 IAAF Rules.

3. Use of the ABP Analytical Model to demonstrate a high statistical likelihood of blood doping qualifies as a “*reliable method*” for the purposes of Rule 33.3. While it is true that an ABP analysis by its nature provides *indirect* evidence of doping practices, such evidence nevertheless can predict, with a high level of statistical confidence, abnormalities attributable to the use of doping agents – sufficient for a finding under the relevant standard of “*comfortable satisfaction*” that a rule violation has occurred. The IAAF Rules make clear that it is “*not necessary*” to establish “*intent, fault, negligence or knowing use*” in order to establish a violation of Rule 32.2(b). Accordingly, the rule can be understood to impose a strict liability on athletes for doping violations.
4. Rule 40.6 of the 2012 IAAF Rules imposes a period of ineligibility of four years (higher than the standard sanction of two years contemplated in Rule 40.2) for a violation of, *inter alia*, Rule 32.2(b), where the anti-doping rule violation is accompanied by “*aggravating circumstances*”. The use of a prohibited substance or prohibited method on multiple occasions and the commission of a “doping plan or scheme” constitute such aggravating circumstances.
5. Consistent with CAS jurisprudence on proportionality and the overriding requirement of fairness in interpreting and assessing sanctions under the IAAF Rules and Swiss law, it is not appropriate to disqualify all results of the athlete corresponding to the entire period encompassed by the latter’s eighteen ABP blood samples. This conclusion is buttressed by the absence of any abnormalities or anti-doping rule violations detected in respect of sixteen of the eighteen samples so collected.

I. BACKGROUND

A. The Parties

1. The International Association of Athletics Federations (“IAAF” or the “Claimant”) is the world governing body for athletics and is responsible for the regulation of international track and field. The IAAF has its registered seat in Monaco.
2. The Russian Athletics Federation (ARAF¹) (the “Russian Federation” or the “First Respondent”) is the national governing body for sport in Russia. It is the relevant Member Federation, currently suspended, of the IAAF for Russia. The First Respondent’s registered seat is in Moscow.

¹ The name “ARAF” was changed on 2 November 2016 to “RUSAF”. For the purposes of this award, the Sole Arbitrator uses the term “ARAF”, in use at the time of the alleged anti-doping rule violations.

3. Mr. Petr Trofimov (the “Athlete” or the “Second Respondent”, and collectively with the First Respondent, the “Respondents”) is an international-level Russian race walking athlete.

B. Background facts

4. This section sets forth a summary of relevant facts provided by the Claimant in its written submissions and factual exhibits attached thereto, and by the Second Respondent in his correspondence with the IAAF. It serves the purpose of factual synopsis only. To the extent they are necessary or relevant, additional facts are set out below. The present Award refers only to such evidence and arguments that provide indispensable explanation for its reasoning. Nevertheless, the Sole Arbitrator has considered all facts, claims, and legal arguments placed before him.
5. The present case concerns charges against the Athlete for alleged violations of Rule 32.2(b) of the IAAF Rules, concerning the “*Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method*”. In particular, the Claimant’s case against the Athlete revolves around a longitudinal analysis of Mr. Trofimov’s “*Athlete Biological Passport*” (“ABP”), a logbook of biological indicators which may serve as indirect evidence of blood doping by virtue of a longitudinal analysis of an athlete’s test scores; these scores are then compared against a statistical model that takes into account both the individual athlete’s historical results as well as the ordinary results expected within the general population (i.e., blood values reported by a large population of non-doped athletes). The ABP profile system was introduced by the IAAF in 2009.
6. From 13 August 2009 to 16 May 2015, the IAAF collected eighteen ABP blood samples from the Athlete. The samples were submitted to a WADA-accredited laboratory and, in keeping with standard practice, logged these samples and compared certain biological indicators – as explained further below – against levels ordinarily expected of Athletes free of the influence of prohibited substances.
7. Once processed, the ABP data were submitted to a panel of experts for anonymous review. The expert panel produced a joint opinion on 16 June 2016 (the “First Expert Panel Opinion”). The opinion concluded that there were multiple statistical “outliers” consistent with evidence of doping. In particular, and with specific respect to two of the thirteen samples (i.e., those collected on 13 August 2009 and 18 May 2013), the First Expert Panel Opinion observed:

In our view, the data of the athlete shows distinct indications of blood manipulation, namely an increased OFF score in samples 1 and 11. Such pattern is typically observed when the body’s blood cell mass has been supraphysiologically increased (high haemoglobin) and its own red blood cell production has subsequently been reduced (low reticulocytes) and results in a high OFF-score value. The configuration is characteristic of the use and discontinuation of an erythropoietic stimulant or the recent application of a blood transfusion. [...].
8. The First Expert Panel Opinion concluded that it was “*highly likely that a prohibited substance or prohibited method has been used and [...] it is unlikely that the [ABP analysis] is the result of any other cause*”.

9. On 20 June 2016, the IAAF informed the Athlete of the abnormalities detected in his ABP profile. The IAAF further informed Mr. Trofimov that he would be afforded an opportunity to submit comments on the ABP profile prior to any charges being brought against him. He was thereafter given a deadline of 4 July 2016 to do so.
10. On 2 July 2016, the Athlete submitted by e-mail an “Explanatory Note” dated 1 July 2016 (the “Athlete’s Explanation”), also enclosing certain medical documentation. In his note, the Athlete denied having used a prohibited substance or otherwise having engaged in prohibited conduct. He wrote:
 1. *Blood Sample of the 13th of August, 2009. Since 2007 I have some problems with my kidneys. The thing is that I got ill and was treated in hospital (clinical summary is attached). After being treated I went on training. On the background of active physical exertion I sometimes have got some pain in the kidneys and also I have got a temperature. Maybe my sickness has in some way influenced on the blood test. Also I often catch cold.*
 2. *Blood Sample of 18th of May, 2013. I can give the following explanation. In April 2013 before the European Cup in athletics I went to training camp in Kyrgyz Republic. I have been there for 28-30 days and lived at an altitude of 1600 meters above sea level. I trained there every day in the mountains and rose to a height of 2500 meters above sea level. Besides that I used a hypoxic tent at an altitude of 3000 meters above sea level during 2 hours a day in order to improve my endurance.*

So, I think, training process in the highland and using a hypoxic tent can be the reasons of changes of some parameters in [my] blood, particularly of increasing the level of haemoglobin in the blood.
11. On 19 July 2016, the previously constituted expert panel issued a second joint report (“Second Expert Panel Opinion”) considering, and rejecting, the affirmations of the Athlete’s Explanation. It reiterated the expert panel’s prior conclusion that it was “*highly likely the Athlete used a Prohibited Substance or Prohibited Method*”.
12. On 3 November 2016, and based on the conclusions of the expert panel in its two Opinions, the IAAF informed the Athlete that it considered the Athlete in violation of IAAF anti-doping provisions, particularly violation of Rule 32.2(b) of the 2016-2017 IAAF Competition Rules (the “IAAF Rules”). The IAAF additionally informed the Athlete of his immediate provisional suspension and that, in light of the Russian Federation’s suspension from the IAAF, his case would be referred to the Court of Arbitration for Sport (“CAS”). The Athlete was advised that his case could be referred to CAS pursuant either to the provisions of IAAF Rule 38.3 or Rule 38.19. He was offered an opportunity to comment. There appears to have been no response to this letter.

II. THE ARBITRAL PROCEEDINGS

A. The CAS Proceedings

13. On 6 December 2016, the IAAF filed a request with CAS for arbitration against the Russian Federation and the Athlete, pursuant to the Code of Sports-related Arbitration (the “CAS Code”).

14. In particular, the IAAF requested that the matter be heard by a sole arbitrator acting as a first instance body, and that, pursuant to Rule 38.3 of the IAAF Rules, the procedure be governed by CAS appeal arbitration rules. The IAAF indicated that its Request for Arbitration should be considered its Statement of Appeal and Appeal Brief for the purposes of the CAS Code.
15. On 9 December 2016, the CAS Court Office forwarded the Claimant's Request for Arbitration, including its exhibits, to the Respondents by DHL, directed to the First Respondent's mailing address, with the invitation to forward them to the Second Respondent as soon as possible. In addition, both Respondents were invited to communicate the postal address of the Second Respondent at their earliest convenience. The CAS Court Office explained that the dispute had been submitted to the CAS Ordinary Arbitration Division, but would be dealt with in accordance with the rules of the CAS Appeals Arbitration Division. The cover letter accompanying the submission was also submitted to an e-mail address on file for Mr. Trofimov.
16. By communication dated 20 January 2017, the CAS Court Office informed the parties, on behalf of the President of the CAS Ordinary Arbitration Division, that the Panel had been constituted as follows: Prof. Jan Paulsson, Sole Arbitrator.
17. On 25 January 2017, the CAS Court Office requested that (i) the First Respondent inform it of the date on which its letter of 9 December 2016 was received by the Second Respondent, and that (ii) the Parties communicate the personal mailing address of Mr. Trofimov by 30 January 2017. The First Respondent confirmed in an e-mail dated 27 January 2017 that the Athlete had confirmed (on 26 January 2017 by telephone) receipt of said correspondence. In a letter of the same date, the CAS Court Office reiterated its request that the parties confirm the Athlete's personal mailing address; the Claimant did so on 30 January 2017.
18. On 1 February 2017, the CAS Court Office (i) confirmed receipt of the mailing address of the Second Respondent, and (ii) deemed the Second Respondent to have received prior CAS correspondence of 9 December 2016 and 20 January 2017 by the date of 26 January 2017, and accordingly invited Mr. Trofimov to submit an Answer on or before 27 February 2017. This letter was delivered by DHL to the First Respondent's mailing address on 7 February 2017.
19. On 8 March 2017, the CAS Court Office invited the parties to indicate whether they wished a hearing to be held by 13 March 2017. It additionally noted the Athlete's failure to submit an Answer. In accordance with the deadline imposed by the CAS Court Office, the Claimant expressed its preference that an award be rendered solely on the basis of the Parties' written submissions on 13 March 2017. None of the Respondents expressed their view on this issue.
20. On 22 March 2017, the CAS Court Office confirmed that the Athlete, in light of his failure to submit an Answer in accordance with the applicable deadline, was deemed to have waived his right to submit an Answer.
21. The Order of Procedure was circulated on behalf of the Sole Arbitrator on 22 March 2017 (the "Order of Procedure"), and was accepted and signed by the IAAF on 27 March 2017.

The Respondents failed to sign. The Order of Procedure confirmed that the Sole Arbitrator deemed himself sufficiently informed to issue an award on the basis of the case file to date.

B. Positions of the Parties

22. The following section is a summary of the parties' positions only. It does not necessarily include every submission advanced by the Claimant or by the Athlete in their pleadings and/or correspondence to the Sole Arbitrator or to the IAAF. The Sole Arbitrator has considered all arguments presented to him.

a) *The Claimant's Position*

23. The Claimant maintains that the Sole Arbitrator has jurisdiction to hear the present dispute. In the view of the IAAF, (i) all formal procedural and substantive requirements under the applicable legal framework, i.e., the CAS Code and the IAAF Rules, have been met; and (ii) it is "plainly not necessary" to set or enforce a deadline for the Russian Federation, in light of its ongoing suspension from the IAAF, to convene a hearing prior to submitting this dispute to CAS.

24. With regard to the merits, the Claimant alleges that the Athlete has violated Rule 32.2(b) of the IAAF Rules. That rule simply reads:

(b) Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

25. In the Claimant's view, it is "*well settled in cases heard by CAS*" that the ABP model is a reliable means of establishing blood doping for the purposes of demonstrating a violation of the IAAF Rules. Values that are assessed under the ABP model include haemoglobin concentration ("HGB"); the percentage of reticulocytes, i.e., immature red blood cells ("RET percentages"); and so-called "OFF-scores", comprising the ratio between HGB and RET percentage values. OFF-scores, the IAAF notes, are "*sensitive to changes in erythropoiesis*", the stimulation of red blood cells resulting in artificially enhanced performance. A longitudinal assessment of these values and ratios among progressively collected blood samples can uncover patterns consistent with an athlete's administration of prohibited blood doping agents, including the sudden cessation of intake of such prohibited substances shortly before a competition in order to "*avoid detection at an in-competition doping control*".

26. The analysis of an ABP profile, the IAAF explains, takes four steps: (i) analysis of the Athlete's ABP results with the Adaptive Model, determining whether the Athlete's results are abnormal or normal; (ii) a detailed analysis of any abnormalities by a panel of three scientific experts; (iii) an opportunity to challenge any conclusions by such panel by the athlete concerned; and (iv) the initiation of disciplinary proceedings, should the expert panel conclude that it is "*highly likely*" that a violation occurred and it is "*unlikely*" that the athlete's profile was the result of "*any other cause*".

27. In the Athlete's case, the Claimant considers the ABP profile to demonstrate a high likelihood of blood doping, allowing the Athlete to increase stamina and performance through artificially induced erythropoiesis. The Claimant notes that four individual "outliers" were detected (two for each of the two samples previously mentioned, i.e., a high OFF-score and low RET percentage for sample 1 and high HGB and OFF-scores for sample 11). These outlying values were detected at a specificity of 99%. Both of these samples, moreover, were taken "on the eve of important competitions", i.e., the IAAF World Championships in Berlin and the European Race Walking Cup in Dudince, Slovakia. In the Claimant's view, these values are "symptomatic of the use and discontinuation" of a doping regime "in order artificially to boost red cell mass during competition".
28. The Claimant further submits that the conclusions contained in the First and Second Expert Panel Opinions amply demonstrate violations of Rule 32.2(b) of the IAAF Rules.
29. The Claimant draws special attention to the Second Expert Panel Opinion, which addressed, and dismissed, the purported explanations offered by Mr. Trofimov in his Explanation, dated 1 July 2016. The Second Expert Panel Opinion concluded:
- (i) With regard to the Athlete's reference to kidney problems: the expert panel considered that kidney disease typically results in reduced red blood cell counts (anaemia); the Athlete's profile, however, did not indicate "a remotely anaemic constellation". Indeed, the first sample taken from the Athlete following the date on which the Athlete began suffering from kidney problems, collected on 13 August 2009, indicated high levels of HGB, not low ones, and therefore showed "the opposite picture than would be expected". In any event, the expert panel noted that the kidney problems alleged by the Athlete occurred more than two years prior to the first blood sample's collection, speaking "against any causality" since such problems "usually resolv[e] within a few days under anti-biotic treatment".
 - (ii) With regard to high-altitude training and the use of a hypoxic tent: changes in blood values resulting from high-altitude exposure at the levels alleged (i.e., ranging from 1600m to 2500m) are typically "small and will cause distinct patterns" in a blood profile – i.e., a slight suppression of reticulocytes and "mildly elevated HGB, resulting in a slight increase in an athlete's OFF-score. To trigger such changes, however, exposure "for an extensive amount of time" at an altitude of more than 2000m, for "more than 10 hours per day over 21 days", is usually a "prerequisite" for such symptoms to arise. The Second Expert Panel Opinion noted that the Athlete does not allege exposure for such a long period of time. Even assuming such exposure, the panel considered that the abnormalities in Mr. Trofimov's OFF-score were "far beyond any changes potentially caused even by long term hypoxic exposure".
 - (iii) The expert panel considered that the Athlete's ABP profile showed a configuration "characteristic of the use and discontinuation of an erythropoietic stimulant or the recent application of a blood transfusion" and accordingly concluded that "it is highly likely the Athlete used a Prohibited Substance or Prohibited Method".
30. In light of the above, the Claimant submits that the results contained in Mr. Trofimov's ABP profile amply meet the standard of "comfortable satisfaction" that a sanctionable violation has occurred, as defined in Rule 33.1 of the IAAF Rules. Its prayers for relief are these:

- (i) *CAS has jurisdiction to decide on the subject matter of this dispute;*
- (ii) *The Request for Arbitration of the IAAF is admissible.*
- (iii) *The Athlete be found guilty of an anti-doping rule violation in accordance with Rule 32.2(b) of the IAAF Rules.*
- (iv) *A period of ineligibility of between two and four years be imposed upon the Athlete, commencing on the date of the (final) CAS Award. Any period of ineligibility or provisional suspension effectively served by the Athlete before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
- (v) *All competitive results obtained by the Athlete from 13 August 2009, through to the commencement of his provisional suspension on 3 November 2016, shall be disqualified, with all resulting consequences (including forfeiture of any titles, awards, medals, profits, prizes and appearance money).*
- (vi) *The arbitration costs be borne entirely by the First Respondent pursuant to Rule 38.3 of the IAAF Competition Rules or, in the alternative, by the Respondents jointly and severally.*
- (vii) *The IAAF is awarded a significant contribution to its legal costs.*

b) *The Positions of the Respondents*

ba) The Position of the First Respondent

31. The Russian Federation was notified of the Claimant's Request for Arbitration, and was given an opportunity to submit an Answer in connection with these proceedings to CAS. It has not, however, submitted an Answer or otherwise contested the merits of the present dispute brought by the IAAF. Accordingly, the First Respondent does not dispute the claims submitted.

bb) The Position of the Second Respondent

32. The Athlete was deemed to have waived his right to submit an Answer following the expiration of the CAS Court Office's deadline, as enunciated in its letter of 8 March 2017 and whose lapse was confirmed by CAS on 22 March 2017.
33. Nevertheless, the Second Respondent has submitted his positions on the ABP profile in his Athlete's Explanation, submitted via e-mail and dated 1 July 2016. The Sole Arbitrator takes this submission into account, the Athlete's effective renunciation of his right to submit a formal Answer notwithstanding.
34. The content of the Athlete's Explanation is described in connection with the factual background of this case. In summary:
- (i) the Athlete does not contest the ABP profile laboratory results indicating the presence of "outliers" such as abnormally high levels of HGB and OFF-scores, as well as low RET percentages, in two blood samples collected in 2009 and 2013;

(ii) the Athlete nevertheless alleges that these levels are attributable to factors unrelated to the presence of prohibited substances or prohibited conduct. Specifically, he alleges kidney problems and, in the case of the second of the two samples, high-altitude training and use of a hypoxic tent as the causal factors for any abnormalities detected.

35. Accordingly, Mr. Trofimov contests the Claimant's conclusions. However, the Athlete does not comment on the arguments contained in the Second Expert Panel Opinion. He neither contests the Sole Arbitrator's jurisdiction, nor the probative value of ABP analysis for demonstrating violations of the IAAF Rules.

III. LEGAL ANALYSIS

A. Jurisdiction

36. Rule 38.3 of the IAAF Rules states, in relevant part:

If a hearing is requested by an Athlete, it shall be convened without delay and the hearing completed within two months of the date of the notification of the Athlete's request to the Member [...]. If the Member fails to complete a hearing within two months, or, if having completed a hearing, fails to render a decision within a reasonable time period thereafter, the IAAF may impose a deadline for such event. If in either case the deadline is not met, the IAAF may elect, if the Athlete is an International-Level Athlete, to have the case referred directly to a single arbitrator appointed by CAS. The case shall be handled in accordance with CAS rules (those applicable to the appeal arbitration procedure without reference to any time limit for appeal). The hearing shall proceed at the responsibility and expense of the Member and the decision of the single arbitrator shall be subject to appeal to CAS in accordance with Rule 42.

37. The Russian Federation's membership in IAAF was suspended during the IAAF Council meeting on 26 November 2015 in Monaco; the suspension remains in place today. Accordingly, the Russian Federation was not in a position to convene a hearing in respect of the IAAF's investigation of Mr. Trofimov. Indeed, no national entity within the Athlete's Member State has jurisdiction under the IAAF Rules to conduct a hearing in this case. In these circumstances, the Sole Arbitrator accepts the submission of the Claimant that it was "*plainly not necessary*" to impose a deadline on ARAF prior to referring the dispute to CAS.

38. The Athlete is an International-Level Athlete, and is therefore eligible to have his case referred to a single arbitrator in accordance with Rule 38.3 of the IAAF Rules.

39. CAS therefore has jurisdiction over the dispute.

B. Admissibility

40. The Claimant's Request for Arbitration complies with all procedural and substantive requirements of the CAS Code. Neither Respondent disputes the admissibility of the IAAF's claims. Accordingly, the Sole Arbitrator deems the claims admissible.

C. Appeal Arbitration Procedure

41. Rule 38.3 of the IAAF Rules states that the procedure in these proceedings is to be governed by those CAS Rules “applicable to the appeal arbitration procedure” with the exception of provisions relating to “time limit for appeal”. Accordingly, Rules 47 et seq. of the CAS Code apply to these proceedings.

D. Applicable Law

42. The IAAF has cited to the 2016-2017 edition of the IAAF Rules (with an effective date of November 2015). To the extent that the IAAF Rules do not speak to a relevant issue, the IAAF submits that Monegasque law shall apply to the question, in accordance with Rule 42.24 of the IAAF Rules.

43. Neither the Russian Federation nor the Athlete has made submissions as to applicable law.

44. Article R58 of the CAS Code reads:

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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

45. It is not in dispute that the IAAF Rules, with Monegasque law applying on a subsidiary basis, govern these proceedings.

46. The Claimant has suggested that the evidence on record indicates anti-doping rule violations ranging (at least) from 2009 to 2013. It submits that the IAAF Rules in force during this time were materially identical and therefore cites from the 2012-2013 IAAF Rules (in force as of 1 November 2011) (“2012 IAAF Rules”).

47. In accordance with the principle of *tempus regit actum*, those regulations in force at the time of the alleged acts apply, with respect to the substantive aspects of the case. In applying this principle, the Sole Arbitrator is mindful that ABP cases are generally treated as a single anti-doping rule violation based on samples collected over an extended period of time. The Sole Arbitrator agrees with the IAAF that the 2012 IAAF Rules do not contain any material changes relative to prior versions applicable between 13 August 2009 and 18 May 2013. Since the 2016-2017 IAAF Rules are in force today, however, the Sole Arbitrator considers whether the 2012 IAAF Rules or a later version apply.

48. Rule 49.1 of the 2016-2017 IAAF Rules, which are applicable to procedural questions, provides the following with respect to the IAAF Rules’ retroactive application:

Non-retroactive except for Rule 40.8(e) and Rule 47, or unless the principle of Lex Mitior applies:

*[W]ith respect to any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred unless the panel hearing the case determines the principle of *lex mitior* appropriately applies in the circumstances of the case.*

49. The present dispute was brought after the Effective Date of the 2016-2017 IAAF Rules. In accordance with Rule 49.1, and given that the Athlete's alleged anti-doping rule violation would have occurred in 2009-2013, this arguably results in the application of Chapter 3 of the 2012 IAAF Rules (in force as of 1 November 2011) to substantive aspects of the case, unless an earlier version of the IAAF Rules can be shown to apply as *lex mitior*.
50. In this case, the Sole Arbitrator holds that that the 2012 IAAF Rules are the *lex mitior*. Should the Athlete be found guilty of an anti-doping rule violation, Rule 40 of those rules prescribes a standard period of ineligibility of anywhere between two to four years in duration; in contrast, the 2015 and 2016-2017 IAAF Rules both impose a four-year period of ineligibility². Additionally, and as will be explained further below (cf. paras. 64 et seq. of this Award), the Sole Arbitrator deems that a 'fairness exception' inheres the 2012 IAAF Rules regarding assessment of sanctions. Accordingly, application of the 2012 IAAF Rules, which read literally do not require that sanctions be fair or proportionate, does not prejudice the Athlete's case relative to the 2015 IAAF Rules (which include a fairness exception in explicit terms).
51. Accordingly, the Sole Arbitrator is satisfied that the principle of *lex mitior* also requires the application of the 2012 IAAF Rules, rather than a later version, to the dispute's substantive aspects. Procedural matters are governed by regulations in force at the time of the procedural act in question, i.e., the 2016-2017 IAAF Rules.

E. Analysis of the Merits

52. The Athlete is charged by the Claimant with violations of Rule 32.2(b) of the IAAF Rules. The Claimant further requests that a period of ineligibility of up to four years be imposed on the Athlete, commencing on the date of this Award, with Mr. Trofimov's provisional suspension being credited against any total period of ineligibility. The Second Respondent denies that his ABP profile owes to a pattern of blood doping; the First Respondent expressed no view on the matter.
53. The Sole Arbitrator recalls, in this regard, Rule 33 of the IAAF Rules, which provides that the Claimant "*shall have the burden of establishing that an anti-doping rule violation has occurred*". Rule 33 further states that such burden requires establishing an anti-doping violation "*to the comfortable satisfaction of the relevant hearing panel [...] greater than a mere balance of probability but less than proof beyond a reasonable doubt*". The Claimant's burden may be established through facts obtained "*by any reasonable means*".

² See, e.g., CAS 2016/O/4464, para. 78.

a) Rule 32.2(b)

54. Rule 32.2(b) of the IAAF Rules prohibits “*use or attempted use*” of such prohibited substances. The Sole Arbitrator notes that violations of Rule 32.2(b), under Rule 33.3, permits proof of a violation by “*reliable means*” including “*conclusions drawn from longitudinal profiling and other analytical information*”.
55. In the Sole Arbitrator’s view, use of the ABP Analytical Model to demonstrate a high statistical likelihood of blood doping qualifies as a “*reliable method*” for the purposes of Rule 33.3. While it is true that an ABP analysis by its nature provides *indirect* evidence of doping practices (as opposed to a direct laboratory analysis of doping agents in individual blood samples), such evidence nevertheless can predict, with a high level of statistical confidence, abnormalities attributable to the use of doping agents – sufficient for a finding under the relevant standard of “*comfortable satisfaction*” that a rules violation has occurred. This conclusion is amply supported by CAS jurisprudence³.
56. The Sole Arbitrator additionally notes that it is “*each Athlete’s personal duty to ensure that no Prohibited Substance enters his body*”. The IAAF Rules make clear that it is “*not necessary*” to establish “*intent, fault, negligence or knowing use*” in order to establish a violation of Rule 32.2(b). Accordingly, the rule can be understood to impose a strict liability on athletes for doping violations.
57. In the present instance, the Athlete’s ABP profile demonstrates highly abnormal results for several biological markers in samples 1 and 11 of his biological passport, dated 13 August 2009 and 18 May 2013, respectively. As noted convincingly in the First Expert Panel Opinion, the Athlete’s high HGB and Off-scores, in addition with low RET percentages at a level of statistical significance of 99% or higher, indicates a strong likelihood of artificial enhancement of the Athlete’s red blood cells. The dates on which these samples were collected coincide with international competitions in which the Athlete took part. The Athlete’s explanations for the detected abnormalities, moreover, were considered and rejected in the Second Expert Panel Opinion.
58. The Athlete did not exercise his right to respond to the Second Expert Panel Opinion in the form of an Answer, nor has he disputed the ABP profile results. In light of the Second Expert Panel Opinion, the Sole Arbitrator considers the explanations advanced by the Athlete for the abnormalities detected in his ABP profile to be unconvincing. Indeed, as the expert panel makes clear, even if the premises in the Athlete’s Explanation are accepted entirely at face value, they cannot convincingly account for the specific abnormalities detected in the Athlete’s blood samples – results which Mr. Trofimov does not purport to contest.
59. In these circumstances, the Sole Arbitrator accepts the conclusions of the First and Second Expert Panel Opinions, namely that it is highly likely that the Athlete’s ABP profile results are attributable to blood doping as defined and sanctioned under the IAAF Rules. Accordingly,

³ See, e.g., TAS 2010/A/2178, paras. 14-22; CAS 2012/A/2773, paras. 13, 90; CAS 2016/O/4464, paras. 148 et seq. Cf. CAS 2010/A/2235, para. 30.

he considers that the IAAF has discharged its burden of establishing a violation of Rule 32.2(b) of the IAAF Rules.

b) *Period of Ineligibility*

60. The Second Athlete having been found in violation of Rule 32.2(b) of the IAAF Rules, the Sole Arbitrator now turns to the sanction to be imposed.

61. Rule 40.6 of the IAAF Rules imposes a period of ineligibility of four years (higher than the standard sanction of two years contemplated in Rule 40.2) for a violation of, *inter alia*, Rule 32.2(b), where the anti-doping rule violation is accompanied by “*aggravating circumstances*”. It states:

Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the Athlete or other Person used or possessed multiple Prohibited Substances or Prohibited Methods or used or possessed a Prohibited Substance or Prohibited Method on multiple occasions [...].

62. In the present case, the Claimant submits that there are two categories of possible aggravating circumstances: the use of a prohibited substance or prohibited method on multiple occasions, and the commission of a doping “*plan or scheme*”. The Sole Arbitrator is satisfied that samples 1 and 11 of the Athlete’s ABP profile indicate, to his “*comfortable satisfaction*”, the use of prohibited substances. Moreover, in light of the dates on which these two samples were collected, the evidence indicates artificial augmentation of red blood cell mass in proximity to competitions spaced nearly four years apart from each other. Accordingly, pursuant to the operation of Rule 40.6 of the IAAF Rules, “*aggravating circumstances*” justify the imposition of a period of ineligibility of four years for the Athlete’s violation of Rule 32.2(b).

63. The Sole Arbitrator finds that for practical reasons and in order to avoid any possible misunderstanding the period of ineligibility shall start on 3 November 2016, the date of commencement of the provisional suspension, and not on the date of the award.

c) *Disqualification of Results*

64. Rule 40.8 of the 2012 IAAF Rules states that, in addition to the “*automatic disqualification*” of results of the competitions producing a positive sample, “*all other competitive results obtained from the date the [...] anti-doping rule violation occurred through to the commencement of any Provisional Suspension or Ineligibility period*” are to be disqualified, “*with all resulting consequences*”, including the forfeiture of titles, awards, medals, points, and prize and appearance money.

65. Equally, however, the Sole Arbitrator notes that the ABP profile results do no more than demonstrate evidence of doping on and/or between the dates of the two samples subject to the conclusions embodied in the First and Second Expert Panel Opinions, i.e., 13 August 2009 and 18 May 2013. No similar evidence has been proffered by the Claimant in regard to the other sixteen samples contained in the Athlete’s ABP profile.

66. The Sole Arbitrator observes that the investigation and adjudication process was only initiated by the Claimant on 3 November 2016, nearly four months after the publication of the First Expert Panel Opinion and nearly eighteen months after the final sample in the Athlete's ABP profile was collected, i.e., 16 May 2015. Consistent with CAS jurisprudence on proportionality and the overriding requirement of fairness in interpreting and assessing sanctions under the IAAF Rules and Swiss law⁴, the Sole Arbitrator does not consider it appropriate to disqualify all results of the Athlete corresponding to the entire period encompassed by Mr. Trofimov's eighteen ABP blood samples. This conclusion is buttressed by the absence of any abnormalities or anti-doping rule violations detected in respect of sixteen of the eighteen samples so collected, including the time period subsequent to the date of the collection of sample no. 11: that is, from 18 May 2013 to 16 May 2015 (the date of the final sample).
67. Accordingly, and finding that no reasons exist to merit a contrary conclusion, the Sole Arbitrator considers that all competitive results of the Athlete from 13 August 2009 to 18 May 2013, inclusive, shall be disqualified.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. CAS has jurisdiction to hear this dispute and the claims submitted to it are admissible;
2. Mr. Petr Trofimov has violated Rule 32.2(b) of the IAAF Rules;
3. A period of ineligibility of four (4) years is imposed on Mr. Petr Trofimov commencing from 3 November 2016;
4. All competitive results obtained by Mr. Petr Trofimov from 13 August 2009 through 18 May 2013, inclusive, are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes);
5. (...);
6. (...);
7. All other motions or prayers for relief are dismissed.

⁴ See, e.g., CAS 2005/A/830, paras. 44 et seq.; CAS 2005/C/976 & 986, paras. 139, 140, 143, 145-158; CAS 2006/A/1025, paras. 11.7.9 et seq.; TAS 2007/A/1252, paras. 33-40.