



Arbitration CAS 2016/A/4703 Lyukman Adams, Kseniya Aksyonova, Tatyana Arkhipova, Victor Butenko, Timofey Chalyy, Elena Cherniaeva (Kozlova), Dmitriy Chizhikov, Artem Denmukhametov, Gulshat Fazlitdinova, Aleksey Fedorov, Ekaterina Galitskaia, Georgy Gorokhov, Elena Isinbaeva, Pavel Ivashko, Oxana Kondratyeva, Ekaterina Koneva, Vasilii Kopeikin, Elena Korobkina, Ilya Krasnov, Vladimir Krasnov, Antonina Krivoshapka, Maria Kuchina, Denis Kudryavtsev, Anna Kukushkina, Alla Kuliatina, Alexandr Lesnoi, Sergej Litvinov, Danil Lysenko, Yuliya Maltseva, Alena Mamima, Nikolay Markov, Aleksandr Menkov, Anna Misochenko, Olga Mullina, Marina Pandakova, Elena (Yuelena) Panova, Marina Panteleyeva, Yulia Pidluzhnaya, Evgeniya Polyakova, Sergey Polyanskiy, Mariya Ponomareva, Alina Prokopeva, Vera Rebrik (Rebryk), Ekaterina Renzhina, Aleksey Reunkov, Vera Rudakova, Ilgizar Safiullin, Ivan Shablyuev (Shablyuyev), Sergey Sharypov, Anna Shchagina, Ilya Shkurenov, Sergey Shubenkov, Maksim Sidorov, Anzhelika Sidorova, Kristina Sivkova, Aleksei Sokirskii, Ekaterina Sokolenko, Ekaterina Strokova, Dmitri Tarabin, Irina Tarasova, Pavel Trenikhin, Sardana Trofimova, Daniil Tysplakov, Ivan Ukhov, Roman Yevstifeyev, Svetlana Vasilyeva, Natalia Vlasova v. The International Association of Athletics Federations (IAAF), award of 14 October 2016 (operative part of 21 July 2016)

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Jeffrey Benz (USA); The Hon. James Robert Reid QC (United Kingdom)

*Athletics*

*Application of Rule 22.1A(b) IAAF Competition Rules regarding eligibility for the Olympic Games*

*Arbitration agreement and choice of law*

*Burden of proof in case of alleged incorrect application of a rule (Rule 22.1A(b) IAAF Competition Rules)*

*Retroactive criteria*

*Rule 22.1A(b) IAAF Competition Rules*

1. If the parties to CAS arbitration agree in an arbitration agreement that the governing law of the arbitration shall be the general principles of law common to civil law and common law systems as referenced in an earlier CAS decision, in accordance with Article R45 of the Code of Sports-related Arbitration (the “Code”) such general principles shall apply in addition to the rules applicable according to Article R58 of the Code.
2. If in a CAS appeal of several athletes the CAS panel is requested to review the proper actual interpretation and application by a first instance body of a certain rule (here: Rule 22.1A(b) of the IAAF Competition Rules) with respect to issues common to all the athletes, and if the burden of proving that the conditions of the rule are satisfied lies with the athletes, the athletes have to provide evidence or argument that, had the rules been properly interpreted, they would have fulfilled the criteria foreseen by the rule in question. In the absence of any such evidence or argument the CAS panel cannot grant the relief of the athletes to declare that they have fulfilled the criteria.

3. **In general the use of retroactive criteria (*e.g.* in order to determine the eligibility of an athlete to compete in international competitions) is to be avoided as unfair and contrary to fundamental notions of due process and good sportsmanship. However, a decision passed by a first instance tribunal applying the retroactive criteria is not invalid if in the individual case, the person concerned by the first instance decision does not adduce evidence that the application of differently set criteria would have been favourable for it.**
4. **Rule 22.1A of the IAAF Competition Rules is a permissive provision insofar as it does not impose ineligibility but rather allows eligibility to be regained if specific conditions are satisfied. As a result, its application cannot be construed as a sanction for the athlete concerned. Furthermore, according to the Guidelines as to the application of Rule 22.1A of the IAAF Competition Rules, the Doping Review Board is mandated to verify the criteria it deems relevant to the case considered, and is not requested to assess every single factor mentioned in Section 7 of the Guidelines. It is therefore possible that in a particular case *e.g.* only the fact whether an athlete had lived and had been tested in a specific country during the period defined as relevant turns out to be decisive in light of the specific circumstances of that case.**

## **I. PARTIES**

1. The appellants are 67 individual athletes of Russian nationality (the “Athletes” or the “Appellants”): Lyukman Adams, Kseniya Aksyonova, Tatyana Arkhipova, Victor Butenko, Timofey Chalyy, Elena Cherniaeva (Kozlova), Dmitriy Chizhikov, Artem Denmukhametov, Gulshat Fazlitdinova, Aleksey Fedorov, Ekaterina Galitskaia, Georgy Gorokhov, Elena Isinbaeva, Pavel Ivashko, Oxana Kondratyeva, Ekaterina Koneva, Vasilii Kopeikin, Elena Korobkina, Ilya Krasnov, Vladimir Krasnov, Antonina Krivoshapka, Maria Kuchina, Denis Kudryavtsev, Anna Kukushkina, Alla Kuliatina, Alexandr Lesnoi, Sergej Litvinov, Danil Lysenko, Yuliya Maltseva, Alena Mamima, Nikolay Markov, Aleksandr Menkov, Anna Misochenko, Olga Mullina, Marina Pandakova, Elena (Yuelena) Panova, Marina Panteleyeva, Yulia Pidluzhnaya, Evgeniya Polyakova, Sergey Polyanskiy, Mariya Ponomareva, Alina Prokopeva, Vera Rebrik (Rebryk), Ekaterina Renzhina, Aleksey Reunkov, Vera Rudakova, Ilgizar Safiullin, Ivan Shablyuev (Shablyuyev), Sergey Sharypov, Anna Shchagina, Ilya Shkurenev, Sergey Shubenkov, Maksim Sidorov, Anzhelika Sidorova, Kristina Sivkova, Aleksei Sokirskii, Ekaterina Sokolenko, Ekaterina Strokova, Dmitri Tarabin, Irina Tarasova, Pavel Trenikhin, Sardana Trofimova, Daniil Tysplakov, Ivan Ukhov, Roman Yevstifeyev, Svetlana Vasilyeva, Natalia Vlasova), affiliated to the Russian athletics federation (ARAF, now RusAF), a member of the International Association of Athletics Federation.
2. The respondent is the International Association of Athletics Federation (the “Respondent” or “IAAF”), the world governing body for track and field, recognized as such by the International

Olympic Committee (“IOC”). One of its responsibilities is the regulation of track and field, including, under the World Anti-Doping Code (“WADC”), the running and enforcing of an anti-doping programme consistent with the WADC. The IAAF is also subject to the provisions of the *Olympic Charter*.

## II. FACTUAL BACKGROUND

### A. Introductory Remark

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 for the case.
4. In this regard, the Panel wishes to point out that the case heard, and the award it renders, is not about “collective punishment” of the Athletes – a measure on which the Panel expresses no view. It is also not about the presumption of guilt of innocent athletes. It is only about the applicability (and indeed the application) of specific rules within the IAAF system and in the *Olympic Charter*, regarding the possibility for the athletes affiliated to a national federation suspended by IAAF to gain eligibility to compete at international competitions, including the Olympic Games, under those rules. The question whether the Athletes are directly or indirectly responsible for anti-doping rule violations, because of their actions, omissions or nationality, is not the object of this award and was not before the Panel.

### B. Events in 2015

5. On 2 November 2015, ARAF (the All-Russia Athletics Federation) became RusAF (the Russian Athletics Federation). The CAS Panel will refer to the Russian federation as RusAF except where ARAF was used in contemporaneous documents.
6. On 9 November 2015, an independent commission (“IC”) presided over by Mr Richard Pound QC submitted a report to the President of the World Anti-Doping Agency (“WADA”). The IC’s mandate was the examination of allegations made on television programs aired by the German television channel ARD, with particular reference to athletics in Russia and the IAAF. Amongst several recommendations made against various bodies, the report recommended that WADA should immediately declare ARAF to be non-compliant with the WADC.
7. On 13 November 2015, the IAAF Council provisionally suspended ARAF with immediate effect under Articles 6.11(b) and 14.7 of the IAAF Constitution. At the same time, it was decided that in order to regain full membership ARAF would need to satisfy a list of criteria, to be verified by a task force specifically appointed for such purpose (the “Taskforce”). The

consequences of the suspension were described to be the following:

- *athletes, and athlete support personnel from Russia may not compete in International Competitions including World Athletics Series competitions and the Olympic Games;*
- *Russia will not be entitled to host the 2016 World Race Walking Team Championships (Cheboksary) and 2016 World Junior Championships (Kazan);*
- *that ARAF delegates the conduct of all outstanding doping cases to [the Court of Arbitration for Sport] CAS”.*

8. On 25 November 2015, Mr Mikhail Butov, the General Secretary of ARAF, wrote to Mr Nick Davies, the Deputy General Secretary of the IAAF. By that letter, ARAF accepted their suspension from the IAAF. It did not seek a hearing in relation to the same.
9. On 26 November 2015, the IAAF Council confirmed the full suspension of ARAF.
10. On 11 December 2015, the Taskforce’s terms of reference were posted on the IAAF’s website. Various conditions were set out for the reinstatement of RusAF (the “Reinstatement Conditions”). Verification criteria (the “Verification Criteria”) were set out in an annex.

### **C. Events in 2016**

11. On 17 June 2016, the IAAF Council stated in a press release that Mr Rune Andersen, an independent chairperson of the Taskforce monitoring RusAF, had recommended that RusAF should not be reinstated to membership of the IAAF because several important Verification Criteria had not been met, specifically:
  - a. the deep-seated culture of tolerance (or worse) for doping that led to RusAF being suspended in the first place appeared not to have changed materially;
  - b. a strong and effective anti-doping infrastructure capable of detecting and deterring doping had still not been created;
  - c. there were detailed allegations, which were already partly substantiated, that the Russian authorities, far from supporting the anti-doping effort, had in fact orchestrated systematic doping and the covering up of adverse analytical findings.
12. As a result, the IAAF Council decided not to reinstate RusAF to IAAF membership. The consequence, said the IAAF Council, was that Russian athletes remained ineligible under IAAF rules to compete in international competitions (the “International Competitions”), as defined in the IAAF Competition Rules, edition 2015-2016 (the “Competition Rules”), including the European Championships and the track and field events at the 2016 Olympic Games in Rio de Janeiro, Brazil (the “Rio Olympic Games” or the “2016 Olympic Games”).
13. On the same day, the IAAF Council passed a rule amendment to the effect that, if there were any individual athletes who could clearly and convincingly show that they were not tainted by

the Russian system because they had been outside the country, and subject to other, effective anti-doping systems, including effective drug-testing, then they should be able to apply for permission to compete in International Competitions, not for Russia but as a neutral athlete. Further, the IAAF Council recommended that any individual athlete who had made an extraordinary contribution to the fight against doping in sport should also be able to apply for permission to compete in International Competitions (as a neutral athlete).

14. For such purposes, the IAAF Council decided to amend the Competition Rules, adopting a new rule, namely Rule 22.1A, and adding a new definition of “*Neutral Athlete*”.
15. As a result of such modifications, the pertinent provisions of the Competition Rules state as follows:

#### DEFINITIONS

##### *Neutral Athlete*

*As specified in Rule 22.1A, an athlete who is granted special eligibility by the Council to compete in one or more International Events in an individual capacity and who satisfies at all relevant times any conditions to such eligibility specified by the Council. All provisions in the Rules and Regulations that are applicable to athletes shall apply equally to Neutral Athletes, unless expressly stated otherwise; and any coach, trainer, manager, Athlete Representative, agent, team staff, official, medical or para-medical personnel, parent or any other Person employed by or working with a Neutral Athlete participating in an International Competition shall be an Athlete Support Personnel for purposes of these Rules.*

#### RULE 22 Ineligibility for International and Domestic Competitions

1. *The following persons shall be ineligible for competitions, whether held under these Rules or the rules of an Area or a Member. Any athlete, athlete support personnel or other person:*
  - (a) *whose National Federation is currently suspended by the IAAF. This does not apply to national competitions organised by the currently suspended Member for the Citizens of that Country or territory;*
  - [...].
- 1A. *Notwithstanding Rule 22.1(a), upon application, the Council (or its delegate(s)) may exceptionally grant eligibility for some or all International Competitions, under conditions defined by the Council (or its delegate(s)), to an athlete whose National Federation is currently suspended by the IAAF, if (and only if) the athlete is able to demonstrate to the comfortable satisfaction of the Council that:*
  - (a) *the suspension of the National Federation was not due in any way to its failure to protect and promote clean athletes, fair play, and the integrity and authenticity of the sport; or*
  - (b) *if the suspension of the National Federation was due in any way to its failure to put in place adequate systems to protect and promote clean athletes, fair play, and the integrity and authenticity of the sport, (i) that failure does not affect or taint the athlete in any way, because he was subject to other, fully adequate, systems outside of the country of the National Federation for a sufficiently long period to provide substantial objective assurance of integrity; and (ii) in particular the athlete has for such period been subject to fully compliant drug-testing in- and out-*

*of-competition equivalent in quality to the testing to which his competitors in the International Competition(s) in question are subject; or*

- (c) *that the athlete has made a truly exceptional contribution to the protection and promotion of clean athletes, fair play, and the integrity and authenticity of the sport.*

*The more important the International Competition in question, the more corroborating evidence the athlete must provide in order to be granted special eligibility under this Rule 22.1A. Where such eligibility is granted, the athlete shall not represent the suspended National Federation in the International Competition(s) in question, but rather shall compete in an individual capacity, as a “Neutral Athlete”.*

16. The Panel will refer to Rules 22.1(a) and 22.1A, and to the definition of “Neutral Athlete”, as the “Contested Rules”.
17. On 23 June 2016, the IAAF provided guidelines as to the application of Rule 22.1A (the “Guidelines”). The Guidelines included the following:
- “7. *Where the application is made pursuant to Competition Rule 22.1A(b), the Doping Review Board shall consider all such factors as it deems relevant, which may include (without limitation):*
  - 7.1 *The nature and extent of the applicant’s contacts with officials, coaches, doctors, other support persons, and other appointees or representatives of his/ her (now suspended) National Federation, and the period over which those contacts occurred.*
  - 7.2 *Any intelligence, investigation(s), and/or results management impacting upon or implicating the applicant.*
  - 7.3 *Whether any coach, doctor or other support person with whom the applicant has worked has ever been implicated in the commission of any anti-doping rule violation(s).*
  - 7.4 *Whether any samples previously provided by the applicant are currently in storage and/ or subject to re-testing.*
  - 7.5 *What, in all of the circumstances of the case, including the nature and timing of the International Competition(s) for which eligibility is sought, is a ‘sufficiently long period’ for the athlete to have been subject to other (fully adequate) anti-doping systems outside of the country of his/ her National Federation for purposes of Rule 22.1A(b) (the ‘Relevant Period’).*
  - 7.6 *The extent to which the applicant was outside of the country of his/ her National Federation during the Relevant Period, and why (in particular, was he/ she outside of the country in an individual capacity, or was he/ she under the control or supervision of the National Federation, for example, as part of a team or delegation representing the National Federation, or attending a training camp organised by the National Federation?).*
  - 7.7 *Whether the applicant was subject to other, fully adequate anti-doping systems outside of the country of the National Federation throughout the Relevant Period. Were there any times during that period when he/ she was not subject to testing?*
  - 7.8 *In particular, whether the applicant was in a Registered Testing Pool or providing other whereabouts during that period, and (if so) to whom, and what was the quality of that whereabouts information*

(e.g., how many unsuccessful attempts were made to test the applicant, were any whereabouts failures declared against the applicant?).

- 7.9 How much in-competition testing and how much out-of-competition testing did the applicant undertake during the Relevant Period outside of the country of his/her (suspended) National Federation, including (a) how many urine samples and how many blood samples, (b) how many Athlete Biological Passport (ABP) samples, (c) who were the testing authorities, and (d) where were the samples sent for analysis?
- 7.10 How comparable is that testing, qualitatively, to the testing to which the applicant's prospective competitors in the International Competition(s) in question have been subjected during the same period?
- 7.11 Where the applicant has been subjected to ABP testing, have any concerns been raised about his/her ABP profile (steroidal and/or haematological modules)?".
18. On 24 June 2016, the IAAF wrote to RusAF confirming the decisions which the IAAF Council had taken on 17 June 2016.
19. The IAAF granted all Russian track and field athletes until 4 July 2016 to file an application under Rule 22.1A. All of the Appellants filed applications within time.
20. On 9 July 2016, the IAAF Doping Review Board (the "DRB") adopted decisions rejecting all of the Appellants' applications (the "Decisions"). The application of Ms Darya Klishina (who is not one of the Appellants, but is a Claimant in the Claim, as defined below: § 26) was accepted by the DRB.
21. In the Decisions, the DRB came to the following conclusions:
- a. the "Relevant Period" (as defined in the Guidelines), *i.e.*, the period for which the athlete concerned had to show that he had been subject to other fully adequate anti-doping systems outside of the country of his national federation, was the period starting from 1 January 2014 up to 9 July 2016;
  - b. "adequate systems of testing" meant systems which were "fully compliant with the mandatory sample collection procedures set out in the WADA International Standard for Testing & Investigations (ISTI) and with the mandatory sample analysis procedures set out in the WADA International Standard for Laboratories (ISL)";
  - c. as a result, the athlete concerned had to show that during the "Relevant Period" he had been subject to fully compliant drug-testing in- and out-of-competition qualitatively equivalent to that of his prospective competitors, with more reliance placed on out-of-competition than on in-competition testing;
  - d. based on the IC's findings and the Taskforce's report of 17 June 2016, no assurance at all could be taken from:
    - i. the anti-doping systems maintained by or on behalf of ARAF/RusAF, the Russian National Anti-Doping Agency ("RUSADA") and/or the Russian

- Ministry of Sport during the “*Relevant Period*”; or
- ii. the drug testing that the IAAF (or any other organisation) conducted in Russia during the “*Relevant Period*”, to the extent that the samples that were collected were sent to the Moscow laboratory for analysis.
22. As a result, based on the analysis of the individual case of the Athletes, all the Decisions came to the following conclusion
- “20. ... *the Doping Review Board is not comfortably satisfied that during the Relevant Period the [Athlete]:*
- a. *was subject to other, fully adequate systems outside of Russia for a sufficiently long period to provide substantial objective assurance of integrity; and*
  - b. *that the [Athlete] has for such period been subject to fully compliant drug-testing in- and out-of-competition equivalent in quality to the testing to which his prospective competitors have been subject in that period.*
21. *Accordingly the [Athlete]’s application under IAAF Competition Rule 22.1A(b) for exceptional eligibility to compete in International Competitions, including the Athletics competition in the 2016 Olympic Games, is DENIED. ...”.*

### III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT (“CAS”)

23. On 2 July 2016, the parties, together with the Russian Olympic Committee (“ROC”) and Ms Darya Klishina, entered into an “Arbitration Agreement” (the “Arbitration Agreement”) under which they agreed to submit the dispute, which had arisen between them as to a number of issues, to arbitration at the Court of Arbitration for Sport (“CAS”) pursuant to Article R38 of the Code of Sports-related Arbitration (the “Code”), for adjudication according to an expedited procedure.
24. In the Arbitration Agreement the parties agreed *inter alia* that the Panel would be constituted as follows: Mr Luigi Fumagalli (President); Mr Jeffrey Benz and His Honour Robert Reid QC (Arbitrators).
25. In addition to the disputed issues set out at Article 2 (§26 below), which are the subject of a separate award, the Arbitration Agreement also conferred on the Panel jurisdiction to determine appeals of the Decisions. Article 12 of the Arbitration Agreement in that regard stated that:

*“Each Claimant Athlete has agreed that, if he/ she has applied for eligibility under IAAF Competition Rule 22.1A and his/ her application has been denied, he/ she may not appeal that denial on any grounds that conflict with CAS Panel’s Award. If he/ she wishes to appeal such denial on any other grounds, he/ she must submit a statement of appeal, setting out the grounds, to the CAS, with a copy simultaneously by email to the IAAF, by no later than 5pm UK time on Friday 15 July 2016, and the CAS Panel will hear and determine such appeal as part of these proceedings. If the deadline for appeal is not met, then as long as the decision to deny the application was notified to him/ her by midnight on Saturday 9 July 2016, the right of appeal will be deemed waived”.*

26. On 3 July 2016, the Appellants, together with the ROC and Ms Darya Klishina (the Appellants and Ms Klishina are the “Claimant Athletes”; the Claimant Athletes and ROC are the “Claimants”), filed with CAS as claimants a Request for Arbitration and Statement of Claim (the “Claim”, registered as CAS 2016/O/4684, and object of a separate award), in essence to challenge the Contested Rules. More specifically, the Claim related to the issues set out in Article 2 of the Arbitration Agreement as follows:

*“2.1. Is IAAF Competition Rule 22.1(a) valid and enforceable in the circumstances of the present dispute?*

*2.2. Is IAAF Competition Rule 22.1A valid and enforceable in the circumstances of the present dispute? In particular (but without limitation), can IAAF Competition Rule 22.1A validly and/or lawfully exclude Russian track and field athletes from International Competition (as that term is defined in IAAF Competition Rule 1.1):*

*2.2.1. who are not currently subject to any period of ineligibility for the commission of an anti-doping rule violation; and/or*

*2.2.2. who are part of the IAAF Registered Testing Pool; and/or*

*2.2.3. on the basis that they have not lived or do not live outside of Russia.*

*2.3. Under the Olympic Charter, is the ROC entitled to nominate and is the IOC entitled to accept the entry of Russian track and field athletes to compete at the Rio Olympic Games even if they are not eligible to participate under IAAF Competition Rule 22.1(a) and 22.1A?*

*2.4. Under the Olympic Charter, if any Russian track and field athletes are eligible to compete at the Rio Olympic Games under IAAF Competition Rule 22.1A, is the ROC entitled to have them compete as representatives of Russia, or may they only participate in an individual capacity, not representing any country?”.*

27. In the Arbitration Agreement the parties also agreed that the IOC would be invited to participate in the arbitration relating to the Claim as an interested party with respect to issues 2.3 and 2.4. The IOC, however, in a communication dated 15 July 2016 finally decided “*not [to] participate as a party to the abovementioned arbitration*”.

28. On 10 July 2016, the IAAF filed a Response to the Claim.

29. On 15 July 2016, a joint statement of appeal (intended also to be a joint appeal brief) was submitted by the Appellants with CAS in accordance with Article 12 of the Arbitration Agreement and pursuant to Article R47 of the Code (the “Appeal”) to challenge the Decisions. The Appeal was registered by the CAS Court Office as CAS 2016/A/4703 and is the object of the present award.

30. On 19 July 2016, a hearing took place before the CAS Panel at the Maison de la Paix, Chemin Eugene-Rigot 2, 1202 Geneva, Switzerland. The Appeal was heard at the same time as the Claim.

31. At the hearing, the parties, by their counsel, made submissions in support of their respective

cases, discussing mainly the issues raised in the Claim. The Appellants, in any case, confirmed that a single award dealing with all of them was requested, as a joint single Appeal was filed, the Appeal is based on grounds common to all Appellants, and these grounds are strictly linked to the positions expressed in the Claim, brought by them jointly. One of the 67 Appellants, Ms Isinbaeva, personally present, rendered a declaration. At the conclusion of the hearing, finally, the parties expressly stated that their right to be heard and to be treated equally in the proceedings had been fully respected.

32. On 21 July 2016, the CAS Panel issued the operative part of this Award.

#### **IV. SUBMISSIONS OF THE PARTIES**

33. The following outline of the parties' positions is illustrative only and does not necessarily detail every submission advanced by the Appellants and the Respondent. The Panel has nonetheless carefully considered all the submissions made by the parties, whether or not there is specific reference to them in the following summary.

##### **A. The Appellants' submissions**

34. In the Appeal the Appellants relied on submissions made in their joint statement of appeal, in addition to the relevant submissions made as Claimant Athletes with respect to the Claim, both in writing and orally at the hearing on 19 July 2016. The Panel's determinations on those submissions can be found in the award CAS 2016/O/4684 rendered with respect to the Claim. For the avoidance of doubt, none of those submissions assist the Appellants in this Appeal.
35. This award is concerned with the Appellants' submissions which are focused solely on the Appeal, not on the Claim.
36. These submissions may be summarized as follows:
- a. with respect to the interpretation offered by the DRB of some expressions contained in Rule 22.1A(b) of the Competition Rules, but not therein defined:
    - i. whether or not it was the purpose of the DRB, the DRB's interpretation of "*fully adequate systems outside the country*" was to exclude automatically eligibility for any athlete who lived in Russia, because of the DRB's suspicions with regards to samples collected in Russia;
    - ii. the Guidelines had not specified what might constitute a "*sufficiently long period*". The DRB had concluded that it was "*from 1 January 2014 to date*";
    - iii. the Decisions did not provide any guidance about what was meant by "*substantial objective assurance of integrity*". All that the Appellants knew was that this assurance was provided upon determination that the athlete "*was subject to other, fully adequate, systems outside of the country of the National Federation for a sufficiently long period*". In the instant cases, however, that assurance could only be provided by the athlete living

- and being tested outside Russia for the majority of the time that had elapsed since 1 January 2014;
- iv. the expression “*equivalent in quality to the testing to which his competitors ... are subject*” had not been defined anywhere. The DRB did not explain what kind of testing would be “*equivalent in quality to the testing to which ... competitors ... are subject*” and found that even samples collected in Russia but analysed at WADA-accredited laboratories outside Russia would not be “*qualitatively equivalent to that of ... prospective competitors*”. Therefore, both the expression and its application by the DRB was arbitrary and discriminatory;
- b. with respect to the application of Rule 22.1A(b) of the Competition Rules in the case of the Athletes:
- v. the DRB did not take into account Sections 7.1 to 7.4 of the Guidelines in the Decisions. It rejected the Appellants’ applications based only on Sections 7.5 to 7.10 of the Guidelines. Ultimately, the Decisions turned on just one criterion, namely whether or not the athlete in question lived in or out of Russia;
  - vi. the DRB was wrong to rely on evidence of wrongdoing which (a) did not relate to the Appellants themselves, and (b) was based on mere and unverified allegations (such as Dr Grigory Rodchenkov’s allegations);
  - vii. the IAAF should be estopped from relying on evidence relating to the Moscow Laboratory. This is because it allowed samples to be sent there despite having known that in the period of 2009 to 2015 only 1 in circa 43 samples collected from Russian athletes outside of Russia and analysed by laboratories outside of Russia were reported positive for prohibited substances, whereas only 1 in circa 280 samples collected from Russian athletes inside of Russia and analysed at the Moscow laboratory were reported positive for prohibited substances;
  - viii. the DRB penalised the Appellants for the conduct of others. It did not allege, never mind prove, any wrongful conduct by any of the Appellants. The DRB and the IAAF did not individualise the assessment of the applications submitted by the Appellants, because they attempted to paint an unlawful picture of “*guilt by association*”;
  - ix. the DRB applied Rule 22.1A in a discriminatory way. The Appellants had no control over where their samples were sent for analysis. Many other laboratories and countries appeared to have serious doping problems, yet it was not suggested that athletes connected to those laboratories or from those countries should be excluded from the Olympic Games;
  - x. the DRB gave little weight to the Appellants’ samples tested outside Russia because, the DRB said, “*there is strong evidence (including the notorious cases involving Marion Jones and Lance Armstrong) that it is quite possible to ‘beat the testing’ through the use of micro-dosing and other techniques*”. If that was right, all athletes should fall under suspicion, including American athletes whose system had permitted the cases of Marion Jones and Lance Armstrong;

- xi. if the DRB's application of Rule 22.1A was discriminatory, then the burden of proof lay on the DRB to show that it was reasonable and proportionate to justify the discrimination (CAS 2014/A/3759).

37. On the basis of the foregoing, and if the Panel was to reject the requests for relief in CAS 2016/O/4684, the Appellants requested from the Panel:

- “(a) annulment of the DRB's Decisions;*
- (b) the Appellants to be declared eligible to participate at the Olympic Games;*
- (c) IAAF Competition Rule 22.1A(b) – to the extent that it is not invalid and unenforceable – to be applied and/ or interpreted in a manner that is no discriminatory nor otherwise unlawful;*
- (d) The IAAF to be ordered to:*
  - (i) reimburse the Appellants' legal costs;*
  - (ii) bear the entire costs of the arbitration”.*

## **B. The IAAF's response**

38. The IAAF did not provide a written response to the Appellants' written submissions. Further, the IAAF did not provide any detailed oral submissions in response to the arguments set out above.
39. The gist of the IAAF's case was that it had to set the bar high. It was the Russian authorities' fault that the Appellants were in the position they found themselves. The DRB had found that some Athletes were close to passing the test under Rule 22.1A and others were far away. There had been an individual factual analysis in each case. There was no unfairness.
40. The only discriminating factor was whether or not an athlete could give an assurance of integrity, in order to ensure that athletes competed on a level playing field. The rule was not aimed at Russian athletes.
41. Whilst the IAAF did not put any request for relief in writing, it was clear that it sought the Decisions to be upheld and for the Appellants' requests for relief to be denied.

## **V. JURISDICTION**

42. The CAS jurisdiction to hear the Appeal against the Decisions has not been challenged and has been confirmed by Article 12 of the Arbitration Agreement.

## **VI. OTHER PROCEDURAL ISSUES**

43. The parties were content that the Appeal should be subject to a specific award, other than the

award to be rendered with respect to the Claim.

44. In the proceedings before CAS, the IAAF sought to rely on a report prepared by Professor Richard McLaren (the “McLaren Report”). The McLaren Report was circulated to the IAAF on 18 July 2016, which in turn circulated it to the Claimants’ representatives and the CAS Panel on the same day. The Appellants did not deny the admissibility of this document, noting that the IAAF had itself received it at a late stage. However, they did query its relevance. The Panel did not consider the McLaren Report to be relevant in determining the issues before it with respect to the Appeal and therefore gave it no weight.
45. The Panel was also provided with an email dated 18 July 2016, which had been sent by Mr Mathieu Holz of WADA to the IAAF’s legal representatives, and an attachment to that email. In the email, Mr Holz said that he was sending the attachment on behalf of Professor McLaren. The attachment comprised a table of athletes (made up of some of the Athletes, but including one who is not one of the Appellants). It sought to show whom of the Appellants Professor McLaren had intelligence on, which indicated some involvement in doping. The attachment stated that an athlete’s absence from the list meant only that Professor McLaren had no information about that athlete, not that the athlete was clean. The Panel did not find this document to be relevant in determining the issues before it and therefore gave it no weight.

## VII. APPLICABLE LAW

46. Article R58 of the Code provides the following:

*“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”.*

47. In the present case the “*applicable regulations*” for the purposes of Article R58 of the Code are, indisputably, the IAAF’s regulations, because the Appeal is directed against the Decisions issued by the DRB, a body of IAAF, which were passed applying IAAF’s rules and regulations.
48. By the Arbitration Agreement, the parties have agreed that the governing law of the arbitration shall be the general principles of law common to civil law and common law systems as referenced at paragraph 156 of CAS 98/200, award dated 20 August 1999. In accordance with Article R45 of the Code, therefore, such general principles shall apply in addition to the IAAF’s regulations.

## VIII. MERITS

49. The objects of the Appeal are the Decisions rendered by the DRB, which denied the Athletes’ application to be granted eligibility to compete at the Rio Olympic Games under Rule 22.1A of the Competition Rules. The Athletes dispute this conclusion, and request that the Decisions be

set aside. The IAAF wishes the Decisions to be confirmed.

50. In light of the parties' submissions, the issues that this Panel has to determine with respect to the Appeal are those which are not covered by the award rendered in respect of the Claim (CAS 2016/O/4684). In such award, the Panel confirmed *inter alia* the validity and enforceability of the Contested Rules. As a result, also the validity and enforceability *vis-à-vis* the Athletes of Rule 22.1A(b) of the Competition Rules was confirmed. The main question left for the Panel's decision in this award, therefore, concerns the actual application of Rule 22.1A(b) to the Appellants: it is the Appellants' case, in fact, that such rule, if held to be valid, was improperly interpreted and applied.
51. Under Rule 22.1A(b) of the Competition Rules, athletes affiliated to a suspended national federation are allowed to avoid the consequences triggered by Rule 22.1(a) of the Competition Rules and to gain exceptional eligibility. In fact, athletes, whose national federation is suspended by the IAAF, would ordinarily be allowed to take part only in track and field competitions organised by the suspended member for the citizens of that country, and not in International Competitions; however, if the suspension of the national federation was due in any way to its failure to put in place adequate systems to protect and promote clean athletes, fair play, and the integrity and authenticity of the sport, these athletes could be granted eligibility for some or all International Competitions if they could demonstrate, to the comfortable satisfaction of the IAAF Council, or of its delegate(s), that:
- i. the national federation's failure did not affect or taint the athlete in any way, because he was subject to other, fully adequate, systems outside of the country of his national federation for a sufficiently long period to provide substantial objective assurance of integrity; and
  - ii. in particular, the athlete has for such period been subject to fully compliant drug-testing in- and out-of-competition equivalent in quality to the testing to which his competitors in the International Competition(s) in question are subject.
52. The Panel notes that under the express terms of Rule 22.1A:
- i. the athlete has the burden of proving that such conditions are satisfied;
  - ii. the applicable standard to evaluate whether the conditions to obtain eligibility are satisfied is the "*comfortable satisfaction*" of the deciding body, *i.e.* of the IAAF Council, or of its delegate(s);
  - iii. the IAAF Council, or its delegate(s), have a discretion ("*may*") to grant "*exceptionally*" the eligibility to the athletes satisfying the conditions set by Rule 22.1A(b). In the Panel's opinion, however, such discretion cannot be applied arbitrarily: it is subject to the satisfaction of the criteria specifically set by the rule (in other words, there is no discretion to grant eligibility if the conditions are not satisfied) and has to be exercised in accordance with the basic principles of fairness and non-discrimination. It cannot imply that the IAAF Council, or its delegate(s), can on the one hand recognize that the conditions for eligibility are met, and still arbitrarily deny eligibility.

53. The question is therefore whether the DRB, acting as a delegate of the IAAF Council, properly applied Rule 22.1A(b) to the Athletes in the Decisions.
54. Two preliminary observations are necessary before such question is addressed.
55. Firstly, the Panel notes that, as already underlined, it has not been called in this Appeal to verify the correct application of the criteria set by Rule 22.1A(b) of the Competition Rules to the individual peculiarities of the case of each of the Athletes. The Panel, as confirmed at the hearing, has been rather requested to verify the application of Rule 22.1A with respect to issues common to all the Appellants. As a result, the Panel will not examine the situation of each of the Appellants separately.
56. Secondly, the Panel remarks that the issue of the suspension of the RusAF was not before it: indeed, the suspension was accepted by the Russian federation. As a result, its failure to put in place adequate systems to protect and promote clean athletes, fair play, and the integrity and authenticity of the sport, has not been disputed in this Appeal.
57. Against this background, the Panel remarks that the Appellants did not provide evidence or even argument that, had the rules (Rule 22.1A and the Guidelines) been properly interpreted, they would have passed the test set by Rule 22.1A of the Competition Rules. In those circumstances, it is impossible to grant the relief sought by the Appellants, which is a declaration that they are eligible to participate in the 2016 Olympic Games. The Panel did not have before it the individual case files of each of the Appellant Athletes so it could not make such a determination on a case by case basis.
58. In addition the Panel notes specifically the following with respect to the Appellants' contentions:
  - i. as to the definition of the "*Relevant Period*" for the assessment of the Athletes' case, the Panel confirms, as noted in its award in CAS 2016/O/4684, that the retroactive application of Rule 22.1A(b) and Section 7.5 of the Guidelines are of concern. The DRB decided that the "*Relevant Period*" was the period starting on 1 January 2014. That meant that the Athletes had to pass a retrospective test, the extent of which the Guidelines did not make clear and the benefit of which none of the Athlete could avail him/herself of, since the period had already passed at the time of the pronouncement of this new rule. In the Panel's opinion, retroactive criteria in general are to be avoided as unfair and contrary to fundamental notions of due process and good sportsmanship. However, in the case of the Athletes, no evidence has been brought that the "*Relevant Period*", as specifically defined by the DRB was the specific reason for the denial of the granting of eligibility: no different indication was given that, if the "*Relevant Period*" had been differently set, the applications filed by the Athletes would have been granted. In any case, the Panel was not put in a condition to independently assess what the "*Relevant Period*" in the Appellants' case should have been;
  - ii. as to the alleged application of a single condition, notwithstanding the plurality of relevant elements according to the Guidelines, and the exclusion of the Athletes only

because they lived and were tested in Russia, the Panel remarks that the Guidelines expressly mandate the DRB to verify the criteria it deems relevant to the case considered, and is therefore not requested to assess every single factor mentioned in Section 7 thereof. In any case, the fact whether the Athletes had lived and had been tested in Russia during the “*Relevant Period*” turned out to be decisive (in the case of Ms Klishina to grant her eligibility) in light of the indications that the RusAF had failed to put in place an adequate anti-doping system (the reason for which it was suspended) and of the fact that the DRB felt itself “comfortably satisfied” by the evidence offered that the Russian anti-doping testing was not fully compliant with WADA rules and standards. The Panel sees no reasons to disturb this conclusion. At the same time, the Panel is satisfied by the DRB’s reasoning regarding the small value of testing conducted outside of Russia, in light of their very limited number;

- iii. the reference, contained in the Decisions, to the cases of US athletes “*beating the testing*”, as a reason to discount the meaning of negative tests, even if performed outside of Russia, cannot be taken as a sign of discrimination against Russian athletes or as reason to suspect all athletes: as properly read in the context of the Decision, it was only meant to underline, together with other elements, that limited objective assurance of integrity could be offered by testing conducted outside of Russia, in the case of the Russian athletes;
- iv. as to an alleged discrimination, such contention is unsupported by any corroborating evidence: there is no indication that the rules were (or would be) applied in a different way to athletes of different nationality;
- v. as to the estoppel of the IAAF, the failure of the Athletes to satisfy the conditions set by Rule 22.1A cannot be attributed to the IAAF;
- vi. as to an alleged finding of “*guilt by association*”, the Panel is of the view that Rule 22.1A is a permissive provision: it does not impose ineligibility; it allows eligibility to be regained, if specific conditions are satisfied. As a result, its application cannot be construed as a sanction for the Athletes, let alone a sanction for “*guilt by association*”.

59. In summary, all the Appellants’ contentions cannot be accepted. As a result, the Appeal has to be dismissed. The Decisions are confirmed, primarily on the basis of the decision of this Panel in the companion case.

## ON THESE GROUNDS

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

1. The Appeal filed by Lyukman Adams, Kseniya Aksyonova, Tatyana Arkhipova, Victor Butenko, Timofey Chalyy, Elena Cherniaeva (Kozlova), Dmitriy Chizhikov, Artem Denmukhametov, Gulshat Fazlitdinova, Aleksey Fedorov, Ekaterina Galitskaia, Georgy Gorokhov, Elena Isinbaeva, Pavel Ivashko, Oxana Kondratyeva, Ekaterina Koneva, Vasiliy Kopeikin, Elena Korobkina, Ilya Krasnov, Vladimir Krasnov, Antonina Krivoshapka, Maria Kuchina, Denis Kudryavtsev, Anna Kukushkina, Alla Kuliatina, Alexandr Lesnoi, Sergej Litvinov, Danil Lysenko, Yuliya Maltseva, Alena Mamima, Nikolay Markov, Aleksandr Menkov, Anna Misochenko, Olga Mullina, Marina Pandakova, Elena (Yuelena) Panova, Marina Panteleyeva, Yulia Pidluzhnaya, Evgeniya Polyakova, Sergey Polyanskiy, Mariya Ponomareva, Alina Prokopeva, Vera Rebrik (Rebryk), Ekaterina Renzhina, Aleksey Reunkov, Vera Rudakova, Ilgizar Safiullin, Ivan Shablyuev (Shablyuyev), Sergey Sharypov, Anna Shchagina, Ilya Shkurenev, Sergey Shubenkov, Maksim Sidorov, Anzhelika Sidorova, Kristina Sivkova, Aleksei Sokirskii, Ekaterina Sokolenko, Ekaterina Strokova, Dmitri Tarabin, Irina Tarasova, Pavel Trenikhin, Sardana Trofimova, Daniil Tysplakov, Ivan Ukhov, Roman Yevstifeyev, Svetlana Vasilyeva and Natalia Vlasova on 15 July 2016 concerning the decisions rendered by the IAAF Doping Review Board on 9 July 2016 is dismissed.
2. The DRB's Decisions are affirmed.
3. The Appellants are ineligible to participate at the 2016 Olympic Games.
- (...)
6. All further claims and prayers for relief are dismissed.