Arbitration CAS 2016/A/4889 Olga Abramova v. International Biathlon Union (IBU), award of 18 April 2017

Panel: Mr Romano Subiotto QC (United Kingdom), President; Mrs Jennifer Kirby (United Kingdom); Mr Michele Bernasconi (Switzerland)

Biathlon
Doping (meldonium)
Establishment of No Fault or Negligence
Athlete's discharge that s/he exercised his/her utmost caution
Elimination of sanction

1. **In order for an anti-doping rule violation by an athlete to be analysed as not having involved any Fault or Negligence on his/her part, said athlete needs to establish how the prohibited substance entered his/her system and that s/he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that s/he had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule.**

2. **When analysing whether one athlete acted with utmost caution when using meldonium, the state of scientific knowledge about the excretion particularities of meldonium before 2016 and the athlete's medical reasons for its prescription are to be taken into consideration.**

3. **According to art. 10.4. of the WADA Code, if an athlete establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of ineligibility shall be eliminated. Additionally, pursuant to art. 10.7.3. of the WADA Code, an anti-doping rule violation for which an athlete has established No Fault or Negligence shall not be considered a prior violation for purposes of said article.**

I. THE PARTIES

1. Olga Abramova (the "Appellant" or the "Athlete") is a Ukrainian biathlete and a member of the national biathlon team of Ukraine.

2. The International Biathlon Union ("IBU" or the "Respondent") is the international governing body of biathlon with headquarters in Salzburg, Austria.

II. APPEALED DECISION

3. The Appellant appeals the decision of the IBU Anti-Doping Hearing Panel ("ADHP") of November 14, 2016 (the "Appealed Decision").

4. The Appeal concerns an anti-doping rule violation ("ADRV") committed by the Appellant resulting from the presence of meldonium (*S4. Hormone and Metabolic Modulators. Non-specified substance*) in the Appellant's sample collected on January 10, 2016.

5. The ADHP sanctioned the Appellant with a one-year period of ineligibility commencing on November 14, 2016, with credit for the period of the provisional suspension served by the Appellant as from February 4, 2016. All competitive results obtained by the Appellant as from January 10, 2016 through February 3, 2016 were disqualified. The ADHP also required the Appellant to pay the IBU a contribution of EUR 2,000 towards costs.

6. The ADHP ordered that the entire period of provisional suspension be credited against the period of ineligibility. As a result, the Appellant could compete from February 4, 2017 onwards.

III. PROCEDURAL BACKGROUND

A. Proceedings before the IBU ADHP

7. On January 10, 2016, Olga Abramova underwent an in-competition doping control initiated by the IBU at Ruhpolding, Germany. The analysis of the Appellant's A sample A 3957344 by the World Anti-Doping Agency ("WADA") accredited laboratory revealed the presence of meldonium.

8. By letter of February 3, 2016, the Cologne laboratory informed the IBU of the Adverse Analytical Finding ("AAF"). By letter of February 4, 2016, the IBU notified the Federation Biathlon of Ukraine ("FBU") and the Appellant of the AAF. The Appellant was provisionally suspended pending the ADHP's decision.

9. On February 10, 2016, the FBU sent a letter on behalf of the Appellant explaining that the Appellant had taken Mildronate from November 10, 2015 to December 12, 2015, based on her doctor's prescription due to her diagnosis of *bronchial asthma* and *dysmetabolic myocardiopathy*.

10. On February 16, 2016, the IBU Secretary General referred the matter to the ADHP.

11. On February 17, 2016, the FBU sent another letter, indicating that the time period during which the Appellant took meldonium was in fact from November 1, 2015 to December 20, 2015.

12. On March 10, 2016, the IBU filed a written statement. The IBU requested that the hearing should be postponed until a date after the expert opinion (of Professor Mario Thevis, Cologne), which should also take the WADA study into account. The provisional suspension remained in place.

13. A hearing took place on March 30, 2016. During the hearing, the Appellant explained that she had taken Mildronate from November 1 to December 10, 2015.

14. Following the hearing, on April 4, 2016, the ADHP rendered the following order:

    a. *"The proceedings are suspended until the results of the scientific studies already initiated by the WADA-accredited laboratories on the long-term pharmacokinetics of Meldonium (Mildronate) of healthy humans are available.*

    b. *The parties will be granted 20 days from the communication of the studies, simultaneously to comment on the results and to complement their requests for relief. Because the time-limit for the Athlete to submit the statement in defense has elapsed on March 21, 2016 no further factual evidence is permitted.*

    c. *The Panel will decide whether a hearing is deemed appropriate.*

    d. *The Athlete remains suspended as required by Article 7.11.1 IBU ADR 2014.*

    e. *The Panel reserved the right to issue a new order if appropriate".*

15. On April 13, 2016, WADA published a preliminary notice on the studies of urinary excretion of meldonium from the body. On June 30, 2016, WADA issued a second notice on meldonium concerning cases where athletes claim that the substance was taken before January 1, 2016, the date when the 2016 WADA Prohibited List ("Prohibited List") including meldonium entered into force.

16. On July 27, 2016, the ADHP panel, having considered the WADA notices, upheld the order of April 4, 2016.

17. It became known in early September that the results of the studies commissioned by WADA and new information on meldonium were not to be expected in the foreseeable future. On September 15, 2016, the ADHP panel ordered the resumption of proceedings.

18. On September 28, 2016, the ADHP panel considered lifting the provisional suspension and invited the Parties to submit comments. On October 3, 2016, the IBU opposed lifting the provisional suspension. On October 7, 2016, the ADHP panel issued the following order:

    a. *"The provisional suspension imposed on Ms. Abramova on February 4, 2016 is upheld.*

    b. *The Panel will adjudicate on the matter in due time before the opening of the IBU World Cup season in Ostersund.*

    c. *The Panel will ask Professor Thevis to give an expert opinion on the state of scientific knowledge with regard to Meldonium, in writing.*

d. The Panel intends to decide without a further hearing unless it deems necessary to discuss the results of the expert opinion at a hearing".

19. On October 19, 2016, Professor Thevis, the expert appointed by the ADHP panel, delivered his opinion. On November 7, 2016, the ADHP panel asked the expert to adapt the conclusions of his opinion on the assumption that December 10, 2015, was the date of the last administration of Mildronate. The amendment was served on the Parties on November 8, 2016.

20. On November 14, 2016, the IBU ADHP rendered the Appealed Decision.

B. Proceedings before the CAS

21. On December 5, 2016, the Appellant lodged an appeal with the Court of Arbitration for Sport (the "CAS") against the decision of the ADHP. The Appellant requested that this matter be expedited in accordance with Article R52 of the Code of Sports-related Arbitration (the "Code") and that this appeal be decided prior to January 10, 2017. On December 14, 2016 and December 15, 2016, the Respondent objected to the Appellant's request for an expedited procedure.

22. On December 19, 2016, the Appellant filed an Appeal Brief, including an application for provisional measures. On January 3, 2017, the Respondent objected to the Appellant's request for provisional and conservatory measures.

23. On January 4, 2017, the Deputy President of the CAS Appeals Arbitration Division dismissed the application for provisional measures.

24. On January 12, 2016, the President of the CAS Appeals Arbitration Division considered the Appellant's request for an expedited procedure of December 5, 2016 and the Respondent's responses of December 14 and 15, 2016. An expedited procedure was not started in view of the lack of express agreement between the Parties as required under Article R52 of the Code.

25. On January 16, 2017, the Respondent filed an Answer to the Appeal Brief ("Answer") of December 19, 2016.

26. On January 18, 2017, the CAS requested the Parties to specify whether they prefer a hearing to be held or for the Panel to issue an award based on the Parties' written submissions. On January 24, 2017, the Respondent indicated that an award could be adopted based on the Parties' written submissions. The Appellant requested a hearing. On January 25, 2017, the Panel decided that a hearing would be held in this matter.

27. On January 20, 2017, the Appellant made a second request for provisional measures to provisionally stay the period of ineligibility.

28. On January 25, 2017, the Appellant requested the Panel to hold the hearing on January 30 or January 31, 2017, so that the operative part of the award could be rendered by 12:00 CET on

February 1, 2017. Alternatively, the Appellant asked the Panel to render the operative part of the order not later than 12:00 CET, February 1, 2017.

29. On January 27, 2017, the Respondent filed its response to the Appellant's request for provisional measures of January 20 and January 25, 2017. The Respondent requested the Panel to dismiss the request and to decide on the request based on the written submissions, *i.e.* without a hearing.

30. On January 27, 2017, the Panel decided that it would issue a decision on the Appellant's request for provisional measures based on the Parties' written submissions and set the date of the hearing to February 2, 2017.

31. On January 31, 2017, the Panel adopted an order on provisional measures, granting the Appellant's request to stay the period of ineligibility.

32. On February 2, 2017, a hearing was held. Both Parties expressly stated that they did not have any objection with the constitution of the Panel and the procedure adopted by it.

IV. CAS JURISDICTION

33. The Appellant submits that international-level athletes have a right to appeal the decision of the relevant body to the CAS (Articles 13.2.1 and 13.2.3 of the IBU ADR, Article 13.2.1 of the WADA Code). The Appellant submits that she is an international-level athlete who competes in international competitions.

34. Article 13.2 of the IBU ADR states that the decisions that may be appealed include *"a decision that an anti-doping rule violation was committed"* and *"a decision imposing consequences or not imposing consequences for an anti-doping rule violation"*.

35. Paragraph 10 of the Appealed Decision states that: *"the Athlete has the right to appeal the decision rendered by the ADHP to the CAS within 21 days from the receipt of the decision with, however, no suspensory effect. The CAS proceedings are de novo"*.

36. Article 47 of the IBU Constitution and Article 8.2.2 of the IBU ADR provide that the decisions of the ADHP may be appealed directly to the CAS.

37. The Respondent raises no objections to the jurisdiction of the CAS.

38. It follows that the CAS has jurisdiction in this case.

V. ADMISSIBILITY

39. Article 13.7.1 of the IBU ADR provides that *"the time to file an appeal to the CAS will be twenty-one (21) days from the date of receipt of the decision by the appealing party"*.

40. The Appellant states that the Appealed Decision was notified to the Appellant on November 14, 2016. The Statement of Appeal was submitted within the time limit, namely on December 5, 2016.

41. Further, according to Article R51 of the Code, the Appellant must file the appeal brief within 10 days following the expiry of the deadline for filing the statement of appeal. On December 12, 2016, the Appellant requested a five-day extension of the time limit to file the Appeal Brief and this extension was granted on December 13, 2016. The Appeal Brief was submitted on December 19, 2016, and, therefore, within the (extended) time limit.

42. The Respondent raises no objections to the admissibility of the Appeal.

43. It follows that the Appeal is admissible.

VI. APPLICABLE LAW

44. Article R58 of the Code provides the following: *"The Panel shall decide the dispute according to the applicable regulations and 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

45. The Appellant considers that the relevant rules and regulations in the present proceedings are the IBU rules and regulations (primarily the IBU ADR), the WADA Code and other rules of WADA, including the WADA notices on meldonium of April 13, 2016 (the "first WADA notice") and June, 30, 2016 (the "second WADA notice") (together the "WADA notices"). Additionally, Swiss law may apply.

46. The Respondent agrees that the applicable rules are the IBU ADR. The Respondent claims that the WADA notices are guidelines but not binding rules.

47. Further, the Respondent claims that the IBU is an association in line with the provisions of the Austrian Law of Associations and a non-governmental international organization with its seat in Salzburg, Austria. Austrian, not Swiss, substantive law may apply.

48. The Panel considers that the relevant rules and regulations in the present proceedings are the IBU ADR, the WADA Code, and the WADA notices (although not binding). Additionally, Austrian substantive law may apply.

VII. SCOPE OF REVIEW

49. According to Article R57 of the Code the *"Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"*.

50. As a result, this Panel has full power to examine *de novo* the Appellant's actions, and the evidence before it, in order to determine whether the Appellant's pleas are grounded.

VIII. SUBMISSIONS OF THE PARTIES

A. Appellant's submissions

1. The Appeal is not moot

51. The Appellant submits that the appeal is not moot despite the fact that an award may be rendered after February 3, 2017, *i.e.* the date when the suspension expires. It is important for the Athlete's reputation to have a clear disciplinary record, clear from any involvement in any anti-doping scandals.

2. Absence of an anti-doping rule violation

52. The Appellant rejects the IBU's finding that an ADRV occurred because of the following reasons:

a. WADA had not studied the excretion time of meldonium before its inclusion in the Prohibited List. On September 29, 2015 (*i.e.* the date when the Prohibited List was published) or on January 1, 2016 (*i.e.* the date when the list came into force), the meldonium excretion times from athletes' bodies were unclear.

b. Administration of meldonium before January 1, 2016 does not constitute an ADRV. The presence of meldonium in the Athlete's sample after January 1, 2016 does not automatically trigger Article 2.1 of the IBU ADR or WADA Code. Rather, the issue is whether meldonium was administrated before or after January 1, 2016 and for what reasons. The Panel should confirm that the Athlete bears no fault and that an ADRV has not taken place.

c. Transition period. WADA *de facto* approved a transition period during which traces of meldonium in the athlete's body are acceptable by establishing permissible urinary concentrations of meldonium during different periods after January 1, 2016.

d. WADA made an exception to the Prohibited List. WADA's transition period after January 1, 2016 amended the Prohibited List and ADR application in relation to meldonium by creating legitimate expectations. As a result, the Appellant submits that

the presence of an acceptable urinary concentration of meldonium should not automatically constitute an ADRV, based on Article 2.1.3 of the IBU ADR.

e. Concentration of meldonium in the Athlete's sample is acceptable. A concentration of meldonium of 7.3μg/ml is slightly higher than the acceptable 5μg/ml, and can be explained by the personal physical particularities of the Athlete, which could influence the rate of excretion of meldonium. The concentration would in any event have been lower than the 5μg/ml had the sample been taken later in the period during which this limit applies, rather than on January 10, 2016.

3. Absence of fault or negligence

53. In the alternative and in line with the WADA notices, an Anti-Doping Organization should focus on whether the athlete took meldonium (i) before or (ii) on or after January 1, 2016. Normal results management should take place in case of (ii) (also based on a concentration of meldonium exceeding 15μg/ml). In case of (i), the athlete should in any event bear no fault or negligence, provided she could not reasonably have known that the substance would still be present in her body on or after January 1, 2016.

54. The Athlete should bear no fault or negligence, should the Panel find an ADRV, because of the following reasons:

a. Concentration of meldonium. Three independent sources, namely WADA's Science Department, Professor Thevis, and Professor Popov confirm that the Athlete likely took meldonium before January 1, 2016. The concentration of meldonium in the Athlete's sample is acceptable under the second WADA notice and would justify a finding of no fault.

i. WADA's Science Department confirmed that based on Athlete's circumstances *"a concentration of 7.3 microgram per milliliter on January 10, 2016 appears possible without the intake of meldonium since January 1, 2016"*.

ii. Professor Thevis claimed that *"there is a considerable probability that concentration would have been found below 5μg/mL, if a follow-up sample would have been collected of February 29, 2016*[1]*"*.

iii. According to Professor Popov, *"the difference in concentration of 2.3μg/mL is totally insignificant but can be a normal deviation due to other factors, including chronicle dysfunction of excretion organs of the athlete*[2]*"*.

b. Date of sample collection. The Appellant submits that the Thevis opinion confirms that the date when the sample was collected had a significant impact in terms of the application of the second WADA Notice. The Athlete's urine concentration of meldonium would

1 Exhibit 25 to the Appeal Brief, *Expert Opinion of Professor Mario Thevis*, October 19, 2016, p.3.
2 Exhibit 30 to the Appeal Brief, *Expert Opinion of Professor Vyacheslav Popov*, December 14, 2016, p.2.

have been below the no fault threshold had the sample been collected later. Further, the Athlete's concentration would have been below 5µg/ml by February 29, 2016, according to the WADA Science Department and the Thevis opinion.

c. Dosing of Mildronate. The Athlete took Mildronate between November 1 until December 10, 2015 in a dose of 500 milligrams twice a day, based on a prescription of October 26, 2015 for 60 days due to heart problems, *i.e. dysmetabolic myocardiopathy*. The Appellant's cardiograms confirmed symptoms of this heart dysfunction.

d. Duration of meldonium consumption and its accumulation. The Athlete had been taking Mildronate since 2006 when she was diagnosed with *cardiopsychoneurosis*. It was not surprising that the detected urinary concentration was slightly higher than 5µg/ml given (i) that meldonium accumulated in the Athlete's body during periodical administration of Mildronate for the last 10 years and (ii) that the last intake was 31 days before sample collection, as confirmed by the Thevis opinion, which states that: *"It has been demonstrated that meldonium can accumulate and be retained in bodily tissue such as erythrocytes*[3]*"*.

e. Individual physical particularities of the Athlete. The Thevis opinion did not take into account the personal physical particularities of the Athlete. However, according to Professor Popov *"Olga's body has its particularities that are very likely [to] influence on the elimination time of metabolites, including Mildronate from her body*[4]*"*. In particular, it took longer for meldonium to excrete from her body due to problems with her liver.

f. Athlete's previous knowledge about excretion period. The Appellant trusted the information on the leaflet accompanying Mildronate, which stated that the substance should be eliminated within a few hours or a few days. The Appellant further submits that at that time, neither WADA, nor the manufacturer of Mildronate nor any other institution had information about the excretion particularities of meldonium. The Appellant claims she could not reasonably have known that meldonium would still be present in her body on or after January 1, 2016.

4. Elimination of the sanction

55. No ADRV had been committed, no sanction should have been imposed and the Appealed Decision should be annulled having regard to the particularities of the present case and issues with the excretion of meldonium.

56. Alternatively, the period of ineligibility should be eliminated should the Panel find an ADRV, given that the Appellant bears no fault or negligence. In addition, the present violation should be disregarded for sanctioning purposes in the event the Appellant commits any further ADRV.

---

3 Exhibit 25 to the Appeal Brief, *Expert Opinion of Professor Mario Thevis*, October 19, 2016, p.2.
4 Exhibit 30 to the Appeal Brief, *Expert Opinion of Professor Vyacheslav Popov*, December 14, 2016, p.3.

5. The imposed period of ineligibility is excessive and must be retrospectively reduced

a. The period of ineligibility is disproportionate and excessive. In case CAS 2016/A/4643, *Maria Sharapova v. ITF*, the period of ineligibility was 15 months (only 3 months longer than in the present case), while Mrs Sharapova acknowledged that she took Mildronate after January 1, 2016. Should WADA wish to punish athletes who took meldonium with a sanction of minimum 12 months of ineligibility, the WADA notices should mention this. In other CAS cases (namely CAS 2014/A/3485, CAS 2013/A/3279, CAS 2011/A/2582, CAS 2010/A/2229, CAS 2008/A/1490, CAS 2005/A/830), the period of ineligibility was 12 months, even though it was established that the prohibited substance was administered after having been included in the Prohibited List in all of the cases just cited.

b. The Appealed Decision implements double standards. Cases handled by different organizations (International Tennis Federation, International Modern Pentathlon Union, International Association of Athletics Federations, Fédération Internationale de Natation, International Skating Union, Fédération Internationale de Volleyball, U.S. Anti-Doping Agency, International Paralympic Committee) found either (i) no fault or negligence or (ii) no ADRV for athletes who did not take meldonium after January 1, 2016. Only the IBU has imposed a period of ineligibility for an athlete.

6. Requests for Relief

57. On the basis of these submissions, the Appellant requests the Panel:

1) *"To CONFIRM that the present appeal is admissible and CAS has jurisdiction to entertain the present dispute.*

2) *To REVIEW the present case as to the facts and to the law, in compliance with Article R57 of the Code of Sports-related Arbitration and Article 13.1 of the WADA Code.*

3) *To ISSUE a new decision, which sets aside the IBU Decision dated 14 November 2016, confirming that Olga Abramova has not committed an anti-doping rule violation, and that there are therefore no consequences to be imposed on her.*

4) *Alternatively, to ISSUE a new decision, which sets aside the IBU Decision dated 14 November 2016, ELIMINATING the period of ineligibility of the Athlete and ORDERING that the present violation be disregarded for sanctioning purposes in the event Olga Abramova commits any further anti-doping violation.*

5) *Alternatively, to ISSUE a new decision, which sets aside the IBU Decision dated 14 November 2016, retrospectively REDUCING the period of ineligibility of the Athlete.*

6) *In any event, to CONFIRM that the present violation shall be disregarded for sanctioning purposes in the event that the Appellant commits any further anti-doping violation.*

7) *In any event, to RELEASE the Appellant to pay the IBU a contribution of EUR 2000.*

8) *In any event, to ORDER the Respondent to bear all costs and legal expenses relating to the present procedure".*

B. Respondent's submissions

1. Is the Appeal moot?

58. It is important for the Appellant to protect her reputation based on a clean doping record, but it is alarming that one of the Appellant's main motives is to make sure that she would not be subject to tougher sanctions because of repeated doping in case she committed a further ADRV.

2. ADRV committed by the Athlete

59. The Respondent submits that the *presence* of meldonium in the Appellant's sample taken after January 1, 2016 by definition constitute an ADRV in line with Article 2.1 IBU ADR. The excretion time of meldonium may have an impact only on the quantum of the sanction.

60. Further, the WADA notices did not allow any urinary concentrations of meldonium nor did they *"de facto approve the transition period"*. WADA's position remained unchanged, namely that the *mere presence* of meldonium in an athlete's sample collected on or after January 1, 2016 constituted an ADRV. WADA intended to provide guidance regarding the results management and adjudication process to be followed for cases involving meldonium in cases where it had been established that the substance had been taken before January 1, 2016. This concerns the question whether an athlete could not reasonably have known or suspected that meldonium would still be present in the athlete's body on or after January 1, 2016; in other words, where there may be grounds for no significant fault or no fault at all.

61. The Respondent submits that neither WADA nor the Respondent created any "legitimate expectations" that the finding of meldonium in a sample taken after January 1, 2016 would not be considered to be an ADRV. WADA allowed the athletes to take the necessary steps to avoid an AAF on or after January 1, 2016 by announcing the amendment to the Prohibited List three months in advance.

3. Is this a case of "No fault or negligence"?

62. The issue of the date of the last use of meldonium cannot determine whether the Appellant has committed an ADRV. The ADRV results from the mere presence of a prohibited substance in her sample taken on January 10, 2016.

63. The Panel must examine whether the Appellant bears no fault or negligence if the Panel shares the ADHP's view that the last intake occurred before January 1, 2016. The Appellant continued taking meldonium despite having been notified in early October 2015 that this substance would

be prohibited as from January 1, 2016, and the Appellant was negligent by continuing to take Mildronate after having been notified that meldonium would be added to the Prohibited List. The Appellant stopped her treatment only in December 2015, *i.e.* shortly before meldonium was added to the Prohibited List. As a result, a lack of fault or negligence cannot be established here.

64. Further, the Appellant's calculations based on other collection dates and other concentrations are irrelevant in this context. The sample taken on January 10, 2016 contained a high concentration of meldonium of 7.3µg/ml. One can only speculate as to what concentrations might have been found on February 29, 2016.

65. The need for the Appellant's treatment with Mildronate is also questionable, irrespective of the dosage applied. A young athlete performing a challenging sport such as biathlon should not be able to perform at a world-class level with a serious heart and liver issue. Also, meldonium was added to the Prohibited List because of its undisputed use by healthy athletes in support of their sporting performance. A significant number of cases involving meldonium in the first half of 2016 indicates that Mildronate was generally used in sports as a convenient drug in support of a demanding training and to enhance performance, at least for as long as it was not included in the Prohibited List.

66. Professor Popov's statements with respect to the Appellant's physical particularities are vague and not supported by any scientific evidence. In particular, these statements do not result from a medical examination of the Appellant by Professor Popov.

67. Further, the purpose of WADA's announcement concerning the Prohibited List was to alert the athletes and other stakeholders of an upcoming prohibition. Having been informed of inclusion of meldonium in the list, the athletes had time to do everything possible to avoid a positive AAF on or after January 1, 2016. The Appellant had a duty of care to stop taking meldonium as soon as she learned about the prohibition meldonium as from January 1, 2016 to avoid any risk. She failed to discharge this duty of care by not doing so.

68. There is no evidence that the leaflet contained any information from which the Appellant could conclude that meldonium was completely eliminated between a few hours and a few days. In addition, the manufacturer's own FAQ section on its website indicates a much longer elimination period: *"Because of the non-linear pharmacocinetics of meldonium, its terminal elimination from the body may last for several months and it depends on a variety of factors such as dose, duration of treatment, individual physiology of the organism, sensitivity of methods and type of samples (blood or urine) used for detection of the substance[5]".*

69. Finally, there might have been no AAF on or after January 1, 2016 had the Appellant stopped taking meldonium immediately upon WADA's announcement of the Prohibited List. In any event, she should then have done everything reasonable to make sure that there was no AAF on or after January 1, 2016. Instead, the Appellant continued taking meldonium for a few more

---

5 *Mildronate FAQs*, available at https://meldonium.mildronate.com/faq/.

weeks and she even started a new cycle in November 2015, *i.e.* one month after she had learned that the substance would soon be prohibited.

70. To conclude, the ADHP's findings that the Appellant failed to establish that she bears no fault shall be upheld. The Appellant's negligence consisted in her continuing to ingest Mildronate after she had been warned by WADA that meldonium would be included in the Prohibited List as from January 1, 2016.

4. Elimination of the Sanction?

71. The sanction of one year of ineligibility is the mildest possible sanction under the IBU ADR:

a. For non-specific substances, the standard period of ineligibility of four years applies (Art. 10.2.1 IBU ADR).

b. Where the athlete can establish that the ADRV was not intentional, the period of ineligibility is two years (Article 10.2.1.1 IBU ADR).

c. The period of ineligibility can be further reduced to no less than one-half of the period of ineligibility otherwise applicable if the athlete establishes that she bears no significant fault or negligence (Article 10.5.2 IBU ADR).

72. The ADHP accepted all possibilities of reduction when it arrived at a minimum period of ineligibility of one year which is ¼ of the otherwise applicable standard sanction.

73. Further, the Appellant has received full credit of the provisional suspension and this suspension mainly lasted during the summer months. The Appellant will therefore be eligible for the 2017 IBU World Championships and all further IBU World Cup competitions.

IX. MERITS

A. ADRV

74. Article 2.1 of the WADA Code provides that an anti-doping rule violation results from the: *"Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample"*. Article 2.1.1 further specifies that *"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes 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 Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1[6]"*. Article 2.1 of the IBU ADR mirrors Article 2.1 of the WADA Code.

---

6 Article 2.1 of the WADA Code, available at https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf.

75. Further, the first WADA Notice specifies that: *"The mere presence of meldonium in an athlete's sample collected on or after January 1, 2016 constitutes an anti-doping rule violation under article 2.1 of the Code, which triggers the results management process*[7]*"*.

76. It follows that the Appellant committed an ADRV under Article 2.1 of the WADA Code and Article 2.1 of IBU ADR, as the blood sample taken on January 10, 2016 contained a concentration of meldonium of 7.3μg/ml.

B. No fault or Negligence

The Panel's reasoning in section IX(B) of the award is by majority.

1. Applicable Law

77. No fault or negligence is defined in the WADA Code as: *"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"*.

78. No significant fault or negligence is defined in the WADA Code as: *"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"*.

79. Moreover, the comment to Article 10.4 of the WADA Code specifies that no fault or negligence will apply only in exceptional circumstances. The WADA Code also lists circumstances in which no fault or negligence would <u>not</u> apply, which do not however cover a situation similar to this case.

    a. *"a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination);*

    b. *the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance);*

    c. *sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink)"*.

---

7 *Meldonium Notice – April 13, 2016*, World Anti-Doping Agency, available at <u>https://www.wada-ama.org/sites/default/files/resources/files/wada-2016-04-12-meldonium-notice-en.pdf</u>.

80. Further, the second WADA notice specifies that for a period of urine collection date between January 1 to February 29, 2016, the following findings may be made:

a. For a concentration of meldonium higher than 15µg/ml, normal results management should take place.

b. For a concentration of meldonium lower than 15µg/ml but higher than 5µg/ml, (i) normal results management should take place and (ii) anti-doping organizations may request the assistance of WADA to facilitate scientific review and interpretation.

c. For a concentration of meldonium lower than 5µg/ml, (i) in the absence of other evidence of use on or after January 1, 2016, a finding of no fault may be made, and (ii) in the absence of other evidence of use after September 29, 2015, there is no disqualification of results.

81. The available evidence in this case, as confirmed by Professor Thevis during the hearing, indicates that it was more likely than not that the Appellant did not take meldonium on or after January 1, 2016.

82. Furthermore, the Appellant would likely have had a concentration of meldonium lower than 5µg/ml had the sample been taken closer to February 29, 2016.

83. As a result, it behooves the Panel to consider whether the Appellant could benefit from a finding of not fault or negligence.

2. Applicable Case Law

84. In order to establish whether the Appellant established no fault or negligence, first, regard must be had to CAS case law on the concepts of (i) no fault or negligence, (ii) no significant fault or negligence, (iii) duty of utmost caution, as well as their application in practice:

a. Advisory opinion CAS 2005/C/976 & 986: *"The WADC imposes on the athlete a duty of utmost caution to avoid that a prohibited substance enters his or her body. Case law of CAS and of other sanctioning bodies has confirmed these duties, and identified a number of obligations which an athlete has to observe, e.g., to be aware of the actual list of prohibited substances, to closely follow the guidelines and instructions with respect to health care and nutrition of the national and international sports federations, the NOC's and the national anti-doping organisation, not to take any drugs, not to take any medication or nutritional supplements without consulting with a competent medical professional, not to accept any medication or even food from unreliable sources (including on-line orders by internet), to go to places where there is an increased risk of contamination (even unintentional) with prohibited substances (e.g. passive smoking of marihuana). (…) "No fault" means that the athlete has fully complied with the duty of care. (emphasis added)*[8]*"*.

[8] CAS 2005/C/976 & 986, para. 73.

b. CAS 2016/A/4643 *Maria Sharapova v. ITF*: *"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, 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". As a result, a deviation from the duty of exercising the "utmost caution" does not imply per se that the athlete's negligence was "significant" (emphasis added)*[9]*"*.

85. The CAS cases where the defence of no fault or negligence has been recognized involve exceptional circumstances such as (i) the sabotage of Trybest capsules in the course of manufacture (to the effect that they included a prohibited substance, stanozolol[10]), (ii) an athlete kissing a girl who had previously taken cocaine, resulting in an AAF for the athlete[11], (iii) the administration of a prohibited substance by the treating doctor in an emergency situation[12].

86. Further, the CAS has already examined the particularities of meldonium in CAS 2016/A/4643, *Maria Sharapova v. ITF*. Mrs Sharapova admitted to using meldonium after January 1, 2016, unaware that it had been added to the Prohibited List. In particular, the panel found that Mrs Sharapova had a reduced perception of the risk that she took while using Mildronate, because (i) she had used Mildronate for around ten years without any anti-doping issue, (ii) she had consulted the Russian doctor who prescribed her Mildronate for medical reasons, not to enhance her performance, and (iii) she had received no specific warning about the change in status of meldonium from WADA, the ITF, or the WTA.

87. In addition, the panel considered that it was reasonable for Mrs Sharapova to entrust the checking of the Prohibited List each year to her agent. However, the panel found that Mrs Sharapova was at fault for (i) failing to give her agent adequate instructions as to how to carry out the important task of checking the Prohibited List, and (ii) failing to supervise and control the actions of her agent in carrying out that task (specifically the lack of any procedure for reporting or follow-up verification to make sure that her agent had actually discharged his duty). The panel also noted Mrs Sharapova's failure to disclose her use of meldonium on her doping control forms. Taking all of these circumstances into account, the panel determined that, although Mrs Sharapova was at fault, her plea of no significant fault or negligence should be upheld. The panel decided that the sanction should be reduced to 15 months based on its analysis of Mrs Sharapova's degree of fault[13].

88. The Panel considers that some guidance may be derived from case CAS 2016/A/4643. The situations of the appellants in both cases are similar to the extent that they both had a reduced perception of the risk that they took while using Mildronate: they both used Mildronate for around ten years without any anti-doping issue and they both consulted doctors who prescribed

---

9 CAS 2016/A/4643, para. 2.
10 CAS 2015/A/4129.
11 CAS 2009/A/1926 & CAS 2009/A/1930.
12 CAS 2005/A/990.
13 CAS 2016/A/4643. *See* also *CAS decision in the case of Maria Sharapova*, ITFTENNIS.com, October 4, 2016, available at http://www.itftennis.com/news/243888.aspx.

them Mildronate for medical reasons. In case CAS 2016/A/4643, the panel decided that the Appellant bore no significant fault despite the Appellant's outright admission that she took meldonium after January 1, 2016. In the present case, the evidence points to the Appellant likely taking meldonium before January 1, 2016.

89. Both appellants also had significantly different concentrations of meldonium in their blood: Mrs Sharapova's concentration of meldonium amounted to 120µg/ml, while the Appellant had only 7.3µg/ml of meldonium in her blood. Despite these quite significant differences, the ineligibility periods imposed on the appellants were similar, namely 15 months in Mrs Sharapova's case (after the appeal to the CAS) and 12 months in the Appellant's case.

90. Regard must be also had to meldonium cases before other international sports bodies. In particular, in a case decided by the International Tennis Federation ("ITF"), Varvara Lepchenko was found to have committed an ADRV under Article 2.1 of the Tennis Anti-Doping Programme, because she had a concentration of meldonium in her blood of 12.63µg/ml on January 7, 2016. In follow-up checks on February 1, March 1, and April 7, 2016, she was found to have concentrations of 0.9µg/ml, 0.339µg/ml and 0.029µg/ml, respectively. Mrs Lepchenko claimed that meldonium present in her samples came from a course of Mildronate tablets that she stopped taking on or around December 20, 2015. WADA advised the ITF that the concentrations found in the athlete's samples were consistent with her account of pre-January 1, 2016 use. Accordingly, it was accepted by the ITF that Mrs Lepchenko bore no fault or negligence for the violation and any period of ineligibility that might have otherwise been imposed was eliminated[14].

91. Mrs Lepchenko and the Appellant had similar concentrations of meldonium in their blood in January 2016. In the *Lepchenko* decision, WADA advised the ITF that the concentrations found in the athlete's samples were consistent with her account of pre-January 1, 2016 use and the appellant bore no fault or negligence for the violation. In addition, the *Lepchenko* decision was rendered on September 20, 2016, after the issuance of the second WADA notice, *i.e.* June 30, 2016. Had the ITF followed the second WADA notice in a strict way, a finding of no fault would not have been possible, as Mrs Lepchenko's concentration of meldonium in her blood amounted to 12.63µg/ml, which is above WADA's safe harbor of 5µg/ml. Although this decision is not binding on this Panel, due regard must be had to similarities between the *Lepchenko* case and the present case.

3. The case at hand

a. Excretion particularities of meldonium

92. In this section, the Panel considers the excretion particularities of meldonium and the various expert opinions on the subject in order to conclude (i) if the Appellant's concentration of meldonium is consistent with her account of pre-January 1, 2016 use, and (ii) if the third column of the second notice of meldonium *"<5µg/ml"* could be applicable here.

---

14 *Decision in the case of Varvara Lepchenko*, ITFTENNIS.com, September 20, 2016, available at http://www.itftennis.com/news/243008.aspx.

93. As reflected in decision CAS 2016/A/4708, Professor Kalvins, the inventor of meldonium, explained at the oral hearing in that case that the peculiarity of meldonium is linked to the fact that it uses a natural substance for its transport, which affects its excretion. Two phases of elimination must be differentiated: a fast phase, depending on the amount of meldonium that has been taken; and a slow phase, which can last for many months due to the fact that the body tries to recapture it. A variety of factors, such as the living and training conditions, the consumption of food, the loss of weight, and the duration of its use, have an influence on the wash-out period of meldonium from the human organism.

94. According to Professor Kalvins, meldonium cannot be used as an acute treatment. It needs at least ten days, probably 2 weeks, in order to reduce the carnitine level. Professor Kalvins considers as optimal an application for 1 – 3 months. At the hearing in this case, Professor Thevis agreed with Professor Kalvins's findings.

95. Further, Professor Thevis in his expert opinion, stated that existing literature on the excretion of meldonium suggests that the drug can accumulate and can be retained in bodily tissue such as erythrocytes (red blood cells). This is supported by an earlier study on the accumulation properties of meldonium[15], which was comprehensively reviewed recently[16]. At the hearing, Professor Thevis was asked by the Appellant's counsel whether it was possible that the Appellant's excretion could be slower due to the fact that she had been taking meldonium for a few years. Professor Thevis could not answer that question definitively, but said that this was not improbable.

96. In his expert opinion, Professor Thevis stated that there are no published studies examining the rates at which meldonium is excreted (so-called elimination kinetics) after administration over a period of 4-6 weeks, *e.g.*, whether this is a linear process or not[17]. There is also a difference in how the drug appears in blood (plasma) or urine samples. There has therefore not been a study conducted, which reflects the facts of the Appellant's case, *i.e.*, where the drug has been administered for as long as the Appellant was taking it and where the patients were competitive athletes. Results from a WADA sponsored study indicate that patients given a higher dose of meldonium over the same period of time as those given a lower dosage will have higher urinary concentrations 21 days after the last dose was administered (2.3µg/ml compared to 1.4µg/ml).

97. At the hearing, Professor Thevis also referred to various factors which might influence degradation time, such as nutrition, lifestyle, or gender. In the first WADA notice, WADA also confirmed that *"the renal elimination of meldonium is expected to vary significantly between individuals,*

---

15 ZHANG/CAI/YANG/ZHANG/PENG, *Nonlinear pharmacokinetic properties of mildronate capsules: A randomized, open-label, single- and multiple-dose study in healthy volunteers* (2013).

16 SCHOBERSBERGER/DUNNWALD/GMEINER/BLANK, *Story behind meldonium-from pharmacology to performance enhancement: A narrative review* (2016).

17 Exhibit 15 to the Appeal Brief, a study from Clinical Pharmacy Research Institute, The Second Xiangya Hospital, Central South University and The Pharmaceutical Science of Centre South University, China (2011), indicating that excretion is non-linear and that there was an accumulation after multiple-dose administration.

depending on the dosing and duration of the drug administration[18]*"*. However, Professor Thevis also noted that he had not taken into account any of the Appellant's characteristics in his expert opinion. When the Appellant's specific circumstances are taken into account (*i.e.*, the longer period of time over which she took the drug and the fact that she was a competitive athlete), Professor Thevis could not exclude the possibility of a urinary concentration of 7.3µg/ml 21 days after the last dose, and concluded that this amounted to a moderate possibility. He later revised this conclusion after being informed that it had actually been 31 days since the Appellant's last dose, stating that he expected the possibility to be *"lower than the initially estimated moderate likelihood*[19]*"*.

98. Finally, in accordance with the second WADA notice, athletes may have a urinary concentration of up to 5µg/ml if they are tested on or before February 29, 2016. With regards to this grace period, Professor Thevis reached two related conclusions. First, taking into account the differences between individuals in how they excrete meldonium, 7.3µg/ml is a relatively close value to the 5µg/ml limit stipulated by WADA. Secondly, in Professor Thevis' opinion, had the Appellant not been tested until later in the grace period (*e.g.*, February 29, 2016), there is *"a considerable probability"* that she could have presented with a urinary concentration of less than the 5µg/ml limit.

99. As a result, scientists' opinions and scientific studies are inconclusive as to exact excretion particularities of meldonium. It seems clear that meldonium is eliminated in two phases and its complete elimination may take a long time. As indicated above, no study reflects the facts of the Appellant's case, *i.e.*, where the drug has been administered for as long as the Appellant was taking it and where the patients were competitive athletes. Even if such a study had been conducted, the particular characteristics of the athlete should have been taken into account in the expert assessment.

100. In view of these scientific uncertainties, the Panel accepts the Appellant's assertion that she did not use meldonium on or after January 1, 2016 and that a concentration of meldonium of 7.3µg/ml is consistent with her administration of the substance *before* the Prohibited List entered into force, *i.e.* before January 1, 2016. The WADA Science Department also confirmed that in the Appellant's case *"a concentration of 7.3 microgram per milliliter on January 10, 2016 appears possible without the intake of meldonium since January 1, 2016"*. The ADHP also accepted that the Appellant had not taken meldonium after January 1, 2016.

101. Further, there are significant differences between individuals in how they excrete meldonium and 7.3µg/ml is a relatively close value to the 5µg/ml limit stipulated by WADA.

102. In addition, as mentioned above, a finding of no fault or negligence was made in the *Lepchenko* decision, even though Mrs Lepchenko's concentration of meldonium in her blood amounted to 12.63µg/ml, which exceeds WADA's safe harbor of 5µg/ml more significantly than the value determined in the Appellant's sample.

---

18 *Meldonium Notice – April 13, 2016*, World Anti-Doping Agency, available at https://www.wada-ama.org/sites/default/files/resources/files/wada-2016-04-12-meldonium-notice-en.pdf.

19 Exhibit 27 to the Appeal Brief, *Letter from the ADHP*, November 8, 2016, p.1.

103. As a result, the Panel finds that the Appellant may rely on no fault or negligence in line with the third column *"<5µg/ml"* of the second WADA notice.

104. It has to be underlined that this column specifies only that *"a finding of no fault may be made*[20]*"*. In line with requirements of the WADA Code, the Appellant must nevertheless have established 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"*. The Appellant must have also established how the prohibited substance entered his or her system.

b. How the prohibited substance entered the system

105. To establish no fault or negligence, apart from the duty of utmost care, an athlete must establish how the prohibited substance entered his or her system. This is a condition precedent to a finding of absence of fault or no significant fault. In the present case, it is not contested that the product was prescribed to the Appellant for medical reasons and that she took meldonium in November and December 2015 in a dose of 500 milligrams twice a day. Therefore, this first test is satisfied.

c. Duty of utmost caution

106. The Appellant must further establish that she discharged her duty of utmost caution in order for the Panel to find no fault or negligence. In other words, *"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"*.

107. To establish whether the Appellant has discharged her duty of utmost caution, the Panel considers below: (i) the state of scientific knowledge about the excretion particularities of meldonium before 2016, (ii) the Appellant's use of meldonium, and (iii) the Appellant's medical reasons for the prescription of Mildronate.

i. State of scientific knowledge about excretion particularities of meldonium before 2016

108. The Appellant submits that little was known about excretion of meldonium at the time when WADA added meldonium to the Prohibited List, *i.e.* September 29, 2015, or when the Prohibited List entered in force, *i.e.* January 1, 2016.

109. Indeed, in CAS 2016/A/4708, Dr. Mazzoni, expert witness on meldonium called by the Respondent, informed the panel that WADA changed its policy regarding excretion studies for meldonium only in 2016 and started to perform its own studies at that time. In addition, Dr Mazzoni explained that WADA only established contact with the inventor of meldonium, Professor Dr Ivars Kalvins, in September 2016, a year after the decision relating to the inclusion

---

[20] *Meldonium Notice – June 30, 2016*, World Anti-Doping Agency, available at https://www.wada-ama.org/sites/default/files/resources/files/2016-06-30-meldonium_notice.pdf.

of meldonium on the Prohibited List and a considerable time after WADA had found out that there were problems with the excretion period of the substance.

110. At the hearing in the present case, when asked about the state of knowledge at the time of inclusion of meldonium on the Prohibited List, Professor Thevis stated that not much was known about excretion particularities of meldonium. Indeed, WADA issued its first notice only on April 13, 2016 in which it acknowledged that *"limited data exists to date on the urinary excretion of meldonium*[21]*"*. Before 2016, neither WADA nor Mildronate's manufacturer nor any other institution could provide information about the excretion particularities of meldonium.

111. Further, the Appellant submits that she and the team doctor trusted the information on the leaflet accompanying Mildronate, indicating the excretion period of the substance of a few hours or a few days. This is contested by the Respondent, who submits that there is no evidence from which the Appellant could conclude that Meldonium was eliminated after a few hours up to a few days. The Respondent refers to the Summary of Product Characteristics ("SPC") of Mildronate, which states that *"renal excretion plays a substantial role in elimination of meldonium and its metabolites. Meldonium elimination half-life (t ½) is approximately 4 hours. Following repeated dosing elimination half-life is different"*. Nevertheless, the SPC does not indicate what that elimination half-life following repeated dosing could be. Having read the SPC, the Panel finds that the Appellant could still have justifiably believed that meldonium would be completely eliminated from her body if not after a few hours, then after a few days.

112. The Respondent also submits that the manufacturer's FAQs indicate that *"although half-life of meldonium in organism is only 4-6 hours, its complete elimination time from organism is significantly longer"* and *"because of the non-linear pharmacocinetics of meldonium, its terminal elimination from the body may last for several months and it depends on a variety of factors such as dose, duration of treatment, individual physiology of the organism, sensitivity of methods and type of samples (blood or urine) used for detection of the substance*[22]*"*. However, the Respondent did not adduce sufficient evidence and *"cannot tell when this information was uploaded"*.

113. It follows that the lack of scientific knowledge on the excretion particularities of meldonium confirms that the Appellant could not reasonably have known or suspected that meldonium could be detected in her blood after January 1, 2016.

ii. The Appellant's administration of meldonium

114. The Appellant submits that she administered meldonium from November 1, 2015 until December 10, 2015. In her first statement of February 10, 2016, the Appellant said she administered meldonium from November 10 to December 12, 2015. In her second statement of February 17, 2016, the Appellant stated she administered meldonium from November 1 to December 20, 2015. Finally, in her third statement of March 30, 2016, the Appellant submitted she administered meldonium from November 1 to December 10, 2015. According to the

---

21 *Meldonium Notice – April 13, 2016*, World Anti-Doping Agency, available at https://www.wada-ama.org/sites/default/files/resources/files/wada-2016-04-12-meldonium-notice-en.pdf.

22 *Mildronate FAQs*, available at https://meldonium.mildronate.com/faq/.

Respondent, the Appellant's inconsistent information about dates of administration of meldonium did not add to her credibility, especially since the dates were corrected twice, without any explanation or evidence.

115. At the hearing, the Appellant explained that she was in Canada with her doctor for a competition while her medical diaries were in Kiev. She was not aware of the enquiries and her doctor answered the Ukrainian Biathlon Association by himself. He did not check the Appellant's medical diaries and this is why the first dates of her final intake of meldonium were not exact. The doctor checked the Appellant's medical diaries upon his return to Kiev and communicated the date of final intake of December 10, 2015.

116. Further, Professor Thevis concluded in his initial opinion that there was a moderate probability that a urine sample taken on January 10, 2016, *i.e.* 21 days after the last dose of meldonium, could nevertheless contain a concentration of 7.3µg/ml. However, his initial opinion was based on incorrect information. He was working from the assumption that the last dose had been administered on December 20, 2015, when in fact it had been administered on December 10, *i.e.* 31 days before the sample was taken instead of 21[23]. In a follow-up email, he revised his opinion and considered that the probability of a concentration of 7.3µg/ml after 31 days was lower than his initially estimated moderate likelihood[24].

117. At the hearing, Professor Thevis stated that there is no scenario in scientific literature which reflects what the Appellant described. Therefore, Professor Thevis considered it impossible to determine whether the Appellant had indeed stopped the administration of meldonium on December 10, 2015. According to Professor Thevis, it is more probable that the Appellant ingested meldonium over a long period of time, until shortly before the end of 2015.

118. According to the Respondent, if the Appellant had stopped taking meldonium upon notification of the Prohibited List, *i.e.* September 29, 2015, there is a strong likelihood that there would have been no AAF on or after January 1, 2016. In any event, if the Appellant had stopped the intake of meldonium upon notification of the Prohibited List, she would have done everything reasonable to make sure that there was no AAF on or after January 1, 2016. Instead, the Appellant continued taking meldonium for several weeks and *"preferred to exploit its effects"* until shortly before it was added to the Prohibited List. The Respondent claims that it is particularly disturbing that the Appellant started a new cycle of meldonium in November 2015.

119. Despite the above arguments, the Panel finds that the exact date of the final intake of meldonium (December 10, 12 or 20, 2015) is not key to the finding of no fault or negligence. In the present decision, the Panel has already accepted that the Appellant's concentration of meldonium on January 10, 2016 is consistent with her account of pre-January 1, 2016 use. Of course, if the Appellant had stopped the intake of meldonium when WADA had included that substance on the Prohibited List, the Appellant would have probably avoided the AAF. However, the Panel cannot ignore the medical reasons for the use of the substance. These medical reasons have been proven or have remained unchallenged. Further, the Panel cannot

---

23 Exhibit 25 to the Appeal Brief, *Expert Opinion of Professor Mario Thevis*, October 19, 2016, p.2.
24 Exhibit 27 to the Appeal Brief, *Letter from the ADHP*, November 8, 2016, p.1.

ignore the lack of scientific knowledge on the excretion particularities of meldonium, as illustrated above. For all these reasons, and considering the quite extraordinary circumstances of the present case, including the concentration of meldonium found in the Appellant's sample, the Panel is comfortably satisfied that the Appellant fulfilled her obligation to ensure that meldonium did not enter her body after January 1, 2016, *i.e.* on the date when Meldonium became prohibited.

120. It follows that the Appellant discharged her duty of utmost care and caution.

iii. Medical reasons for the prescription of Mildronate

121. The Appellant submits that she took Mildronate for medical reasons, not in order to increase her performance. She had been taking Mildronate since 2006 when she was diagnosed with *cardiopsychoneurosis*. Since then, she had been prescribed Mildronate from time to time.

122. Further, on April 14, 2015, the Appellant was diagnosed with *bronchial asthma* by the Federal Medical and Biological Agency (Pulmonology Scientific and Research Institute, Ukraine). This condition makes her particularly sensitive to allergens and, most significantly, cold and/or wet air. Exposure can cause "suffocation attacks" [sic] (*i.e.*, asthma attacks/bronchospasms), causing heavy breathing and wheezing in the chest. In addition to prescribing a number of inhalers, anti-inflamatories (for her airways), eye drops, and antihistamines, she was prescribed Mildronate 0,25g[25]. The course of treatment involved taking 1 capsule daily for a three week period and this course of treatment was to be repeated every spring and summer.

123. On October 26, 2015, the Appellant was diagnosed with *dysmetabolic mycardiodystrophy*, first degree mitral valve prolepsis [sic] (presumably a mitral valve prolapse, whereby the mitral valve flaps do not close smoothly or evenly, causing a heart murmur). This is also confirmed in a medical record from 2006 when she was diagnosed with *cardiopsychoneurosis*[26]. For this condition, in addition to annual echocardiograms and regular check-ups, she was prescribed, *inter alia*, Mildronate (500mg), to be taken twice a day for a period of 60 days[27]. This, in combination with the prescription for the *bronchial asthma* diagnosis, coincides with the Appellant taking meldonium in November and December 2015. This is also corroborated by Professor Popov, who confirmed the Appellant's diagnosis of *dysmetabolic mycardiodystrophy*[28], which is evidenced by her ECG (echo cardiogram)[29].

124. At the hearing, the Appellant also confirmed that she had been prescribed Mildronate for her heart disease and *bronchial asthma*. The Appellant stated that she stopped taking meldonium on December 10, 2015 not because of a competition taking place the next day, *i.e.* December 11, 2015, but because her medical results improved. She also confirmed that she is now trying a

25 Exhibit 11 to the Appeal Brief, *Medical Report in relation to Ms Abramova*, April 14, 2015, p.4.
26 Exhibit 32 to the Appeal Brief, *Medical Report in relation to Ms Abramova*, May 6, 2006, p.3.
27 Exhibit 12 to the Appeal Brief, *Medical Report and prescription in relation to Ms Abramova*, October 26, 2015, p.2.
28 Exhibit 30 to the Appeal Brief, *Expert Opinion of Professor Vyacheslav Popov*, December 14, 2016, p.25.
29 Exhibit 14 to the Appeal Brief, *Ms Abramova's Cardiogram*, October 29, 2015. *See* also Exhibit 31 to the Appeal Brief, *Ms Abramova's Cardiogram*, November 26, 2015.

new treatment instead of Mildronate. She started a new treatment on January 1, 2016. Should this treatment not help, she will apply for a Therapeutic Use Exemption for meldonium.

125. It follows that on the basis of the evidence submitted, the Panel is satisfied that the Appellant administered meldonium because of medical reasons, and not in order to increase her performance. An athlete who has for a long time been relying on the medication in question and who does not have any concrete information on excretion of this substance, cannot be considered negligent if she decides to continue treatment in the way the Appellant did.

iv. Conclusion on the Appellant's exercise of duty of utmost caution

126. Taking into consideration that: (i) the state of scientific knowledge about excretion particularities of meldonium before 2016 was poor, (ii) the Appellant was not required to stop the administration of meldonium when the Prohibited List was published or communicated to the Appellant, and (iii) the Appellant had and still has medical problems requiring treatment by meldonium or by alternative medicine, the Panel finds that the Appellant discharged her duty of utmost caution. Against the background of the very specific circumstances of the present case, the Panel is satisfied that the Appellant could not reasonably have known or suspected even with the exercise of utmost caution that meldonium could still be detected in her blood after January 1, 2016.

d. Conclusion

127. It follows that the Appellant has established the two components necessary for finding no fault or negligence, by establishing how the prohibited substance entered her system and by discharging her duty of utmost caution to ensure that the prohibited substance would not be detected in her body after the Prohibited List came to force.

128. Further, looking at the most relevant decisions and cases, Mrs Lepchenko and the Appellant had similar levels of meldonium present in their blood in January 2016. In the *Lepchenko* decision, WADA advised the ITF that the concentrations found in the athlete's samples were consistent with her account of pre-January 1, 2016 use and Mrs Lepchenko bore no fault or negligence for the violation. In addition, the *Lepchenko* decision was rendered on September 20, 2016, therefore after the second WADA notice had been issued. Had the ITF followed the second WADA notice in a strict way, a finding of no fault would not have been possible, as Mrs Lepchenko's concentration of meldonium in her blood amounted to 12.63µg/ml, which is above WADA's safe harbor of 5µg/ml. As indicated, although this decision does not bind this Panel, the Panel considers appropriate not to disregard the similarities between the *Lepchenko* case and the present case.

129. It follows that the Appellant has established that she bore no fault or negligence for the ADRV.

C. Sanction

130. According to Article 10.4 of the WADA Code, *"If an Athlete 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"*.

131. The one-year period of ineligibility should be cancelled since no fault or negligence has been established.

132. Further, the second order on provisional measures rendered by the CAS on January 31, 2017 is upheld. In that order, the Appellant's suspension was lifted by one day, allowing her to compete in IBU Cup Biathlon 6 on February 3 and February 4, 2017. For the avoidance of doubt, the Appellant's results obtained in IBU Cup Biathlon 6 are not disqualified accordingly.

133. As regards the results obtained by the Athlete as from January 10, 2016 through February 3, 2016, the second WADA notice clearly states that no disqualification of results should follow only *"in the absence of other evidence of use after September 29, 2015*[30]*"*. It follows that her results as of as of January 10, 2016 through February 3, 2016, should remain disqualified since it is established that the Appellant took meldonium after that September date.

134. In the Appealed Decision, the ADHP also obliged the Appellant to pay the IBU a contribution of EUR 2,000 towards the costs. The finding of no fault or negligence leads the Panel to cancel this obligation.

135. Finally, in accordance with Article 10.7.3 of the WADA Code: *"An anti-doping rule violation for which an Athlete or other Person has established No Fault or Negligence shall not be considered a prior violation for purposes of this Article"*. Therefore, in case of another doping violation, the Appellant will not be subject to sanctions for repeated doping.

136. The above conclusion makes it unnecessary to consider any further requests of the parties. Accordingly, any further prayers and requests shall be dismissed.

---

30 *Meldonium Notice – June 30, 2016*, World Anti-Doping Agency, available at https://www.wada-ama.org/sites/default/files/resources/files/2016-06-30-meldonium_notice.pdf.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on December 5, 2016 by Mrs Olga Abramova against the decision rendered by the International Biathlon Union Anti-Doping Hearing Panel on November 14, 2015 is partially upheld.

2. The decision rendered by the International Biathlon Union Anti-Doping Hearing Panel on November 14, 2015 is set aside.

3. Mrs Olga Abramova's results obtained between January 10, 2016 and February 3, 2016, are disqualified.

4. Mrs Olga Abramova's contribution of EUR 2,000 towards the IBU's costs is cancelled.

5. (…).

6. (…).

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