



Arbitration CAS 2018/A/5592 Olga Kazankevich v. Russian Anti-Doping Agency (RUSADA),  
award of 15 October 2018

Panel: Mr Hans Nater (Switzerland), Sole Arbitrator

*Para-powerlifting*

*Doping (oxandrolone and metabolite)*

*Proof of lack of intent in absence of establishment of source*

*Burden of proof for absence of intent*

*Burden of proof for source of prohibited substance*

1. Until the entry into force of the 2015 edition of the World Anti-Doping Code (WADC) it was the athlete's burden of proof to establish that the violation was unintentional and thus to establish how the relevant prohibited substance entered into his/her body; with the consequence that in case the athlete failed to establish the source of the prohibited substance, the anti-doping rule violation shall be deemed intentional and sanctioned accordingly. Following the entry into force of the 2015 WADC, and given that in contrast to the definitions to the WADC of "*No Fault or Negligence*" or "*No Significant Fault or Negligence*", where proof of the source of the prohibited substance is required, no such requirement is found in the article addressing "*intent*", or the definitions for establishment of absence of intent, a certain number of CAS panels have accepted that – in yet very exceptional cases – an athlete might be able to succeed in demonstrating lack of intent even where he/she cannot establish the source of the prohibited substance.
2. The burden of proof with respect to intent lies with the athlete, who has the duty to establish, on a balance of probability, that the anti-doping rule violation was not intentional; *i.e.* the athlete has the burden of convincing the CAS panel that the occurrence of the circumstances on which he/she relies is more probable than their non-occurrence.
3. In order to establish the source of the prohibited substance it is not sufficient for the athlete to protest innocence and to suggest that the substance must have entered his/her body inadvertently from some contaminated food or water. Rather, the athlete must adduce concrete and credible evidence to demonstrate that a particular supplement, medication or other product taken contained the substance in question. The mere presentation of invoices or bills as evidence for the purchase of contaminated foods cannot fulfil the athlete's burden of proof that the food was indeed the source of the contamination.

## **I. THE PARTIES**

1. Mrs Olga Kazankevich, born on 26 June 1974, is a Russian powerlifter, who competes in para-powerlifting (the “Athlete”).
2. The Russian Anti-Doping Agency (“RUSADA”) is the National Anti-Doping Organisation responsible for enforcing the applicable Russian anti-doping rules. Its seat is in Moscow, Russia. On 9 February 2018, the Athlete was notified of the Appealed Decision.

## **II. FACTUAL BACKGROUND**

### **A. Background facts**

3. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions and evidence adduced. References to additional facts and allegations found in the Parties’ written submissions and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in his award only to the submissions and evidence he deems necessary to explain his reasoning.

### **B. The Athlete’s adverse analytical findings**

4. On 6 May 2017, the Athlete was subject to an in-competition doping control during the “Russian Powerlifting Championship for athletes with musculo-skeletal/mobility disabilities” in Kursk, Russia.
5. On the doping control form, the Athlete indicated that she had been taking the following substance: “Elevit Pronatal”.
6. The WADA-accredited laboratory “Laboratoire Suisse d’Analyse du Dopage” in Lausanne, Switzerland (the “Laboratory”), was instructed to conduct the analysis of the Athlete’s A-sample. In its analytical report dated 13 June 2017, the Laboratory confirmed that it detected in the Athlete’s sample the presence of Oxandrolone and its long-term metabolite.
7. Oxandrolone is a non-specified substance, included in the category S1.1.a) (“Exogenous Anabolic Androgenic Steroids”) on the applicable WADA Prohibited List.
8. On 15 June 2017, the Athlete was notified of the positive test result and, simultaneously, was provisionally suspended from any sporting competition. It appears that she did not ask for a confirmatory analysis to be conducted on her B-sample.
9. At an undetermined date, the Athlete requested and obtained a copy of the documentation package related to the analysis procedure of her A-sample.

**C. The Disciplinary Proceedings before the RUSADA**

10. On 22 November 2017, the Athlete was heard by the Disciplinary Anti-Doping Committee of the RUSADA and, on that occasion, declared that a) the anti-doping rule violation was not intentional, b) she had been taking “Elevite Prenatal” for the achievement of pregnancy since April 2017 and c) she had been using the supplement Indinol for several years as “*a preventive treatment of diseases*”. She explained that she did not mention Indinol on the doping control form as she stopped using this substance seven days prior to the doping control. In view of these circumstances, the Athlete “*considers that since she has been taking measures on pregnancy planning and preventive disease treatment, it would be illogical and absurd for her to take prohibited medication*”. The Athlete was unable to explain how the prohibited substance entered her system but was of the view that the positive findings could most likely be explained by the use of contaminated food.
11. In a decision dated 22 November 2017, the Disciplinary Anti-Doping Committee of the RUSADA held that the Athlete was found guilty of an anti-doping rule violation. It observed that the standard period of ineligibility was 4 years as the anti-doping rule violation involved a non-specified prohibited substance. The Disciplinary Anti-Doping Committee of the RUSADA found that the sanction could not be reduced considering that a) the Athlete was unable to establish how the prohibited substance entered her system, b) she failed to establish that Elevite Prenatal or Indinol was at the origin of her positive findings and c) she obviously did not take “*all possible precaution measures in order to prevent the prohibited substance into her body*”.
12. As a result, on 22 November 2017, the Disciplinary Anti-Doping Committee of the RUSADA issued the following decision (the “Appealed Decision”) (as translated from Russian into English by the Athlete):

<b><i>Sanctions applied</i></b>	<i>Disqualification for 4 (four) years</i>
<b><i>Date of disqualification start</i></b>	<i>June 15, 2017</i>
<b><i>Date of disqualification end</i></b>	<i>June 14, 2021</i>
<b><i>Results dissolution</i></b>	<i>Annul Athlete results in Russian Powerlifting Championship (Musculo-Skeletal/Mobility Disabilities) in Kursk</i>

13. On 9 February 2018, the Athlete was notified of the Appealed Decision.

**III. SUMMARY OF THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

14. On 24 February 2018, the Athlete filed a Statement of Appeal with the Court of Arbitration for Sport (“CAS”) in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the “Code”). Within such document, she appointed Mr Jacques Radoux as arbitrator but confirmed that she was favourable to refer the case to a Sole Arbitrator. She also requested an extension of the time limit to file her appeal brief “*pending the outcome of [her] Legal Aid Application*”.

15. On 5 March 2018, the CAS Court Office acknowledged receipt of the Athlete's Statement of Appeal and of her payment of the CAS Court Office fee. It invited the Parties to state within three days whether they would be interested in submitting the case to a Sole Arbitrator.
16. In response to the request of the CAS Court Office, both Parties eventually confirmed that they accepted to submit the matter to a Sole Arbitrator but could not manage to reach an agreement as to the person to be appointed for the task.
17. On 21 March 2018, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to submit the dispute to a Sole Arbitrator, whose name would be communicated in due course.
18. On 26 March 2018, and in view of the agreement of the RUSADA, the CAS Court Office advised the Parties that the Athlete was granted an extension of 10 days for the filing of her Appeal Brief.
19. On 30 March 2018, the Athlete filed her Appeal Brief in accordance with Article R51 of the Code.
20. On 9 April 2018, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division appointed Mr Hans Nater, attorney-at-law, Zurich, Switzerland, as Sole Arbitrator.
21. On 11 April 2018, the RUSADA filed an application for a 5-day extension of its deadline to file its Answer, which was granted the following day by the CAS Secretary General, pursuant to Article R32 of the Code.
22. On 23 April 2018, the RUSADA requested another extension of its deadline to file its Answer, which was eventually granted in the absence of any objection raised by the Athlete.
23. On 11 May 2018, within the prescribed deadline, the RUSADA filed its Answer in accordance with Article R55 of the Code.
24. On 29 May 2018, the CAS Court Office advised the Parties that the Sole Arbitrator had decided to grant them a second round of written submissions and invited the Athlete to file her Reply within a week, at the receipt of which, the RUSADA would be granted the same timeframe to submit its Response.
25. On 13 June 2018, the CAS Court Office acknowledged receipt of the Athlete's Reply dated 5 June 2018 and forwarded this document to the RUSADA, which was invited to file its Response within a week.
26. On 19 June 2018, the RUSADA filed an application for a 4-day extension of its deadline to file its Response, which was granted by the CAS Secretary General, pursuant to Article R32 of the Code.
27. On 21 June 2018 and within the prescribed deadline, the RUSADA filed its Response.

28. On 9 July 2018, the CAS Court Office advised the Parties that the Sole Arbitrator deemed himself sufficiently well-informed to decide on the dispute without the need to hold a hearing.
29. On 27 and 30 July 2018 respectively, the Athlete and the RUSADA signed and returned the Order of Procedure in this appeal procedure.

#### IV. SUBMISSIONS OF THE PARTIES

##### A. The Appeal

30. The Athlete submitted the following requests for relief:

“(…)

1. *The Appeal of Olga Kazankevich is admissible.*
2. *The decision rendered by the RUSADA Disciplinary Anti-doping Committee on November 22, 2017 in the matter of Olga Kazankevich is set aside.*
3. *The period of ineligibility imposed on Olga Kazankevich shall reasonably be reduced to two years. Any period of ineligibility served by Olga Kazankevich before the entry into force of the CAS award, shall be credited against the total period of ineligibility to be served.*
4. *The Parties bear their own costs with respect to the CAS arbitration”.*

31. The Athlete’s submissions, in essence, may be summarized as follows:

- The Athlete’s appeal is admissible and was filed in a timely manner.
- The anti-doping rule violation was unintentional and, consequently, the standard period of ineligibility must be reduced from four years to two years.
- The Athlete ignores how the prohibited substance entered her system. “[An] analytical chemistry specialist, Ms. Olga Kiseleva, has made a proposition as to the possible time-frame within which the Athlete could have ingested Oxandrolone (...). She has advised: “The detected concentration of oxandrolone (10 ng/ml) suggest that the prohibited substance was accepted by the athlete (intentionally/unintentionally) about 3-5 days before the sampling of the biomaterial for analysis (...). This calculation is based on the assumption of a single admission of oxandrolone, is approximate and does not allow to fully take into account the contribution of external factors and individual characteristics of the athlete’s metabolism” (...). Having regarded the said information the Athlete reconstructed a day-by-day regimen within the 3-5 days before the 6th of May, 2017, i.e. the doping test day. The only version Ms. Kazankevich could think of is that: she has consumed inadvertently some contaminated food or water during the days of the Para-Championship (02-06 May, 2017), including the case where such food/water had been intentionally contaminated/sabotaged. The probability of such a scenario is quite real, taking into account she was a leader in her category at the time of the Para-Championship”.

- In order to prove the absence of intent to enhance her performances, the applicable regulations do not require from the Athlete to establish how the prohibited substance entered her system. It is sufficient for the Athlete to prove that the anti-doping rule violation was not committed knowingly or recklessly, in particular that she did not deliberately use Oxandrolone. In order to support her position, the Athlete puts forward the following arguments:
  - In October 2016, the Athlete decided to have a child and, in this context, “*consulted with the specialist of RUSADA on possible consumption of the multivitamin complex «Elevit@Pronatal», which is recommended for use in planning pregnancy*”. Under these circumstances, it would be absolutely illogical for the Athlete to use Oxandrolone, which could be detrimental to her potential child’s health.
  - Likewise and for many years, she suffered from a number of health issues, which would have been exacerbated by the use of Oxandrolone. This is another reason for the Athlete not to use the litigious prohibited substance.
  - She was “*an unquestionable leader in her weight category for several years at national level (...) and one of the world leaders*” and, therefore had no need to dope.
  - In her very long sporting career and until the doping control carried out on 6 May 2017, the Athlete had a clean doping record, as she had never tested positive for any prohibited substance.
  - She has always taken appropriate precautions in order to prevent the intake of prohibited substances. In particular, she did not take any sport supplements since she decided to have a child in October 2016, she would systematically check the status of her medications or diary supplements with the national team doctor as well as with her personal coach. She would also methodically consult the WADA Prohibited List and the RUSADA official website.
- On the balance of probabilities, which is the applicable standard of proof, the scenario that the Athlete consumed the prohibited substance unintentionally through contaminated food or water is more likely than any other explanation.

## **B. The Answer**

32. The RUSADA submitted the following requests for relief:

“(…) RUSADA says that -

64.1. *Ms Kazankevich has committed an Anti-Doping Rule Violation contrary to ADR Article 2.1;*

64.2. *The Consequences to be applied in respect of the Anti-Doping Rule Violation are that a period of Ineligibility of four years be imposed;*

64.3. *The period of Ineligibility should commence on the date the Provisional Suspension was imposed;*

65. *RUSADA respectfully requests that costs be awarded to RUSADA in accordance with Rule 64.4 and Rule 64.5 of the Code of Sports-related Arbitration (in force from 1 January 2017)”.*

33. The submissions of the RUSADA, in essence, may be summarized as follows:

- It is undisputed that the Athlete has committed an anti-doping rule violation, which involves a non-specified substance. The mandatory sanction for this violation is a period of ineligibility of four years. The Athlete can reduce the sanction only if she can demonstrate on a balance of probability that her violation was not intentional.
- The Athlete failed to meet her burden of proving how Oxandrolone entered her body. The RUSADA can accept that it is not necessary to establish the route of ingestion of the prohibited substance in order to demonstrate that the anti-doping rule violation was not intentional. However, *“proof is still required, and the evidence must be such that the unintentional use is more probable than the intentional use”*.
- In the present case, the totality of the evidence put forward by the Athlete is not sufficient to persuade that she did not act intentionally:
  - The expert opinion of Ms Olga Kiseleva filed by the Athlete is irrelevant with respect to the intentional use of the prohibited substance. *“It is speculative evidence as to when oxandrolone might have been administered”* and does not offer any assistance as to how the prohibited substance entered the Athlete’s system and as to whether the use Oxandrolone was intentional or not.
  - The fact that the Athlete has health issues is not contested but does not give any indication as to whether she intentionally used Oxandrolone. The Athlete’s contention that these health conditions would have made it illogical for her to have willingly ingested the prohibited substance is a mere assertion. The same can be said about her desire to conceive.
  - The Athlete cannot reasonably claim that she has always exercised utmost caution to avoid that a prohibited substance enters her body. The Athlete admittedly had been taking Indinol for several years but has never used the services provided by the RUSADA to check the status of this substance and to make sure that it does not carry a potential risk. Under these circumstances, it can be affirmed that the Athlete’s use of medication was certainly not diligently managed.
- The Athlete *“has tested positive for a Non-Specified Substance; she cannot explain how the substance entered her system, but asserts forcibly that she is not a ‘cheat’ and did not use the substance intentionally. Assertion is not enough. She must provide evidence sufficient to comply with her burden of proof. In order to be in a position to discharge her burden of proof, [the Athlete] must either show how oxandrolone entered her system, or show that her case is one of the ‘exceptional cases’ referred to in the CAS jurisprudence that would mean she could discharge her burden of proof without providing evidence as to*

*means of ingestion. For the reasons stated in this Response Brief, RUSADA says that she has not. Accordingly, her appeal must fail”.*

- The Athlete’s version of how the prohibited substance entered her body is not the most likely.

## **V. JURISDICTION**

34. The jurisdiction of the CAS, which is not disputed, derives from Article 13.6 of the All-Russian Anti-Doping Rules (AAR), edition 2016, and Article R47 of the Code. It is further confirmed by the Order of Procedure duly signed by the Parties.
35. It follows that the CAS has jurisdiction to decide on the present dispute.

## **VI. APPLICABLE LAW**

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

37. The relevant facts at the basis of the present case arose after 9 August 2016, which is the date when the pertinent edition of the AAR came into force. In accordance with the principle of non-retroactivity, this set of rules is the regulation under which the case shall be assessed in conjunction with the 2015 World Anti-Doping Code (“WADC”) so as to harmonise anti-doping policy rules and regulations within all sports in Russia as well as all sports around the world. In this respect, the Sole Arbitrator notes that none of the Parties has asserted that any other set of laws or procedures should apply alternatively. On this topic, the RUSADA confirmed that the provisions contained in the AAR are identical to or substantially the same as the corresponding Articles of the 2015 WADC.

## **VII. ADMISSIBILITY**

38. The appeal is admissible as the Athlete submitted it within the deadline provided by Article R49 of the Code as well as by Article 13.6 of the AAR. It complies with all the other requirements set forth by Article R48 of the Code.

## **VIII. MERITS**

39. The Sole Arbitrator observes that the following facts are undisputed:



- It is the first anti-doping rule violation committed by the Athlete.
  - No breach of the chain of custody occurred in the present case.
  - The RUSADA successfully established the presence of Oxandrolone and its long-term metabolite (17 $\beta$ -hydroxymethyl-17 $\alpha$ -methyl-18-nor-2-oxa-5 $\alpha$ -androsta-13-en-3-one) in the Athlete's urine A-sample.
  - The Athlete committed an anti-doping rule violation in accordance with Article 2.1 of the AAR.
  - Oxandrolone is a non-specified substance, included in the category S1.1. a) ("*Exogenous Anabolic Androgenic Steroids*") on the applicable WADA Prohibited List. The substance is prohibited both in- and out-of-competition and there is no threshold under which it is allowed.
  - The Athlete has been provisionally suspended from any sporting competition since 15 June 2017.
40. The Parties agree that the standard period of ineligibility is 4 years. However, whereas the RUSADA is of the view that there are no reasons to reduce this sanction, the Athlete claims that she has successfully established that the anti-doping rule violation was not intentional, with the consequence that the period of ineligibility should be reduced to 2 years. In this respect, the Athlete contends that there is no necessity of proving how Oxandrolone entered her system to qualify for any reduction as long as she is able to convince the Judging Body that the occurrence of the circumstances on which she relies is more probable than their non-occurrence. In the present case, it is the Athlete's position that she has presented circumstantial and conclusive evidence that she ingested Oxandrolone by way of contaminated food or water.
41. Pursuant to Article 2.1.1 AAR, it is each athlete's personal duty to ensure that no prohibited substance enters his/her body. Athletes are responsible for any prohibited substance or its metabolites or markers found to be present in their biological 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 violation under Article 2.1 AAR.
42. Under Article 10.2.1 AAR, an athlete who did not discharge his/her burden of proof of the unintentional nature of his/her use of a prohibited product shall be deemed to have intentionally violated the relevant anti-doping regulations (CAS 2016/A/4563 para. 58).
43. Under these circumstances, the Sole Arbitrator has to resolve the following issues:
- In order to establish absence of intent for the purposes of the applicable regulations, is it necessary for the Athlete to establish how Oxandrolone entered her system?
  - If it is not necessary for the Athlete to prove how Oxandrolone entered her system, has she established that the anti-doping rule violation was not intentional?

- What are the sanctions to be applied to the Athlete?

**A. In order to establish absence of intent for the purposes of the applicable regulations, is it necessary for the Athlete to establish how Oxandrolone entered her system?**

44. The AAR provides, so far as material, as follows (as translated from Russian into English by the RUSADA):

*Article 10.2*

*The period of Ineligibility for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:*

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

*(a) The Anti-Doping Rule Violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the Anti-Doping Rule Violation was not intentional.*

*(b) The Anti-Doping Rule Violation involves a Specified Substance and the Anti-Doping Organisation can establish that the Anti-Doping Rule Violation was intentional.*

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

*10.2.3 As used in Articles 10.2 and 10.3, the term “intentional” is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct that he or she knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not “intentional” if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered “intentional” if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.*

45. Until recently, it was quite uncontroversial that it was the athlete who had to bear the burden of proof of establishing that the violation was unintentional and thus to establish how the relevant forbidden substance entered into his/her body (for instance, CAS 2006/A/1067 para. 11; CAS 2006/A/1130 para. 12; CAS 2006/A/1067 para. 15; CAS 2010/A/2230 para. 11.6; CAS 2013/A/3124 para. 12.2; CAS 2016/A/4563 para. 50; CAS 2016/A/4377, para 51; CAS 2016/A/4845 para. 41; CAS 2017/A/4962 para. 50). Pursuant to these CAS precedents, the athlete's burden of establishing how the prohibited substance entered his/her system is a precondition to qualify for any reduction in sanction as, otherwise, his/her absence of intent would be examined in relation to circumstances that are speculative and that could be partly or entirely made up. To allow any such speculation as to the circumstances in which an athlete

ingested a prohibited substance would undermine the strict liability rules underlying the World Anti-Doping Code, thereby defeating its purpose (among others CAS 2006/A/1130 para. 14; CAS 2013/A/3124 para. 12.2; CAS 2016/A/4534 para. 36; CAS 2016/A/4563 para. 56).

46. As a logical consequence of the above findings, if an athlete fails to establish how a prohibited substance entered into his/her body, her/his anti-doping rule violation shall be deemed intentional and sanctioned accordingly based on the applicable regulations (among others CAS 2006/A/1067 para. 14; CAS 2016/A/4563 para. 56; CAS 2017/A/4962 para. 50).
47. Following the entry into force of the 2015 edition of the WADC, a certain number of Panels and Sole Arbitrators have accepted that an athlete might be able to demonstrate a lack of intent even where he/she cannot establish the origin of the prohibited substance (for instance CAS 2016/A/4534; CAS 2016/A/4627 & 4628 & 2017/A/5283; CAS 2016/A/4676; CAS 2016/A/4919; CAS 2017/A/5017; CAS 2017/A/5295). These findings arise from the observation that, in contrast to the Definitions to the WADC (and the AAR) of “*No Fault or Negligence*” or to “*No Significant Fault or Negligence*” (pursuant to the definitions contained in the AAR or the WADC) where proof of the source of the prohibited substance is required, no such requirement is found in Article 10.2.1 AAR or the Definitions for establishment of the absence of intent. Thus, it must be inferred that the “legislator” of the WADC intended to leave the door open for an athlete to prove absence of intent even if he/she does not know, and therefore cannot show, how the prohibited substance entered his/her system. As a matter of fact, “[a]ny ambiguous provisions of a disciplinary code must in principle be construed *contra proferentem* and in accordance with the hallowed statement in [...] CAS 94/129: “*The fight against doping is arduous and if may require strict rules. But the rule makers and the rule appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable*”. (para. 34). This is especially so when on the express language of the code the purpose of the concept of intent is to identify athletes “*who cheat*” (*sic*)” (CAS 2016/A/4534 para. 35).
48. The Sole Arbitrator adheres to the approach adopted in the aforementioned paragraph and comes to the conclusion that the establishment of the source of the prohibited substance in an athlete’s sample is not mandatory in order to prove an absence of intent.

**B. If it is not necessary for the Athlete to prove how Oxandrolone entered her system, has she established that the anti-doping rule violation was not intentional?**

49. According to Article 3.1 AAR, the burden of proof with respect to intent lies with the Athlete, who thus has the duty of establishing on a balance of probability that her anti-doping rule violation was not intentional under Article 10.2.1.1 AAR. In this respect, the Athlete has the burden of convincing that the occurrence of the circumstances on which she relies is more probable than their non-occurrence (CAS 2017/A/4962).
50. The Sole Arbitrator is mindful of the fact that the Panels, which rendered the decisions mentioned in para. 47 here-above, were keen to emphasize the very exceptional nature of the case in which the athlete would succeed in demonstrating his/her lack of intent without establishing the source of the prohibited substance:

- *“Where an athlete cannot prove source it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him”* (CAS 2016/A/4534 para. 37).
  - *“[...] it is unlikely in the extreme that in a doping case under Article 2.1 ADR (presence of a prohibited substance) an athlete will be successful in proving that he acted unintentionally, without establishing the source of the prohibited substance”* (CAS 2017/A/5017 para. 54).
  - *“Thus, the requirement of the proof of source of a prohibited substance is not mandatory but remains an important - not to say the crucial - factor in deciding whether the athlete has succeeded in discharging her/his burden of proving lack of intent”* (CAS 2016/A/4627 & 4628 & 2017/A/5283 para. 49).
  - *“The Panel is mindful of CAS 2016/A/4534 and CAS 2016/A/4676, where the CAS Panels considered that an Athlete might be able to demonstrate a lack of intent even where he/she cannot establish the origin of the prohibited substance. In CAS 2016/A/4676, at para. 72, is, inter alia, stated that “the Panel can envisage the theoretical possibility that it might be persuaded by a Player ‘s simple assertion of his innocence of intent when considering not only his demeanour, but also his character and history, even if such a situation may inevitably be extremely rare”* (CAS 2017/A/5295 para. 112).
51. In the present arbitral proceedings, the Sole Arbitrator does not see any reason to depart from the above findings and holds that it is the duty of the Athlete to bring forward the necessary evidence and arguments to support the assertion that her case is among the most exceptional ones.
52. The Athlete, who does not dispute the fact that she has not been able to identify the source of Oxandrolone in her sample, claims that she consumed either some contaminated food or water prior to the collection of her urine sample on 6 May 2017. According to the Athlete, bearing in mind that she was trying to get pregnant and was facing numerous health issues, it would be illogical for her to use prohibited substance as it would be detrimental to her health as well as to the health of her potential child. Moreover, she is of the view that *“food/water had been intentionally contaminated/sabotaged. The probability of such a scenario is quite real, taking into account she was a leader in her category at the time of the Para-Championship”*.
53. To support her position, the Athlete filed the following evidence:
- A statement dated 23 May 2018 from MiraxBioPharma, the manufacturer of Indinol and an expert opinion dated 5 October 2007 (*“valid until October 5, 2008”*) issued by Mr. G. M. Rodchenkov, *“Candidate of chemical sciences, member of expert commission of Ministry of Health on sports pharmacology”*.
- These documents confirm that Indinol does not contain any prohibited substance.
- A receipt dated 5 March 2017 establishing the purchase of Indinol.
  - An expert opinion dated 12 September 2017 from Mrs Olga Kiseleva, Junior Staff Scientist of *“FSBSP”*.

This evidence only corroborates that a) the *“procedure for sample delivery to the laboratory, sample preparation, analysis and interpretation of the obtain results is described transparently and exhaustively”*, b) *“the detection of oxandrolone in urine is possible only in a short time after the use of the drug”* and c) *“[the] detected concentration of oxandrolone (...) suggests that the prohibited substance was accepted by the athlete (intentionally/unintentionally) about 3-5 days before the sampling”*.

- A medical report issued by the State Budgetary Healthcare Institution of Ynad on 11 March 2015 and a medical report dated 14 July 2016 containing a diagnosis, as well as a description of the Athlete’s condition.
- An undated joint written statement signed by Mr Dimitry Valeryevich Krasilnikov, *“senior coach for powerlifting the sport of persons with MusculoSkeletal/Mobility Disabilities”* and Mr Kirill Sergeevich Flegentov, head of the Russian national team, the written statement signed on 21 June 2017 by Mr Shishkin Vyacheslavovich, the doctor of the Paralympic team for powerlifting among the persons with Musculo-Skeletal/Mobility Disabilities and the written statement signed on 21 June 2017 by Mrs Irina Naskripnyak, the Athlete’s personal coach.

Mr Dimitry Valeryevich Krasilnikov and Mr Kirill Sergeevich Flegentov they just expressed the fact that the Athlete’s positive finding came as a great surprise. They confirmed the Athlete’s clean record in doping throughout the years, her various sporting successes, her intention to get pregnant and the great care she would pay to make sure that no prohibited substance enters her body (*“The athlete always observed the code of WADA and did not hesitate to ask questions about the use of medicine prescribed to her by doctors”*). Likewise, Mr Shishkin Vyacheslavovich only declared that the Athlete *“always responsibly approaches to a choice of preparations and sports nutrition; before the reception, we jointly examine in detail each substance that is part of the sports nutrition, for the possibility of its application under anti-doping rules, while often referring to the “RUSADA” search system, where there is almost always advice on many drugs”*. As regards the evidence of Mrs Irina Naskripnyak, she also insisted on the fact that all the tests conducted on the Athlete during her long sporting career had systematically been negative and detailed the Athlete’s sporting results as well as her cooperation with the RUSADA and WADA to promote *“physical culture, sports, clean and fair sports, active lifestyle. She regularly participates in organized meetings and conversations about the negative attitude awards taking illegal drugs with children and young people of the city”*.

54. The Sole Arbitrator observes that the Athlete’s adverse analytical finding cannot be explained by the intake of Indinol, as this supplement apparently does not contain any Oxandrolone. The contrary has not been proven. As a consequence, there is no need to take into account the evidence filed by the Athlete with respect to this substance. Likewise, the expert opinion dated 12 September 2017 from Mrs Olga Kiseleva can also be ignored. As a matter of fact, the Sole Arbitrator sees nothing favourable to the Athlete’s theory in this document, which confirms that the doping control and analysis were performed in a flawless manner and which does not rule out the possibility for the Athlete to have intentionally absorbed the prohibited substance. This document only evaluates when Oxandrolone might have been administered and is of no help in resolving whether the use of Oxandrolone was intentional or not. Finally, with respect

to the medical reports issued on 11 March 2015 and on 14 July 2016, the Sole Arbitrator does not question the real intention of the Athlete to conceive and the existence of the numerous and difficult health issues she has been facing in recent years. The evidence filed in this respect is convincing and must be accepted. The Athlete's sporting results are also undisputed. However, these three aspects (desire to get pregnant, health issues and sporting successes) do not explain why the Athlete's case is so exceptional that it shows on the balance of probability that the anti-doping rule violation was not intentional (without the Athlete having to establish the origin of the prohibited substance).

55. In view of the above considerations, the remaining evidence consists of the various witness statements of the Athlete's close entourage (team doctor, coach, etc.). The testimonies of Mr Dimitry Valeryevich Krasilnikov, Mr Kirill Sergeevich Flegentov, Mr Shishkin Vyacheslavovich and Mrs Irina Naskripnyak do not bring additional pertinent information into the case as regards how the unintentional ingestion of Oxandrolone may have occurred and the reasons why, on 6 May 2017, the Athlete tested positive for Oxandrolone. Apart from expressing their surprise at the Athlete's positive findings, none of the witnesses even addressed the issue of the presence of the prohibited substance in the Athlete's system.
56. As a consequence, the available evidence filed by the Athlete boils down to her own assertion that her health condition would make it *"absolutely illogical and incorrect for her to use any prohibited substance while she was taking measures to conceive a child and preventive treatment of several severe diseases"*. It is not sufficient for the Athlete to protest her innocence and to suggest that the substance must have entered her body inadvertently from some contaminated food or water. Rather, the Athlete must adduce concrete and credible evidence to demonstrate that a particular supplement, medication or other product that she took contained the substance in question. The mere presentation of invoices or bills as evidence for the purchase of contaminated foods cannot fulfil the Athlete's burden of proof that this food was indeed the source of the contamination (CAS 2017/A/5105 para. 67; CAS 2017/A/4962 para. 51; CAS 2016/A/4563 para. 52; CAS 2016/A/4377 para. 52).
57. The Sole Arbitrator fully adheres with the position expressed in the following two cases:
  - CAS 2010/A/2230 para. 11.12: *"[to] permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body"*.
  - CAS 2017/A/4962 para. 54: *"the Athlete's contention that he must have ingested the DHCMT from contaminated supplements had no evidentiary basis at all by reference to (including test results of) the supplements he had allegedly taken or from any other persuasive source. If such an "explanation" was dispositive, any athlete whose body contained a prohibited drug could assert that it had come from contaminated supplements of any sort. That would destroy the effectiveness of WADC and of the anti-doping regulations based on it and amount to a license to cheat and an abject surrender in the battle against doping"*,

58. Apart from her own words, the Athlete did not supply any actual evidence, which could explain how the unintentional ingestion of Oxandrolone may have occurred. In this case, the Athlete's suggestion that her water or food must have been contaminated with Oxandrolone is nothing more than speculation, unsupported by any evidence of any kind. Such bare speculation is not nearly sufficient for the Athlete's burden of establishing that the anti-doping rule violation was unintentional.
59. As a result, the Sole Arbitrator finds that there are no exceptional circumstances in the present case, which show on the balance of probability that the anti-doping rule violation was not intentional. Accordingly, the Sole Arbitrator considers that the Athlete must therefore be sanctioned with a four-year period of ineligibility under the AAR.

**C. What are the sanctions to be applied to the Athlete?**

60. For the reasons exposed here above, the Athlete is found guilty of anti-doping rule violations in accordance with Article 2.1 of the AAR.
61. Pursuant to Article 10.10 AAR, the period of ineligibility shall start on the date of the final hearing, which occurred on 22 November 2017.
62. In accordance with Articles 10.10.3 and 10.10.3.1, if a provisional suspension is imposed and respected by the athlete, then the athlete shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. It is undisputed that in the present case, the Athlete was provisionally suspended as of 15 June 2017. That is the date set in the Appealed Decision for the beginning of the period of ineligibility. The Sole Arbitrator sees no reason to decide otherwise.
63. In accordance with Article 10.8 AAR and as provided in the Appealed Decision, the Athlete's results obtained during the "Russian Powerlifting Championship for athletes with musculo-skeletal/mobility disabilities" in Kursk, Russia must be forfeited.
64. As a consequence, the Sole Arbitrator holds that the Appealed Decision must be upheld in its entirety, without any modification. This conclusion makes it unnecessary for the Sole Arbitrator to consider the other requests submitted by the Parties. Accordingly, all other prayers for relief are rejected.

## **ON THESE GROUNDS**

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

1. The appeal filed by Mrs Olga Kazankevich against the decision issued on 22 November 2017 by the Disciplinary Anti-Doping Committee of the RUSADA is dismissed.
2. The decision issued on 22 November 2017 by the Disciplinary Anti-Doping Committee of the RUSADA is confirmed.
- (...)
5. All other motions or prayers for relief are dismissed.