



Arbitration CAS ad hoc Division (OG Rio) 16/024 Darya Klishina v. International Association of Athletics Federations (IAAF), award of 16 August 2016 (operative part of 15 August 2016)

Panel: The Hon. Annabelle Bennett (Australia), President; Mr Francisco Müssnich (Brasil); Mr Mohammed Abdel Raouf (Egypt)

Athletics (long jump)

*Revocation by an International Federation of its previous decision to declare an athlete exceptionally eligible to compete
Right to reconsider a decision*

Interpretation of Rule 22.1A of the IAAF Competition Rules

1. There is a right to revisit a decision where new facts and evidence, not previously available, are presented to the decision maker. Under Swiss law and the laws of many other countries, such a reversal is valid in law if new circumstances have arisen (or possibly have since come to light) which would have entitled the authority to refrain from issuing the original decision had the circumstances been known at the time of its issuance, or if the decision is not final when the new decision is to be taken.
2. Rule 22.1A of the IAAF Competition Rules provides that whether or not an athlete has been affected or tainted in any way by the failure on the part of a National Federation to protect and promote clean athletes, fair play, and the integrity and authenticity of the sport, if the athlete can establish to the comfortable satisfaction of the IAAF that (i) he or she was outside the country of that National Federation for a sufficiently long period and (ii) subject to other fully compliant drug testing in- and out-of-competition equivalent in quality to the testing to which his or her competitors were subject, that athlete may be exceptionally granted eligibility for all International Competitions. Even if the athlete was subjected to or the subject of drug testing that was not fully compliant during the same period, the fact that, during the whole of that period, the compliant system applied to him or her, is enough for the athlete to fulfil the second criterion.

1 PARTIES

- 1.1 The Applicant is Darya Klishina, a long jumper of Russian nationality.
- 1.2 The Respondent is the International Association of Athletics Federations (hereinafter, the “IAAF”), the organisation responsible for the sport of athletics, having its headquarters in Monaco.

2 FACTS

- 2.1 The elements set out below are a summary of the main relevant facts as established by the Panel by way of a chronology on the basis of the submissions of the parties. Additional facts may be set out, where relevant, in the legal considerations of the present award.
- 2.2 In November 2015, the World Anti-Doping Agency (hereinafter, the “WADA”) Independent Commission issued a detailed report upholding allegations about systemic, state-sponsored doping in Russian track & field.
- 2.3 Based on those findings, the IAAF Council resolved on 13 November 2015 to provisionally suspend the All Russian Athletics Federation (ARAF) from membership of the IAAF. ARAF accepted the provisional suspension and acknowledged that the IAAF Council would only consider its reinstatement as an IAAF member once a specially-established IAAF Taskforce was satisfied that adequate remedial measures had been fully completed.
- 2.4 On 17 June 2016, the IAAF Taskforce submitted a detailed report to the IAAF Council stating that ARAF (now renamed Russian Athletics Federation — hereinafter, “RusAF”) had clearly not met the conditions for reinstatement and that RusAF athletes could not credibly return to international competition without undermining the confidence of their competitors and the public in the integrity of that competition. On the basis of this report, the IAAF Council decided not to reinstate RusAF to membership of the IAAF. RusAF therefore remains suspended to date, with the result that its athletes remain ineligible to compete in international competitions, by operation of IAAF Competition Rule 22.1(a).
- 2.5 On the same date, the IAAF Council also resolved to adopt IAAF Competition Rule 22.1A (hereinafter, “the Rule”) and delegated authority to a Doping Review Board (hereinafter, the “DRB”) to consider applications made by athletes affiliated to RusAF for exceptional eligibility pursuant to the Rule to compete in international competitions notwithstanding RusAF’s continued suspension from membership of the IAAF.
- 2.6 On 28 June 2016, the Applicant applied to the IAAF to restore her eligibility pursuant to the Rule.
- 2.7 On 9 July 2016, the DRB accepted the Applicant’s application under the Rule for exceptional eligibility to compete in international competitions, including the Athletics competition in the Games of the XXXI Olympiad in Rio de Janeiro. The Applicant was found eligible to compete in an individual capacity as a Neutral Athlete. The decision of the DRB (hereinafter, the “First Decision”) stated that in order to compete as a Neutral Athlete, the Applicant’s participation, in addition to complying with all other eligibility requirements under IAAF Rules, still needed to be accepted by the organiser of the competition in question.
- 2.8 In addition, the First Decision reserved the right of the DRB *“to reconsider the Applicant’s case should information ever be brought to its attention (including but not limited to as a result of the current*

investigation being conducted by Professor McLaren on behalf of WADA) that the Doping Review Board considers is such as to undermine the basis upon which the application was accepted”.

- 2.9 On 16 July 2016, Professor McLaren issued his Independent Report, commissioned by WADA, into the allegations about the systemic State-sponsored doping in Russia (hereinafter, “the IP Report”). Of course, the Applicant was not named in that report.
- 2.10 The Applicant prepared an affidavit dated 8 August 2016, pursuant to an invitation dated 6 August 2016, to comment on the IP Report. In that same invitation, the DRB summarised the evidence later included in Professor McLaren’s affidavit. The Applicant was also asked to comment on that information.
- 2.11 By operative decision dated 10 August 2016 (hereinafter, the “Second Decision”), the DRB revoked its previous grant of exceptional eligibility pursuant to the First Decision and decided that the Applicant was “*not eligible to compete at or otherwise take part in International Competitions, including the athletics competition at the 2016 Olympic Games*” (emphasis in original document). The grounds of that decision were issued on 12 August 2016.
- 2.12 The DRB found that, within a relevant period of time defined to be between 1 January 2014 to date (hereinafter, the “Relevant Period”), there was evidence in an affidavit sworn by Professor McLaren on 7 August 2016 (hereinafter, the “McLaren Affidavit”) that the Applicant had been directly affected and tainted by the State-organised doping scheme described in the IP Report. The evidence also recorded that some samples of the Applicant had been subject to the methods described in the IP Report. In summary, that evidence was that:
- (i) a sample collected on 26 February 2014, yielding a T/E ratio of 8.5, had been subject to a “SAVE” order by the Ministry of Sport on 3 March 2014;
 - (ii) a sample collected on 17 October 2014 and subsequently seized by WADA in December 2014 was found to bear marks and scratches consistent with the removal of the cap and contained urine from the Applicant but also from another female athlete; and
 - (iii) a sample collected on the occasion of the 2013 IAAF World Championships in Moscow was also found to bear marks and scratches consistent with the removal of the cap.

3 CAS PROCEEDINGS

- 3.1 On 13 August 2016 at 08:30 am (time of Rio de Janeiro), the Court Office of the CAS ad hoc Division acknowledged receipt of the application filed by the Applicant against the Second Decision.
- 3.2 On the same day, the Parties were informed that the President of the CAS ad hoc Division had decided to appoint the following Panel of arbitrators: The Hon. Dr Annabelle Bennett A.O. S.C. (President); Mr Francisco Mussnich and Dr Mohamed Abdel Raouf (arbitrators).

- 3.3 The Panel allowed the Respondent to file its reply to the Applicant's application by 13 August 2016, 18.00 pm (time of Rio de Janeiro). Within the same deadline, the Russian Olympic Committee (hereinafter, the "ROC"), the International Olympic Committee (hereinafter, the "IOC") and Professor McLaren were invited to file amicus curiae briefs, if they deemed necessary.
- 3.4 The Respondent was granted until 13 August 2016, at 15.00 pm (time of Rio de Janeiro) to file the exhibits (other than the McLaren Report) to the Second Decision.
- 3.5 The Parties were also summoned to a hearing to be held on 14 August 2016, at 11.00 am (time of Rio de Janeiro).
- 3.6 The Respondent did not file a written submission but stated that it would make oral submissions.
- 3.7 No amicus curiae brief was filed.
- 3.8 On 14 August 2016, at 11.00 am (time of Rio de Janeiro), the hearing took place at the temporary offices of the CAS ad hoc Division. The Panel was joined by Mr Antonio De Quesada, Counsel to the CAS and the following persons also attended the hearing: for the Applicant, the Applicant herself, Mr Paul J. Greene (Applicant's Counsel) and Mr Loren Seagrave (Applicant's coach); for the Respondent, Messrs Huw Roberts and Ross Wenzel (IAAF Counsel).
- 3.9 At the hearing, evidence was called from the Applicant and from Mr Seagrave, who is based in the United States.
- 3.10 At the conclusion of the hearing, the parties confirmed that their rights to be heard had been fully respected.

4 PARTIES' SUBMISSIONS

- 4.1 The Parties' submissions and arguments shall only be referred to in the sections below if and when necessary, even though all such submissions and arguments have been considered.

a. Applicant's Requests for Relief

- 4.2 The Applicant requests the Panel to:

"(1) render the IAAF's 12 August 2016 [the Second Decision in the present award] decision legally invalid reinstating the IAAF's 9 July 2016 decision [the First Decision] and declaring her immediately eligible to compete in the Rio Olympic Games in the sport of Athletics (her event the women's long jump will begin on Tuesday 16 August);

- (2) *in the alternative, overturn the IAAF's 12 August 2016 decision since nothing was revealed after 9 July to undermine the IAAF's initial determination that Ms. Klishina was eligible to compete,*
- (3) *award Ms. Klishina any further relief that this Panel deems to be just and equitable".*

5 JURISDICTION AND ADMISSIBILITY

5.1 Article 61.2 of the Olympic Charter provides as follows:

"61 Dispute Resolution

[...]

2. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration".

5.2 In view of the above, the Panel considers that the CAS ad hoc Division has jurisdiction to hear the present matter. The jurisdiction of the CAS ad hoc Division was not contested in the written submissions and was expressly confirmed by all parties at the hearing.

5.3 Article 1 of the CAS Arbitration Rules for the Olympic Games (hereinafter referred to as the "CAS Ad Hoc Rules") provides as follows:

"Article 1. Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport (CAS)

The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games.

In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective".

5.4 The Panel notes that the operative part of the Second Decision was issued on 10 August 2016, that is, during the Olympic Games. Therefore, as agreed by the parties at the hearing, there is no issue regarding the admissibility of the Applicant's application.

6 APPLICABLE LAW

6.1 Under Article 17 of the CAS Ad Hoc Rules, the Panel must decide the dispute *"pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate".*

7 DISCUSSION

a. *Legal framework*

- 7.1 These proceedings are governed by the CAS Ad Hoc Rules enacted by the International Council of Arbitration for Sport (“ICAS”) on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (“PIL Act”). The PIL Act applies to this arbitration as a result of the express choice of law contained in Article 17 of the CAS Ad Hoc Rules and as the result of the choice of Lausanne, Switzerland as the seat of the ad hoc Division and of its panels of arbitrators, pursuant to Article 7 of the CAS Ad Hoc Rules.
- 7.2 According to Article 16 of the CAS Ad Hoc Rules, the Panel has *“full power to establish the facts on which the application is based”*.

b. *Merits*

- 7.3 In the First Decision, the DRB determined that the Applicant had met her burden and proven to its comfortable satisfaction that she was subject to other fully adequate systems outside of Russia for a sufficiently long period to provide substantial objective assurance of integrity. The DRB was also satisfied that since 1 January 2014, she had been subject to fully compliant drug testing in- and out-of-competition. Thus, the Applicant fulfilled both criteria of the Rule.
- 7.4 The DRB revisited the First Decision following the publication of the IP Report. The IP Report included findings, made beyond reasonable doubt, concerning a State-sponsored system, operated for the protection of doped Russian athletes, within a State-dictated failsafe system, described in the IP Report as the Disappearing Positive Methodology which included a sample swapping methodology (hereinafter, the “Russian System”).
- 7.5 No athlete was named in the IP Report. Professor McLaren made it clear that his findings did not extend to individual athletes and that his enquiries into athletes was ongoing. He did, however, subsequently provide information concerning individual athletes to WADA and it was on the basis of that information that the IAAF reversed the First Decision and, on 10 August 2016, declared the Applicant ineligible for the Games of the XXXI Olympiad in Rio de Janeiro (that is, Second Decision). The DRB found that she did not fulfil the second criterion.
- 7.6 Ms Klishina relies on the fact that she had been subject to a fully adequate system outside of Russia for *“a sufficiently long period”*, determined by the DRB to be since 1 January 2014, to satisfy the criteria of the Rule. This involved being subject to drug testing out of Russia. She has been training in the United States since October 2013 and has been a permanent resident of the United States since March 2014. She says that she has been tested *“almost exclusively outside Russia”*. Her tests, as shown on ADAMS, support this.
- 7.7 The Applicant raises a number of issues concerning the Second Decision:

- Whether it is invalid for want of power in the IAAF to reverse the First Decision under the Rule and the Guidelines for Applications made under Competition Rule 22.1A of 23 June 2016 (hereinafter, the “Guidelines”).
- Whether the Second Decision should be overturned.
- Whether the Applicant’s evidence, which overcame the burden of satisfying the Rule to the comfortable satisfaction of the DRB for the purposes of the First Decision, is sufficient to establish that she was subject to fully adequate anti-doping systems outside of Russia from 1 January 2014.

1) *The First Decision*

7.8 The Applicant sought from the IAAF exceptional eligibility to compete in, inter alia, the Games of the XXXI Olympiad in Rio de Janeiro. In her application, made from Florida, the Applicant stated, inter alia:

“At the same time a rule amendment (under which I am applying, namely 22.1A(b)) was also passed saying that if there are individual athletes who can clearly and convincingly show that they are not tainted by the Russian system because they have been outside the country and subject to other effective anti-doping systems, then should be able to apply for permission to compete in international competitions”.

7.9 There was no response from the DRB to the effect that the Applicant’s understanding of the Rule was inaccurate.

7.10 The DRB took into account, in particular, whether the Applicant was subject to fully adequate anti-doping systems outside of Russia during the Relevant Period (1 January 2014 to the date of the First Decision) and whether she had been subject to fully compliant drug testing in- and out-of-competition equivalent in quality to the testing to which her prospective competitors in the Games of the XXXI Olympiad in Rio de Janeiro have been subject in the same period.

7.11 In the First Decision, notified to the Applicant on 9 July 2016, the DRB recorded the *“deeply rooted culture of cheating”*, the *“exploitation of athletes”*, the *“consistent and systematic use of performance enhancing drugs by many Russian athletes”* and *“confirmed involvement by doctors, coaches and laboratory personnel”* set out in the report of a WADA Independent Commission appointed to investigate allegations made about systemic, State-sponsored doping in Russian track and field.

7.12 In that report, it had been found that while Russian athletes were often willing participants in the system, there were documented cases where athletes who did not want to participate in *“the program”* were the subject of *“coercive activities”*.

7.13 The DRB took into account certain findings concerning the State-sponsored system prevalent in Russia, including that no assurance could be taken of drug testing conducted in Russia during the Relevant Period. The DRB acknowledged that the Applicant had undergone testing in Russia. However, it took only limited *“objective assurance of integrity”* of samples collected in Russia

and tested by WADA-accredited laboratories outside of Russia, including for the reason that it had been reported *“that samples being shipped for analysis out of Russia appear to have been subject to interference by Russian customs authorities before leaving the country”*.

7.14 However, the DRB also recorded a number of matters relevant to the Applicant, including:

- The fact that she had spent 632 days out of Russia, being 86.6% of her time, in the Relevant Period;
- She had relocated permanently to the United States in March 2014 and had been trained under a US coach since October 2013;
- She regularly competes in competitions on the international circuit;
- A total of 11 samples had been collected from the Applicant outside of Russia in the Relevant Period;
- 1 sample had been collected by the IAAF since June 2016 and sent for analysis by a laboratory outside of Russia.

7.15 No assurance was taken from any testing where the samples collected were sent for analysis by the Moscow laboratory.

7.16 The DRB acknowledged that no samples had been collected from the Applicant while she was in competition in the Relevant Period. It did record dates on which 1 blood passport and 10 urine samples were collected from the Applicant out-of-competition between 17 October 2014 and 11 May 2016. It is now accepted by the parties that the first of these samples, on 17 October 2014, was in fact collected in Russia, leaving 10 samples collected outside of Russia during the Relevant Period.

7.17 The DRB was comfortably satisfied that the Applicant:

- “a. was subject to other, fully adequate systems outside of Russia for a sufficiently long period to provide substantial objective assurance of integrity; and*
- b. that the Applicant has for such period been subject to fully compliant drug-testing in- and out-of-competition equivalent in quality to the testing to which her prospective competitors have been subject in that period”.*

7.18 She was declared eligible to compete.

2) *The Second Decision*

7.19 Information was subsequently made available to the DRB by Professor McLaren.

- 7.20 Professor McLaren set out the summary of his findings, made beyond reasonable doubt, as to the operation of the Russian system. This included the manipulation of athletes' analytical results or sample swapping, with the active participation and assistance of the FSB, CSP and the Moscow and Sochi Laboratories. Professor McLaren also described a system of sample swapping whereby sample bottles were tampered with and clean urine was swapped for dirty urine.
- 7.21 He did not, in the IP Report, make findings with respect to individual athletes but subsequently, upon request from WADA and International Federations, he did provide such evidence that he described in his affidavit provided to the DRB as "*reliable evidence*" which, as he put it, "*clearly implicates individual athletes in the State-dictated doping cover up program*" that he described in the IP Report.
- 7.22 The information provided by Professor McLaren and specific to the Applicant is set out at para. 2.12 and 7.37 and ff.
- a) The construction of the Rule
- 7.23 The First Decision and the Second Decision were made under the Rule. It is convenient first to consider the construction of the Rule.
- 7.24 There are important matters to note:
- The Rule was inserted by amendment on 17 June 2016.
 - This was the same date as the decision by the IAAF to continue the suspension of RusAF.
 - The amendment was inserted before the publication of the IP Report and clearly before the provision of information as to individual athletes by Professor McLaren.
 - The Rule is **not** the same as the decision of the IOC Executive Board made after the publication of the IP Report. Accordingly, as the parties agreed, the IOC Executive Board decision is not in evidence in this case and decisions of the Ad hoc Panel of the CAS for the Games of the XXXI Olympiad in Rio de Janeiro as to the application of, or the terms of, the IOC Executive Board decision are not applicable.
- 7.25 The Rule is in the following terms:
- "1. *The following persons shall be ineligible for competitions, whether held under these Rules or the rules of an Area or a Member. Any athlete, athlete support personnel or other person:*
- (a) *whose national Federation is currently suspended by the IAAF. This does not apply to national competitions organised by the currently suspended Member for the Citizens of that Country or territory;*
- (...)

1.A. Notwithstanding Rule 22.1 (a), upon application, the Council (or its delegate(s)) may exceptionally grant eligibility for some or all International Competitions, under conditions defined by the Council (or its delegate(s)), to an athlete whose National Federation is currently suspended by the IAAF, **if (and only if)** the athlete is able to demonstrate to the comfortable satisfaction of the Council that:

- (a) the suspension of the National Federation was not due in any way to its failure to protect and promote clean athletes, fair play, and the integrity and authenticity of the sport, or
- (b) if the suspension of the National Federation was due in any way to its failure to put in place adequate systems to protect and promote clean athletes, fair play, and the integrity and authenticity of the sport, **(i) that failure does not affect or taint the athlete in any way, because he was subject to other, fully adequate, systems outside of the country of the National Federation for a sufficiently long period to provide substantial objective assurance of integrity; and (ii) in particular the athlete has for such period been subject to fully compliant drug-testing in- and out-of-competition equivalent in quality to the testing to which his competitors in the International Competition(s) in question are subject; or**
- (c) that the athlete has made a truly exceptional contribution to the protection and promotion of clean athletes, fair play, and the integrity and authenticity of the sport.

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

7.26 It must be emphasised that this is the provision relied upon by the DRB to support the Second Decision.

7.27 It is helpful to consider what is provided for in the Rule, in summary and relevantly:

- The Rule imposes a strict and limited basis on which exceptional eligibility can be granted.
- An athlete may apply for the exceptional grant of eligibility notwithstanding the suspension of his or her National Federation and the ineligibility of the athlete provided for in Rule 22.1(a).
- Such eligibility will be granted if and only if the athlete is able to demonstrate certain matters to the comfortable satisfaction of the IAAF Council.
- The relevant failure by the National Federation, not in dispute in this case, does not affect or taint the athlete in any way because certain facts are established by the athlete:
 - The athlete was subject to other fully adequate systems outside of, here Russia, for a sufficiently long period to provide substantial objective assurance of integrity; and

- The athlete has for such sufficiently long period been subject to fully compliant drug testing.

7.28 The Guidelines relevantly provide:

- “6. *The Doping Review Board shall grant an application under Competition Rule 22.1A only when the applicant has demonstrated to its comfortable satisfaction that he/she fully satisfies the relevant criterion/criteria specified in the sub-clause of Competition Rule 22.1A on which he/she is relying. The more important the International Competition in which the applicant is seeking to compete, the more corroborating evidence the applicant will have to provide in order to meet that burden.*
7. *Where the application is made pursuant to Competition Rule 22.1A(b), the Doping Review Board shall consider all such factors as it deems relevant, which may include (without limitation):*
 - 7.1 *The nature and extent of the applicant’s contact with officials, coaches, doctors, other support persons, and other appointees or representatives of his/ her (now suspended) National Federation, and the period over which those contacts occurred.*
 - 7.2 *Any intelligence, investigation(s), and/ or results management impacting upon or implicating the applicant.*
 - 7.3 *Whether any coach, doctor or other support person with whom the applicant has worked has ever been implicated in the commission of any anti-doping rule violation(s).*
 - 7.4 *Whether any samples previously provided by the applicant are currently in storage and/ or subject to re-testing.*
 - 7.5 *What, in all of the circumstances of the case, including the nature and timing of the International Competition(s) for which eligibility is sought, is a 'sufficiently long period' for the athlete to have been subject to other (fully adequate) anti-doping systems outside the country of his/ her National Federation for purposes of Rule 22.1A(b) (the ‘**Relevant Period**’).*
 - 7.6 *The extent to which the applicant was outside of the country of his/ her National Federation during the Relevant Period, and why (in particular, was he/ she outside of the country in an individual capacity, or was he/ she under the control or supervision of the National Federation, for example, as part of a team or delegation representing the National Federation, or attending a training camp organised by the National Federation?).*
 - 7.7 *Whether the applicant was subject to other, fully adequate anti-doping systems outside of the country of the National Federation throughout the Relevant Period. Where there any times during that period when he/ she was not subject to testing?*
 - 7.8 *In particular, whether the applicant was in a Registered Testing Pool or providing other whereabouts during that period, and (if so) to whom, and what was the quality of that whereabouts information (e.g., how many unsuccessful attempts were made to test the applicant, were any whereabouts failures declared against the applicant?).*
 - 7.9 *How much in-competition testing and how much out-of-competition testing did the applicant undertake during the Relevant Period outside of the country of his/ her (suspended) National Federation, including (a) how many urine samples and how many blood samples, (b) how many*

Athletes Biological Passport (ABP) samples, (c) who were the testing authorities, and (d) where were the samples sent for analysis?

7.10 *How comparable is that testing, qualitatively, to the testing to which the applicant's prospective competitors in the International Competition(s) in question have been subjected during the same period?*

7.11 *Where the applicant has been subjected to ABP testing, have any concerns been raised about his/her ABP profile (steroidal and/or haematological modules)?”.*

(emphasis in original document).

b) Application of the Rule in the First Decision

7.29 In the First Decision, the DRB made a clear determination that the Applicant satisfied the criteria of the Rule to the requisite standard.

7.30 In coming to this conclusion, the DRB was fully aware of the chronology of the Applicant's whereabouts during the Relevant Period, which was the “*sufficiently long period*” referred to in the Rule and defined in the Guidelines and determined to be 1 January 2014 to the date of the First Decision.

7.31 Further, the DRB decided whether the anti-doping systems to which the Applicant was subject during the Relevant Period were fully adequate and whether the drug testing to which she was subject during that period was “*fully compliant*”.

7.32 The DRB acknowledged at para. 15:

“The Doping Review Board has to decide whether the anti-doping systems to which the Applicant was subject during the Relevant period were fully adequate, and whether the drug testing to which she was subject during that period was 'fully compliant'. The Doping Review Board interprets this to mean fully compliant with the mandatory sample collection procedures set out in the WADA International Standard for Testing & Investigations (ISTI) and with the mandatory sample analysis procedures set out in the WADA International Standard for Laboratories (ISL)” (emphasis in original document).

7.33 Further, the DRB cited the findings of the WADA Independent Commission and the contents of the report submitted by the IAAF Taskforce to the IAAF Council on 17 June 2016, outlining certain matters with respect to the system applied by the Moscow laboratory, which are similar to those later detailed in the IP Report. It also noted that WADA had suspended the accreditation of the Moscow laboratory in November 2015 and had revoked it for non-compliance with the requirements of the ISTI.

7.34 Importantly, the DRB concluded in the First Decision that it was comfortably satisfied that during the Relevant Period the Applicant satisfied each of the criteria set out in the Rule for exceptional eligibility, notwithstanding the suspension of the National Federation.

- 7.35 It should be remembered that in making its findings, the DRB was aware of, and took no account of, tests conducted in Russia and that it was cognisant of inadequacies in the system of testing in Russia, for which RusAF had been suspended.
- c) The material made available to the DRB between the First Decision and the Second Decision
- 7.36 On 16 July 2016, the IP Report was published, setting out in detail the methodologies used to conceal doping by Russian athletes. Those findings were made beyond reasonable doubt but no findings were made in the IP Report concerning individual athletes.
- 7.37 On 7 August 2016, Professor McLaren provided an affidavit concerning the Applicant and the application to her samples of different aspects of the Russian System, being a summary of the system described in the IP Report.
- 7.38 In particular, that evidence was to the effect that one of her samples, taken 26 February 2014, had yielded a T/E ratio of 8.5 and was subject to a “SAVE” order by the Ministry of Sport on 3 March 2014. That sample was subsequently recorded in the Moscow Laboratory notes as having been made subject to a GC/C/IRMS analysis with inconclusive results and reported negative in ADAMS.
- 7.39 A further sample, taken on 17 October 2014, was subsequently seized by WADA in December 2014 and found to bear marks and scratches, said by Professor McLaren to indicate tampering in a way that was consistent with having the cap removed and was subsequently tested to reveal the presence of a mixed DNA profile with a minor presence (under 25%) from at least one other female. This was said by Professor McLaren to be corroborative of the urine swapping methodology that was later used in the Sochi Games. Professor McLaren’s conclusion, made beyond reasonable doubt, was that the contents of the sample were tampered with and replacement urine was contained in the sample.
- 7.40 A third sample, taken in 2013, was referred to in Professor McLaren’s affidavit. However, this was taken outside of the Relevant Period for the purposes of the Rule and, by agreement of the parties, it is not presently relevant.
- 7.41 The Applicant points out that she was not permitted to be present in person for the purposes of the making of the Second Decision and that she was given only about 48 hours to provide her response to the letter of 6 August 2016.
- 7.42 In her affidavit, the Applicant addressed the suggestion of doping. Although it is not presently relevant to the issue of eligibility, for completeness that evidence can be summarised as follows. The Applicant sought to explain why her sample may have contained a high level of testosterone. She also explained that she cannot say what the laboratory did with her urine samples after they were out of her control. She denied being one of the 8 protected athletes referred to by Professor McLaren. She described her vigilance in following official doping protocols and her commitment to anti-doping. She provided some details of the dates on which she was in Russia, and the reasons for such visits.

- 7.43 She also stated that if she had been doping and had known that she would be protected in Russia, she would never have left that country. She did leave Russia to go to the United States. She reiterated that she was very careful during the period of collection of her samples to ensure that they were sealed.
- 7.44 The Applicant confirmed that for the entire period in question, she knew that she was subject to both in-competition and out-of-competition testing outside of Russia “*every single day*”. She provided a chronology of her movements in 2014, stated that she kept her whereabouts up to date in her ADAMS system and stated that she was available for doping tests throughout the Relevant Period.
- 7.45 The IAAF sought opinion as to the possible explanations raised by the Applicant regarding the presence of a high level of testosterone in her urine. The expert opinion provided rejected those proffered explanations. The Applicant had also understood that the evidence about her samples suggested that she had provided two samples on one of the occasions. That was not the case, as explained to the IAAF by WADA.
- d) Consideration
- 7.46 While the Panel accepts that the DRB is entitled to review its First Decision and to take into account relevant new evidence not previously available, the Panel is of the view that the conclusion reached in the Second Decision, and the basis for that decision, are not in accordance with the Rule which was purportedly invoked. Indeed, the further evidence considered by the DRB for the purposes of the Second Decision did not undermine its finding in the First Decision that the Applicant was eligible to compete by reason of her compliance with the Rule.
- 7.47 As to the Second Decision, the Applicant submitted, in substance, first that the DRB was not entitled in law to revisit the first decision; secondly, that on the evidence before the DRB and the Panel, the conclusion should be reached that the Applicant does meet the criteria of the Rule because of her time outside Russia during the Relevant Period and that on the merits, she had no knowledge of or involvement with the system in Russia; thirdly, that she was denied natural justice, or procedural fairness, in presenting her case to the DRB for the purposes of the Second Decision.
- 7.48 Two of these issues can be disposed of shortly.
- 7.49 The Applicant has not established a basis for concluding that the DRB, which expressly reserved the right to reconsider its decision if new evidence was brought to its attention, was precluded from that course. The Applicant has not explained why this was precluded as a matter of law. The Applicant says that the DRB did not expressly include in the heading that the decision was interim in nature but that was the effect of the decision. Further, there is a right to revisit a decision where new facts and evidence, not previously available, are presented to the decision maker. Under Swiss law and the laws of many other countries, such a reversal is valid

in law if new circumstances have arisen (or possibly have since come to light) which would have entitled the authority to refrain from issuing the original decision had the circumstances been known at the time of its issuance, or if the decision is not final when the new decision is to be taken.

- 7.50 The Applicant points to the extremely tight timeframe provided to her to respond to the IP Report and to the material later contained in Professor McLaren's affidavit, as summarised in the letter to her of 6 August 2016. However, that time frame was not of the IAAF's making. It was a result of the timing of the provision to the IAAF of the material specifically concerning the Applicant as provided by Professor McLaren. Within that time frame, limited by the impending date of her competition, the Applicant was provided with sufficient opportunity to present her case to the DRB and now to the Panel. She was not denied procedural fairness.
- 7.51 It is not in dispute that the Applicant bears the onus of proof and that the standard to be applied is the standard of comfortable satisfaction, as provided in the Rule.
- 7.52 The Rule has been considered in CAS 2016/O/4684 and found to confirm the validity of the IAAF's decision to apply Rules 22.1(a) and 22.1A of the IAAF Competition Rules, which state that athletes whose national federation is suspended by the IAAF are ineligible for competitions held under the IAAF Rules, in accordance with the Olympic Charter, *unless they satisfy specific criteria*. It is clear that the Rule, included by amendment on 17 June 2016, concurrently with the decision to maintain the suspension of RusAF, concerned the exceptional eligibility of individual athletes after the suspension of the National Federation. The Rule was included prior to the publication of the IP Report and, of course, prior to the provision of any information as to an individual athlete.
- 7.53 The Rule provides that whether or not an athlete has been affected or tainted in any way by the failure on the part of the National Federation to protect and promote clean athletes, fair play, and the integrity and authenticity of the sport, if the athlete can satisfy the criteria in (i) and (ii) of the Rule, to the comfortable satisfaction of the DRB as delegate of the IAAF Council, that athlete may be exceptionally granted eligibility for all International Competitions. This includes the Games of the XXXI Olympiad in Rio de Janeiro.
- 7.54 In the First Decision, the DRB decided that the Applicant satisfied each of those criteria. In that decision, the DRB effectively adopted and applied, correctly in the view of the Panel, the requirements for eligibility referred to by the Applicant in her letter of 28 June 2016.
- 7.55 Does the evidence in the IP Report and Professor McLaren's affidavit affect or undermine this conclusion?
- 7.56 That evidence confirms the failure and inadequacy that led to the suspension of RusAF. It also serves to "implicate" the Applicant. However, that implication is not relevant to the application of criteria which, if fulfilled, mean that for the purposes of the Rule, the Applicant is not affected or tainted by the failures of the National Federation. That is, the Rule which refers to the "*affect or taint*" also provides for a mechanism or a basis by which an athlete is granted exceptional

eligibility. That mechanism is fulfilment of the two criteria which, for this athlete, was established by the DRB in the First Decision. The evidence as to the application of the Russian System to an individual athlete cannot act as an effective amendment to the Rule.

- 7.57 The additional evidence before the DRB did not affect that conclusion in the First Decision. The fact that the athlete was **subjected to** or **the subject of** drug testing that was not fully compliant during the Relevant Period does not derogate from the fact that she was, during the Relevant Period (that is, “*a sufficiently long period*”), **subject to** fully compliant drug testing in- and out-of-competition by reason of the fact that she was during that time training in and resident in the United States and not in Russia. During the whole of that period the compliant system applied to her, regardless of whether she was actually tested or whether or not she had non-compliant testing. Further, there is no evidence to suggest that the testing that she was subject to was other than equivalent in quality to the testing to which her competitors were subject.
- 7.58 That is, in the Panel’s view, an athlete may have undergone non-compliant testing while concurrently being **subject to** fully compliant testing and still fulfil the second criterion.
- 7.59 The Panel does not need to address an additional point of construction that further supports this conclusion. This arises from the recognition in criterion (i) that the fully compliant system is one **other** than the one of the National Federation. Criterion (ii) is then a more **particular** application of criterion (i) and thus also provides that the fully compliant drug testing to which the athlete must be subject is one other than that inside the country of the National Federation. This is also consistent with para. 7.5 of the Guidelines.
- 7.60 It should be observed that the Rule is addressed to the suspension of any International Federation for failure to put in place an adequate system and the impact on the eligibility of the athlete. The criteria are directed to the establishment by an athlete that he or she is outside the country of his or her National Federation during the Relevant Period. It is not addressed to the implication of an athlete in a defective system. Rather, it states that an athlete is taken not to be affected or tainted by the action of the National Federation if he or she was subject to other, compliant systems outside of the country. The Rule is addressed to the eligibility of an athlete whose National Federation is suspended and not to the IP Report which revealed what has been described as the worst case of doping in history. That report post-dated the inclusion of the Rule by amendment to the IAAF Competition Rules.
- 7.61 The relevant question is not whether the athlete was affected by the Russian System, or how, or whether she had knowledge of the way in which the system worked. The question is whether she fulfilled the criteria of the Rule. If she could establish that she was outside the country and subject to the compliant drug testing as specified, the “*affect or taint*” that would otherwise follow from the failure of her National Federation would not apply. This is not a reference to the “*affect or taint*” arising from specific information concerning testing of the athlete’s samples. Indeed, the IAAF emphasised that this case did not concern doping but concerned eligibility. Further, the IAAF did not assert that the evidence established that the Applicant had engaged in doping or other wrongful actions within the Russian System.

8 CONCLUSION

8.1 It follows that the Applicant's application should be upheld.

The ad hoc Division of the Court of Arbitration for Sport renders the following decision:

1. The application filed on 13 August 2016 by Ms Darya Klishina is upheld.
2. The decision issued on 10 August 2016 by the Doping Review Board of the IAAF to revoke its previous grant of exceptional eligibility to Ms Darya Klishina is set aside.
3. Darya Klishina remains eligible to compete in international competitions, including the Olympic Games 2016, pursuant to the IAAF regulations.