



**Arbitration CAS 2018/A/6025 Lenka Ferenčuková v. Association of Bodybuilding and Fitness of the Czech Republic & Anti-Doping Committee of the Czech Republic (ADCCR), award of 16 December 2019**

Panel: Mr Ken Lalo (Israel), Sole Arbitrator

*Bodybuilding and fitness*

*Doping (failure to submit to doping control)*

*CAS jurisdiction*

*Sanction for participation in a competition during a period of provisional suspension*

1. **If the appeal to an independent and impartial body in accordance with rules established by the national anti-doping organisation in the sense of Article 13.2.2 of the World Anti-Doping Code (WADC) does not respect the principles of a timely hearing, a fair and impartial hearing panel and a timely, written, reasoned decision, but rather is conducted in clear violation of the principles of fair legal proceedings, it constitutes a denial of justice making an appeal to the CAS the only appellate remedy and giving CAS jurisdiction to consider the matter.**
2. **Articles 10.1, 10.2 and 10.3 provide sanctions for violation of WADC, but participation in competition during a period of provisional suspension is not one of the enumerated violations permitting a sanction to be imposed on the athlete. A review of the various provisions of the WADC indicate that there is no provision which allows for a suspension following an athlete's breach of his/her provisional suspension. Such a breach only affects the starting date once a suspension is implicated and, of course, disqualifies any results received during the period of suspension. However, it does not appear possible to impose a separate sanction for breaching a provisional suspension.**

**I. PARTIES**

1. Ms. Lenka Ferenčuková (the "Appellant" or the "Athlete") is an amateur body builder and fitness model, as well as a police woman, from Prague, Czech Republic. The Athlete was born on 27 February 1984.
2. The Association of Bodybuilding and Fitness of the Czech Republic (the "First Respondent") is a professional association representing the interests of bodybuilding and fitness in the Czech Republic, and within international bodies, the Czech Olympic Committee, the Anti-Doping Committee of the Czech Republic (the "Second Respondent" or "ADCCR") and other entities involved in bodybuilding and fitness.

3. The ADCCR is a national regulator of anti-doping in the Czech Republic. It participates in the harmonization, coordination and implementation of anti-doping programs at national and international levels.
4. Each of the Athlete, the First Respondent and ADCCR is hereinafter referred to as a “Party”. The First Respondent and ADCCR are collectively referred to as the “Respondents”. The Athlete and the Respondents are collectively referred to as the “Parties”.

## **II. FACTUAL BACKGROUND**

### **A. Background Facts**

5. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence. Additional facts and allegations found in the Parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion 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 considers necessary to explain his reasoning.
6. On 1 November 2017, at around 17h40, Ms. Daniela Kacafirkova, a doping-control officer (the “DCO”) from the ADCCR, attempted to collect an out-of-competition sample from the Athlete at her private residence. What happened next is in dispute between the Parties.

### **B. The DCO’s Account of Events**

7. According to the DCO, upon arrival she ascertained the physical location of the Athlete’s apartment by examining the mailboxes outside the building. She then gained entry into the common area of the apartment building when a man leaving the premises let her in through the front door. When she arrived at the Athlete’s front door, she rang the buzzer but no sound emanated. So she proceeded to knock on the door. A woman appeared who the DCO considered to be the Athlete based on her review of various pictures of the Athlete from the Athlete’s personal website ([www.lenkaferencukova.com](http://www.lenkaferencukova.com)) and Facebook.
8. The DCO notes that she introduced herself to the woman at the door and announced that she was there to administer a doping control test. The woman refused to take any test and slammed the door on the DCO. The DCO verbally communicated to the woman that her refusal to cooperate with the sample collection could result in various penalties. The woman never reappeared and the DCO left.
9. The DCO then notified the Head of the Doping Control and Monitoring Unit, Dr. Jan Chlumsky, of the situation and completed a formal report.

10. On 9 January 2017, Mr. Chlumsky filed a criminal complaint with the General Inspectorate of Security Corps whereby he asserted potential use of prohibited substances used by the Athlete, a member of the foreign police of the Czech Republic in Ruzyně, following her alleged refusal to cooperate with the out-of-competition testing.
11. On 15 January 2017, the General Inspector issued a determination that there were no grounds to proceed on Mr. Chlumsky's criminal complaint as it did not give cause to grounds that a crime was committed by the Athlete.

**C. The Athlete's Account of Events**

12. According to the Athlete, upon the DCO arrival, the Athlete's roommate, Ms. Klara Liparova (not the Athlete), answered the door and explained to the DCO that the Athlete was not home as she was having her car serviced at a nearby service station.
13. The DCO, who Ms. Liparova describes as "*shady*" and without any visible identification and "*reminiscent of that of criminal delinquents who will as a rule will try to gain access to apartments of strangers by resorting to subterfuge so that they can engage in various crimes*", introduced herself as being from the "*anti-doping committee*" and sought entry into the premise. Such entry was refused by Ms. Liparova.
14. The Athlete asserts that the DCO proceeded to utter threats against Ms. Liparova and began kicking the door.
15. Ms. Liparova immediately contacted the Athlete by telephone and informed her of the DCO's arrival and pending situation. Ms. Liparova asked the Athlete whether she should call the police but the Athlete suggested otherwise, noting that she would be home shortly and by then the matter would hopefully be cleared up. Sometime thereafter, the Athlete returned home, but the DCO was gone by the time she arrived.
16. On 22 November 2017, the Athlete filed a criminal complaint with the Czech police department following the incident with the DCO at her home.

**D. Proceedings before the Disciplinary Commission of the Association of Bodybuilding and Fitness of the Czech Republic**

17. On 2 November 2017, Mr. Chlumsky filed a notice of violation against the Athlete following her missed test in accordance with Article 2.3 of the Directive for Sports Doping Detection and Sanctions in the Czech Republic (the "Directive") with the Disciplinary Commission of the Association of Bodybuilding and Fitness of the Czech Republic (the "Disciplinary Commission"). The notice included a recommendation for a provisional suspension in accordance with Article 7.7 of the Directive.
18. On 21 November 2017, the Disciplinary Commission initiated formal procedures against the Athlete and charged her with an alleged violation of Article 2.3 of the Directive. The

Disciplinary Commission also provisionally suspended the Athlete in accordance with Article III(a) of the Disciplinary Code of the Association of Bodybuilding and Fitness of the Czech Republic. In its instructions at the end of that decision the Disciplinary Commission advised that: “[n]o appeal may be brought against this suspension decision. An athlete has the right to accelerated proceedings promptly after the suspension has been imposed. Athlete has all rights listed in Article 8.1 of the Directive”.

19. The Athlete was thereafter invited to file a written submission in defence of the charges against her within 15 days.
20. In an undated letter (presumably within the 15-day deadline), the Athlete filed her defence statement with the Disciplinary Commission.
21. On 13 February 2018, the Disciplinary Commission invited the Athlete to participate in a hearing on 20 April 2019. In the invitation letter, the Athlete was provided with all evidence against her and was invited to file any further evidence in support of her alleged anti-doping rule violation (“ADRV”).
22. On 12 April 2018, the Disciplinary Commission adjourned the hearing indefinitely after learning that the Athlete filed criminal complaint against an unknown perpetrator (i.e. the alleged DCO) and on the grounds that the allegations were being investigated by the Regional Police Directorate of Prague. In the Disciplinary Commission’s opinion, the criminal investigation should take precedent over the Disciplinary Commission’s hearing, which would be rescheduled following the conclusion of the Police investigation. Moreover, the Athlete was advised that a new Disciplinary Commission was recently elected into function and such new members needed ample time to review the Athlete’s file.
23. On 19 April 2018, the Athlete objected to the adjournment of the Disciplinary Commission’s hearing arguing that the procedure before the Disciplinary Commission and the criminal authorities are separate and, therefore, both cases should be run in parallel.
24. The Disciplinary Commission did not respond or comment regarding the Athlete’s request to proceed with the Disciplinary Commission’s hearing.
25. On 8 October 2018, the Athlete followed-up on her 19 April 2019 letter to the Disciplinary Commission, again requesting that the Disciplinary Commission proceed with her hearing.
26. On 31 October 2018, the Disciplinary Commission issued a decision sanctioning the Athlete with a two-year period of ineligibility on the basis that she wilfully violated her provisional suspension by competing in the Olympia Amateur San Marino competition on 25 November 2017 (the “Olympia Event”). More specifically, the Disciplinary Commission decision stated in its pertinent part as follows:

*The aforementioned athlete is said to have violated the antidoping rules within the meaning of Art. 2.3 of the Directive for Sports Doping Detection and Sanctions in the Czech Republic (the*

“Directive”) when, according to the Notice of a violation of the anti-doping rules by ADC of the Czech Republic, she refused on 1 November 2017 to submit to a doping test.

Even though the athlete must have been aware of the situation, given that she contested the Notice by ADC of the Czech Republic of 2 November 2017 and has been served with the Decision on her suspension of 21 November 2017 – based upon which she contacted ABFCR and learned that the Disciplinary Committee was under obligation to initiate disciplinary proceedings and issue a decision on suspension under the Directive for Sports Doping Detection and Sanctions (the “Directive”), whereas she was expressly instructed of the fact that, under the circumstances, she was not allowed to enrol as athlete in any competition of the Association of Bodybuilding and Fitness of the Czech Republic or of IFBB until the case is brought to a close – the athlete nonetheless actively participated on 25 November 2017 in the Olympia Amateur San Marino competition.

The factual circumstances which led to the Decision on the suspension of the athlete cannot be determined without substantial doubt, but the athlete nonetheless acted wilfully against her suspension when she started at Olympia Amateur San Marino, which is why the Disciplinary committee decided to

**impose a penalty in the form of a two-year ban and on setting the matter aside.**

(the “Challenged Decision”).

27. The Disciplinary Commission explained the reasoning for the Challenged Decision as follows:

*While certain assertions of fact made by the athlete ... have been shown to be wrong, it cannot be said that the claim of the athlete according to which she had not been at the place where the doping test should be administered, and had not been contacted by the doping inspector, has been clearly refuted. The Disciplinary committee believes that in the case at hand, neither the testimony of the doping inspector nor the testimony of the athlete can serve as unambiguous proof of which side is more likely to have described the course of events truthfully.*

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*With a view to the above, the Disciplinary committee has substantiated doubt as to whether the anti-doping rules within the meaning of the Directive were violated by the athlete insofar as the refusal to submit to a doping test is concerned; however, the committee considers it proven beyond doubt that the athlete violated the anti-doping rules within the meaning of the Directive with respect to her violation of the suspension when she started at Olympia Amateur San Marino.*

*Even though the circumstances of the doping test could not be established beyond doubt, the athlete consciously and deliberately violated the decision on her suspension. With a view to the above, the Disciplinary committee decided to set the matter aside and to merely penalize the athlete with a two-year ban on participation, even though she faced a penalty of a ban on participation of up to four years for a proven infraction of the athlete.*

28. The Disciplinary Commission concluded the Challenged Decision with the following “*Instruction on Remedies*”:

*An appeal may be filed against this decision on the type and severity of the penalty and on setting the matter aside, with the ABFCR Executive Committee, within 15 days from the date on which this decision is served to the athlete. The appeal may be brought by the athlete, or by any person affected by this decision.*

29. According to a filing by the Athlete, the Challenged Decision was delivered to the Athlete on 2 November 2018 and the Athlete filed an appeal against the Challenged decision with the Executive Committee of the First Respondent on 14 November 2018, which appeal was not addressed by the First Respondent.

### III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

30. On 21 November 2018, the Appellant filed her statement of appeal with the Court of Arbitration for Sport (the “CAS”) against the Respondents with respect to the Challenged Decision in accordance with Article R47 et seq. of the Code of Sports-related Arbitration (the “Code”). In her statement of appeal, the Appellant nominated Ms. Carmen Nunez-Lagos as arbitrator.
31. On 30 November 2018, the Appellant filed her appeal brief in accordance with Article R51 of the Code.
32. On 28 December 2018, the Second Respondent filed an unsolicited “Opinion” denying the claims set out by the Appellant in her statement of appeal and informing the CAS Court Office that it did not intend to participate in this procedure.
33. On 7 January 2019, the Second Respondent filed a document with the CAS referring to its Opinion and reconfirming its position in these proceedings. Additionally, the Second Respondent restated that it “*is not going to continue in this arbitrary procedure as a respondent*”. Regardless of whether this document or the “Opinion” of 28 December 2018 constitute and answer by the Second Respondent, they have been fully considered by the Sole Arbitrator.
34. On 7 January 2019, the CAS Court Office informed the Parties that “*the Second Respondent cannot unilaterally dismiss itself from this legal procedure*”. The Appellant did not voluntarily dismiss the Second Respondent from its participation in these proceedings.
35. Also on 7 January 2019, the CAS Court Office informed the parties that Ms. Nunez-Lagos did not accept her nomination and, as a result, the Appellant was invited to re-nominate an arbitrator.
36. On 10 January 2019, the Appellant nominated Ms. Hilikka Salmenkyla as arbitrator.

37. On 24 January 2019, the First Respondent filed its Answer, including an objection to jurisdiction, in accordance with Article R55 of the Code.
38. On 8 February 2019, the Appellant filed its response to the First Respondent's objection to jurisdiction, in accordance with Article R55 of the Code and the invitation by the CAS Court Office in its letter of 29 January 2019.
39. On 11 February 2019, the Appellant modified her request for a three-member panel, instead requesting that this procedure be referred to a Sole Arbitrator.
40. On 11 February 2019, the Second Respondent made an additional filing re-iterating its position contained in the filing of 7 January 2019 stating that it *"is not going to continue as second respondent in this phase, just remains at Court of Arbitration for Sport disposal (in accordance with the rules and as written in the previous statements)"*.
41. On 8 March 2019, given the disparity between the Parties' positions on the number of arbitrators, the CAS Court Office on behalf of the President of the Appeals Arbitration Division, appointed Mr. Ken Lalo as Sole Arbitrator in accordance with Article R54 of the Code.
42. On 15 March 2019, following an inquiry from the Sole Arbitrator, the Appellant confirmed that no hearing was requested from her perspective. No response was provided in this respect from the Respondents.
43. On 2 May 2019, the CAS Court Office, on behalf of the Sole Arbitrator, confirmed that the Sole Arbitrator was sufficiently well informed to decide this dispute without the need for a hearing.
44. On 9, 10 and 17 May 2019, the Appellant, First Respondent, and Second Respondent, respectively, signed and returned the Order of Procedure.
45. On 14 May 2019, the CAS Court Office received a filing dated 27 April 2019 from the First Respondent, which included Witness Statements from Martin Jebas, the former President of the First Respondent, and Zdenka Razymova, a national trainer. This filing was made without request or consent from the Sole Arbitrator.
46. On 28 May 2019, the CAS Court Office, on behalf of the Sole Arbitrator, accepted such statements in accordance with Article R44.3 of the Code and invited the Appellant and Second Respondent to file comments/statements in response.
47. On 6 June 2019, the Appellant filed a response to the First Respondent's filing dated 27 April 2019. The Appellant objected to this late filing by the First Respondent indicating that it could have been filed earlier and along with the Answer, that the First Respondent is merely trying to delay the process and that the late submissions contradict Article R56 of the Code. The filing included a Witness Statement from Karel Petrus, an employee of the garage at which the Appellant allegedly serviced her car at the time of the DCO's visit. The filing also included

evidence supporting the Appellant's claim regarding Mr. Jebas' and Mr. Chlumsky's bias against the Appellant.

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

48. The Appellant's submissions, in essence, may be summarized as follows:

- This appeal is admissible as the Appellant filed an appeal against the Challenged Decision to the Executive Committee but this appeal has not been responded to by the First Respondent or the Executive Committee. Such appeal was duly sent to the address of Ronnie.cz, the company owned by Mr. Martin Jebas, the former President of the First Respondent. Moreover, there is no obligation to exhaust post-hearing review when such review fails to follow the principles set out in Article 13.2.2 of the World Anti-Doping Code ("WADC") (i.e. right to a timely hearing and timely written and substantiated decision).
- Moreover, this procedure is certainly related to anti-doping since the interim suspension of the sport activity is only possible following an adverse analytical finding or based on other ADRVs.
- The Second Respondent violated the principles of the Directive in a serious manner, including the principles of a timely hearing, a fair and impartial decision-making authority, and a timely written and substantiated ruling.
- The Respondents have a personal bias and aversion against the Appellant, which extends to Mr. Jebas. This is demonstrated by rude emails being sent from Mr. Jebas to a supporter of the Appellant. Moreover, further animosity is demonstrated by Mr. Jan Chlumsky's report filed with the Appellant's employer reporting suspicions that the Appellant uses prohibited substances.
- The Appellant's right to a timely hearing was violated from the beginning of her first-instance procedure. More specifically, the Disciplinary Commission wrongly suspended the Appellant's procedure following the police department's investigation into the criminal complaint and proceedings and the staff change at the Disciplinary Commission. This unnecessary suspension of the proceedings violated the Appellant's right to a timely hearing. The Appellant has an express right to an expedited hearing as set out in Article 8.1 of the WADC. Despite this, the Disciplinary Commission took no action for six months without providing any explanation.
- The Disciplinary Commission failed to provide a timely written and substantiated ruling and failed to identify evidence on the basis of which it rendered its decision. Indeed, the Disciplinary Commission imposed a ban on the Appellant based on allegations that were unknown to the Appellant and on account of actions that were entirely different from those that transpired on the date of the sample collection. She was never informed of the

charges brought against her and was unable to state her position or submit contrary evidence.

- The additional filings by the First Respondent on 14 May 2019 merely contains a statement by Zdenka Razymova who, as the national coach, depends on the First Respondent for this position and so she must have a bias.
- Ing. Martin Jebas, the President of the First Respondent during 2014 to 2017, who is still a member of its review committee and an influential person in Czech bodybuilding and fitness, holds a personal bias against the Appellant.
- The Witness Statement of Karel Petrus, who is employed by the tire service garage in West Prague at which the Athlete services her car at the time of the DCO's visit, evidences that on 1 November 2017 from 5 to 6 pm the Athlete visited the tire service facility in order to replace the tires on her Fiat Panda vehicle. This is confirmed by the garage's official "receiving orders book".
- The Appellant also states that consequently to the unlawful decisions of the First Respondent, she has significantly less sponsors and lower income in general but also higher costs of doing sport, etc. Therefore she will claim also damages against the First Respondent. The Appellant also bears the costs of legal advice which is (compared to her income) quite high. The financial situation of the Appellant is obvious from the fact that the legal aid was granted to her by the Court.

49. In her appeal brief, the Appellant requested the following relief:

- I. *Lenka Ferenčuková, born on 27 February 1984, address: Spanielova 1295/88, 163 00 Praha 6, has not violated article 2.3 of the Directive for Sports Doping Detection and Sanctions in the Czech Republic.*
- II. *The ruling of the Disciplinary Committee of the Association of Bodybuilding and Fitness of the Czech Republic of 31 October 2018, reference number 02/2017, is annulled.*
- III. *The ruling of the Disciplinary Committee of the Association of Bodybuilding and Fitness of the Czech Republic of 21 November 2017, reference number 2017-12, is annulled.*

50. The First Respondent's submissions, in essence, may be summarized as follows:

- The Appellant's appeal is inadmissible because she has failed to exhaust all internal remedies. In this respect, an appeal against the Challenged Decision with the Executive Committee of the Association of Bodybuilding and Fitness within 15 days receipt of the underlying decision. The Appellant did not do so and according to Article 13.1 of the Directive, an appeal to the CAS is only viable after the exhaustion of all possible internal remedies have been exhausted.

- The Appellant cannot assert that there was a breach of her right to a timely hearing because she breached her provisional suspension 4 days after it was implemented (the provisional suspension was issued on 21 November 2017 and the Appellant participated at the Olympia Event on 25 November 2017).
- The Appellant has provided no evidence to assert that the Disciplinary Commission was not impartial. All members are impartial and the process was fair.
- The Challenged Decision was made in writing and contains not only the Disciplinary Commission's decision, but also its reasoning.
- The Appellant's assertions concerning her refusal to provide a sample are misplaced. The Challenged Decision was determined based on the Appellant's breach of her provisional suspension when she competed in the Olympia Event. There was no finding on her alleged violation of the anti-doping rules and she was not punished for violating any anti-doping rules as it was not possible to do so based on the evidence beyond all reasonable doubt.
- This appeal is also not admissible because this case is not related to anti-doping, which is a requirement under Part 1 "Mission" of the Code. As set out above, this case simply involves the Appellant's breach of her provisional suspension, not an ADRV (as none was found by the Disciplinary Commission).
- The Appellant's storyline as it concerns the attempted doping control is purpose-built. Unlike the Appellant, the DCO had no reason to claim false statements.
- The Witness Statements filed by the First Respondent on 14 May 2019 evidences that the Athlete is lying in that her story regarding the DCO's visit changed. Zdenka Razymova, a national trainer who trained the Athlete for 3 years, was contacted by the Athlete on 1 November 2017. The Athlete claimed that the DCO was met by the Athlete's sister while the Athlete was training. Mrs. Razymova then called the chairman of the association, Mr. Vjaceslav Vinograd, who in turn called Mr. Jebas to advice of the events relating to the Athlete and the DCO. On the following week the Athlete met Mrs. Razymova and at that time her story changed, claiming that it was a friend that opened the door to the DCO while the Athlete was at a car tire service facility. As a result of this change in the story Mrs. Razymova stopped all contacts with the Athlete. Mr. Jebas' Witness Statement confirms the same facts.

51. In its answer, the First Respondent requested the following relief:

***I. The appeal of the appellant is dismissed as inadmissible.***

*In case the Court of Arbitration for Sport will consider the appeal as admissible, the Association of Bodybuilding and Fitness suggests that the Court of Arbitration for Sport would rule as follows:*

***I. The appellate court confirms the decision of the Disciplinary Committee of Association of Bodybuilding and Fitness dated on 31<sup>st</sup> October 2018 imposing to the appellant the punishment of disqualification in the extent of 2 years and deciding on adjournment of the matter.***

52. The Second Respondent did not file an answer in this procedure. The Second Respondent did, however, submit an “Opinion” dated 28 December 2018 and statements dated 7 January 2019 and 11 February 2019 in which it:

- Stated that it *“holds an unambiguous conclusion that the athlete ... violated anti-doping rule of the Regulations (Code) Article 2.3 in a manner of evading sample collection without reasonable justification after notification resulting from relevant anti-doping rules”*.
- Stated that the Athlete has also breached the relevant rules by participating at the Olympia Event after her provisional suspension.
- Questioned the integrity of the Athlete stating that ***“Czech Anti-Doping Committee strongly protests against false and intentionally speculative assertions of the athlete Lenka Ferencukova and will not comment neither these invented opinions, nor the numerous documentations addressed to the Czech Anti Doping Committee and other institutions”*** (bold in the original “Opinion” of 28 December 2018).
- Indicated that the matter must be exclusively dealt by the internal bodies in the Czech Republic.
- Indicated that it did not intend to continue as the Second Respondent in this matter.
- In its statement of 7 January 2019, the Second Respondent stated as follows:
  - *Czech Anti-Doping Committee insists on its objective statement that the procedure during doping control was completely standard and in compliance with the legal rules.*
  - *Athlete Lenka Ferencukova broke anti-doping rule of the Regulations (Code) Article 2.3.*
  - *Due to given circumstances Czech Anti-Doping Committee is not going to continue in this arbitrary procedure as a respondent. According to CAS rule it is possible. The Appellant’s appeal brief is against Association of Body Building and Fitness of the Czech Republic decisions.*
  - *Czech Anti-Doping Committee remains at your disposal for any further information, evidence and documents.*

## V. JURISDICTION

53. Article R47 of the Code provides as follows:

*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.*

54. Article 13.1 of the Directive provides as follows:

*Decisions made under the Code or rules adopted pursuant to the Code may be appealed as set forth below in Articles 13.2 through 13.4 or as otherwise provide in the Code or International Standards. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise. Before an appeal is commenced, any post-decision review provided in the anti-doping organization's rules must be exhausted, provided that such review respects the principles set forth in Article 13.2.2 below (except as provided in Article 13.1.3).*

55. While the Parties did not provide a translation to Article 13.2 of the Directive, it presumably mirrors the relevant provision of WADC, which reads in its pertinent part:

### *13.2.2 Appeals Involving Other Athletes or Other Persons*

*In cases where Article 13.2.1 is not applicable, the decision may be appealed to an independent and impartial body in accordance with rules established by the National Anti-Doping Organization. The rules for such appeal shall respect the following principles:*

- a timely hearing;*
- a fair and impartial hearing panel;*
- the right to be represented by counsel at the Person's own expense; and*
- a timely, written, reasoned decision.*

56. The First Respondent asserts that the CAS has no jurisdiction over this matter and thus the appeal is not admissible in that the Appellant did not exhaust the post-decision review available to her in accordance with Article 13.1 of the Directive. According to the First Respondent, the Appellant could have appealed the Challenged Decision to the Executive Committee of the First Respondent as instructed in the Challenged Decision itself. The First Respondent argues that the challenged Decision was in writing, was reasoned and that it was taken by the Disciplinary Committee which is an impartial body.

57. The First Respondent further asserts that CAS has no jurisdiction over this matter since the matter is not anti-doping related as it involves a decision regarding competition within a period of a provisional suspension and not an ADRV.

58. The Second Respondent also asserts that an appeal from the Challenged Decision should have been filed with the Executive Committee within 15 days receipt of the Challenged Decision as was also instructed in the Challenged Decision itself.
59. This appeal clearly involves an appeal regarding a decision of a sporting federation and sport-related bodies and involves anti-doping related matters. It is true that an alleged violation of the provisional suspension should have been resolved by the Disciplinary Committee itself, but since the underlying ADRV was not substantiated, the Disciplinary Committee had no longer any jurisdiction to deal with the alleged breach of the provisional suspension and the Appellant had the possibility to appeal that decision.
60. The Appellant asserts that she did indeed file a timely appeal with the Executive Committee of the First Respondent, but that such an appeal was not acted upon by the Executive Committee.
61. A copy of the appeal to the Executive Committee was provided by the Appellant in the current proceedings. The Appellant provided undated stamped delivery receipts with the words “Ronnie.cz” explaining that the company “Ronnie.cz” has its registered office at the same address as the First Respondent and is owned by Ing. Martin Jebas who was the Chairman of First Respondent during 2014 to 2017 and is still a senior official of the First Respondent. This was not disputed by the Respondents.
62. Moreover, the Appellant asserts that such direct right of appeal to the CAS exists as her rights to a timely hearing and written, reasoned decision were violated thus not requiring any internal appeal.
63. The Challenged Decision includes the following paragraphs:

*The Disciplinary committee at the same time believes that even a hearing of the personal testimony of the athlete and of the testimony of the witnesses proposed by her (and of the documentary evidence) cannot resolve the situation, which appears to have reached an impasse: the word of the athlete is against the word of inspector ADC. Given that the claim made by the athlete in her statement of 6 December 2017 has not been corroborated by the trainer of the national women's team Zdeňka Razýmová, whom the athlete also proposed to hear as a witness, the Disciplinary committee made its decision without summoning the athlete for a personal hearing, as this would be a superfluous step in this disciplinary procedure and clearly go against the principle of procedural economy.*

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*With a view to the above, the Disciplinary committee has substantiated doubt as to whether the anti-doping rules within the meaning of the Directive were violated by the athlete insofar as the refusal to submit to a doping test is concerned; however, the committee considers it proven beyond doubt that the athlete violated the anti-doping rules within the meaning of the Directive with respect to her violation of the suspension when she started at Olympia Amateur San Marino.*

64. On 13 February 2018, the Disciplinary Committee ordered a hearing in the matter relating to the Athlete. Despite a number of specific reasoned requests by the Athlete to hold such a hearing, the hearing was continued and eventually not held. The Challenged Decision explains that *“the Disciplinary committee made its decision without summoning the athlete for a personal hearing, as this would be a superfluous step in this disciplinary procedure and clearly go against the principle of procedural economy”*. We are not even advised whether the First Respondent was represented, as the Challenged Decision refers to not summoning “the Athlete” and not “the Parties”. Furthermore, the Challenged Decision ended up finding against the Athlete in a matter that was not notified to the Parties before the decision was taken. The decision was to be taken with respect to the alleged ADRV for refusing to take a test, while the Disciplinary Committee found against the Athlete in regard to violating the provisional suspension. This finding is alleged to have been *“proven beyond doubt”*, without providing the Athlete with an opportunity to address such an issue.
65. The Sole Arbitrator finds that this is a clear violation of the principles of fair legal proceedings.
66. The Sole Arbitrator confirms that Article 13.1 of the WADC applies only *“provided that such review respects the principles set forth in Article 13.2.2”* and that Article 13.2.2 of the WADC requires, among others, that *“a timely hearing; a fair and impartial hearing panel; ... and a timely, written, reasoned decision”* are all provided.
67. While Article 13.2.2 of the WADC refers to the process in front of the internal appeal body itself, this matter relates to proceedings before the disciplinary bodies of the First Respondent which involve an alleged ADRV on 1 November 2017, in regard to which proceedings were initiated on 21 November 2017. The alleged breach of the provisional suspension occurred on 25 November 2017. The scheduled hearing was continuously postponed, regardless of the Appellant’s insistence that she required a hearing. Finally, the decision was taken only on 31 October 2018. This, while the Appellant is provisionally suspended from competing. Additionally, it is not even clear from the documents that the Appellant was properly charged with the breach of the provisional suspension and not with the underlying ADRV while the Challenged Decision found against the Appellant only in regard to the breach of the provisional suspension.
68. Against this very specific background and considered together with the other procedural inadequacies of the process in front of the bodies of the First Respondent, the lack of response by the Executive Committee of the First Respondent in regard to the appeal filed by the Appellant, albeit over a period which is not overly extended, may be considered to be in violation of the requirements of Article 13.2.2 of the WADC. Together, the actions of the First Respondent set out above constitute a denial of justice making this appeal to the CAS the only appellate remedy for the Appellant.
69. Therefore, in the very specific circumstances of this case, the Sole Arbitrator concludes that CAS has jurisdiction over this matter.

## VI. ADMISSIBILITY

70. Article R49 of the Code provides as follows:

*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.*

71. Article 13.7.1 of the Directive provides as follows:

*The filing deadline for an appeal filed with CAS is 21 days after delivering the ruling to the Appellant.*

72. The Challenged Decision was rendered on 31 October 2018 (and presumably notified to the Appellant on the same date). The statement of appeal was filed on 21 November 2018 and within the 21-day period. This appeal is, therefore, admissible.

## VII. APPLICABLE LAW

73. Article R58 of the Code provides as follows:

*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.*

74. The Parties submit and rely upon the Directive and WADC as the regulations applicable to this dispute. The Sole Arbitrator agrees with the Parties and will apply the Directive and WADC as necessary in deciding this appeal.

## VIII. MERITS

### A. Did the Athlete commit an ADRV as a result of the alleged refusal to submit to a doping control?

75. The Athlete focuses the appeal on facts supporting her claim that it was her roommate, not her, who answered the door and refused the control.

76. The Challenged Decision found in this regard that “[t]he factual circumstances which led to the Decision on the suspension of the athlete cannot be determined without substantial doubt [...]” and that “the Disciplinary committee has substantiated doubt as to whether the anti-doping rules within the meaning of the Directive were violated by the athlete insofar as the refusal to submit to a doping test is concerned”. Therefore,

the Challenged Decision has not made a finding of an ADRV in regard to the Athlete's actions surrounding the failed test.

77. The Second Respondent clarifies that there was no refused test as it was determined that there was insufficient evidence to pursue this claim against the Athlete. So the Second Respondent confirms that there is no ADRV here.
78. The Sole Arbitrator remarks that substantial evidence and pleadings were submitted by both the Appellant and the First Respondent in regard to the alleged ADRV which, as explained above, is not an issue subject to this appeal since that Challenged Decision has not found that an ADRV had been committed by the Athlete for failing or refusing to take the test.

**B. Did the Athlete commit an ADRV by “violating” her provisional suspension?**

79. On 31 October 2018, the Disciplinary Commission issued the Challenged Decision sanctioning the Athlete with a two-year period of ineligibility on the basis that she wilfully violated her provisional suspension by competing at the Olympia Event on 25 November 2017.
80. The Athlete does not contest that she participated in the competition, but argues that under the WADC it is impossible to be suspended without a breach of the WADC.
81. Pursuant to Article 10.11.3.1 of the WADC “[i]f a Provisional Suspension is imposed and respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed”.
82. Therefore, Article 10.11.3.1 of the WADC considers that it is possible that an imposed Provisional Suspension is not “respected” by an athlete and, in such an event, indicates that no credit would be granted for the period of Provisional Suspension.
83. Article 10.12.1 of the WADC states in its pertinent part as follows:

*10.12.1 Prohibition against Participation during Ineligibility*

*No Athlete or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any Signatory, Signatory's member organization, or a club or other member organization of a Signatory's member organization, or in Competitions authorized or organized by any professional league or any international- or national-level Event organization or any elite or national-level sporting activity funded by a governmental agency.*

84. Article 10.12.1 of the WADC recognizes the prohibition against participation during a period of ineligibility which prohibition applies also to an ineligibility imposed on a provisional basis.
85. Article 10.12.3 of the WADC states in its pertinent part as follows:

### *10.12.3 Violation of the Prohibition of Participation during Ineligibility*

*Where an Athlete or other Person who has been declared Ineligible violates the prohibition against participation during Ineligibility described in Article 10.12.1, the results of such participation shall be Disqualified and a new period of Ineligibility equal in length to the original period of Ineligibility shall be added to the end of the original period of Ineligibility. The new period of Ineligibility may be adjusted based on the Athlete or other Person's degree of Fault and other circumstances of the case. The determination of whether an Athlete or other Person has violated the prohibition against participation, and whether an adjustment is appropriate, shall be made by the Anti-Doping Organization whose results management led to the imposition of the initial period of Ineligibility. This decision may be appealed under Article 13.*

86. Pursuant to Article 10.12.3 of the WADC, the results of participation during a period of ineligibility are disqualified. Furthermore, Article 10.12.3 of the WADC provides a sanction for participation during a period of ineligibility. An athlete violating the prohibition against participation during a period of ineligibility is subject to a harsh sanction of a new period of ineligibility equal to the length of the original period of ineligibility commencing at the end of the original period of ineligibility. For example, an athlete on whom a two-year period of ineligibility has been imposed and who violates such ineligibility period during its first month would be subject to an additional period of up to two years and thus a total period of four-years of ineligibility. Such additional period may be shortened based on the athlete's degree of fault (e.g., if it is proven that the Athlete was not notified of the period of suspension).
87. Articles 10.1, 10.2 and 10.3 provide sanctions for violation of WADC, but participation in competition during a period of provisional suspension is not one of the enumerated violations permitting a sanction to be imposed on the athlete.
88. A review of the various provisions of the WADC thus indicate that there is no provision which allows for a suspension following an athlete's breach of his/her provisional suspension. Such a breach only effects the starting date once a suspension is implicated and, of course, disqualifies any results received during the period of suspension. However, it does not appear possible to impose a separate sanction for breaching a provisional suspension.
89. Since there is no provision which allows for a suspension of the Athlete for breaching her provisional suspension and since it was determined in the Challenged Decision that the Athlete has not committed an ADRV for not submitting to the doping test, no sanction can or should be imposed on the Athlete.
90. The Challenged Decision was, therefore, wrong in imposing a sanction on the Athlete and the imposition of such sanction should be set aside.

**C. What is the applicable sanction?**

91. If there was no underlying ADRV, and a period of ineligibility cannot be asserted for breaching a provisional suspension, no sanction may be imposed under the Directive or the WADC.
92. The Athlete seeks damages for the actions of the First Respondent, the delays in processing the alleged ADRV, the fact that no hearing before the Disciplinary Commission was held and what the Athlete describes as the *“unlawful decisions of the First Respondent”* which has caused her to have *“significantly less sponsors and lower income in general but also higher costs of doing sport”*.
93. The Athlete has not presented any rule which permits the granting of damages in these circumstances and no such award is permitted under the WADC. Therefore, the Sole Arbitrator does not grant any damages to the Athlete.

**ON THESE GROUNDS****The Court of Arbitration for Sport rules that:**

1. The appeal filed by Ms. Lenka Ferenčuková on 21 November 2018 against the Association of Bodybuilding and Fitness of the Czech Republic and the Anti-Doping Committee of the Czech Republic is upheld.
2. The decision issued by the Disciplinary Commission of the Association of Bodybuilding and Fitness of the Czech Republic dated 31 October 2018 to impose on Ms. Lenka Ferenčuková a two-year period of ineligibility is set aside.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.