Arbitration CAS 2020/A/6988 Andrey Isaychev v. Russian Anti-Doping Agency (RUSADA), award of 6 April 2021

Panel: Mr Vladimir Novak (Slovakia), Sole Arbitrator

Athletics (middle-distance running)
Doping (prohibited association)
Methods of interpretation of legal/regulatory provisions
Requirements of the prohibited association rule
Burden and standard of proof under the Russian Anti-Doping Rules (ADR) in relation to an anti-doping rule violation
Appeal arbitration dispute decided ex aequo et bono

1. **Under Swiss law, if the provision under review is clear and unambiguous, an authority applying it is bound to follow its literal meaning, provided it expresses its true meaning. Only if a text is not clear and if several interpretations are possible, one must determine its true scope by analysing its relation with other provisions (systematic interpretation), its legislative history (historic interpretation) and the spirit and intent of such provision (teleological interpretation). It is not for CAS panels to question the policy or intent of anti-doping rule makers, in particular given that the WADA Code emphasises that *"when reviewing the facts and the law of a given case, all (…) adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport"*.**

2. **It is unambiguous that for article 2.10 of the Russian ADR to be applied to an athlete, s/he must have been previously advised in writing by a relevant anti-doping agency of said athlete support person's disqualifying status and of the potential consequence of a prohibited association and that said athlete can reasonably avoid the association.**

3. **According to article 3.1 of the Russian ADR, the RUSADA shall have the burden of establishing that an ADR violation has occurred. The Standard of proof shall be whether the RUSADA has established an ADR violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made.**

4. **It is accepted that the arbitral tribunal could decide *ex aequo et bono* also in appeal proceedings (pursuant to Article R58 of the CAS Code), if the parties so agree.**

I. PARTIES

1. Mr Andrey Isaychev (the "Appellant") is a 26-year old track athlete (middle distance runner) from Russia. The Appellant is a member of the All-Russia Athletic Federation ("RusAF"), participating in competitions organized, convened, authorized or recognized by RusAF.

2. Russian Anti-Doping Agency ("RUSADA" or the "Respondent") is a Russian anti-doping agency approved by the World Anti-Doping Agency ("WADA") as a national anti-doping organization within the meaning of the WADA Code. RUSADA has its registered seat in Moscow, Russia.

3. The Appellant and the Respondent are collectively referred to as the "Parties".

II. FACTUAL BACKGROUND

A. Background facts

4. Below is a summary of the relevant facts and allegations based on the Parties' written submissions and evidence adduced. Additional facts and allegations found in the Parties' submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, his award refers only to the submissions and evidence, which he considers necessary to explain his reasoning.

5. The Appellant is a 26-year-old middle-distance runner from the Orenburg region in Russia. In 2009, the Appellant won the 800m event at the Russian U16 Championships in Petrozavodsk. After this success, the Appellant considered pursuing a professional career in athletics. In 2010, the Appellant moved to the city of Orenburg, where he started working with Mr Sait Kiramov.

6. In summer 2014, the Appellant's previous coach, Mr Sait Kiramov, introduced him to Mr Vladimir Semenovich Kazarin (the "Coach"). In September 2014, the Appellant began his employment at Sputnik where the Coach was a member of staff.

7. On 7 April 2017, the CAS rendered a decision imposing a life period of ineligibility on the Coach due to his violation of anti-doping rules (*see* CAS award 2016/A/4480).

8. In July 2018, the Appellant participated at the Russian Championships in Kazan, Russia. On 19 July 2018, the Appellant was in the call room with other athletes prior to the race. While in the call room, a few minutes before the race, Mrs Tatyana Goncharenko, a RusAF representative, informed the Appellant and other athletes that they were required to sign an acknowledgment form in order to compete. The form in question referred to the *"Order 37"* issued by RusAF on 25 June 2018. The relevant parts of the Order 37 provide as follows (although it is disputed whether the text of the Order 37 was provided to the Appellant):

"The following professional have been currently disqualified:

V. Chegin, A. Melnikov, V. Kazarin, S. Portugalov (lifetime disqualification).

V. Mokhev – 10-year disqualification (until 22.12.2026).

Ye. Yevsyukov – 4-year disqualification (until 28.12.2020).

L. Fedoriva – 4-year disqualification (until 19.09.2020).

V. Kolesnikov – 4-year disqualification (until 20.08.2018).

V. Volkov – 4-year disqualification (until 03.08.2021).

The mere presence of a disqualified coach at the official training camp may be regarded as a violation by athletes of coaches of paragraph 2.10 (Illicit Cooperation) of the Russian National Anti-Doping Rules. This violation is punishable with the disqualification for 1 to 2 years".

9. The Appellant signed the acknowledgment form.

10. From 17 October 2018 to 26 November 2018, the Appellant attended the training camp in the Republic of Kyrgyzstan (with a short period of absence from 4 November 2018 to 11 November 2018). During this time, the Coach was also present at the camp.

11. On 3 November 2018, the Appellant attempted to terminate his association with the Coach due to his suspicion that the Coach was misleading his athletes regarding his right to train. However, the Coach reacted aggressively and made it clear to the Appellant that if he were to discontinue training with the Coach, he would be required to pay the costs of that training camp and other training activities. The Appellant returned to the training camp in the Republic of Kyrgyzstan on 12 November 2018.

12. During the training camp, RUSADA's personnel conducted an investigation into prohibited association with the Coach. The RUSADA personnel had observed the Coach was present at the training camp and was training athletes. However, RUSADA did not record this activity.

13. On 27 November 2018, the Appellant received a circular email from RUSADA containing questions regarding his relationship with the Coach.

14. On 29 November 2018, the Appellant completed the questionnaire received from RUSADA as instructed by the Coach.

15. The questionnaire, received on November 27 2018, prompted the Appellant to make a definitive decision to leave the Coach since it was not clear if it was legally permissible for him to continue training with the Coach. Therefore, in spring 2019, the Appellant began training

with another coach from Sputnik. However, the Appellant continued to attend training sessions and camps on the same dates and at the same locations where the Coach was present.

B. Proceedings before the Disciplinary Anti-Doping Committee of RUSADA

16. On 14 June 2019, the Appellant received a notice of charge from RUSADA alleging prohibited association with the Coach. According to the Appellant, this was the first official communication from RUSADA that explained the essence of the Prohibited Association Rule and the consequences thereof.

17. The Prohibited Association Rule is an anti-doping rule violation that was introduced in the 2015 WADA Code. It prohibits athletes from associating with athlete's support personnel (*e.g.*, coaches, trainers, physicians) that are, among other things, serving a period of ineligibility. The relevant parts of the Prohibited Association Rule included in Article 2.10 of the Russian Anti-Doping Rules ("ADR") read as follows:

> *"Association by an Athlete or other Person subject to the authority of an Anti-Doping Organization in a professional or sport-related capacity with any Athlete Support person who:*
>
> *If subject to the authority of an Anti-Doping Organization, is serving a period of Ineligibility;*
>
> *(…).*
>
> *In order for this provision to apply, it is necessary that the Athlete or other Person has previously been advised in writing by an Anti-Doping Organization with jurisdiction over the athlete or other Person, or by WADA, of the Athlete Support Person's disqualifying status and the potential Consequence of prohibited association and that the Athlete or other Person can reasonably avoid the association"* (the "Prohibited Association Rule").

18. On 17 December 2019, the Disciplinary Anti-Doping Committee of RUSADA ("DADC") rendered a decision no. 21/2020 (the "Appealed Decision") finding that the Appellant violated Article 2.10 of the ADR by engaging in prohibited association with the Coach on 15 November 2018 in the Republic of Kyrgyzstan.

19. The Appealed Decision concluded as follows:

- The case file did not contain any evidence in relation to an appropriate written notification to the Appellant by an anti-doping organization regarding the Coach's disqualification status and possible consequences of prohibited association with the Coach.

- On 19 July 2018, before competing at the Russian Championships in Kazan, the Appellant signed the acknowledgment form referencing the Order 37, a statement concerning the status of the Coach. However, the Appellant was not aware, and did not understand, the specific consequences of the Coach's disqualification and in particular,

his obligation to avoid any association with the Coach. This was due to lack of appropriate written notice provided to the Appellant.

- Given that the Appellant was not aware of his obligation to avoid any association with the Coach and the specific consequences for violation, the Appellant was sanctioned with a 1-year period of ineligibility (from 17 December 2019 until 16 December 2020) instead of the standard 2 years. Further, the Appellant's results were disqualified as from the date of the alleged ADR violation (*i.e.*, 15 November 2018).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 15 April 2020, the Appellant filed, pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code"), the Statement of Appeal at the Court of Arbitration for Sport in Lausanne, Switzerland (the "CAS"), against the Appealed Decision (the "Appeal"). The Appellant selected English as the language of the procedure and asked to consolidate his procedure with two other matters pending before the CAS, namely CAS 2020/A/6986 and CAS 2020/A/6987.

21. On 23 April 2020, the CAS Court Office informed the Parties that the three appeals were not against the same decision and accordingly consolidation was not possible. The Parties were asked whether they agree to submit the three appeals to the same Sole Arbitrator.

22. On 27 April 2020, the Appellant, and the other two athletes, Mrs Anna Knyazeva-Shirokova, and Mr Rudolf Verkovykh, all consented with the submission of their appeals to the same Sole Arbitrator. The Appellant also requested, in accordance with Article R44.3 of the Code, that the CAS Court Office order RUSADA to produce all documents in its possession related to the Appealed Decision.

23. On 27 April 2020, the Appellant requested an extension to submit the Appeal Brief of three business days after the receipt of the requested documents from RUSADA.

24. On 29 April 2020, the CAS Court Office asked the Respondent to provide the requested documents to the Appellant by 11 May 2020, and to state its position on the Appellant's request for extension by 6 May 2020. Meanwhile, the Appellant's deadline to file the Appeal Brief was suspended. The Respondent did not object within the prescribed deadline. Accordingly, the Appellant's request was granted and the deadline remained suspended.

25. On 7 May 2020, the CAS Court Office noted that the Respondent did not state its position in relation to the possibility of submitting the three appeals to the same Sole Arbitrator, and informed the Parties that unless the Respondent objected by 11 May 2020, the three appeals would be assigned to the same Sole Arbitrator. The CAS Court Office also informed the Parties that the Respondent did not object to English as the language of the present proceedings within the prescribed deadline. Accordingly, pursuant to Article R29 of the Code, all written submissions should be filed in English and all exhibits submitted in any other language should be accompanied by an English translation.

26. On 1 June 2020, the Appellant requested, pursuant to Article R44.3 of the Code, that the Respondent make available a copy of the regulations of the DADC, which were not publicly available.

27. On 8 June 2020, the CAS Court Office acknowledged receipt of the Appellant's request of 1 June 2020 and informed the Parties that, if the Respondent did not provide the Appellant with the requested documents by 12 June 2020, it would be for the Sole Arbitrator to decide on such request pursuant to Article R44.3 of the Code.

28. On 9 June 2020, the Respondent informed the CAS Court Office that it agreed with the appointment of the same Sole Arbitrator in the three appeals, and had no objections to the selection of English as the language of the proceedings nor to the Appellant's request for extension to submit the Appeal Brief.

29. On 10 June 2020, the Respondent informed the Appellant that the DADC Regulations were available on RUSADA's website and shared with the Appellant the requested documents related to the Appealed Decision.

30. On 10 June 2020, the CAS Court Office informed the Parties that the Appellant's deadline to file the Appeal Brief resumed from 10 June 2020 and the three appeals were submitted to the same Sole Arbitrator.

31. On 12 June 2020, the Appellant requested a further extension to submit the Appeal Brief by 19 June 2020.

32. On 15 June 2020, the CAS Court Office informed the Parties that, in light of their agreement, the Appellant's request was granted.

33. On 20 June 2020, the Appellant filed his Appeal Brief pursuant to Article R51 of the Code (the "Appeal Brief").

34. On 22 June 2020, the CAS Court Office informed the Respondent that, pursuant to Article R55 of the Code, it should submit its Answer within twenty days.

35. On 10 July 2020, the Respondent requested an extension to submit the Answer by 20 July 2020. The Appellant consented thereto and the CAS Court Office accordingly granted the extension.

36. On 13 July 2020, pursuant to Article R54 of the Code, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to appoint Mr Vladimir Novak as the Sole Arbitrator and that the file had been transferred to the Sole Arbitrator on the same day.

37. On 17 July 2020, the Respondent requested a further extension to submit the Answer by 24 July 2020. The Appellant consented thereto and the CAS Court Office accordingly granted the extension.

38. On 24 July 2020, the Respondent filed its Answer pursuant to Article R55 of the Code (the "Answer").

39. On 27 July 2020, the CAS Court Office invited the Parties to inform the CAS Court Office by 3 August 2020 whether they would prefer a hearing to be held in this matter or for the Sole Arbitrator to issue an Award based solely on the Parties' written submissions.

40. On 28 July 2020, the Appellant requested an expedited hearing in view of the forthcoming Russian Athletics Championships on 8 September 2020. The Respondent did not express its view on the Appellant's request for an expedited hearing. The Appellant also objected to the deposition of Respondent's witnesses because the Respondent failed to submit a brief summary of their expected testimony, though noted his willingness to withdraw the objection if such error is corrected before the hearing. In addition, the Appellant objected to the deposition of the Respondent's witness, Mrs Elena Ikonnikova, on the ground that she was charged with anti-doping rule violation of Tampering and Complicity and was provisionally suspended by the Athletics Integrity Unit ("AIU") in November 2019.

41. Following correspondence with the Parties, the oral hearing date was set for 22 September 2020. Due to the prevailing Covid-19 pandemic, and associated travel limitations and safety concerns, the Parties and the Sole Arbitrator agreed to conduct the oral hearing via videoconference (Webex).

42. On 9 September 2020, the CAS Court Office informed the Parties that, pursuant to Article R44.2 of the Code, the Parties should call to be heard by the Sole Arbitrator the witnesses and experts which they specified in their written submissions. The Parties were reminded that they were responsible for the availability and costs of the witnesses to be heard at the oral hearing. Furthermore, as the language of the present arbitration is English, any person requiring the assistance of an interpreter is obliged to arrange for the attendance of an independent, non-interested interpreter, retained at the expense of the requesting Party. The Parties were also invited to provide, by 14 September 2020, the CAS Court Office with the names, phone numbers and email addresses of all persons attending the hearing.

43. On 14 September 2020, the Appellant submitted the list of his witnesses and their details. The Respondent did not respond within the prescribed deadline.

44. On 22 September 2020, a hearing took place via videoconference. The Sole Arbitrator was assisted by Mrs Andrea Sherpa-Zimmermann, CAS Counsel and Mr Jon Polanec (with the agreement of the Parties), and joined by the following participants:

- For the Appellant: Mr Sergei Lisin, Counsel; Mr Sergei Mishin, Counsel; Mr Andrey Isaychev, the Appellant; Mr Andrey Loginov, Witness; Mr Albert Ramazanov, Witness; and Mr Artem Denmukhametov, Witness.

- For the Respondent: Mr Graham Arthur, Counsel; Mrs Elena Dronina, Interpreter; Mrs Elena Barabonova, non-participating observer from RUSADA's Results Management department.

45. At the hearing, the Parties agreed to the following schedule of witness examination:

- Mr Andrey Loginov, the Appellant's Witness;

- Mr Albert Ramazanov, the Appellant's Witness;

- Mr Artem Denmukhametov, the Appellant's Witness; and

- Mr Andrey Isaychev, the Appellant.

46. Due to initial technical difficulties, Mr Danila Gubaev, could not join the hearing despite initially managing to connect. Therefore, the Parties agreed for the Sole Arbitrator to refer to Mr Gubaev's written witness statement.

47. The Sole Arbitrator notes that, in the Answer, the Respondent reserved the right to call the following witnesses: (i) Mrs Margarita Paknotskaye and/or RUSADA personnel as available given the date of the hearing; (ii) Mr Leonid Ivanov; (iii) Mrs Elena Ikonnikova; and (iv) Mrs Tatyana Goncharenko. On 2 September 2020, the CAS Court Office invited the Respondent to provide the witness statements at least 10 days prior to the hearing. The Respondent did not respond within the stated deadline. At the hearing, the Respondent's Counsel informed the Sole Arbitrator that the Respondent did not intend to call any witnesses in the present Appeal.

48. The witness testimonies and arguments raised by the Parties during the hearing are, where relevant, discussed in the corresponding Merits section of the present Award.

49. At the end of the hearing, the Parties confirmed that their right to be heard had been respected and that they had no objection to the conduct of the proceedings.

50. On 23 September 2020, the Parties returned the signed Order of Procedure.

51. On 28 September 2020, reflecting agreement at the oral hearing, the CAS Court Office informed the Parties that they had until 8 October 2020 to submit their post-Hearing submissions, which were not to exceed 15 pages.

52. On 29 September 2020, the Respondent requested an extension to submit the post-Hearing submissions by 16 October 2020 and indicated that the Appellant consented thereto. The extension request was granted by the CAS Court Office.

53. On 16 October 2020, the Parties submitted their post-Hearing submissions.

54. On 30 October 2020, the Appellant submitted a letter in relation to the Respondent's post-Hearing submission.

IV. SUBMISSIONS OF THE PARTIES

55. The Appellant's Appeal Brief contained the following requests for relief:

> *"In light of the above, CAS is asked:*
>
> *a. to find that the requirement in 2.10.2 ADR for written notice has not been satisfied;*
>
> *b. to find that there was no anti-doping rule violation;*
>
> *c. to award the Athlete ex aequo et bono a compensation for damages sustained by the Athlete as a result of systematic violation by RUSADA of the Athlete's right to fair hearing, intimidation, confidentiality breach and undue interference following submission of this appeal to CAS;*
>
> *d. to award the Appellant a contribution of his costs, including (i) CAS Court Office Fee, and (ii) reasonable and documented courier and travel costs incurred by the Appellant's representatives, if any".*

56. In support of his relief, the Appellant relied on the following principal arguments.

- The Appellant did not dispute that:
  - He learned about the existence of the Coach's ban before 15 November 2018, the date of the alleged ADR violation, though he was not aware of the allegations against the Coach nor the details of the findings against him. The Appellant believed that the Coach could train him (and other athletes) unofficially.
  - On 19 July 2019, when competing at the Russian Championships in Kazan, he signed the acknowledgment form that referenced the Order 37.
  - He participated in training activities on 15 November 2018 in the Republic of Kyrgyzstan under the Coach's directions.
- The Appellant could not have been sanctioned for violation of Article 2.10 of the ADR because he was not advised in writing by an anti-doping organization with jurisdiction over him, nor by WADA, of the Coach's disqualifying status and the potential consequences of associating with the Coach. In the Appellant's view, a written warning is a necessary condition before finding a violation of the Prohibited Association Rule. If this condition is not satisfied, no ADR violation is committed.

- The acknowledgment form the Appellant signed on 19 July 2018 did not meet the requirement of a written notice within the meaning of Article 2.10 of the ADR. Although the acknowledgment form referenced the Order 37, which was a statement prepared by the RusAF regarding the Coach's disqualifying status, the Order 37 itself was not provided to the Appellant before he signed the acknowledgment form.

- Even if the Appellant had received a written notice in July 2018, the Order 37 was issued by RusAF and not RUSADA. RusAF is not an anti-doping organization within the meaning of Article 2.10 of the ADR. In the Appellant's view, this is an additional reason for which the Order 37 did not satisfy requirements for a written notice within the meaning of Article 2.10 of the ADR.

- The Appellant requested *ex aequo et bono* compensation for damages sustained as a result of systematic violation by the Respondent of (i) the Appellant's right to a fair hearing; (ii) intimidation; (iii) confidentiality breach; and (iv) undue interference following submission of the Appeal.

57. In the post-Hearing submission, the Appellant reiterated his previous arguments and further submitted that:

- The Appellant's and witnesses' testimonies confirmed that, before signing the acknowledgment form at the Russian Championships in July 2018, no one had explained to the athletes the content of the Order 37, nor made the Order 37 available for their review.

- The Respondent did not offer any evidence in support of its argument that the Appellant was told that the Order 37 listed a number of athlete support personnel with whom the Appellant (and other athletes) could not associate.

- The requirement of a written notice in Article 2.10 of the ADR is very clear and does not require a purposive interpretation that completely reverses the clear language of the provision as suggested by the Respondent.

- The Appellant's request for monetary damages is not related to the substance of the disputed ADR violation, though the alleged violations committed by RUSADA cannot be separated from this Appeal. The Sole Arbitrator has full jurisdiction to award the Appellant *ex aequo et bono* damages as a result of systematic violations committed by the Respondent.

58. The Respondent's Answer contained the following requests for relief:

"For the reasons explained in this Response Brief, RUSADA says that –

The Appellant has committed an Anti-doping rule violation contrary to ADR Article 2.10;

The Consequences to be applied in respect of the Anti-Doping Rule Violation are that a period of Ineligibility be imposed pursuant to Article 10.3.5;

RUSADA respectfully requests that costs be awarded to RUSADA in accordance with Rule 64.4. and Rule 64.5 of the Code of Sports-related Arbitration".

59. In support of its relief, the Respondent relied on the following principal arguments.

- In July 2018, the Appellant competed at the Russian Championships in Kazan. During this competition, the Appellant signed a document entitled *"Appendix to Order No. 37/1 of June 25, 2018"*. This document was intended to advise the Appellant about the content of the Order 37. He was explicitly advised that the Order 37 lists a number of athlete support personnel with whom the Appellant and other athletes are prohibited to associate.

- The key element for finding an ADR violation under Article 2.10 of the ADR is whether (i) the athlete *knows* that the person with whom he or she associates is serving a period of ineligibility; and (ii) the athlete nonetheless associates with that person.

- The Respondent disagreed with the Appellant that the written notice requirement is a substantive element of the Prohibited Association Rule. The wording of Article 2.10 of the ADR referring to *"advised in writing"* was meant to ensure that the athlete in question knew that the person with whom he or she was associating was a *"disqualified person"*.

- The Respondent agreed that it bears the burden of proof to establish that the Appellant was aware of the Coach's disqualification and the consequences of associating with him, though the means by which his knowledge was acquired is irrelevant.

- Further, the Respondent acknowledged that the Appellant was in a difficult position. On the one hand, he was involved with the Coach and it was difficult for him to terminate the relationship. On the other hand, the Appellant was aware that he was risking disciplinary action by associating with the Coach. However, these are issues regarding fault and do not alter the fact that an ADR violation was committed.

- The Respondent disagreed with the Appellant's request for damages and submitted that the Appellant should bring her claims before the Russian courts.

60. In the post-Hearing submission, the Respondent reiterated its previous submissions and further submitted that:

- The Appellant became conscious of the Order 37 when he signed the acknowledgment form at the Russian Championships in July 2018 and he was well aware that he is prohibited from associating with the Coach.

- The WADA Code is intended to establish measures that protect clean athletes and ensure that athletes who break the rules can be disciplined proportionally. It is not designed to provide *"loopholes"* or create opportunities for the rules to be circumvented on the basis of technicalities.

- The Appellant's request for damages has nothing to do with the dispute at hand, *i.e.*, whether the Appellant committed an ADR violation.

V. JURISDICTION

61. The Appellant submitted that the CAS has jurisdiction pursuant to Article R47 of the Code and Article 13.2 of the ADR. The Respondent did not contest this.

62. 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 CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.*
>
> *An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".*

63. Article 13.2 of the ADR provides as follows:

> *"13.2. Appeals from Decisions Regarding Anti-doping Rule Violations, Consequences, Provisional Suspensions, Recognition of Decisions and Jurisdiction*
>
> *The following decision may be appealed exclusively as provided in Articles 13.2-13.6:*
>
> - *a decision that an anti-doping rule violation was committed;*
>
> - *a decision imposing Consequences or not imposing Consequences for anti-doping rule violations".*

64. Articles 13.2.1 and 13.2.2 of the ADR provide as follows:

> *"13.2.1 Appeals involving International-level Athletes or International Events*
>
> *In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS.*
>
> *13.2.2 Appeals Involving Other Athletes or Other Persons*
>
> *13.2.2.1 In cases where Article 13.2.2. is not applicable, the decision may be appealed exclusively to CAS".*

65. Article 1.3.3.2 of the ADR provides as follows:

> *"National-Level Athletes are considered as Athletes that participate in the competition included in the Single Calendar Plan of inter-regional, all-Russian and international physical culture events and sport events having "all-Russian" status: Russian Championship, Russian Junior Championship, Russian Cup, and other official national Russian sport events, provided that such Athletes are not classified by their respective International Federations as International-Level Athletes".*

66. The Sole Arbitrator notes that Article 13.2 of the ADR (applicable to the Appealed Decision) read in conjunction with Article 13.2.2 of the ADR (applicable to the Appellant as a *national-level athlete* per Article 1.3.3.2 of the ADR) explicitly provides for an appeal to the CAS. The Sole Arbitrator therefore concludes that CAS has jurisdiction to entertain the present Appeal.

VI. ADMISSIBILITY

67. 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 in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after any submission made by the other parties".*

68. Article R51 of the Code provides as follows:

> *"Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS Court Office a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which it intends to rely. Alternatively, the Appellant shall inform the CAS Court Office in writing within the same time limit that the statement of appeal shall be considered as the appeal brief. The appeal shall be deemed to have been withdrawn if the appellant fails to meet such time limit".*

69. Article 13.6 of the ADR provides as follows:

> *"The time to file an appeal to CAS shall be twenty-one days from the date of receipt of the decision by the appealing party".*

70. The admissibility was not contested by the Respondent.

71. The Sole Arbitrator notes that the Appellant received the Appealed Decision on 30 March 2020. The Appellant filed the Statement of Appeal on 15 April 2020, and therefore within the 21-day time limit prescribed by the ADR. Further, as explained in Section III above, following the

suspension of the deadline to file the Appeal Brief and subsequent extensions until 19 June 2020, the Appellant filed the Appeal Brief on 19 June 2020 and was thus timely.

72. Accordingly, the present Appeal is 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, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

74. Article 1.3.3.1 of the ADR provides as follows:

> *"1.3.3.1 These Anti-Doping Rules shall apply to the following Persons:*
>
> *a) All Athletes who are nationals, residents, license-holders or members of All-Russian Sports Federation in the Russian Federation, including Athletes who are not nationals or residents of the Russian Federation but who are present in the Russian Federation and Athletes that participate in Events organized by a sports organization registered on the territory of the Russia Federation".*

75. The Appealed Decision was issued under the ADR, which is not disputed. Accordingly, consistent with Article R58 of the Code and CAS jurisprudence, the Sole Arbitrator concludes that the ADR should apply as the primary applicable law to the present case.

76. On a subsidiary basis, since RUSADA is domiciled in Russia (and absent choice of law by the Parties), the Sole Arbitrator shall resort to Russian law to fill in any gaps or lacuna stemming from the primary applicable law.

VIII. MERITS

77. As a preliminary remark, the Sole Arbitrator explains why he did not hold an expedited proceeding in this case.

78. Article R52 of the Code provides as follows:

> *"With the agreement of the parties, the Panel or, if it has not yet been appointed, the President of the Division may proceed in an expedited manner and shall issue appropriate directions for such procedure".*

79. The Sole Arbitrator declined to conduct an expedited hearing for the following reasons.

- First, the expedited CAS procedure cannot be imposed on the Parties. It is necessary that both Parties consent to the fast-track procedure. In other words, even if the case is clearly and objectively urgent, it is not possible to have an expedited procedure if one of the Parties objects thereto[1]. The Sole Arbitrator notes that the Respondent did not submit its views in this regard.

- Second, the Appellant's request was made almost four months after the submission of the Statement of Appeal, almost two months after the submission of the Appeal Brief, and after agreeing to two additional extensions to the Respondent's deadline to submit the Answer. The Sole Arbitrator notes that it is common to submit a request for an expedited procedure together with the Appeal Brief[2].

- Third, the Appeal raises novel legal issues that have yet to be addressed by the CAS.

80. The Sole Arbitrator recalls that it is not disputed between the Parties that (i) the Appellant was aware that the Coach had been banned from training athletes; (ii) the Appellant trained with the Coach after the Coach was banned by the CAS in 2017; and (iii) in July 2018 the Appellant signed the acknowledgment form that referred to the Order 37.

81. However, the following principal issues are disputed between the Parties:

- Is it necessary that an athlete has been previously advised in writing by an anti-doping agency of the athlete support person's disqualifying status and the potential consequences of prohibited association before an athlete could be sanctioned for a violation of Article 2.10 of the ADR?

- If so, was this requirement satisfied in this case?

A. Background

82. The present Appeal does not concern a typical doping case. The Appellant did not fail a doping test nor is there any indication in the file that he used or witnessed the use of prohibited substances. Instead, he was charged with a Prohibited Association in violation of Article 2.10 of the ADR. In essence, the anti-doping rule offence stems from the Appellant's *association* with the Coach, who was sanctioned with a lifetime period of ineligibility for anti-doping rules violations[3].

83. As previously stated by the WADA President, Sir Craig Reedie, *"WADA is increasingly of belief that athletes do not dope alone, and that often there is a member of their entourage encouraging them to cheat"*[4].

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1 *See* MAVROMATI/REEB, *"The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials"*, January 2015.

2 *See* CAS 2014/A/3694, para. 31; CAS 2010/A/2216, p. 3; CAS 2013/A/3256, para. 74; and CAS 2014/A/3793, para. 3.1.

3 *See* CAS 2016/A/4480.

4 WADA, *"WADA Publishes Global List of Suspended Athlete Support Personnel"*, 14 September 2015, available at: https://www.wada-ama.org/en/media/news/2015-09/wada-publishes-global-list-of-suspended-athlete-support-

There have been several high-profile examples where athletes have continued to work with coaches who have been banned or with other individuals who have been criminally convicted for providing performance-enhancing drugs[5]. As a result, a new anti-doping rule violation called *"Prohibited Association"* was introduced in the 2015 WADA Code (Article 2.10 of the ADR mirrors the wording in the 2015 WADA Code)[6]. At that time, WADA stated that the newly adopted Prohibited Association Rule sent a clear message to athletes not to associate with individuals that have breached anti-doping rules because such individuals may encourage athletes to cheat the system and *"rob fellow athletes of their right to clean sport"*[7].

84. Despite being introduced almost 5 years ago, the Prohibited Association Rule is still in its infancy with regard to sanctioning[8]. As publicly stated by the Respondent in relation to the present Appeal and the appeals of the two other athletes, *"the cases of these three athletes, which were considered late last year, were the first cases in world history when athletes were sanctioned for prohibited association"*. Accordingly, the Appeal is the first time that the CAS is considering the Prohibited Association Rule[9].

85. On 15 June 2020 the 2021 WADA Code was approved, and is set to enter into force on 1 January 2021. In the recently approved 2021 WADA Code, the Prohibited Association Rule is substantially revised. The Sole Arbitrator addresses the revision below.

B. Interpretation of the Prohibited Association Rule

86. Article 2.10 of the ADR provides as follows:

> *"Association by an Athlete or other Person subject to the authority of an Anti-Doping Organization in a professional or sport-related capacity with any Athlete Support Person who:*
>
> *2.10.1 If subject to the authority of an Anti-Doping Organization, is serving a period of Ineligibility;*
>
> *(…).*

personnel; *see* also NAPLEY K., *"The Wrong Crowd – Protecting Athletes from Prohibited Association"* Lexology, 22 November 2017.

5 WADA, *"Athlete Reference Guide to the 2015 World Anti-Doping Code"*, 18 September 2014, p. 9.

6 WADA, *"Significant Changes Between the 2009 Code And the 2015 Code, Version 4.0"*, 1 September 2013, p. 4.

7 WADA, *"WADA Publishes Global List of Suspended Athlete Support Personnel"*, 14 September 2015, available at: https://www.wada-ama.org/en/media/news/2015-09/wada-publishes-global-list-of-suspended-athlete-support-personnel.

8 *See* WADA, *"2015 Anti-Doping Rules Violations (ADRVs) Report"*, 3 April 2017, p. 31; WADA, *2016 Anti-Doping Rules Violations (ADRVs) Report*, 26 April 2018, p. 33; WADA, *2016 Anti-Doping Rules Violations (ADRVs) Report*, 19 December 2019, p. 33.

9 The Sole Arbitrator notes that the Sport Resolutions, an independent non-profit dispute resolution service for sport based in the United Kingdom issued a decision on 21 October 2019 regarding the interpretation of the Prohibited Association Rule included in Article 2.10 of the ADR (*see* SR/Adhocsport/186/2019 in case *International Association of Athletics Federations (IAAF) and Artyom Denmukhametov*, 21 October 2019).

In order for this provision to apply, it is necessary that the Athlete or other Person has previously been advised in writing by an Anti-Doping Organization with jurisdiction over the Athlete or other Person, or by WADA, of the Athlete Support Person's disqualifying status and the potential Consequence of prohibited association and that the Athlete or other Person can reasonably avoid the association. The Anti-Doping Organization shall also use reasonable efforts to advise the Athlete Support Person who is subject of the notice to the Athlete or other Person that the Athlete Support Person may, within 15 days, come forward to the Anti-Doping Organization to explain that the criteria described in Articles 2.10.1 and 2.10.2 do not apply to him or her.

The burden shall be on the Athlete or other Person to establish that any association with Athlete Support Personnel described in Article 2.10.1 or 2.10.2 is not in a professional or sport-related capacity".

87. The Sole Arbitrator notes that, based on a plain reading of the wording of Article 2.10 of the ADR, four conditions may be discerned:

- First, the athlete *"has been previously advised in writing".*
- Second, the notice must be given by *"an Anti-Doping Organisation with jurisdiction over the Athlete (…), or by WADA".*
- Third, the notice must be *"of the Coach's disqualifying status" and "of the potential Consequence of prohibited association".*
- Fourth, the athlete *"can reasonably avoid the association".*

88. The principal disagreement between the Parties is whether the first condition is an inherent substantive element of the Prohibited Association Rule, which therefore must be established literally, or whether it could be satisfied by different means such as establishing an athlete's knowledge.

89. At the outset, the Sole Arbitrator notes that the Prohibited Association Rule included in the ADR mirrors Article 2.10 of the WADA Code. Given that WADA is itself a Swiss private law foundation with its seat in Lausanne, its rules should comply with Swiss law as otherwise the Swiss Courts will declare them to be non-compliant[10]. In accordance with the CAS jurisprudence, the interpretation of the WADA Code (including the Prohibited Association Rule) must be consistent with Swiss law, as the law with which the WADA Code must comply. Such an interpretation ensures that the WADA Code is not subject to the vagaries of myriad systems of law throughout the world, but is capable of uniform and consistent construction wherever it is applied[11]. Furthermore, the Sole Arbitrator emphasizes that the provisions included in the ADR *"shall be interpreted in a manner that is consistent with applicable provision of the* [WADA] *Code"*[12].

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10 CAS 2006/A/1025, para. 15.
11 CAS 2006/A/1025, para. 16.
12 *See* Article 20.6 of the ADR: *"These Rules have been adopted pursuant to the applicable provisions of the* [WADA] *Code and shall be interpreted in a manner that is consistent with applicable provisions of the* [WADA] *Code".*

90. The Sole Arbitrator recalls that under Swiss law, *"the starting point for interpreting a legal provision is its literal interpretation"*[13]. As consistently held by the Swiss Federal Tribunal, there is no reason to depart from the plain text, unless there are objective reasons to think that it does not reflect the core meaning of the provision under review[14]. If the provision under review is clear and unambiguous, an authority applying the provision is bound to follow its literal meaning, provided it expresses its true meaning. Only if a text is not clear and if several interpretations are possible, one must determine the true scope of the provision by analysing its relation with other provisions (systematic interpretation), its legislative history (historic interpretation) and the spirit and intent of provision (teleological interpretation)[15].

91. According to the well-established CAS jurisprudence, the Sole Arbitrator notes that the interpretation of a rule should indeed begin first and foremost with the text[16]. Moreover, it is not for the Sole Arbitrator, nor the CAS more generally, to question the policy or intent of anti-doping rule makers, in particular given that the WADA Code emphasises that *"when reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport"* (emphasis added)[17]. The Sole Arbitrator therefore must exercise caution when engaging in interpretation of rules that, upon the face of the text, leave little doubt as to their meaning.

92. The Sole Arbitrator notes that the germane part of Article 2.10 of the ADR states as follows: *"In order for this provision to apply, it is necessary that the Athlete or other Person has previously been advised in writing"*. The Sole Arbitrator observes the following elements of the *text* at issue:

- The use of the wording *"in order for this provision to apply"* makes it abundantly clear that the application of the Prohibited Association Rule is subject to the requirements that follow in the text at issue.

- The use of the wording *"it is necessary that"* leaves little doubt that the satisfaction of the ensuing conditions is not discretionary but in fact *necessary*. The word *"necessary"* is generally understood as *"needed for a purpose or a reason"*[18]. Accordingly, the ensuing conditions are effectively "conditions precedent".

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13 CAS 2015/A/4345, para. 99.

14 *See* 137 IV 180, 184; *see* also CAS 2013/A/3365&3366, para. 139.

15 CAS 2015/A/4345, para. 99.

16 By way of parallel, the Sole Arbitrator also recalls *"the text is the law, and it is the text that must be observed"*, the adage of the late U.S. Supreme Court Justice Scalia, under which 'interpretation' is used only if the statutory language is unclear, and the scrutiny begins with the text but it does not end there. This topic has recently resurrected in connection with the U.S. Senate confirmation hearings for the U.S. Supreme Court Justice nominee, Justice Amy Coney Barrett, a former clerk of late Justice Scalia, who remarked that the *"judge approaches the text as it is written with the meaning at the time"*.

17 *See* 2015 WADA Code, *"Doping Control, Introduction"*, p. 16.

18 https://www.oxfordlearnersdictionaries.com/us/definition/english/necessary?q=necessary.

- The use of the wording *"previously advised in writing"* unambiguously mandates a previous advice in writing.

- Further, the Sole Arbitrator notes that the wording *"in order for this provision to apply, it is necessary that"* is not used anywhere else in the WADA Code or the ADR. Therefore, the ensuing conditions (*i.e.*, *"previously been advised in writing by an Anti-Doping Organization with jurisdiction over the Athlete or other Person, or by WADA, of the Athlete Support Person's disqualifying status and the potential Consequence of prohibited association and that the Athlete or other Person can reasonably avoid the association"*) are arguably inherent in the violation itself.

93. In light of the foregoing, the Sole Arbitrator is convinced that the text of the Prohibited Association Rule unambiguously provides that in order to charge an athlete with the violation of Article 2.10 of the ADR, the athlete ought to be advised in advance, in writing, about the rule in question and the consequences of its breach.

94. For completeness, the Sole Arbitrator also proceeds with scrutiny of the Prohibited Association Rule that goes beyond its text. The following seven considerations bear emphasis.

95. First, the Sole Arbitrator recalls that in accordance with the well-established CAS jurisprudence, any ambiguous provisions of a disciplinary code must in principle be constructed *contra proferentem*[19].

> *"The fight against doping is arduous and it may require strict rules. But the rule makers and the rule appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorized bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders"*[20].

> *"Pursuant to CAS jurisprudence, the different elements of the rules of a federation shall be clear and precise, in the event they are legally binding for the athletes (see CAS 2006/A/1164; CAS 2007/A/1377; CAS 2007/A/1437). Inconsistencies/ambiguities in the rules must be constructed against the legislator (here: FIS) as per the principle of "contra proferentem" (CAS 2013/A/3324 & 3369; CAS 94/129; CAS 2009/A/1752; CAS 2009/A/1753; CAS 2012/A/2747; CAS 2007/A/1437; CAS 2011/A/2612)"*[21].

96. Indeed, as expressed by the Sole Arbitrator's esteemed colleagues in another matter, clarity and predictability of the rules are essential for the entire sporting community and athletes in particular should be able to understand the meaning of those rules and the circumstances in which they apply:

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19 The *contra proferentem* principle states, broadly, that where there is doubt with regard to the meaning of the contract or the rule, the preferred meaning should be the one that works against the interests of the party who provided the wording.

20 CAS 94/129, para. 34.

21 CAS 2014/A/3832 & 3833, para. 85.

"The rationale for requiring clarity of rules extends beyond enabling athletes in given cases to determine their conduct in such cases by reference to understandable rules. As argued by the Appellants at the hearing, clarity and predictability are required so that the entire sport community are informed of the normative system in which they live, work and compete, which requires at the very least that they be able to understand the meaning of rules and the circumstances in which those rules apply"[22].

"It is equally important that athletes in any sport (including Waterpolo) know clearly where they stand. It is unfair if they are to be found guilty of offences in circumstances where they neither knew nor reasonably could have known that they were doing was wrong (to avoid any doubt we are not to be taken as saying that doping offences should not be offences as a strict liability, but rather that the nature of the offences [as one of strict liability] *should be known and understood)"*[23].

97. Second, the Sole Arbitrator takes due account of materials that may shed light on the interpretation of the Prohibited Association Rule[24]. These materials overwhelmingly refer to an advance written notification requirement.

- WADA's Result Management, Hearings and Decisions Guidelines ("WADA Guidelines")[25], issued in 2014, effective from 2015, recommend the following steps be taken in the application of the Prohibited Association Rule:

  - Step 1: The anti-doping organization advises the Athlete or other Person in writing of the disqualifying status of the Athlete Support Personnel.

  - Step 2: The anti-doping organization ensures that the Athlete or other Person is provided with the opportunity to explain why he or she cannot reasonably avoid the association.

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22 CAS 2004/A/725, para. 20.

23 CAS 96/149, para. 31.

24 The Sole Arbitrator is not aware of any commentary issued in relation to the Prohibited Association Rule in the ADR (nor did the Parties refer to one). The commentary to Article 2.10 of the WADA Code provides as follows: *"Athletes and other Persons must not work with coaches, trainers, physicians or other Athlete Support Personnel who are Ineligible on account of an anti-doping rules violation or who have been criminally convicted or professionally disciplined in relation to doping. Some examples of the types of association which are prohibited include: obtaining training, strategy, technique, nutrition or medical advice; obtaining therapy, treatment of prescriptions; providing any bodily product for analysis; or allowing the Athlete Support Person to serve as an agent or representative. Prohibited association need not involve any form of compensation"*. Accordingly, the commentary does not shed light on the question of whether a written notice is required before an athlete could be found in violation of the Prohibited Association Rule.

25 *See* WADA, *"Result Management, Hearings and Decisions Guidelines"*, October 2014. The WADA Guidelines were prepared by WADA in conjunction with several key stakeholders in order to harmonize the practice of anti-doping organizations. Although the WADA Guidelines are not mandatory, they are intended to provide clarity and additional guidance to anti-doping organizations as to the most efficient, effective, and responsible way of discharging their responsibilities in terms of Results Management. The WADA Guidelines are a model for best practice developed as part of the World Anti-Doping Program. They have been drafted to provide anti-doping organizations with Results Management responsibilities with a document detailing in a step-by-step fashion the phases of the Results Management process, hearing and decision processes, and execution.

- Step 3: The anti-doping organization ensures that the Athlete or other Person is provided with the opportunity to explain why the relevant Athlete Support Personnel is not disqualified.

- If the prohibited association continues despite the written warning addressed to the athlete, proceedings shall be instigated.

- The WADA Guidelines include a model template of the first written notice to be provided to the athlete[26]. The template recommends that the relevant anti-doping organization explain in reasonable details the basis for the belief that the athlete has been associating with a disqualified person. The evidence relied upon by the anti-doping organization may be a combination of witness evidence, as well as open source information such as news reports, press articles and so forth. The evidence must support a strong case (*i.e.*, the "comfortable satisfaction standard") that both the *"association"* is taking place, and that the nature of the association falls within Article 2.10 of the WADA Code.

- The model template of the first written notice to the athlete concludes as follows: *"If you fail to cease all association with* [Name] *within the timeframes stipulated in the notice, this matter may result in disciplinary proceedings being brought against you. In particular, you may be charged with committing an ADRV contrary to Article 2.10. The sanction provided in the ADR in respect of such a violation is a period of ineligibility from sport of between 1 and 2 years".*

- A quiz published on WADA's website includes the following explanation in relation to the Prohibited Association Rule: *"Prohibited Association is an Anti-Doping Rule Violation (ADRV) that athletes can be sanctioned for, if they have previously been advised in writing by an Anti-Doping Organization or WADA of the Athlete Support Person's disqualifying status and the potential consequence of prohibited association"* (emphasis added)[27].

- WADA's Athlete Reference Guide to the 2015 World Anti-Doping Code includes the following explanation regarding the Prohibited Association Rule: *"A new feature of the Code taking effect at the start of 2015 makes it an anti-doping rule violation for you to associate with this sort of 'athlete support person' once you have been specifically warned not to engage in that association"* (emphasis added)[28].

- WADA's ADO Reference Guide to the WADA Code, which outlines the changes in the 2015 WADA Code and highlights issues on which anti-doping organizations should focus, explains the following in connection with the Prohibited Association Rule: *"Before an athlete can be found to have violated this Article, he/she must have received written notice from and*

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26 *See* WADA, *"Result Management, Hearings and Decisions Guidelines"*, October 2014, Template C: Prohibited Association (first letter), p. 121–124.

27 *See* WADA, *Play True Quiz* available at: https://www.wada-ama.org/sites/default/files/resources/files/english_0.pdf.

28 *See* WADA, "*Athlete Reference Guide to the 2015 World Anti-Doping Code*", 18 September 2014, p. 9.

ADO of both the: Athlete's support personnel's disqualification status, and Consequences of continued association" (emphasis added)[29].

98. Third, the Sole Arbitrator notes the following guidance provided by leading national anti-doping organizations, which refer to an advance written notification requirement.

- The UK Anti-Doping ("UKAD") agency explains that if an athlete knows that someone is serving an anti-doping ban, and he or she nevertheless continues to associate with that person, then the athlete is at risk of violating the Prohibited Association Rule. The UKAD clarifies that *"before an Anti-Doping Organisation (such as UKAD) can charge you with a breach of Prohibited Association Rule (…) you must have been given a written notice of the person's banned status and the potential consequences of prohibited association"*[30].

- According to Article L 232-9-1 of the French Code of Sports (*Code du Sport*), if the French Anti-Doping Agency ("AFLD") considers that the athlete is seeking assistance from an athlete support personnel that is disqualified, it must notify the athlete and give him or her a deadline to present his or her observations[31]. This guarantee is not considered superfluous, but rather a necessary complement[32].

- The U.S. Anti-Doping Agency ("USADA") explains that *"first and foremost, it is important for athletes to realize that they are not in violation of Prohibited Association rule unless they are notified of the prohibited association and then KNOWINGLY continue on with the professional sport relationship"*[33].

99. Fourth, the Sole Arbitrator notes that Article 2.10 of the ADR (mirroring Article 2.10 of the WADA Code) establishes different *efforts* standards for the anti-doping organization in relation to an athlete and an athlete support person. This further supports the assertion that there is a strict notification standard when it comes to the athlete.

Notification to an athlete	Notification to an athlete support person
"In order for this provision to apply, it is necessary that the Athlete or other Person has previously been advised in writing" (emphasis added).	*"The Anti-Doping Organization shall also use reasonable efforts to advise the Athlete Support Person who is subject of the notice to the Athlete or other Person"* (emphasis added).

100. Fifth, the Sole Arbitrator notes that the Prohibited Association Rule appears to be the only anti-doping rule that requires an advance written notice before finding an ADR violation. If that were not the intention, it is difficult to understand why the authors of the 2015 WADA Code

29 WADA, *"ADO Reference Guide to the Code"*, 30 July 2015, p. 23.
30 *See*, UKAD, *"What is "Prohibited Association"?"*, available at: https://www.ukad.org.uk/what-prohibited-association.
31 Article L232-9-1 of *Code du sport*.
32 *See* COSTA J.-P., *"Legal opinion 2019 (expert opinion on the World Anti-Doping Code"*, 26 September 2019.
33 *See* USADA, *"Keeping Good Company: Prohibited Association"*, 10 May 2016, available at: https://www.usada.org/spirit-of-sport/education/keeping-good-company/.

included specific wording requiring that *"[i]n order for this provision to apply, it is necessary that the Athlete or other Person has previously been advised in writing"*.

101. Sixth, the requirement that a written notice be provided to the athlete before the anti-doping organization may find a violation of the Prohibited Association Rule is consistent with the special nature of this rule. The Prohibited Association Rule, when applied to an athlete, is a violation that was added to the list of anti-doping offences not because the athlete in question committed a violation, but because somebody else did. In that sense, the Prohibited Association Rule was added as a new rule to protect athletes further from bad influence, thus imposing on him or her an obligation act with more prudence. As such, the Prohibited Association Rule is aimed at dissuading athletes from working with athlete support personnel who have committed an ADR violation or who have been convicted of doping-related activities[34].

102. Seventh, the Sole Arbitrator takes due account of the recent developments in connection with the adoption of the 2021 WADA Code.

- During the 2021 WADA Code consultation process, various stakeholders submitted their observations. The following examples of observations indicate that the version of Article 2.10 of the ADR applicable in this case requires a written notice to an athlete:

  - *"The USOC favoured the advance notice requirement to athletes to protect the innocent or unknowing athlete as the original intent of this provision is not to trap athletes with a violation"* (emphasis added)[35].

  - *"The proposed change of article 2.10 does not require the Anti-Doping Organization to notify the Athlete or other person about the Athlete's Support Person's disqualifying status (…). Out of fairness to the athletes, we therefore propose that the current wording of article 2.10 is upheld, whereby in order for this provision to apply, it is necessary that the Athlete or other person has previously been advised in writing"* (emphasis added)[36].

  - *"Under the 2015 WADA Code, there existed a requirement that an Athlete or other Person have been previously advised in writing of the Athlete Support Person's disqualifying status and the potential Consequence of prohibited association, so that the Athlete or other Person can reasonably avoid the association (…). ADO's will no longer have any obligation or incentive to notify athletes that they are working with coaches who are under sanction"* (emphasis added)[37].

- In June 2020, WADA approved and published the 2021 WADA Code, which is set to enter into force on 1 January 2021[38]. In the 2021 WADA Code, the Prohibited

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34 *See* WADA, *"ADO Reference Guide to the Code"*, 30 July 2015, p. 22.

35 WADA, *"2021 Code Review – Third Consultation phase"*, Comments received from the United States Olympic & Paralympic Committee ("USOC"), 17 June 2019, p. 12.

36 WADA, *"2021 Code Review – Third Consultation phase"*, Comments received from the Anti-Doping Denmark ("ADD"), 17 June 2019, p. 15.

37 WADA, *"2021 Code Review – Third Consultation phase"*, Comments received from Law Offices of Howard L. Jacobs, 17 June 2019, p. 16.

38 *See* WADA, *"WADA publishes approved 2021 World Anti-Doping Code and International Standards"*, 26 November 2019.

Association Rule has been significantly revised. The new rule provides that, in order to establish a violation of the Prohibited Association Rule, the anti-doping organization must establish that the Athlete or other person *knew* of the Athlete Support Person's disqualifying status. This is supported by WADA commentary to Article 2.10 of the 2021 WADA Code:

> *"while Article 2.10 does not require the Anti-Doping Organization to notify the athlete or other Person about the Athlete Support Person disqualifying status, such notice, if provided, would be important evidence to establish that the Athlete or other Person knew about the disqualifying status of the Athlete Support Person".*

Article 2.10 WADA Code – Redline comparison[39]

2.10.2 ~~In order for this provision to apply, it is necessary that the Athlete or other Person has previously been advised in writing by~~To establish a violation of Article 2.10, an ***Anti-Doping Organization*** ~~with jurisdiction over the Athlete or other Person, or by WADA, of the Athlete Support Person's disqualifying status and the potential Consequence of prohibited association and that the Athlete or other Person can reasonably avoid the association. The Anti-Doping Organization shall also use reasonable efforts to advise the Athlete Support Person who is the subject of the notice to the Athlete or other Person that the Athlete Support Person may, within 15 days, come forward to the Anti-Doping Organization to explain that the criteria described in Articles 2.10.1 and 2.10.2 do not apply to him or her. (Notwithstanding Article 17, this Article applies even when the Athlete Support Person's disqualifying conduct occurred prior to the effective date provided in Article 25.)~~must establish that the *Athlete* or other *Person* knew of the *Athlete Support Person's* disqualifying status.

The burden shall be on the ***Athlete*** or other ***Person*** to establish that any association with an ***Athlete Support*** ~~Personnel~~*Person* described in Article ~~2.10.1~~2.10.1.1 or ~~2.10.2~~2.10.1.2 is not in a professional or sport-related capacity and/or that such association could not have been reasonably avoided.

Anti-Doping Organizations that are aware of ***Athlete Support Personnel*** who meet the criteria described in Article ~~2.10.1, 2.10.2~~2.10.1.1, 2.10.1.2, or ~~2.10.3~~2.10.1.3 shall submit that information to ***WADA***.[15]

- The significant revision of the Prohibited Association Rule, which goes beyond mere clarifications, provides strong indication that the rule has been fundamentally changed.

103. In sum, in light of the foregoing, the Sole Arbitrator notes that (1) the text of Article 2.10 of the ADR unambiguously requires that an athlete be provided with an advance notice in writing explaining the Prohibited Association Rule and consequences of its breach, and, for completeness, (2) secondary sources and developments related to Article 2.10 of the ADR confirm the textual interpretation.

104. The Respondent argued, in essence, that the Prohibited Association Rule ought to be interpreted purposefully, not literally, and that an athlete who actually *knows* that he or she is associating with a banned coach and the ensuing consequences, should not escape liability because a *technical* notification requirement may not have been satisfied.

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39 WADA, *"2021 Code – Redline Version – November 2019"*, 15 June 2020.

105. The Sole Arbitrator has sympathy for this argument, including the tension between an athlete's actual knowledge and whether that knowledge has been established via a process outlined in Article 2.10 of the ADR. The Sole Arbitrator also acknowledges that, absent the interpretation put forward by the Respondent, some athletes who may be aware of their violations could escape liability for their actions if they were not served an advance written notice. However, the Sole Arbitrator is not called upon to form or determine the "right" anti-doping policy or enforcement practice. The Sole Arbitrator must exercise utmost caution in substituting his views or policy preference for what unambiguously arises from the text of the rule in question, which in this case is further supported by secondary materials shedding light on the rule's background and intent. Finally, for completeness, the Sole Arbitrator notes that any policy concerns in this regard could anyways easily be addressed by simply notifying an athlete in accordance with the requirements of Article 2.10 of the ADR.

106. Accordingly, the Sole Arbitrator concludes that, in order to establish a violation of Article 2.10 of the ADR applicable in this case, the Appellant ought to have first been advised in writing by an anti-doping organization with jurisdiction over the Appellant of the Coach's disqualifying status and the potential consequence of prohibited association therewith. Failing to do so, a violation cannot properly be established.

C. Satisfaction of the conditions of the Prohibited Association Rule

107. The Sole Arbitrator now turns to the factual issue as to whether an advance written notice was served to the Appellant prior to establishing a violation of Article 2.10 of the ADR.

1. Order 37

108. The Sole Arbitrator notes that it is undisputed between the Parties that, on 19 July 2018, the Appellant signed the acknowledgment form, which referenced the Order 37. However, the Parties disagree whether the Order 37 was presented or made available to the Appellant at the time of signing the acknowledgment form.

109. The Order 37 was an administrative order issued by RusAF on 25 June 2018. The Order 37 reads as follows:

"Russian Athletics Federation

Order No. 37

25 June 2018

Moscow

On April 2018 the RUSADA employees found the coach V.M. Chegin, who had been banned for life for violation of the anti-doping rules, at the stadium used as a training camp of the Russian national athletics

team in Karakol (Kyrgzstan). The reinstatement of the RusAF in the IAAF has been adversely affected by the presence of the disqualified coach at the athletes' training camp and has resulted in suspension of the following race walking athletes: S. Shirobokov, S. Sharypov, Yu. Lipanova, K. Afansyeva, O. Yeliseyeva.

The following professional have been currently disqualified:

V. Chegin, A. Melnikov, V. Kazarin, S. Portugalov (lifetime disqualification).

V. Mokhev – 10-year disqualification (until 22.12.2026).

Ye. Yevsyukov – 4-year disqualification (until 28.12.2020).

L. Fedoriva – 4-year disqualification (until 19.09.2020).

V. Kolesnikov – 4-year disqualification (until 20.08.2018).

V. Volkov – 4-year disqualification (until 03.08.2021).

The mere presence of a disqualified coach at the official training camp may be regarded as a violation by athletes of coaches of paragraph 2.10 (Illicit Cooperation) of the Russian National Anti-Doping Rules. This violation is punishable with the disqualification for 1 to 2 years.

In order to prevent similar violations in future, I hereby order:

1. *The head coach of the Russian national athletics team Yu. M. Borzakovskiy to communicate this order and paragraph 2.10 of the Russian National Anti-Doping Rules to athletes and coaches of the Russian national team against written acknowledgment, and to submit the acknowledgment list by 1 August 2018.*

2. *The RusAF Anti-Doping Coordinator Ye. V. Ikonnikova to inform the regional athletics federations and regional executive authorities of the need to control the disqualification of coaches, to arrange for anti-doping activities involving athletes and coaches with regard to the anti-doping policies, and to submit the relevant action plan by 10 July 2018.*

3. *The regional athletics federations to monitor the compliance by coaches with the disqualification terms and conditions, and to prevent the illicit cooperation between disqualified personnel and athletes or coaches.*

4. *I will be solely in charge of monitoring the execution of this order.*

President D.A. Shlyakhtin".

110. The Appellant testified both in writing and at the hearing that he was not presented with the Order 37 before signing the acknowledgment form on 19 July 2018. The Appellant's written witness statement expressed as follows:

"After warm up, when I was already in my short race uniform and preparing for the start of my heat, we were informed that we would not be allowed to race unless we signed a form.

We were presented with a one-page document that, in the evidence pack sent to me on 14 June 2019 is referred to as the "Acknowledgment form in relation to article 2.10". The contents of the Order 37 dated 25 June 2018 were not communicated to me.

The signatures were collected immediately before the heat, and I was under stress and could think only about my run at the main event of the year – Russian Championships.

All the signatures were collected in less than a minute. No lectures, explanations or demonstrations took place in the call-room and couldn't take place, because the call-room was just a small tent and there was very little time left, and everyone was nervous, and the schedule was tight" (emphasis added).

111. The Appellant's principal statements at the hearing may be summarized as follows:

- Direct examination:

  - In 2015, the Appellant joined the group of athletes trained by the Coach. At that time, the Coach was considered the best middle-distance coach in Russia.

  - To date, the Appellant has not been charged with any ADR violation, though he was included in the international testing pool since 2017.

  - The Appellant learned about the Coach's disqualification status in 2017. The Coach informed him and other athletes that he was disqualified but explained to the Appellant that he was allowed to train with him unofficially. Before 2017, the Appellant was training with the Coach for almost three years.

  - When the Appellant was in the call room at the Russian Championships in July 2018, preparing for his event, he was asked to sign a document to allow him to compete. In the call room, the Appellant prepared for his event and signed the document. The document contained the list of athletes, and all athletes were required to sign.

  - An individual in the call room asked about the purpose of the document and the person responsible for collecting the signatures replied that it concerned a new rule.

  - After the event, the Appellant did not discuss the document with other athletes. He was clearly told that he needed to sign it otherwise he would not be allowed to compete. He did not receive any document afterwards.

- In November 2018, the Appellant received a questionnaire from RUSADA inquiring about his association with the Coach. He responded to the questionnaire as instructed by the Coach.

- In December 2018, the Appellant had a discussion with the Coach because he suspected that the Coach was not honest with the athletes. The Coach did not understand the Appellant's concerns and threatened him. He again told the Appellant that he was not violating the rules as long as the Appellant did not indicate the Coach as his official coach.

- The Appellant did not contact RUSADA because RUSADA did not help other athlete who had similar issues. One athlete recorded the Coach associating with athletes and later had to leave Russia.

- The Coach was an influential person and could impact his career, in particular, with regard to the Appellant's prospective employment.

- Cross-examination:

  - During the Russian Championships in 2018, just before his event, the Appellant was asked to sign a document. At the moment of signing the document he was in the call room, which was located approximately 300 metres from the tracks.

  - The Appellant did not remember the substance of the document he signed at the Russian Championships in 2018. He remembered that he was asked to put his signature against his name.

  - The Appellant had never been given a similar form before a competition. Once he was asked to sign, the Appellant did not query the form.

  - The Appellant was aware that Mr Denmukhametov and Mr Verkovykh were tested at the training camp in October 2018. However, this was normal procedure and he did not discuss with them whether RUSADA was asking questions about their association with the Coach.

  - In November 2018, the Appellant responded to the questionnaire received from RUSADA. The Appellant did not remember the exact circumstances, but recalled that the Coach sent him written answers, and phoned him to ensure that he submitted answers deemed appropriate by the Coach.

  - When the Appellant received a questionnaire from RUSADA in November 2018, he was not aware that associating with the Coach may be seen as an ADR violation. He was never explained the meaning of "disqualified coach".

- The Appellant was very concerned about the Coach's status as some of his answers submitted to RUSADA were misleading. He became suspicious of the Coach' status.

- The Coach explained to the Appellant that as long as he was not listed as his official coach, the Appellant would not encounter any problems.

- Sole Arbitrator's questions:

- Before signing the form at the Russian Championships in July 2018, one of the eight athletes in the call room asked what is the reason for signing the document.

- The person responsible for handling the documents explained that the form was related to *"some kind of new rule and regulation"*. However, the Appellant did not remember the details as he was focusing on the competition.

112. The Appellant's written testimony regarding the circumstances of signing the acknowledgment form in July 2018 was supplemented with written testimony of five other athletes that participated at the Russian Championships: (i) Mr Danila Gubaev; (ii) Mr Andrey Loginov; (iii) Mr Albert Ramazanov; (iv) Mrs Alyona Shuhtueva; and (v) Mr Artem Denmukhametov. They stated, in writing, that the Order 37 was not presented to them before signing the acknowledgment form.

113. Mr Albert Ramazanov's principal statements at the hearing may be summarized as follows:

- Direct examination:

- Mr Ramaznov put his signature on the signatures list without having the opportunity to become acquainted with the Order 37 itself.

- As requested, he signed the acknowledgment form and did not ask any questions because he was focusing on the competition.

- Cross-examination:

- Mr Ramazanov did not remember any details about the acknowledgment form as he signed the form a few minutes before his competition. At that time, he understood that he had to sign the acknowledgment form in order to be allowed to compete at the Russian Championships.

- After the competition, Mr Ramazanov discussed with his fellow athletes as to how they were obliged to sign the form, and only later discovered that the form was related to anti-doping.

- Sole Arbitrator's questions:

  - Mr Ramazanov did not read the form before signing.

  - This was the first time that Mr Ramazanov was asked to sign a form before a competition.

  - After the race, he discussed with other athletes only the fact that they were obliged to sign the form. After the Russian Championships, he discovered that the form related to the anti-doping rules.

114. Mr Artem Denmukhametov's principal statements at the hearing may be summarized as follows:

- Direct-examination:

  - In 2017, the Coach explained to Mr Denmukhametov and other athletes that they were allowed to train with him unofficially.
  - A few minutes before Mr Denmukhametov was about to compete at the Russian Championships, he received an A4-format paper and was asked to put his name and signature. At that time, he understood that his signature was a prerequisite for participating at the competition. Before signing the acknowledgment form, no one explained to Mr Denmukhametov that the form related to the anti-doping rules, nor that the Order 37 listed coaches with whom the athletes were prohibited to associate.

- Cross-examination:

  - The Coach explained to the athletes that if they indicated as their official coach the Coach's wife, they would not encounter any problems.

  - At that time, Mr Denmukhametov did not think that training with a disqualified coach would put him at risk of violating the anti-doping rules.

  - He did not remember anything about the acknowledgment form, and at that time was not aware that RusAF issued the Order 37. He did not discuss the signing of the acknowledgment form with other athletes.

- Sole Arbitrator's questions:

  - This was the first time Mr Denmukhametov had to sign a form before competing at the event.

  - Mr Denmukhametov was explained that he needed to sign the acknowledgment form to be allowed to compete at the Russian Championships. He did not read the

acknowledgment form before signing, and there were no other documents accompanying the form.

- After the competition, he did not discuss the acknowledgment form with other athletes.

115. Mr Andrey Loginov's principal statements at the hearing may be summarized as follows:

- Direct examination:

  - Before competing at the Russian Championships, when Mr Loginov was in the call room, he was requested to sign the acknowledgment form. He was not interested in the form as he was just about to compete, but he understood that the form related to some new anti-doping rules.

  - Mr Loginov was explained that he needed to sign the form in order to be allowed to compete. When he finished his race, he was not provided with any copies of the form.

- Cross-examination:

  - Only a year ago, Mr Loginov became aware that athletes working with disqualified coaches might commit an ADR violation.

  - Once Mr Loginov signed the acknowledgment form at the Russian Championships, he did not receive any copy of the form. After the competition, he did not discuss with other athletes anything about the form.

- Sole Arbitrator's questions:

  - Before signing the acknowledgment form, one of Mr Loginov's colleagues mentioned that the acknowledgment form related to new anti-doping rules. However, he was not explained anything else.

116. The Sole Arbitrator recalls that the Respondent has the burden of proof to establish that the Appellant has committed a violation of the Prohibited Association Rule, including that the Appellant has received a written notice. The relevant part of Article 3.1 of the ADR states as follows:

> *"The RUSADA shall have the burden of establishing an anti-doping rules violation has occurred. The Standard of proof shall be whether the RUSADA has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt"* (emphasis added).

117. The Sole Arbitrator finds that the Respondent did not establish to the Sole Arbitrator's comfortable satisfaction that the content of the Order 37 was served or explained to the Appellant before the Appellant signed the acknowledgment form on 19 July 2018 at the Russian Championships. This reflects the following considerations.

- First, the Sole Arbitrator notes that the Appellant's signature was collected only a few minutes before his race. This appears suboptimal when compared to the process recommended by the WADA Guidelines. The Appellant testified that he was focused on the race and understood that he was obliged to sign the acknowledgment form if he wished to participate in the competition. The Sole Arbitrator has no reason not to accept the Appellant's testimony on this point. When probed by the Sole Arbitrator whether the person handing down the acknowledgment forms explained that the form relates to anti-doping rules, the Appellant testified that he only heard through discussion from other athletes that the form related to 'some new regulation', but could not remember any details nor is there any evidence that further details were provided.

- Second, the Appellant testified that, before signing the acknowledgment form, he was not handed the Order 37 nor explained its content. The Appellant's testimony is further supported by oral testimony of Mr Ramazanov, Mr Denmukhametov, and Mr Loginov, who testified that they similarly were not handed the Order 37 nor explained its content.

- Third, the Sole Arbitrator notes that the Respondent, as the Party bearing the burden of proof, could have clarified whether the Appellant was provided with the Order 37 before signing the acknowledgment form to the comfortable satisfaction of the Sole Arbitrator, by simply providing the testimony of Mrs Tatyana Goncharenko, the relevant RusAF representative collecting the signatures. While the Respondent reserved the right to call Mrs Goncharenko as a witness, it did not submit her written testimony nor did it call her to appear at the hearing, despite being repeatedly invited to do so[40].

- Fourth, the acknowledgment form itself did not list the names of the coaches with whom the athletes were prohibited to associate, nor explained the sanctions that may be imposed on the Appellant if he were to continue to associate with the Coach. In essence, the relevant part of the acknowledgment form reads as follows: *"Acknowledgment form for the order and paragraph 2.10 of the Russian National Anti-Doping Rules"*.

118. In light of the foregoing, the Sole Arbitrator concludes that he is not comfortably satisfied that the advance written notification requirement inherent in Article 2.10 of the ADR was fulfilled in connection with the signing of the acknowledgment form at the Russian Championships in Kazan on 21 July 2018.

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40 *See also* MAVROMATI/REEB, *"The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials"*, January 2015; *see also* CAS 2004/O/645, para. 11; CAS 2004/O/649, para. 58.

2. RUSADA questionnaire

119. The Sole Arbitrator notes that the Appellant received a questionnaire from RUSADA on 27 November 2018 inquiring about his association with the Coach. The questionnaire reads as follows:

> *"Russian Anti-doping Agency is carrying out the verification of the fact of potential anti-doping rules violation. Based on the above we request you to answer the following questions:*
>
> - *Were you in the territory of the Kyrgyzstan Republic during the period from October 17 to November 23, 2018;*
> - *Are you acquainted with Vladimir Semenovich Kazarin;*
> - *Do you know who V.S. Kazarin is, how he looks like, for what reason he was disqualified and for how long;*
> - *Was V.S. Kazarin present at your training sessions in Kyrgyzstan during the specified period;*
> - *Are you acquainted with coach Natalia Petrovna Khrushcheleva;*
> - *Did you meet N.P. Khrushcheleva during the specified period in Kyrgyzstan;*
> - *Was N.P. Khrushcheleva present at the training activities in Kyrgyzstan from October 17 to November 23, 2018*
>
> *You must type or write with your own hand, answers to the questions in the following order" RUSADA's question and your answer under it. You must confirm it with the signature, specify the date and email us a photo or a scanned copy of your reply. You are requested to answer these questions within three days from the time of receiving the letter".*

120. On 29 November 2018, the Appellant responded as follows:

- Question 1: *"Were you in the territory of the Kyrgyzstan Republic during the period from October 17 to November 23, 2018?"*
  - *"Yes. To be more accurate I was there from 17.10.2018 to 03.11.2018 and from 12.11.2018 to 26.11.2018".*
- Question 2: *"Are you acquainted with Vladimir Semenovich Kazarin?"*
  - *"Yes, I'm familiar* [with him]*".*
- Question 3: *"Do you know who V.S. Kazarin is, how he looks like, for what reason he was disqualified and for how long"*?

- *"Yes, I know who Kazarin V.S. is, I know what he looks like. I don't know what he was sanctioned for, because I personally didn't receive notification about the ineligibility status of Kazarin V.S. I also don't know time period of the sanctions against Kazarin".*

- Question 4: *"Was V.S. Kazarin present at your training sessions in Kyrgyzstan during the specified period"* [from October 17 to November 23, 2018]:

  - *"No".*

- Question 5: *"Are you acquainted with coach Natalia Petrovna Khrushcheleva?"*

  - *"Yes, I know her".*

- Question 6: *"Did you meet N.P. Khrushcheleva during the specified period in Kyrgyzstan?"*

  - *"Yes".*

- Question 7: *"Was N.P. Khrushcheleva present at the training activities in Kyrgyzstan from October 17 to November 23, 2018?"*

  - *"Yes".*

121. The Sole Arbitrator notes that the Respondent did not explicitly argue that the questionnaire satisfied the advance written notification requirement inherent in Article 2.10 of the ADR. The Sole Arbitrator nonetheless proceeded with the analysis and concludes that he is not comfortably satisfied that the questionnaire fulfilled the written notification requirement per Article 2.10 of the ADR. This reflects the following considerations.

- First, the questionnaire clarified that the Respondent was merely collecting facts: *"RUSADA is carrying out the verification of the fact of potential anti-doping rules violation"*. Accordingly, the questionnaire did not appear to represent a written advance notification required by Article 2.10 of the ADR.

- Second, the questionnaire did not include any explanation regarding the Prohibited Association Rule, nor referenced the relevant provisions of the ADR.

- Third, the questionnaire did not explain that the Appellant was prohibited to associate with the Coach and what consequences could ensue for the breach thereof, as explicitly required by the wording of Article 2.10 of the ADR.

122. For completeness, the Sole Arbitrator notes that some of the answers of the Appellant in response to the RUSADA questionnaire were untrue, as acknowledged by the Appellant himself at the hearing. The Appellant testified that he was intimidated by the Coach and strictly followed his instructions (including on how to respond to the questionnaire), given the Coach's influential status and the Appellant's belief at that time that the Coach had the power to impact

his employment and future career. This is also supported by the written explanations submitted by the Coach:

> *"During the training process, the athletes asked me about admissibility of such association.*
>
> *As an argument, I referred to the situation with A. Denmukhametov, who was not affected by the story of 2017 related to the publication of the video of the training session in the arena of the city of Chelyabinsk, hence, the athletes were confident that they were not violating the anti-doping rules (…).*
>
> *Thus, I admit that I misled the athletes regarding the situation and I exploited my authority among them in order to continue work with them".*

123. It is regrettable that the Appellant submitted false answers in response to the RUSADA questionnaire (albeit the Appellant explained the circumstances for doing so). However, the Sole Arbitrator notes, this does not alter the fact that the questionnaire did not meet the notification requirement inherent in Article 2.10 of the ADR.

124. In sum, in light of the foregoing, the Sole Arbitrator concludes that the Respondent did not establish to the comfortable satisfaction of the Sole Arbitrator that the Appellant was previously advised in writing by an anti-doping agency of the Coach's disqualifying status and the potential consequences of prohibited association. Accordingly, the Respondent did not establish to the comfortable satisfaction of the Sole Arbitrator that the Appellant infringed Article 2.10 of the ADR.

D. Alleged procedural irregularities and request for compensation *ex aequo et bono*

125. The Appellant argued that the procedure before RUSADA leading up to the Appealed Decision, and the actions of RUSADA after the Appealed Decision, amounted to systematic violation of certain principles in the WADA Code and the WADA guidelines aimed at protecting the athletes' right to a fair hearing. The Appellant raised the following points.

- Even though the Appellant requested the Respondent to conduct an expedited hearing, the Respondent failed to arrange an expedited hearing. The hearing took place almost six months after the Appellant's submission of her statement on the merits. The hearing in the Appellant's case was delayed by at least five months and there were no *"special circumstances"* in the Appellant's case to prolong the hearing.

- The Appellant did not have access to certain documents in the case file until the CAS proceedings. The Appellant's Counsel was only able to review these documents six months after the hearing before the DADC.

- Before the hearing at the DADC, RUSADA had not delivered its written submission, and as a result the Appellant could not understand the nature of the charge.

- On 26 March 2020, the news regarding the Appealed Decision appeared on RusAF's website. A scanned copy of the Appealed Decision was received by the Appellant on 30 March 2020, thus four days after the news was publicly disclosed.

- The Respondent's letter dated 19 June 2019 disclosed confidential information (identity of witnesses) to a third party, *i.e.*, RusAF.

- The Respondent and DADC have engaged in systematic violation of the Appellant's right to a fair hearing, putting her in a disadvantageous position and undermining the adversarial nature of the hearing.

- After filing the Appeal to the CAS, the Appellant was summoned to the Anti-Drug Division of the Ministry of the Interior of the Orenburg Region to provide a written statement in relation to the ADR violation.

- On 11 June 2020, the Respondent issued a press release announcing that the Respondent *"is contemplating to collect the court fees on the cases lost by athletes in CAS"*. The press release included a statement that *"*[a]*t the moment, RUSADA is concerned about unreasonable appeals from athletes who put RUSADA in a situation where it is necessary to hire lawyer for representation in CAS and spend budgetary funds"*.

- On 12 June 2020, an interview was published in major Russian news regarding the Appellant's Appeal before the CAS. During this interview, the Respondent's Deputy Director, Mrs Margarita Pakhnotskaya, made a few misleading statements and disclosed confidential information regarding the ongoing Appeal.

126. Based on the above, the Appellant requested *ex aequo et bono* compensation for damages sustained as a result of systematic violation by the Respondent of (i) the Appellant's right to a fair hearing; (ii) intimidation; (iii) confidentiality breach; and (iv) undue interference following submission of the Appeal. In his post-Hearing submission, the Appellant further submitted that although monetary claims brought by the Appellant were not related to the substance of the disputed ADR violation, the Sole Arbitrator has full jurisdiction to grant the Appellant compensation *ex aequo et bono* for the damages sustained by the Appellant.

127. The Respondent disagreed with the Appellant and argued that these points had no bearing on the subject matter of the Appeal, *i.e.*, alleged breach of the ADR. At the hearing, the Respondent noted that, while issues raised by the Appellant are highly important, these arguments were not for the CAS to resolve in the present Appeal. The Respondent also disagreed with the Appellant's claim for damages and submitted that the Appellant should bring his claims before the Russian courts.

128. The Sole Arbitrator dismisses the Appellant's request for compensation. This reflects the following considerations.

129. First, consistent with the CAS jurisprudence, Article R57 of the Code[41] grants CAS Panels full power to examine all facts and legal issue of a dispute and to hold a trial *de novo*[42]. Similarly, Article 13.1.1. of the ADR, the primary applicable law to the Appeal at hand, provides that *"the scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker"*. The full power of review has a dual meaning: (i) CAS admits new prayers for relief and new evidence and hears new legal arguments; and (ii) the full power of review means that procedural flaws, which occurred during the proceedings of the previous instances, can be cured by the CAS Panel[43]. This is also supported by CAS jurisprudence:

- *"Pursuant to the first paragraphs of Article R57 of the CAS Code, the Panel has full power to review the facts and the law of cases before it. Numerous Panels have understood this to mean that any procedural defects which occurred in the internal proceedings of a federation are cured by arbitration proceedings before the CAS (cf., CAS 96/156, award of 6 October 1997, p. 61 with reference to the Bundesgerichtsentscheidungen (decision of the Swiss Federal Tribunal) 116 Ia 94 and 116 Ib 37). This Panel agrees with these decisions"*[44].

- The CAS Panel defined a *de novo* hearing as *"completely fresh hearing of the dispute between the parties, any allegation of denial of natural justice or any defect or procedural error ('even in violation of the principle of due process') which may have occurred at first instance, whether within the sporting body or by the Ordinary Division CAS Panel, will be 'cured' by the arbitration proceedings before the appeal paned and the appeal panel is therefore not required to consider any such allegations"*[45].

- *"if the hearing in a given case was insufficient in the first instance (…), the fact that as long as there is a possibility of full appeal to the Court of Arbitration for Sport the deficiency may be cured"*[46].

- According to the well-established CAS jurisprudence, the violations that might be cured by a CAS hearing comprise, *inter alia*, violations of the right to be heard. In case CAS 2012/A/2913, the CAS Panel held: *"Therefore even if a violation of the principle of due process, or of the right to be heard, occurred in the proceedings in respect of which the appeal is brought, it is cured, at least to the extent such violation did not irreparably impair the First Appellant's rights, by full appeal to the CAS (CAS 94/129; CAS 98/211; CAS 2000/A/274; CAS 2000/A/281; CAS 2000/A/317; CAS 2002/A/378). In fact, the virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance 'fade to the periphery' (CAS 08/211. Citing Swiss doctrine and case law)"* (emphasis added)[47].

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

42 *See* CAS 2014/A/3467, paras. 78-79; CAS 2011/A/2500 & 2591, para. 108; CAS 2008/A/1700 & 1710, para. 66.

43 *See* MAVROMATI/REEB, *"The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials"*, January 2015.

44 CAS 2001/A/435, para. 8.

45 CAS 2008/A/1574, para. 42; *see* also CAS 2012/A/2702, para. 122.

46 CAS 94/129, para. 59.

47 CAS 2021/A/2913, para. 87.

- The Swiss Federal Tribunal has also confirmed the legality of the curing effects of the CAS *de novo* review. Accordingly, infringements of the parties' right to be heard can generally be cured when the procedurally flawed decision is followed by a new decision, rendered by an appeal body which had the same power to review the facts and the law as the tribunal of first instance and in front of which the right to be heard had been properly exercised[48].

130. Accordingly, the Sole Arbitrator considers that any procedural irregularities which may have occurred in the first instance proceedings were cured by the present CAS arbitral proceedings.

131. Second, *ex aequo et bono* literally means ruling according to what is equitable and good. The parties to an arbitration have their disputes resolved *ex aequo et bono* only as an exception, not as a rule[49]. In principle, arbitration in equity is opposed to arbitration according to a specific law, and an arbitrator in equity has the mandate to issue a decision based exclusively on equity, without regard to legal rules, based on the circumstances of the particular case[50].

132. In the CAS Code, other than in Article R45 (applicable law in the *ordinary* CAS procedures)[51], there is no provision in Article R58 authorizing the arbitral tribunal to decide *ex aequo et bono* or in equity, but the arbitral tribunal may apply the law that it *"deems appropriate"* and has to give reasons for such decision. This would be a clarification of the closest connection rather than an expression of *ex aequo et bono* principle, and, in practice, could enable the Sole Arbitrator to apply the law he wants to see applied to the merits of the dispute[52].

133. In an appeal opposing a player to a sports federation, athletes should be equal in front of the sporting regulation, and ruling in equity is therefore not appropriate for disputes opposing athletes/clubs to a sports federation, and this is all the more so for disciplinary cases[53]. It is however accepted[54] that the arbitral tribunal could decide *ex aequo et bono* also under the appeal procedure (pursuant to Article R58 of the Code), if the parties so agree[55]. According to the unanimous opinion of the Swiss legal doctrine in relation to commercial arbitration in general, if both parties would directly choose *ex aequo et bono* and submit their dispute to CAS appeal

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48 *See* ATF 124 II 132 of 20 March 1998, A., 138. See DTF 118 I b 111, p. 120 and ATF 116 Ia 94 of 30 May 1990, J.

49 *See* RADKE H., *"Sports arbitration ex aequo et bono: basketball as a groundbreaker"*, CAS Bulletin, 2019/02, 2019, p. 26.

50 *See* MAVROMATI/REEB, *"The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials"*, January 2015.

51 Article R45 of the CAS Code reads as follows: *"The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The Parties may authorize the Panel to decide ex aequo et bono"* (emphasis added).

52 *See* MAVROMATI/REEB, *"The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials"*, January 2015.

53 *See* MAVROMATI/REEB, *"The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials"*, January 2015.

54 *See* CAS 2005/A/983 & 984, para. 62.

55 *See* MAVROMATI/REEB, *"The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials"*, January 2015; this is also the general policy in other arbitration rules: in Article 33 of the Swiss Rules, it is possible to decide *"ex aequo et bono only if the parties have expressly authorised the arbitral tribunal to do so"*. A very similar provision is contained in Article 21 para. 3 of the ICC Rules, which provides that *"3 The Arbitral Tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers"*.

arbitration, the direct choice of *ex aequo et bono* would prevail[56]. In the context of CAS appeal procedure, the CAS Panels have held:

> *"In substance, it is generally considered that the arbitrator deciding ex aequo et bono receives 'a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead, applying general and abstract rules, he/she must stick to the circumstances of the case"*[57].
>
> *"This conclusion is also confirmed by the provision of Article 187(2) PILA which expressly provide that 'the parties may authorize the arbitral tribunal to decide ex aequo et bono.' Such an authorization has taken place in FIBA's adoption of Article 17 of the FAT rules and in the Appellant's recognition of the FAT Rules"*[58].

134. In light of the foregoing, the Sole Arbitrator notes that the authority of the arbitral tribunal to rule *ex aequo et bono* may be conferred based on the will of the parties to the dispute[59]. The arbitral tribunal settles a case *ex aequo et bono* not because of the inherent virtue of resorting to such a process, but because the parties have agreed so[60]. However, the Parties did not agree to do so in this case.

135. In any event, the Sole Arbitrator observes that the Appellant did not submit any evidence that he sustained damages due to alleged misconduct by the Respondent, nor established a nexus between the Respondent's alleged misconduct and any alleged damages incurred by the Appellant. For completeness, the Sole Arbitrator adds that, although the Appealed Decision was set aside, there is no indication in the case at hand that the adoption of that decision was manifestly arbitrary and, therefore, in and of itself cannot possibly form a basis of damages claims, and certainly not before the CAS.

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56 *See* RADKE H., *"Sports arbitration ex aequo et bono: basketball as a groundbreaker"*, CAS Bulletin, 2019/02, 2019, p. 36.

57 CAS 2009/A/1952, para. 12; CAS 2010/A/2234, para. 8; CAS 2009/A/1921, para. 10.

58 CAS 2010/A/2234, para. 8 (Article 17 of the FAR rules provides as follows: *"Awards of the FAT can only be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland (…). The CAS shall decide the appeal ex aequo et bono and in accordance with the Code of Sports-related Arbitration, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure"* (emphasis added)).

59 *See* also Article 187 PILA (*"The parties may authorize the arbitral tribunal to decide ex aequo et bono"*); RADKE H., *"Sports arbitration ex aequo et bono: basketball as a groundbreaker"*, CAS Bulletin, 2019/02, 2019, p. 36

60 *See* RADKE H., *"Sports arbitration ex aequo et bono: basketball as a groundbreaker"*, CAS Bulletin, 2019/02, 2019, p. 28.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Andrey Isaychev on 15 April 2020 against the Russian Anti-Doping Agency with respect to the decision no. 21/2020 of 17 December 2019 of the Disciplinary Anti-Doping Committee of Russian Anti-Doping Agency is partially upheld.

2. The decision no. 20/2020 of 17 December 2019 of the Disciplinary Anti-Doping Committee of Russian Anti-Doping Agency is set aside.

3. All individual results earned by Mr Andrey Isaychev from 15 November 2018 are reinstated.

4. The request for compensation filed by Mr Andrey Isaychev is dismissed.

5. (…).

6. (…).

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