Arbitrations CAS 2020/A/7579 World Anti-Doping Agency (WADA) v. Swimming Australia (SA), Sport Integrity Australia (SIA) & Shayna Jack and CAS 2020/A/7580 SIA v. Shayna Jack & SA, award of 16 September 2021

Panel: Prof. Jan Paulsson (France), President; The Hon. Michael Beloff QC (United Kingdom); Prof. Richard McLaren (Canada)

Aquatics (swimming)
Doping (ligandrol)
Proof of lack of intent
Standard of proof for a panel deciding on a reduction of ineligibility
Indiscriminate effect of the rules
Lack of intent
Type of proof
Assessment of the evidence

1. **Athletes who have committed an anti-doping rule violation (ADRV) and seek to reduce the period of ineligibility under Article 10.2.1 of the World Anti-Doping Code (WADC) need to prove both that they did not intentionally use a prohibited substance and (on the assumption that the explanation given in Article 10.2.3 is binding) that they *did not take the risk* of using a substance which might lead to an ADRV.**

2. **In reaching a decision as to whether an appellant deserves a reduction of ineligibility, it is sufficient that a CAS panel base this conclusion on a simple balance of probability, because this is not a decision involving the imposition of disciplinary measure, but rather a reduction of its consequences.**

3. **The one-size-fits-all characteristics of the rule on reduction of ineligibility may tempt adjudicating bodies to make allowances for specific circumstances – such as the great difference from sport to sport of the likelihood of being able to compete at an elite international level of competition, and thus the different impact of the same period of ineligibility on athletes whose international competitiveness may be of greatly contrasting duration given the physical demands of their sport. But the time and place for making such allowances is when such rules are drafted (and amended), not in making individual decisions.**

4. **The establishment of the source of the prohibited substance in an athlete's sample is not mandated in order to prove an absence of intent. In other words, it is possible to prove – albeit with much difficulty – innocent exposure to prohibited substance in the absence of a credible identification of its source. However, as certitude with respect to the source of contamination decreases, so the athlete's chances of prevailing depend on a counterbalancing increase of the implausibility of bad motive and negligence. The**

doping hypothesis must no longer (on a balance of probability) make sense in all the circumstances, and the charge of recklessness must (on a balance of probability) be overcome. This can be proved by any means. Identification of the source is often important (but not in and of itself sufficient), but it is not indispensable.

5. Speculations, declarations of a clear conscience, and character references are not sufficient proof. It is an unacceptable paradox to posit that the effect of the apparent unavailability of *objective* and *probative* evidence is to give an athlete the same benefit as if s/he had found and presented it. However, if uncorroborated speculation is said not to avail an accused athlete; it should not in fairness avail the accuser either.

6. Assessing evidence in a manner that (i) *begins with the science* and then (ii) considers *the totality of the evidence* (iii) through the prism of *common sense,* possibly (iv) "bolstered" by the athlete's *credibility*, is a process that appears to be legitimate as a way of achieving its intended effect of enforcing the rules without finding comfort in the cynical view that occasional harm done to an innocent athlete is acceptable collateral damage.

I. THE PARTIES

1. Sport Integrity Australia ("SIA" or the "Appellant" in the case CAS 2021/A/7580) is Australia's national anti-doping organisation tasked with managing anti-doping rule violations.

2. The World Anti-Doping Agency ("WADA" or the "Appellant" in the case CAS 2021/A/7579) is the international anti-doping agency, constituted as a private law foundation under Swiss law. WADA has its registered seat in Lausanne, Switzerland and has its headquarters in Montreal, Canada.

3. Ms Shayna Jack (the "Athlete") is an Australian swimmer. The Athlete was at the relevant time a member of the Australian Swimming Team and subject to the Swimming Australia Limited Anti-Doping Policy 2015 (the "Policy").

4. Swimming Australia ("SA") is the national federation for the sport of swimming within Australia.

5. SIA, WADA, the Athlete, and SA are collectively referred to as the "Parties".

II. FACTUAL BACKGROUND

6. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced, and at the hearing. Additional facts and

allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. Background Facts

7. On 26 June 2019, the Athlete underwent an out-of-competition doping control test at Tobruk Pool in Cairns, Australia, during an Australian Swimming Team camp.

8. The sample was analysed by the Australian Sports Drug Testing Laboratory and the analysis returned a positive result for an Adverse Analytical Finding for Di-Hydroxy LGD-4033, a metabolite of Ligandrol.

9. Ligandrol is a Non-Specified Substance and is always prohibited under Class S1.2 (other Anabolic Agents) of the 2019 World Anti-Doping Code – International Standard – Prohibited List.

10. On 12 July 2019, the Athlete was notified by the Australian Sports Anti-Doping Authority ("ASADA", now Sport Integrity Australia) that her Part A sample had returned an Averse Analytical Finding for Ligandrol.

11. On 12 July 2019, Swimming Australia imposed a mandatory Provisional Suspension on the Athlete in accordance with Article 7.9.1 of the Policy .

12. On 17 July 2019, the Athlete's B sample was analysed by the Australian Sports Drug Testing Laboratory which confirmed the A sample result.

13. On 7 November 2019, the Anti-Doping Rule Violation Panel determined it was satisfied that the Athlete had possibly committed an Anti-Doping Rule Violation ("ADRV").

14. On 19 December 2019, the matter went before the Anti-Doping Rule Violation Panel of Swimming Australia for final consideration, and they confirmed the Panel's preliminary finding that it was satisfied that there was a possible ADRV. As a result of the ADRV, a four-year period of ineligibility was imposed on the Athlete under article 10.2 of the Policy, commencing from 12 July 2019, i.e. the date the original Provisional Suspension was issued against the Athlete.

B. Proceedings before the First Instance Arbitrator

15. On 2 January 2020, the Athlete submitted an application to the Court of Arbitration for Sport Oceania (the "CASO") in accordance with R38 of the Code of Sports-related Arbitration (2019 Edition) (the "CAS Code") challenging the determination by the ASADA (now known

as SIA) of 19 December 2019 imposing a four-year period of ineligibility on Ms Jack under Article 10.2 of the Policy.

16. In the Athlete's submissions dated 12 June 2020, the Athlete submitted, in essence, that although she was unable to demonstrate how the Prohibited Substance entered her system, in the exceptional circumstances of this case, CAS should determine the following:

"a. That the Applicant's application is upheld;

b. the Infraction Notice from [Swimming Australia] is set aside;

c. find that the Applicant bears No Fault or Negligence and eliminate her period of ineligibility; and

d. in the alternative, find that the Applicant's use of the Prohibited Substance was not intentional and that the CAS imposes a period of ineligibility of one (1) year and backdated to the date of the sample collection on 26 June 2019".

17. In her Submissions in Reply filed on 24 August 2020, the Athlete amended the relief sought, acknowledging that she had not demonstrated or provided any evidence as to how the Prohibited Substance entered her body, but maintaining that the ADRV was not intentional and did not occur due to her recklessness. On that basis, the Athlete sought these determinations:

"[…] the Applicant has provided all available and sufficient evidence that the ADRV was not intentional and did not occur due to the Applicant's recklessness. On this basis, the Applicant seeks a finding of No Significant Fault or Negligence under clause 10.5 of the Swimming Australia Limited Anti-Doping Policy. […]

The Applicant seeks the Period of Ineligibility to be reduced to two (2) years under clause 10.2 of the Swimming Australia Limited Anti-Doping Policy based on the finding of No Significant Fault or Negligence".

18. The hearing proceeded on 25 and 28 September 2020 at the CAS Oceania Registry, Sydney. The Sole Arbitrator was Mr Alan Sullivan QC and was assisted by Mr Harry Cook, Counsel to the CAS.

19. On 16 November 2020 the Sole Arbitrator rendered an Award (the "Appealed Decision"), with, *inter alia*, the following operative part:

"1. The appeal filed by Ms. Shayna Jack on 2 January 2020 is partly upheld.

2. Ms. Shayna Jack has committed a violation of Article 2.1 [of] the Swimming Australia Limited Anti-Doping Policy 2015 and as a result, is suspended for a period of two (2) years commencing as from the date of her provisional suspensions [sic] (i.e. 12 July 2019).

3. *The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne by Ms. Shayna Jack and the Australian Sports Anti-Doping Authority (now known as Sport Integrity Australia) in equal shares.*

4. *Each party shall bear its own legal costs and other expenses incurred in connection with this arbitration.*

5. *All other motions or prayers for relief are dismissed".*

20. The grounds of the Appealed Decision determined, *inter alia*, the following:

21. The Sole Arbitrator found that the Athlete had not discharged the onus placed upon her to bring her case within the ambit of either Article 10.4 or Article 10.5 of the Policy by establishing how Ligandrol entered her system. It followed that the critical issue in the proceeding was whether the Athlete had discharged the burden of showing that the ADRV was not intentional with the result that the default sanction of a four-year period of ineligibility was reduced to a two-year period of ineligibility. Because the Athlete could not rely on Article 10.4 or Article 10.5, the sanction imposed upon her could not be any less than a two-year period of ineligibility.

22. The Sole Arbitrator reviewed CAS jurisprudence in the light of which he concluded that there was no strict need for the Athlete to establish the origin of the Prohibited Substance to establish that the ADRV was not intentional.

23. The Sole Arbitrator bore in mind that the default sanction for such an ADRV of four years is a severe one, especially for a first offender. He stated that the language of Article 10.2.3 of the Policy set out the aim or objective of the relevant Article, making it plain that the term "intentional" is meant to identify those who cheat. The Athlete must prove she did not engage in conduct which she knew constituted an ADRV or that she did not know there was a significant risk that the conduct might constitute or result in an ADRV, and she must show that she did not manifestly disregard that risk. A finding that athletes have intentionally committed an ADRV is tantamount to finding that they have cheated, and the sanction is appropriately proportionate to such a finding.

24. The Sole Arbitrator found that the Athlete had proved that the ADRV was not intentional.

25. The foremost reason for this finding was the Athlete's own evidence. The Sole Arbitrator observed the Athlete to be emphatic and believed that she did not intentionally take the Prohibited Substance. The Sole Arbitrator considered her prior diligence to observing and following at all times all advised protocols and her intense disdain for intentional doping and cheating in coming to this conclusion.

26. The Sole Arbitrator considered the steps the Athlete had taken at considerable expense to seek to ascertain or identify the origins of the Prohibited Substance.

27. The Sole Arbitrator considered the Athlete's subjection to a rigorous but fair cross-examination and her overall credibility as an honest and plausible witness.

28. The Sole Arbitrator noted the need to exercise great caution in accepting an applicant's protestations of innocence, however, it would be an over-cynical and wrong approach to the evidence of people to start with a presumption that what they say is not to be believed or can only be believed if corroborated by other objective evidence.

29. Character evidence by a number of individuals on behalf of the Athlete was given substantial weight by the Sole Arbitrator.

30. The Sole Arbitrator considered that there was no evidence of any long-term use of the substance, that the amount of the metabolites found in the Athlete's system was *"low"*, and that the amount of the Prohibited Substance found in the Athlete's body was a *"pharmacologically irrelevant dose"* meaning that it was insufficient, per se, to provide any positive benefits to the Athlete. The Sole Arbitrator noted that there are very limited scientific papers or the like concerning the effects of taking Ligandrol or of the doses required for performance enhancing effect especially in the case of females, and therefore this was not a case where either party could present reliable, relevant scientific data supporting, or disproving, intentional use of the Prohibited Substance.

31. The Sole Arbitrator was persuaded on a balance of probabilities that the Athlete did not intentionally ingest Ligandrol.

32. The Sole Arbitrator decided in accordance with Article 10.2.2 of the Policy that the Athlete's Period of Ineligibility was two years commencing on 12 July 2019.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

33. On 7 December 2020 WADA filed a Statement of Appeal against the Appealed Decision in accordance with Article 13.2.1 of the Policy.

34. On 7 December 2020 SIA filed a Statement of Appeal against the Appealed Decision.

35. On 18 December 2020, in view of the Parties' agreement and on behalf of the President of the CAS Appeals Arbitration Division, the procedures CAS 2020/A/7579 and CAS 2020/A/7580 were consolidated in accordance with Article 52 of the CAS Code (2020 Edition).

36. On 7 January 2021, SIA filed its Appeal Brief in accordance with Article R51 of the CAS Code.

37. Pursuant to a CAS letter dated 7 January 2021 WADA was granted an extension of the deadline to file its Appeal Brief until 18 January 2021.

38. On 18 January 2021, WADA filed its Appeal Brief.

39. On 19 January 2021, the Athlete and Swimming Australia were given notice to submit an Answer to both appeals to the CAS within twenty days.

40. On 20 January 2021, the Athlete was granted an extension of ten days to submit an Answer to CAS.

41. On 3 February 2021, the Athlete requested a further extension of twenty-one days. This request was granted on 8 February 2021.

42. On 11 February 2021 Swimming Australia advised that they would not be filing any Answer in relation to the appeals.

43. On 15 February 2021 the Arbitral Panel called upon to resolve the dispute was constituted as follows: Prof. Jan Paulsson, Attorney-at-Law, Manama, Bahrain; The Hon. Michael Beloff M.A. QC, Barrister in London, United Kingdom; and Prof. Richard McLaren O.C., Professor and Barrister in London, Ontario, Canada.

44. On 9 March 2021, the Athlete engaged Counsel Tom Sprange QC of King & Spalding International LLP in London, UK in this matter.

45. On 15 March 2021, the Athlete requested an extension of time to 23 March 2021 to provide an Answer. On 16 March 2021 SIA and WADA opposed the request for a further extension because the deadline had expired. On 17 March 2021 the Athlete was invited to comment on the timeliness of her request for extension.

46. On 25 March 2021, the Parties were advised that the Athlete's request for extension was timely and that it was accordingly denied by the Panel pursuant to Article R32(2) of the CAS Code. The Parties were further advised that the Panel decided to hold a hearing in these procedures. In accordance with Articles R44.2 and R56 of CAS Code, the Athlete had the right to attend the hearing, present opening and concluding statements within the scope of the submissions made in the first instance, and confront the Appellants' evidence and arguments. She would not be allowed to present witnesses or new evidence at the hearing.

47. On 6 April 2021, as suggested by the Panel and accepted by the Appellants, the Athlete was invited to provide a Written Summation, without exhibits, expert reports, or witness statements, by 12 April 2021.

48. On 12 April 2021, a Written Summation was filed on behalf of the Athlete.

49. On 28 April 2021, the Parties were advised that the Panel had decided to hold a hearing in this matter by video-conference.

50. On 7 May 2021, the Parties and their witnesses were called to appear at a hearing on 28 June and 29 June 2021.

51. On 20 May 2021, the Order of Procedure (the "Order") was distributed to the Parties. They were requested to sign and return a copy of the Order to the CAS Court Office by 27 May 2021.

52. The Athlete and Swimming Australia reviewed and returned the Order duly signed on 21 May 2021. The SIA returned a signed copy of the Order on 26 May 2021. WADA returned a signed copy of the Order on 27 May 2021.

53. A hearing before the Panel was held on 28 and 29 of June 2021 by video link.

54. Oral submissions were made for Ms Shayna Jack by Tom Sprange Q.C. of King & Spalding International LLP in London, UK; for SIA by Ms Houda Younan SC, Barrister in Sydney, Australia; and for WADA by Mr Ross Wenzel of Kellerhals Carrard in Lausanne, Switzerland.

55. The hearings before the Panel did not involve the hearing of witnesses, although the Athlete responded to a few questions of clarification put by Mr Sprange, and was thereafter questioned by Ms Younan in connection therewith.

56. At the conclusion of the hearing the parties confirmed that they had no objection to the composition of the Panel and that their right to be heard had been fully respected.

IV. SUBMISSIONS OF THE PARTIES

57. The Panel wishes to make an inhabitual observation with respect to the remarkable advocacy from which it has benefitted in this case. In order of appearance Ms Houda Younan SC of the Brisbane Bar for SIA, Mr Ross Wenzel of Kellerhas Carrard for WADA, and Mr Thomas Sprange QC of King & Spalding for the Athlete addressed the Panel with exceptional pertinence, clarity, conciseness, and courtesy. This was a case where all parties enjoyed an equality of arms of the highest order, and it merits mention.

58. The following outline of the Parties' requests for relief and positions is illustrative and does not necessarily encompass every contention put forward by the Parties.

A. The Appellants' requests for relief and essential submissions

59. SIA prosecuted the Athlete in the course of the proceedings before the Sole Arbitrator at the Australian level. It is a principal Appellant as a result of its dissatisfaction with the reduction of the period of ineligibility from four to two years. It is joined at this level by WADA as a second active Appellant.

60. Although WADA and SIA were represented by separate counsel, their arguments broadly coincide and will be referred to generically as "the Appellants' arguments" unless it seems appropriate to specify which of the two made a particular submission.

a. The Appellants resist the proposition that a supposed lack of incentive to achieve better results can be invoked as a defence; the Code is designed to create a disincentive to carelessness such as ingesting a non-prohibited supplement contaminated by a prohibited substance. Mr Wenzel in particular invoked CAS 2017/A/5392 as authority against the ostensible but meretricious logic of the argument that a successful athlete does not need to engage in doping.

b. Speaking as the international authority for the curtailment of doping, WADA acknowledges that the Policy does not explicitly require proof of the source (or origin) of the detected Prohibited Substance to achieve a reduction of the period of eligibility but insists that a failure to prove the source the constitutes a very daunting obstacle to success. It suggests, echoing Mr Taylor, that an erosion of this proposition would *"open the floodgates"* to overly liberal dispensation of reductions.

c. This contention resulted in a spirited debate as to the correctness and validity of numerous prior decisions involving athletes in this situation. In the interest of conciseness, this Award will not give an account of all the elements of this debate, but instead limit itself to an exposition of how the Arbitrators have dealt with points they consider of decisive relevance in the section on "The Merits" below.

d. Referring to the Sole Arbitrator's words of praise for the Athlete because she did not yield to a temptation to blame others for her predicament, Ms Younan (who acted for SIA in the proceedings before the Sole Arbitrator) pointed out that this cannot be accepted as clearly exculpatory, since the implication of others might just as well result in impugning one's self.

e. Mr Wenzel made the compelling argument that *"it cannot be right"* that the multiplication of post-test searches should be accepted as evidence of the absence of intent given the evident ease with which this can be done on a self-serving basis by the most guilty of competitors, who could of course with little if any risk conduct an infinite number of investigations that lead nowhere (except of course, in the case of a transgressing athlete, to the veritable source which will be studiously avoided).

f. The Sole Arbitrator came to his finding of a lack of intent on elements that should carry little or no weight, including the Athlete's protestations of innocence, her previous clean records, her attempts at *"considerable expense"* to discover the origin of the prohibited substance, and character evidence. The decision of the Sole Arbitrator sets a dangerous precedent for the administration of anti-doping schemes in so far as it leaves much to impression in lieu of concrete evidence.

g. It is fundamentally wrong, and against the case law, to decide that athletes can established their burden to prove a lack of intent in committing an ADRV almost exclusively on credibility; that burden can be met under the Policy only by objective and credible evidence that an intentional violation can be excluded. Athletes must provide actual evidence as opposed to mere speculation, and the burden lies solely on the athlete.

h. An individual cannot engage the definition of "intentional" conduct in Article 10.2.3 WADC, which is concerned with identifying risk, if one cannot identify the conduct in question. Ms Jack has not adduced adequate evidence to satisfy her burden of establishing a lack of intent without demonstrating where the doping substance came from. There is nothing in her evidence that excludes micro-dosing or the use of a risky, black-market product that could have contained Ligandrol. Her explanations remain entirely speculative.

i. Whether the Athlete used Ligandrol on a long-term basis is irrelevant to whether she used the substance intentionally or repeatedly. Establishing long-term use is not necessary in determining whether the use was intentional.

j. The hair analysis presented by the Athlete, as well as the DXA scans measuring muscle mass, were of little or no relevance.

k. As Ligandrol is an illegal and synthetic substance, not present in the environment; lack of intent without evidence of a specific origin highly improbable.

l. The report submitted by Dr Thevis' concludes that the analytical result is not instructive with respective to intent.

m. The Sole Arbitrator's finding that the Athlete *"did all that she could reasonably be expected to have done"* ignores the evidence of reasonable enquiries that the Athlete failed to undertake, such as adducing evidence from her partner, with whom she was living with and shared the same supplements, conducting enquiries of the Tobruk Memorial Pool and Gym, which was suggested as the source of the Prohibited Substance, and documenting evidence that she tested all of her dietary supplements.

n. The Sole Arbitrator's finding ignores deficiencies in the Athlete's evidence, particularly that she did not present a reliable account of her dietary intake in the period before sample collection, did not keep a contemporaneous food or training journal, did not verify the chain of custody of the hair analysis and did not submit information as to the protocols used to minimise technical and biological errors of measurement in the DXA scans.

o. The Athlete's theories of the source of the prohibited substance have changed over time. In primary submissions, the Athlete supposed that it was more likely that the contamination was from a contaminated substance. However, in reply submissions, the

Athlete instead posited her exposure to contamination to the substance at a public pool or gym as a distinct possibility.

p. SIA alleged that the theory of contamination at a public pool or gym was merely a theoretical possibility as Ligandrol is not currently approved by Australia's therapeutic goods administration. Additionally, Dr Thevis indicated that pool water contamination or sweat transfer was unlikely. Of the eight athletes training and tested at the Tobruk Memorial Pool on the 26th and 27th of June 2019, only the Athlete returned a finding of Ligandrol.

q. That the Athlete ingested a presumably pharmacologically irrelevant dose is no more than an asserted presumption. Dr Thevis found that the mere presence of the metabolite does not permit one to deduce any conclusion as to pattern or intention of usage of the agent. The conclusion is in reference to a study of male, non-athlete subjects and as such, is not directly applicable to the Athlete.

r. By concluding that the Athlete had proven, on the balance of probabilities, that she *"did not, or did not attempt to, cheat"* the Sole Arbitrator did not properly engage the definition of intentional conduct in Article 10.2.3. He went against jurisprudence by boxing himself into the dichotomy of *"cheat"* or *"not to cheat"*. The case law makes it clear that the panel is not confined by a binary choice between the two.

s. As the origin of the Prohibited Substance remains unknown, and all manner of scenarios remain possible that would easily amount to indirect intent, the Athlete does not pass through the narrowest of corridors.

a. WADA's requests for relief

61. In its Appeal Brief of 18 January 2021, WADA requested the Panel to rule as follows:

"1. The appeal of WADA is admissible.

2. The award rendered by the Sole Arbitrator on 16 November 2020 in the matter of Shayna Jack is set aside.

3. Shayna Jack is found to have committed an anti-doping rule violation.

4. Shayna Jack is sanctioned with a four-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of provisional suspension or ineligibility effectively served by Shayna Jack before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.

5. All competitive results obtained by Shayna Jack from and including 26 June 2019 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

6. The arbitration costs shall be borne by the Respondents jointly and severally.

7. WADA is granted a contribution to its legal and other costs".

b. SIA's requests for relief

62. In its Statement of Appeal of 7 December 2020, the SIA sought orders that:

"1. The decision of the Sole Arbitrator of 16 November 2020 be set aside, specifically:

a) That Shayna Jack is suspended for a period of two (2) years commencing as from the date of her provisional suspension (i.e. 12 July 2019) (order 2);

b) That the costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne by Ms Jack and the Australian Sports Anti Doping Authority (now known as Sport Integrity Australia) in equal shares (order 3);

c) Each party shall bear its own legal costs and other expenses incurred in connection with this arbitration (order 4);

2. That a four (4) year period of Ineligibility be imposed on Ms Jack from the date of her provisional suspension (i.e. 12 July 2019); and

3. Ms Jack is to pay:

a) costs of the arbitration, on appeal and at first instance before the Ordinary Division of CAS; and

b) a contribution towards Sport Integrity Australia's legal fees and other expenses incurred in connection with the proceedings, on appeal and at first instance before the Ordinary Division of CAS, to be determined by the Appeal Panel".

63. In its Appeal Brief, SIA submitted the following prayers for relief:

"a) The First Respondent is found to have committed a violation of Article 2.1 and Article 2.2 of the 2015 Policy;

b) The decision of the Sole Arbitrator of 16 November 2020 is set aside, specifically:

i. That Shayna Jack is suspended for a period of two (2) years commencing as from the date of her provisional suspension (i.e. 12 July 2019) (order 2);

ii. That the costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne by Shayna Jack and the Australian Sports Anti-Doping Authority (now known as Sport Integrity Australia) in equal shares (order 3);

iii. That each party shall bear its own legal costs and other expenses incurred in connection with this arbitration (order 4);

c) A four (4) year period of Ineligibility is imposed on the First Respondent from the date of her provisional suspension (i.e. 12 July 2019); and

d) The First Respondent is to pay:

i. costs of the arbitration, on appeal and at first instance before the Ordinary Division of CAS; and

ii. a contribution towards the First Appellant's legal fees and other expenses incurred in connection with the proceedings, on appeal and at first instance before the Ordinary Division of CAS, to be determined by the Appeal Panel".

B. The Athlete's requests for relief and essential submissions

64. In her Written Summation, the Athlete submitted the following requests for relief:

"a. The decision of the Sole Arbitrator of 16 November 2020 is not disturbed, other than:

i. an additional finding of No Fault or Negligence or No Significant Fault or Negligence being made under Articles 10.4 or 10.5 of the Policy respectively;

ii. that the costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne by Shayna Jack and the Australian Sports Anti-Doping Authority (now known as Sport Integrity Australia) in equal shares (order 3); and

iii. That each party shall bear its own legal costs and other expenses incurred in connection with this arbitration (order 4).

b. The First Appellant and Second Appellant are to pay:

i. costs of the arbitration on appeal; and

ii. a contribution towards the First Respondent and Second Respondent's legal fees and other expenses incurred in connection with the proceedings on appeal, to be determined by the Appeal Panel.

c. The Second Appellant is to pay;

i. costs of the arbitration at first instance before the Ordinary Division of CAS; and

ii. a contribution towards the Second Respondent's legal fees and other expenses incurred in connection with the proceedings at first instance before the Ordinary Division of CAS, to be determined by the Appeal Panel".

65. In support of her requests for relief (in her Written Summation and Oral Submissions) the Athlete submitted as follows:

a. The Sole Arbitrator was correct in his interpretation of intentionality under the Policy; it is not indispensable for an athlete to establish the origin of the Prohibited Substance in order to prove that the ADRV was not intentional.

b. There was no requirement for the Athlete to provide conclusive identification of the conduct that led to her ingestion of the Prohibited Source.

c. The Sole Arbitrator does not "lower the bar"; athletes must demonstrate, on a balance of probabilities, that their ADRV was not intentional, and this is necessarily specific to each case.

d. The Sole Arbitrator did not misinterpret the scientific evidence provided at the proceeding at first instance.

e. The Sole Arbitrator's conclusion that the dose had no practical effect on the Athlete was not in error on the evidence provided to him. Neither the evidence submitted in the Report of Dr Thieme nor the evidence contained in the Basaria Report were directly applicable to the Athlete's circumstances (in particular, the studies were conducted on men).

f. SIA could not rely on the Basaria Report to suggest the Athlete benefitted from multiple low doses over a longer period of time, especially in light of the Athlete's hair test and low urine levels not providing evidence of long-term use.

g. The Sole Arbitrator was also correct in his approach of considering the character evidence and credibility as factors to be weighed against the other evidence.

h. WADA overemphasized the importance of identifying the exact source of ingestion or contact, incorrectly dismissing the line of cases that supports the proposition that this is not necessarily required.

i. Although evidence of the exact source of the ADRV would be helpful to the Athlete's case, its lack is not fatal. The Athlete provided detailed accounts of conduct and evidence of possibilities of contamination that are able to satisfy the evidential burden.

j. This case falls within the ambit of CAS decisions where the athlete passes through the "narrowest of corridors". The Athlete here has done far more than simply assert innocence of intent.

k. The burden of proof is higher than the balance of probabilities, or that a failure to identify the origin of the Prohibited Substances makes establishing that the ADRV was not intentional extremely rare.

l. To establish intentionality should involve efforts to find the probable source of the Prohibited Substance that are both proportionate to an athlete's means and likely to lead

to probative evidence. It is unreasonable and unrealistic to expect athletes to pursue any avenue which might possibly render a result at their own cost.

m. The Sole Arbitrator conducted the correct assessment of the staged process under Article 10 of the Policy, giving considerable weight to previous decisions and a harmonised approach in consideration of all stakeholders, including athletes.

n. Holistically, the human, scientific and circumstantial evidence, as well as applying common sense, forensics and plausibility, demonstrate that the Sole Arbitrator came to the correct conclusion in the Appealed Decision on a balance of probabilities. One should not look at discrete aspects of a case in a vacuum or require perfection from athletes.

o. A combination of factors justify the Athlete's plea: her diligence and character evidence, the multitude of steps she took taken to identify the source of Ligandrol, the *"pharmacological irrelevance"* of the detected dose, the absence of a suspect improvement in her performance, or of a rational explanation for why the Athlete needed to enhance performance, the availability of Ligandrol in nineteen supplements sold in Australia, and the accepted possibility that contamination occurred a public gym using gym equipment, drinking from the water fountain, and the like.

p. Refuting the argument that there is a danger of *"opening the floodgates"*, the Athlete urges the Panel to observe that *"the system is working"*. Undeserving athletes are not given the two-year reduction of ineligibility, and those who can show no intent and no recklessness are properly shown some lenience, in that the period is limited to two years on account of the strict liability rule imposed for the simple failure to ensure that no Prohibited Substance enters one's body.

C. Swimming Australia

66. As a national federation, Swimming Australia adopts the policy of following the cases involving its athletes as an interested but neutral party, making no submissions as to a desired outcome.

V. JURISDICTION

67. Article R47 of the Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS 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".

68. Article 13.2 of the Policy provides that *"a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation […] may be appealed exclusively as provided in this Articles 13.2 – 13.6"*.

69. In accordance with Article 13.2.1 of the Policy, in cases involving International-Level Athletes, the decision may be appealed exclusively to the Appeals Division of CAS. Article 13.2.3 of the Policy specifies that *"the following parties shall have the right to appeal to CAS: […] (d) SIA … (f) WADA"*.

70. The jurisdiction of CAS is not disputed by the Parties.

71. It follows that CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

72. 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 it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties"*.

73. Article 13.6.1 of the Policy sets out that 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"*.

74. Article 13.6.1 of the Policy sets out that the deadline for WADA's appeal shall be *"the later of: (a) Twenty-one days after the last day on which any other party in the case could have appealed; or (b) Twenty-one days after WADA's receipt of the complete case file relating to the decision"*.

75. As the Appealed Decision was rendered on 16 November 2020, the appeal deadline of the other parties (e.g. the Athlete or SIA) would fall on 7 December 2020 at the earliest. As a result, WADA's appeal deadline is at the earliest on 28 December 2020.

76. In accordance with Article 13.6.1., both SIA and WADA filed their Statements of Appeal on 7 December 2020. Both appeals complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fee.

77. Therefore the appeals were timely submitted and are admissible.

VII. APPLICABLE LAW

78. 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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

79. The Appealed Decision was rendered in application of the Policy. The Swimming Australia Policy (which reflects the World Anti-Doping Code ("WADC")) is applicable to the present appeal, with Swiss law applying to fill in gaps or *lacuna* within those regulations.

VIII. PRELIMINARY OBSERVATIONS

A. The Appealed Decision

80. WADA and SIA are acting separately but with common cause, seek to reinstate the Athlete's four-year period of ineligibility which had been reduced to two years by the Sydney-based Sole Arbitrator in CAS A1/2020.

81. The Athlete has accepted the Appealed Decision.

82. Swimming Australia is cited as a Respondent but its presence in these proceedings has been as an attentive but passive observer.

83. WADA and SIA challenge the Appealed Decision on the grounds that while the Sole Arbitrator acknowledged that in order to reduce the period of ineligibility from four years to two years the Athlete had the burden to demonstrate that the ADRV was not intentional, he erred in relying excessively on the Athlete's credibility to conclude that she had met that burden and in too readily accepting an absence of intent.

84. SIA states that the Sole Arbitrator omitted to find that the Athlete also committed a violation of Article 2.2 ("Use") as pleaded by SIA and conceded by the Athlete, observing however in para. 4 of its Statement of Appeal that *"nothing turns on that omission"*.

B. General Preliminary Observations

85. This appeal raises one single question, but one of considerable difficulty which has produced a variety of different answers from previous CAS Panels and other sports appellate bodies. It is this: beyond the uncontroversial requirement that athletes convicted of an ADRV who seek a reduction of the period of ineligibility bear the burden of proof that the violation was neither, in convenient shorthand, intentional nor reckless, what precisely is that burden? More

particularly, will an explanation which satisfies a CAS panel of the athlete's sincerity suffice, or is more objective proof necessary – and if so what?

86. WADA claims that that the Appealed Decision was *"strikingly erroneous"* in finding a lack of intent *"based on elements that should carry little or no weight in that analysis e.g. the athlete's protestations of innocence, her previous clean record, her attempts 'at considerable expense' to discover the origin of the prohibited substance, and character evidence"*. WADA does not consider that decisions made before the entry into force of the 2015 WADC are pertinent in this respect, and states that it is unaware of any decisions since then that have found a lack of intent *"almost exclusively based on the athlete's credibility"*.

87. The Athlete disagrees and accordingly seeks confirmation of the Appealed Decision.

88. The present Panel's duty is to apply, not evaluate, the relevant rules. It does so with full powers of review to confirm, modify, or annul the Appealed Decision in light of its own understanding of the rules and assessment of the evidence.

89. Article 10.2.1 of the 2015 WADC enabled Athletes to obtain a reduction of the four-year period of ineligibility if the Athlete can "establish" that the violation "was not intentional".

90. Article 10.2.3 provided this explanation:

> *"… the term 'intentional' is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete […] engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk".*

91. Article 10.2.1 remains unchanged in the 2021 WADC (although it is now Article 10.2.3). But this comment was added:

> *"While it is theoretically possible for an Athlete […] to establish that the anti-doping rule violation was not intentional* ***without*** *showing how the Prohibited Substance entered one's system, it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance".*
>
> (According to Article 24.2 of the 2015 WADC and Article 26.2 of the 2021 WADC, *"The comments annotating various provisions of the Code shall be used to interpret the Code"*).

92. Moreover, in Article 10.2.3 the explanatory reference to "Athletes who cheat" was removed. The change is shown as follows:

> *"… the term 'intentional' is meant to identify those Athletes who ~~cheat. The term, therefore, requires that the Athlete~~ … engage~~d~~ in conduct which they ~~he or she~~ knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk".*

Footnote 59 which appears at the end of this text reads as follows: *"Comment to Article 10.2.3: Article 10.2.3 provides a special definition of 'intentional' which is to be applied solely for purposes of Article 10.2"*. The 2021 Code is not per se applicable to the Athlete, but there is no indication that the deletion of the comment was intended to alter the effect of the rule itself.

93. Athletes who have committed an ADRV and seek to reduce the period of ineligibility under Article 10.2.1 WADC need to prove both that they did not intentionally use a prohibited substance and (on the assumption that the explanation given in Article 10.2.3 is binding) that they *did not take the risk* of using a substance which might lead to an ADRV.

94. The Athlete in this case does not deny that she committed an ADRV by failing to keep her body clean of prohibited substances, with the result that she could not participate in the Tokyo Olympics. Such a violation does not imply deliberate misconduct; it may be inadvertent or negligent. If the Athlete can prove the absence of intent or recklessness, the possibility arises of reduction of the period of ineligibility. It is therefore necessary to consider the meaning of intent and recklessness, and how their absence may be proved.

95. A number of reduction-of-ineligibility cases such as this one have reached CAS under the same WADA rules that are applicable here. Generically, these cases tend to raise a series of common questions – implicitly if not explicitly.

C. Recurring concerns

96. Two matters are straight-forward. The first is the question of the scope of appellate review by a Panel such as this: *if it is found that the author(s) of the contested decision had the discretion to make it, does a CAS Panel's appellate function extend to plenary review*? In simple terms, may the Panel substitute its conclusions with respect to the merits for those of the Appealed Decision? The answer is an unqualified yes; such is the function of appellate review in CAS, as explicitly affirmed in Articles 13.1.1 and 13.1.2 of the Policy as well as Article R57 of the CAS Code.

97. The second is the question of the standard of proof to be applied: *In reaching its decision as to whether an appellant deserves a reduction of ineligibility, must the Panel base this conclusion on a simple balance of probability or must it meet the higher test of the Panel's "comfortable satisfaction"?* The answer is that a mere balance of probability is sufficient, because this is not a decision involving the imposition of disciplinary measure, but rather a reduction of its consequences. This may seem a simple rationale, and so it is.

98. In contrast, other common questions are troubling. The third is this: *"intention" to do what?* The intuitive answer might be that the culpable intent is to cheat, in the sense of purposefully seeking to achieve an undue advantage. If that is shown, it might be exculpatory for the athlete to show that the *type* or *minimal quantity* of the prohibited substance was such that it could not possibly have produced a competitive advantage. (Even so there may be controversy as to the nature of competitive advantage; cannabis may not seem to assist a downhill skier jumper or a weight lifter, but it might be countered that it could make ski jumpers more daring, or assist

an athlete who would otherwise suffer from competition anxiety – and tolerance of prohibited substances may create incentives which exacerbate health risks to athletes and to admirers tempted to emulate them.) In 2021, as seen in Paragraph 92 above, the rules were modified and the word "cheat" was removed from Article 10.2.3. This suggests that what matters is simply that the conduct that violated the rules was not inadvertent, irrespective of purpose.

99. Another issue of concern is *the illusion of affirmations that a decision is based on "probabilistic analysis" and therefore avoids "speculation"*. All disciplinary tribunals who have dealt with these issues agree: mere "speculation" that a positive test could have innocent explanations is not sufficient. But speculation may be dressed up in the raiments of abstract terms that in reality amount to nothing more than conjecture, such as statements that the decision flows from a probabilistic analysis. As an example, the athlete in CAS 2020/A/6978 & 7068, para. 145 argued that it was more probable than not that (a) the athlete had consumed a particular type of meat with a particular time frame, (b) the meat had been purchased by a restaurant from a particular supplier, (c) it had been contaminated by a prohibited substance, and (d) the countries where the meat had been consumed face problems with the unregulated if not unlawful administration of steroids to livestock. But to say that the *"analysis"* reposes on a balance of probability *"at each stage"* means little more than that the *"50% estimate"* is made more than once. The sequence could be said to amount to nothing more than reiterations of suppositions (i.e. "guesstimates"); it is difficult to see how speculation has been avoided, particularly if the assessments are presented as within the nonreviewable *"discretion"* of an ultimate disciplinary body – and above all because the entire exercise is logically no less speculative than its weakest link.

100. That problem leads to a fifth question: in concluding that absence of intent is more likely than not, *must the more-than-50% probability be established with respect to a particular, identified source of the prohibited substance or is it enough to conclude that it seems likely that the substance came from some possible unknown source*? If the second alternative is available, it may seem possible for a disciplinary body so to conclude on the basis of nothing more than perceived credibility, or a feeling that *"it seems out of character"* or a determination that *"it makes no sense"* that the athlete in question would have knowingly committed an offence. That raises the next vexing concern: the sixth question.

101. *Resolving the problem of personal credibility*. Arbitrators have repeatedly stated that protestations of innocence are the "common coin" of appellants irrespective of their actual guilt or innocence. In other words, the guilty are just as likely as the innocent to express surprise, disbelief, and a profound sense of injustice. Therefore bodies that adjudicate such disputes can expect to hear adamant denials of guilt, affirmations of a life-long commitment to fair play and a loathing of doping, and the expression of consternation at a positive test. This "common coin" should not, it is rightly said, necessarily be taken at face value.

102. Yet presentational skills of appellants – what one may call the "likeability" factor – undeniably play a role. In this case, the Appealed Decision includes a statement by the Sole Arbitrator, whose sincerity is not in doubt, that in his 40 years of experience as an advocate the Athlete

was *"one of the most impressive"* witnesses he had ever seen: *"completely straightforward, genuine and honest […] emotional at times […] but not inappropriately or theatrically so"*. In recent cases where the period of ineligibility was reduced notwithstanding the absence of proof of the source of the prohibited substance, such as CAS 2019/A/6313 and CAS 2019/A/6443, three-member tribunals comprised of highly experienced arbitrators were also clearly influenced by the personal charisma of the appellants.

103. It is perfectly possible not only that wholly deserving appellants may be personally unattractive, but that indeed this very charmlessness reflects innocent sincerity. Appellants may be honestly outraged at a system which allows them to be fingered as cheaters, upset at being treated as miscreants by unsympathetic officials, incredulous at impersonal rules which they find hard to understand and impossible to accept, and bewildered by their first humiliating exposure to formal adjudication by individuals whom they have no inclination to trust – and even less so if their supporters, including their home public as well as national officials whose own reputation may be at stake, encourage them in this disbelief. When they address their judges, they may have the choice between expressing themselves in a foreign language in which they may sound harsh, hesitant, and defensive, or through interpreters lacking the ability to covey personal qualities which would be apparent in the appellants' own communities.

104. Thus the outcome may be affected by presentational skills and the cultural affinities of the accused and the judge. The former may not have a high level of educational level and cognitive ability, or come from a background of privilege, all of which may safely be assumed to have a positive correlation with the ability to appear convincing. In some sports athletes may reach an international level at a young age. They may be a tongue-tied and nervous for reasons that have nothing to do with guilt. They may lack the support of a confidence-boosting entourage. Such factors should not be decisive.

105. A notorious example may be instructive of the dangers of making too much of protestations of innocence and sincerity. In the wake of his dramatic Tour de France victory in 2006 and his following disqualification for doping, the cyclist Floyd Landis convinced thousands of his US supporters that he was the victim of national prejudice, conspiracy, and injustice. Having launched appeals on social media, he collected nearly half a million dollars to fund legal challenges. In the course of five full days of hearings before CAS, in Case CAS 2007/A/1394, Landis referred to his deeply religious background which would supposedly make him too ashamed to lie. He was assisted by experts and lawyers who did not hesitate to conduct aggressive cross-examination of the modest technicians from the lab which had detected his doping, and to accuse them of far worse than incompetence. His defense failed in June 2008, whereupon he launched an action in a US federal court seeking the annulment of the award, denounced what he asserted to be the illegitimacy of CAS, and continued vehemently to protest his innocence until suddenly recanting in April 2010, admitting to years of doping and ultimately avoiding criminal prosecution for having defrauded his donors only by undertaking to make restitution of the money raised.

106. *The indiscriminate effect of the rules*. Disciplinary bodies do not make the rules and are tasked with applying them. But in the semiotic interstices of the texts one can find significant space for result-oriented ratiocination, and the one-size-fits-all characteristics of the rule on reduction of ineligibility may tempt arbitrators to make allowances for specific circumstances – such as the great difference from sport to sport of the likelihood of being able to compete at an elite international level of competition, and thus the different impact of the same period of ineligibility on athletes whose international competitiveness may be of greatly contrasting duration given the physical demands of their sport. But the time and place for making such allowances is when such rules are drafted (and amended), not in making individual decisions.

107. The eighth question relates to the unacceptable prospect that *guilty athletes could spend their way out of trouble by engaging in extensive post-violation investigations*. Some disciplinary bodies have given weight to the intensity with which an athlete pursues inquiries of conceivable origins of the offending substance (vendors, restaurant owners, whole-sale meat suppliers, legislative reports on the unlawful use of steroids to stimulate the growth of livestock, statements of friends and relatives about their own use in the proximity of the athlete of supplements and other products – not to mention experts opining on any of the above). As with after-the-fact attempts to reconstitute the intake of nourishment and health products, such supposed evidence of the lack of culpable intent is likely to suffer from an evident deficit of credibility. There is a problem in rewarding athletes for the insistence of their efforts at exculpation, and in other cases observing that the athletes *"could have done more"*. The quality and consistency of records kept *prior to the positive test* are more indicative of seriousness in seeking to avoid non-compliance with the Code.

108. The present Panel bears these challenges in mind as it approaches the task of deciding this appeal.

D. Jurisprudence invoked by the Parties

109. CAS Panels have reached divergent outcomes with regard to the interrelation and application of Article 10.2.1 WADC. That should not necessarily lead to the conclusion that they were inconsistent in principle; particular circumstances may have weighed heavily in favor of each result. Nevertheless, it is important to seek the clearest possible articulation of the principle, in order to achieve more predictability than by saying *"it depends"*. A simple rule would be an absolute requirement of proving the source. But there is no such rule in the Principles with respect to reduction of the period of ineligibility, and CAS arbitrators have quasi-unanimously refused to read such a requirement into it. What is the rationale behind decisions that take a more nuanced approach?

110. An instructive case in this respect is CAS 2017/A/5016 & 5036, where the Panel, after stating in para. 122 that it endorsed the findings in CAS 2016/A/4534, CAS 2016/A/4676, and CAS 2016/A/4919 to the effect that *"the establishment of the source of the prohibited substance in an athlete's sample is not mandated in order to prove an absence of intent"*, notably reasoned as follows:

"123. […] it could be de facto difficult for an athlete to establish lack of intent to commit an anti-doping rule violation demonstrated by presence of a prohibited substance in his sample if he cannot even establish the source of such substance: proof of source would be an important, even critical, first step in any exculpation of intent, because intent, or its lack, are more easily demonstrated and/or verified with respect to an identified "route of ingestion". However, the Panel can envisage the possibility that it could be persuaded by an athlete's assertion of lack of intent, where it is sufficiently supported by all the circumstances and context of his or her case, even if, in the opinion of the majority of the Panel, such a situation may inevitably be extremely rare: where an athlete cannot prove source, it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him.

124. The foregoing, in fact, does not mean that the Athlete can simply plead his lack of intent without giving any convincing explanations, to prove, by a balance of probability, that he did not engage in a conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that said conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. The Panel repeats that the Athlete, even though he is not bound to prove the source of the prohibited substance, has to show, on the basis of the objective circumstances of the anti-doping rule violation and his behaviour, that specific circumstances exist disproving his intent to dope".

111. In CAS 2017/A/5016 & 5036, however, the athlete's complaint was dismissed and therefore the Award is not illustrative of a concrete situation where *"on the basis of the objective circumstances of the anti-doping rule violation and his behaviour … specific circumstances exist disproving his intent to dope"*.

112. In any event, that Panel made the following observations:

"125. In this context, therefore, it is this Panel's opinion that, in order to disprove intent, an athlete may not merely speculate as to the possible existence of a number of conceivable explanations for the AAF (such as sabotage, manipulation, contamination, pollution, accidental use, etc.) and then further speculate as to which appears the most likely of those possibilities to conclude that such possibility excludes intent. There is in fact a wealth of CAS jurisprudence stating that a protestation of innocence, the lack of sporting incentive to dope, or mere speculation by an athlete as to what may have happened does not satisfy the required standard of proof (balance of probability) and that the mere allegation of a possible occurrence of a fact cannot amount to a demonstration that that fact did actually occur (CAS 2010/A/2268; CAS 2014/A/3820): unverified hypotheses are not sufficient (CAS 99/A/234-235). Instead, the CAS has been clear that an athlete has a stringent requirement to offer persuasive evidence that the explanation he offers for an AAF is more likely than not to be correct, by providing specific, objective and persuasive evidence of his submissions. In short, the Panel cannot base its decision on some speculative guess uncorroborated in any manner. […]

129. […] the various explanations put forward by the Appellant as to the presence of the prohibited substance are, in the opinion of the majority of the Panel, no more than theoretical possibilities, not even linked to definite circumstances, still less verified by evidence as to, for example, when, where, how and why there was any manipulation or sabotage or contamination or mislabelling in or after the production process. […]

> *131. […] the majority of the Panel cannot find that the Athlete has discharged the burden which lies upon him to establish by a balance of probability non-intentional use of a prohibited substance. It reminds itself that it is not confined to a binary choice: intention or non intention. It is sufficient for it to find that the Athlete has not disproved intention. It can itself construct theories which both inculpate and which exculpate the Athlete from intentional use; but its only function as an arbitral body is to make findings based on the evidence and arguments adduced before it".*

113. In sum, CAS 2017/A/5016 & 5036 and the cases it cites acknowledge the possibility of proving – albeit with much difficulty – innocent exposure to prohibited substance in the absence of a credible identification of its source. This leads the present Panel to reflect on what could be sufficient even if the source is not proved.

114. One answer is reflected in the reasoning in CAS 2011/A/2384 & 2386, where a CAS panel considered that while the athlete was able to identify a source that was plausible but not to the degree of being more likely than not, the athlete's plea for reduction could nevertheless be accepted because of the existence of other objective evidence that adequately corroborated the denial of intentional consumption, namely negative tests the day before and the day after the positive test.

115. An even more liberal answer was given in CAS 2019/A/6313. It involved a positive test for Trenbolone, an anabolic steroid used to boost the growth of cattle, and also by some athletes seeking to increase muscle mass and repair muscle injury. The athlete argued that he had consumed meat at a restaurant the day before the test, and that it must have been contaminated. He provided personal character recommendations, a negative lie detector test, and hair-test results which the experts agreed ruled out the regular use of large doses – but not regular use of smaller doses. Thus the outcome came to depend on the thesis of contaminated food.

116. US law requires Trenbolone to be injected into the ear of cattle. The athlete suggested that in his case it had been injected into the animal's longissimus muscle from which his piece of meat was taken. The first IAAF panel to hear the case accepted expert evidence that such an injection would be irrational because it would prevent the benefits of the substance to the wholesaler of the meat. On that footing, inter alia, the IAAF panel concluded that the athlete's explanation was possible but not probable. It concluded that there should be no reduction of ineligibility.

117. On appeal to CAS, this expert evidence was apparently not rebutted. The CAS Panel nevertheless held that it was not able to dismiss the athlete's explanation as scientifically speculative or as less than 50% likely. It then reached this outcome:

> *"65. The state of the relevant science as presented to the Panel, combined with the totality of the other evidence, viewed with common sense and bolstered by the Athlete's credibility, opened up the corridor for him to establish his lack of intentionality without concretely proving the origin of the tiny amount of Epitrenbolone found in his urine on 2 June 2018. No one could quantify by science the percentage*

likelihood that the particular steak that he consumed, from the longissimus muscle, contained hormone residues from the implant in the particular cattle, details of which are not available, or the consequent likelihood that the quantity of Trenbolone in that steak caused his ADRV. But that was a reasonable possibility and, even if the likelihood were to be considered scientifically less than 50%, it would be more than unfair and harsh to treat that as negating the Athlete's efforts to do all that he could to obtain the best possible evidence.

[…]

87. The Panel also accepts the evidence proffered by the Athlete concerning his approach to training and competition, his disdain for cheating and his impeccable history and attitude to "clean" sport. Again, it is not suggested that this alone is determinative – arbitrators do not pretend to be able to see into athletes' souls and thereby divine the truth – but the Panel does consider it relevant.

90. […]

b) the Athlete's credibility and history, supported by the tests which he volunteered and the evidence of his manager and trainer, go beyond a mere denial and corroborate his explanation;

c) common sense must count strongly against it being a mere coincidence that he tested positive, for such a tiny amount of a dangerous and illegal prohibited substance as to be undetectable in his hair, and for no rational benefit, so soon after having eaten beef from hormone-treated cattle (after numerous tests over his previous career, always negative […]

d) […] this is indeed one of those rare cases where the impossibility of proving scientifically that the steak consumed did or did not contain hormone residues does not debar the athlete from establishing his innocent lack of intent under Art 10.2.1(a) of the IAAF ADR".

118. In April 2020, Jonathan Taylor QC, an English barrister who had just finished three years of service as chairman of the WADA Compliance Review Committee, published a much-discussed article on *"Assessing Contamination and Thresholds under the World Anti-Doping Code"*, in which he sharply disagreed with CAS 2019/A/6313, observing among other things the following:

"It is not clear why the [CAS 2019/A/6313] *panel considered that the athlete's protestations of innocence, the testimonials of his manager and agent and his previous clean tests, 'go beyond mere denials and corroborate his explanation'. That is the kind of deductive reasoning that previous CAS panels have strongly rejected. […]*

The fact that the athlete tested positive after eating hormone-treated meat is only more than mere circumstance if there is good evidence that the meat more likely than not contained sufficient trenbolone to cause the positive test, and here there was not. It might possibly be argued to be more than coincidental if all other potential sources of trenbolone could be definitively ruled out, but the analytical evidence (including the hair analysis as

well as the urinalysis) is just as consistent with regular, low doses of trenbolone as it is with meat contamination".

119. Taylor's final sentences were these:

"The floodgates have therefore been flung wide open. This author submits that those who support a rigorous regulatory response to doping in sport will hope that future CAS panels act quickly to shut them again, by rejecting the [CAS 2019/A/6313] *decision in favour of the large body of CAS jurisprudence that preceded it".*

120. Taylor's vigorous criticism and his comment about *"floodgates"* related to a context where (unlike the situation in this case, where the Athlete has endured two years of ineligibility and thus missed a realistic gold medal possibility in the Tokyo Olympics), the relevant issue under the applicable rules was one of fault or negligence, in the absence of which (as found by the Panel) there would be no period of ineligibility at all. What happened to the Athlete in the present case, even with the reduced ineligibility granted by the Sole Arbitrator, requires the closest possible scrutiny of requirements of the Code to ensure that the Athlete is not unjustly treated.

121. At any rate, CAS 2019/A/6313 was followed by CAS 2019/A/6443, which also cleared the athlete of fault and imposed no period of ineligibility. The Panel seemed to have been inspired by the fictional Sherlock Holmes's famous words: *"When you have eliminated all which is impossible, then whatever remains, however improbable, must be the truth"*. It accordingly identified a series of conceivable "pathways" for the Prohibited Substance: the Intimate Contact Pathway, the Contaminated Product Pathway, and the Meat Pathway. The first was eliminated because the disciplinary body (the Canadian Centre for ethics in Sport) had conceded that there was no evidence that the athlete had either acted intentionally or recklessly; the Contaminated Product Pathway was *"not an inference […] reasonably drawn from all of the evidence"* (or lack of evidence); and thus the Meat Pathway remained as a possibility which was to be preferred to a conclusion of fault on the part of an athlete whose testimony, and that of her supporters, was credible. The Award notably recites that:

"175. […] the Panel finds it reasonably possible, or in other words, that it is a reasonable inference able to be made, that the Athlete's AAF was caused by the ingestion of meat illegally treated with clostebol […].

181. This case is, in the Panel's view, unique. From the very outset, the CCES accepted that the Athlete's ADRV was not intentional or the result of reckless conduct. Not one argument or piece of evidence was submitted in respect of the Intimate Contact Pathway, or the notion that the Athlete may have been the victim of sabotage. The Parties' submissions focused largely on two possible explanations for the Athlete's AAF – the Contaminated Product Pathway and the Meat Pathway – and the CCES' own expert characterized these two explanations as 'equally extremely unlikely'".

182. At first and in isolation, the mere suggestion that the Athlete's AAF was the result of the consumption in Australia or Canada of meat illegally treated with clostebol may appear speculative. However, in the final weighing of all of the evidence, including the absolute absence of any suggestion of intentional doping or cheating, the Athlete's witness statement and the content and manner in which she gave her oral testimony at the hearing, the witness statements of Mr. Boorsma and in particular, Mr. Liang, who as High Performance Director for Triathlon Canada has interacted with the Athlete and who gave compelling evidence, largely uncontested by the CCES, on the Athlete's diligence and approach to her role as an elite athlete, and importantly, the factual and circumstantial evidence presented and the Panel's findings in respect of the Contaminated Product Pathway as summarized above, the Meat Pathway became a reasonable inference to explore in the absence of evidence of any other reasonable explanation as to how clostebol entered the Athlete's system.

183. Having more closely examined the entirety of the evidence in respect of the Meat Pathway as summarized above, and when combined with other inferences made, the Panel is unanimously of the view that the Meat Pathway is the only reasonably possible and credible explanation for the Athlete's AAF and is more likely than not to have occurred. The Panel finds that the Athlete has established on a balance of probability how clostebol entered her system.

184. In reaching this conclusion we have applied the rules and standards that govern triers of fact in assessing circumstantial evidence. In weighing both the inferences to be drawn and the weight of all of the inferences when balanced together, we are satisfied that our conclusion meets the standard of being logical 'in light of human experience and common sense'".

122. In contrast, the Panel in CAS 2020/A/6978 & 7068 reasoned as follows:

"134. […] it is clear that the athlete cannot rely on simple protestations of innocence or mere speculation as to what must have happened but must instead adduce concrete and persuasive evidence establishing, on a balance of probabilities, a lack of intent (see for example, CAS 2017/A/5369; CAS 2016/A/4919; CAS 2016/A/4676; CAS 2017/A/5335). [CAS 2019/A/6313] *and* [CAS 2019/A/6443]*, the most recent cases, are outliers inasmuch as they apparently propose an enlargement of that possibility.*

135. The Panel notes that CAS does not have a doctrine of binding precedent, such as it exists in common law jurisdiction, though in the interest of maintaining a consistent jurisprudence, any panel will pay respectful attention to the awards of its predecessors raising similar issues to those of the case before it. However, when an award departs from some well-established CAS case law, proper reasons for such change should be sufficiently stated. That said, failing a stare decisis effect or precedential value of CAS awards, this Panel is therefore not obliged to follow the legal analysis conducted by previous panels (CAS Code Commentary Mavromati/Reeb, Art. R46 no. 47)".

123. The present Panel notes this reference to the absence of binding precedents in CAS, as well as the countervailing desire for consistency and predictability. But like must be compared with like. The present Panel, as it too is dealing with a reduction of ineligibility under a substantially

identical regime, will seek coherence with the succinct statement in para. 134 of CAS 2020/A/6978 & 7068.

124. From the outset of the present case, SIA has accepted that there was no direct evidence that Jack intentionally ingested Ligandrol to enhance performance and agreed that the level of banned substance was low and there was no evidence of any long-term usage of the substance (see para. 99 of the Appealed Decision). These concessions are significant, but (contrary to what might be expected by someone unacquainted with the rules) not decisive – or else this appeal would have been hopeless, and dropped. SIA is well cognizant of the rules and knows that it does not have the burden of proving intentional misconduct; in order to secure confirmation of the reduction of ineligibility granted by the Appealed Decision, it is for the Athlete to prove its absence.

IX. THE MERITS

125. *Problems with the Appealed Decision.* The Panel finds that the Appealed Decision, for all its admirable qualities of discernment and exposition, is not in accordance with the Policy and with what the Panel perceives as consistent strands of leading decisions which contribute to the uniformity of application which is desirable in the international community of elite sports. It nevertheless upholds the ultimate holding of that Decision in favour of the Athlete, on what it deems to be the balance of probability. It is a close call made with considerable hesitation, indeed by a majority decision with respect to the decisive issue of recklessness under the fact of this case, but close calls must be made, and it favors her for the reasons set forth below.

126. The Appealed Decision states in para. 65 that the Athlete *"has not established how ligandrol entered her system"* and that the following three possibilities were *"speculation"*:

(a) Supplements which she had been using were contaminated at the manufacturing level.

(b) They were contaminated by being prepared or mixed in a blender used by her brothers or partner to blend their own, possibly contaminated supplements.

(c) She had come into contact with the substance as a result of using public pool or gym facilities in May/June 2019 or while otherwise training for the trials for the world championships.

127. The Sole Arbitrator went on in para. 81 to object to the "gloss" added to the Policy by arbitrators who have spoken of *"only the narrowest of corridors"* being available to achieve a reduction of ineligibility in the absence of proof of origin:

"the Sole Arbitrator considered that it is unwarranted to approach the consideration of which [sic; should contextually be 'whether'] an Athlete has discharged the onus cast upon him or her from a perspective that he or she must be able to fit within 'the narrowest of corridors' or show that his or her case is an 'extremely rare'

one. Rather, the proper approach is to determine whether, on the totality of the evidence, the Applicant has proven on the balance of probabilities that she did not, or did not attempt to, cheat".

128. He thereafter concluded that the Athlete had indeed discharged this burden and said that his reason was *"first and foremost … [her] own evidence"*. He described this evidence by listing a considerable number of *"emphatic"* declarations and responses to cross-examination indicating her aversion to doping and dedication to serving as a *"role model"* which he found persuasive. Later in his Decision (para. 91), he refers to consistent *"character evidence"* expressed by *"numerous people […] in the most glowing and praiseworthy of terms"*. Her admirers, he noted, included her competitors. She was said to be generous with her time and eager to *"give back to the sport"* by interacting with young swimmers.

129. He then states in para. 86 that the evidence *"also shows"* that she took *"considerable steps, at considerable expense, to seek to ascertain or identify"* the provenance of the Prohibited Substance. She *"might have done more"* but *"the test is not one of perfection […] common sense must be applied"* in light of the cost and time involved. He concluded that she *"did all that she could reasonably be expected to have done […] to seek to locate or identify the source or origin of the Prohibited Substance"*.

130. The Appealed Decision also records that this was a first offence, that the Athlete had been tested 10 times since February 2018, and this was the only positive – a history said to be *"consistent with"* her denial of cheating.

131. As for objective and non-inferential evidence, the Sole Arbitrator deals with this matter last, in these terms:

> *"99. Finally, there is the physical and/or scientific evidence. As stated, on the state of that evidence, it is impossible to know how the Prohibited Substance entered the Applicant's body. What is known (and conceded by the Respondents) however is that there is that there is no evidence whatsoever of any long-term use of the substance, that the amount of the metabolites found in the Applicant's system was 'low', and that the amount of the Prohibited Substance found in the Applicant's body was a 'pharmacologically irrelevant dose' – meaning that it was insufficient, per se, to provide any positive benefits to the Applicant.*
>
> *100. It also has to be borne in mind that, as the evidence establishes, there are very limited scientific papers or the like concerning the effects of taking ligandrol or of the dosages required for a performance enhancing effect especially in the case of females, or female athletes. This was not the case where either party could present reliable, relevant scientific data supporting or disproving intentional use of the Prohibited Substance for performance enhancing reasons".*

132. This led directly in para. 101 to the Sole Arbitrator's *"overall"* persuasion, *"on the balance of probabilities, that the Applicant did not intentionally ingest ligandrol"*.

133. Up to that point, the Appealed Decision reflects seriousness of purpose, clarity of thought, and felicity of expression. Yet it falters at this last hurdle. Although this remains an area where

the jurisprudence at present appears unsettled, there is at least clear consensus at the following level of generality: speculations, declarations of a clear conscience, and character references are not sufficient proof. It is an unacceptable paradox to posit, as the Appealed Decision apparently does, that the effect of the apparent unavailability of *"reliable, relevant scientific"* (i.e. *objective* and *probative*) evidence is to give the Athlete the same benefit as if she had found and presented it.

134. This weakens the Appealed Decision, but is not fatal to the Athlete. This is a *de novo* appeal, and the Panel is entitled to and indeed duty bound to examine the record to appraise the evidence and determine whether in its own view the outcome of the Appraised Decision is justified. That is now what remains for it to do.

135. *General observations with respect to the weighing of evidence.* Although, as is to be expected, most of the Parties' written and oral submissions were devoted to the opposition between the common views of WADA and SIA, on the one hand, and those of the Athlete on the other, there was significant common ground among the Parties.

136. They agree that that athletes who have committed a doping violation and face a four-year period of ineligibility may obtain its reduction to two years if they can prove that the violation was not intentional or reckless. They also agree that athletes in that situation will find it significantly more difficult but not impossible to succeed if they are unable to show how they came into contact with the Prohibited Substance. (This is generally referred to as proving its "source" or "origin"). Unsurprisingly, the degree of difficulty in WADA and SIA's submissions verges on the impossible. With this the Athlete just as predictably disagrees.

137. It all comes down to the evidentiary requirements and whether athletes can meet them. The subject of evidence accordingly merits some observations before considering the contentions of the parties.

138. It is illusory to think that disciplinary policies can be defined in rules that are sufficiently precise as to *prove* deliberate misconduct or its absence with the same precision and conclusiveness as the proof of a mathematical theorem. This would be true even if the rule required proof of the origin of the offending substance, because there may be controversy as to the reliability of the demonstration of that identification of that origin; once having tested positive, the athlete may present a container of a non-prohibited supplement which they say they are used to taking, point to the fact that its list of ingredients is innocuous, and (now having caused it to be examined following their positive test) express consternation at the presence of the offending substance in it; yet the simple fact – known only to the athlete – may be that the athlete *added the substance afterward*. "Circumstantial" evidence is highly important by default, since this is the name by which we call all evidence which is not the product of direct observation. Direct observation itself may be unreliable if not dishonest. And yet when a judge or arbitrator accepts either type of evidence as more likely than not, whether as a matter of credibility or inference, it is still probative.

139. It is of course highly desirable that rules be applied in a uniform manner, in order that those affected by their application may be aware of the consequences of their action and satisfied that they are given the same treatment as others in their situation.

140. This explains why lawyers refer extensively to precedents. They seek to distill guidance from prior decisions, on the reasonable assumption that the consistent evaluation of evidence may create reasonable expectations of how future conduct will be judged, and thus provide concreteness to the bare abstraction that something must be "proved".

141. In this area of reduction of the period of ineligibility by proving absence of intent or recklessness notwithstanding the absence of proof of the source of the prohibited substance, some prominent cases are frequently cited by lawyers facing new disputes. Prior cases that upheld the arguments of the athlete are cited by the next athlete's advocate on the footing that they correctly apply the texts and that the facts are congruent with the new case. On the other side, it is countered that the reasoning was wrong and that anyway the facts were different. Cases that deny the reduction are criticized by the athlete as wrong and irrelevant; and the disciplinary body takes the oppositive view.

142. This is to be expected. (The unseen cases are the ones where the athlete and the disciplinary body do not disagree, which may be numerous.) But it creates a problem in that the cases tend to be highly fact-specific and extremely detailed. If each subsequent arbitrator or judge is to give an exhaustive exposition of how the facts of the new case cohere or conflict with those of the growing body of prior jurisprudence, the body of decisions will grow in complexity and make it difficult for non-specialists who desire a more ready understanding of how the rules are applied and thus to know where they stand – and so avoid making futile claims.

143. Accordingly the Panel in this case will focus on the contentions of the Parties as to the facts of this case, and make only a few particularly illustrative references to precedents.

144. The relatively nuanced approach of the Policy is evident when compared with the uncompromising disqualifications of Olympic medalists who tested positive after their inadvertent ingestion of prohibited substances. Two famous examples are those of Andreea Raducan (CAS (OG) 00/11) and Alan Baxter (CAS 2002/A/376) which of course predated the WADA Code (the applicable rules were those of the IOC Medical Code then in force).

145. Raducan, the diminutive 16-year old Romanian gymnast who astonished the world by winning the gold medal in the individual all-round event on the first day of the Sydney Olympics, was disqualified due to a positive test for pseudoephedrine reported several days later. It transpired that she had taken two Nurofen Cold and Flu tablets given to her by a team doctor (after she complained of a headache, running nose, and congestion). The CAS Panel upheld the retraction of her gold medal by the International Olympic Committee, stating notably (para. 14) that *"no intentional element is required to establish a doping offence. The mere presence of a forbidden substance in the urine sample is sufficient"*. It cited three cases of swimmers to the same effect (CAS 95/150, CAS 96/149, and CAS 98/208). The arbitrators upheld *"the strict consequence of an*

automatic disqualification – severe as it may be in that it affects a gold medal winner – as a matter of fairness to all other athletes" , noting that it was *"aware of the impact its decision will have on a fine, young, elite athlete"* but finding, *"in balancing the interest of Miss Raducan with the commitment of the Olympic Movement to drug-free sport, [that] the Anti-Doping Code must be enforced without compromise"* (The doctor was suspended for two Olympic cycles. According to press reports, Raducan's three closest competitors were offered the possibility of a new ceremony to receive reassigned medals, but declined in solidarity with her.)

146. Baxter also astonished the world, as a British skier who unexpectedly finished third in an Alpine skiing event in the Salt Lake City Winter Olympics. He too was disqualified. Suffering from a cold, he had used a Vicks Vapor Inhaler which he spontaneously purchased over the counter from a local pharmacy; it looked exactly like the ones he was used to at home but in the US contained lev-metamfetamine and was therefore encompassed by the term "methamphetamine" notwithstanding its difference from the specific targeted substance dextro-methamphetamine, which is a right-rotation isomer ("dextro") and known on the street as "meth" or "speed". The CAS Panel held that although Baxter's *"story [was] sincere and compelling"*, *"athletes are strictly responsible for substances they place in their body that for purposes of disqualification (as opposed to suspension), neither intent nor negligence needs to be proven by the sanctioning body. […] doping is 'the presence in the body of a prohibited substance'"*. It noted that there were *"a number of CAS cases where athletes have had the sanction of disqualification imposed under circumstances at least as sympathetic as Mr Baxter's"*, citing *Raducan* and also the case of the swimmer in CAS 95/141.

147. Athletes who have a clean record and do not have uncharacteristically poor competitive results before the violation (and thus avoid the possible inference that they had a motive to cheat) or uncharacteristically good results thereafter (which might be suggested to confirm cheating) will improve their prospects yet further if they can show an invoice from a restaurant indicating they were served meat which could be traced to a whole-sale supplier known or suspected by regulatory authorities to feed steroids to its livestock.

148. But unconscious contamination by the spiking of supplements in a manner which is of course not indicated on the label, or as a result of using the common facilities or equipment of a gym, does not lend itself to such proof. Still, it is not impossible. It is ultimately a question of evidence – what one means by the notion of proof. The rules require proof of the absence of a state of mind (intention or recklessness), and proving a negative is notoriously difficult. The Policy does not define what it means by proof, leaving the matter to be debated by the parties and resolved by the arbitrators.

149. Direct evidence is thought to be the best, because it was perceived by the witness. Circumstantial evidence is not as good, because it is a matter of inference. Yet the witness who claims to have seen the defendant bite off the ear of the victim may have poor eyesight, which raises a question of the probability of accuracy of testimony, while the fact that the ear is found in the mouth of the defendant may, although "only" an inference, be very convincing. In any event, there may be chains of evidence which combine observation and inference –

two team-mates saw the accused order and eat a particular cut of meat, but no one saw the farm hand inject the steroids when the animal was still alive.

150. Mr Wenzel argued forcefully for WADA that the Athlete has offered no proof whatsoever that the Ligandrol found in her body *did not* give her some competitive benefit. Viewed in isolation, this contention is logically consistent with the rules, but cannot be decisive, because the issues of intent and recklessness are to be decided on more than the logical force of a singular sub-issue in a context where the Athlete must in effect prove two negatives.

151. This is perhaps best illustrated by an example. For Baxter, the unfortunate Alpine skier, the disqualification was inevitable because he had in his system a substance which although innocent was, unfortunately for him, captured by an over-broad definition that encompassed both the bad and the inoffensive. But what if the test had not concerned the result of a concluded competition, but intention or recklessness out of competition? Surely it could not be said against him that he failed to provide any proof of the inoffensiveness of the Vicks inhalers which he was used to purchase over the counter in Britain which he had simply assumed (as it turned out correctly) had no properties that merited a ban and also assuming (wrongly but understandably and innocently) that its ingredients were identical to the inhaler he had been pleased to come across in Salt Lake City.

152. The Athlete in this case of course did not go to a public gym with the absurd intent of procuring a competitive advantage by being accidentally contaminated by Ligandrol. Yet it is accepted as possible that she was contaminated there, or possibly in other unspecified environments where she found herself in the course of the 21 days or so before her positive test – the lapse of time for detection of Ligandrol. (Merely to invoke such possibilities cannot be a successful defence, but must be combined with a forcefully persuasive showing of unlikelihood of intent as defined in the rules: a point to be addressed below.)

153. This situation leads to the central two-part question. Does this circumstance lead to the conclusion that she cannot disprove (a) culpable intent or (b) recklessness? The answer is: not necessarily. As we shall now see, this Athlete's case is more readily made with respect to (a) than (b).

154. The determination of the two-part question is to be made in light of all the facts, and the Panel's conclusion that the two factual propositions which the Athlete must establish are more likely true than false, on a simple balance of probability.

155. As certitude with respect to the source of contamination decreases, so the Athlete's chances of prevailing depend on a counterbalancing increase of the implausibility of bad motive and negligence. The doping hypothesis must no longer (on balance) make sense in all the circumstances, and the charge of recklessness must (on balance) be overcome.

156. CAS 2019/A/6313, at para. 65, illustrates the plain fact that even with steak (or what in CAS 2019/A/6443 was called "the Meat Pathway"), as opposed to supplements or contamination, there will be suppositions.

"No one could quantify by science the percentage likelihood that the particular steak he consumed, from the longissmus muscle, contained hormone residue from the implant in the particular cattle, details of which are not available, or the consequent likelihood that the quantity of Trenbolone in that steak caused his ADRV. But that was a reasonable possibility […]".

157. The Panel in CAS 2019/A/6313 structured its analysis by assessing the evidence in a manner that (i) *begins with the science* and then (ii) considers *the totality of the evidence* (iii) through the prism of *common sense,* possibly (iv) "bolstered" by the athlete's *credibility* (para. 65). In other words: start with the science, continue by taking a broad view, test it against common sense, and finally consider whether the credibility factor confirms the emerging conclusion. The way in which arbitrators *apply* this method in a given case may be a matter of controversy, but as a *process* it appears to be in conformity with the Policy and legitimate as a way of achieving its intended effect of enforcing the rules without finding comfort in the cynical view that occasional harm done to an innocent athlete is acceptable collateral damage.

158. *The science.* In this case the science is important but cannot be decisive given the absence of an identified origin of the Prohibited Substance detected in the Athlete's system. What is known about Ligandrol is that although not having regulatory approval it is widely available in Australia on the black market, notably sold and advertised by suppliers on the Internet (as anyone can verify) where its merits are debated by body-builders seeking bulk, claimed by some to have restorative qualities, apparently never analysed by scientists for its effect on females, thought to be of possible help in geriatric medicine (boosting the capacity of seniors to climb and descend stairs), and possibly transmittable by minute contamination (droplets or powder). SIA's expert, Professor Trevis, concluded that the positive test revealed *"pharmacologically irrelevant"* quantities of Ligandrol, insufficient to boost strength, speed, or recovery. The Appellants have suggested that the small quantity detected might be explained by a pattern of micro-dosage and by the happenstance that the test was conducted at the end of a *"doping cycle"*. The Athlete, however, took the initiative of commissioning a test of her hair (at a cost to her of AUS$ 6000) which indicated no long-term use. SIA does not contradict this conclusion.

159. The "science" cannot in this case extend to an examination of the *source* or "pathway" of contamination. There is no container of supplement which can be examined to see if it has been spiked, no date and place of a restaurant which can be asked to confirm whether a certain type of meat was served to a particular table on a particular date – leading to further investigations of the prevalence of prohibited substances being fed to livestock. Professor Thevis's *"estimate"* of the *"order of magnitude"* of the detected concentration of the Prohibited Substance (in the absence of a known comparator) indicates that the amount of the metabolite in the Athlete's sample was *"low"*. In the environments where the Athlete moved, conclusive

evidence of contamination in some ultimately unidentifiable way is practically impossible, although no one denies that such contamination could conceivably occur.

160. Unable to identify a source or origin, the Athlete has in the time that has passed since her adverse test effectively abandoned her attempt to show that her ingestion of the Substance was the result of contamination of supplements. The last time she recalled having taken supplements was on 8 April 2019, far before the test on 26 June. Instead, she puts forward the case that she most likely could have been contaminated at a public Zoo Health & Fitness Gym in Townsville (Queensland) which she visited some three weeks before the test (the apparent limit of retention for the purpose of testing) and remarked on the number of densely muscled men, or at a public facility at the Tobruk Memorial Pool in Cairns immediately before the test. But as far as she knows (or so she says), her exposure to contamination could have taken place practically anywhere – gym, pool, public toilet, hotel, baggage claim at an airport, and so on.

161. This is a kind of contention which is difficult to sustain, but not impossible given the apparent communicability of Ligandrol. The Policy does not exclude that outcome in terms. So one turns to evidence of the totality of the circumstances, and here the Athlete finds herself on firmer ground in terms of corroboration of her thesis. She was a successful elite swimmer, part of a world-record setting relay team and selected to be a member of both the 4x100 and 4x200 meter national teams for the imminent World Championships in Korea. (She was in fact sent back to Brisbane from Korea as a result of her instant provisional suspension upon news of her adverse test.) On the path to that success she had been tested many times, always negative.

162. In the relevant period in 2019, she was tested on 26 March, 14 April, 27 May, and finally 26 June. In late May she spent two weeks in Townsville training with other swimmers preparing for the Australian trials which would determine the composition of the national team to be sent to the World Championships. The Trials were held from 1 to 14 June. Her performances were elevated and steady, except in the 200 m freestyle where she was given a specific program to improve her time as a candidate for the 4x200m relay team. She testified before the Sole Arbitrator that this was an event which she had *"hated because my aerobic ability wasn't there"*. That plan succeeded, but in his testimony Dean Boxhall, a team coach, dismissed the suggestion that this could have anything to do with doping, as her time in the 50m and 100m did not improve to any significant degree.

163. In her testimony before the Sole Arbitrator, she was given the opportunity to agree that the longer distance is an endurance event, and therefore unlikely to reward a competitor using Ligandrol, but to her credit demurred, describing it as a challenging event which demands a combination of speed and endurance in which she was lacking the latter. This was not the picture of a candidate looking for forbidden means of adding sprinting power. Her stable times in the sprint races would presumably have improved if she was "benefitting" from the ingestion of Ligandrol. But that, as Mr Boxhall confirmed, did not happen.

164. Equally, it merits mention that there is no evidence of any drop in form during the relevant period, or any need to surpass the level she had actually achieved to stave off competitors. She was doing well and had every expectation of a likelihood that she would be on a path which could lead to the Olympic Games where a gold medal was a realistic possibility.

165. The care with which Swimming Australia ensures that its athletes are conscious of the imperative of being careful with what they ingest is documented. (In the case of the Athlete, SIA has verified that she underwent its on-line anti-doping education on 7 and 8 July 2014, 6 July 2017, 4 March 2018, and 13 May 2019, as well as face-to-face education sessions on 4 March 2018 and 15 June 2019 which according to the Athlete's testimony before the Sole Arbitrator included skits simulating situations in different settings where an athlete might be offered food, drink, or products which might contain prohibited substances and advised on how to react.) It seems likely, given the strength of its team at the international level, that the Australian federation is among the strictest national institutions in terms of ensuring compliance. The Athlete's home club, St Peters Western, had no less than seven swimmers selected for the Tokyo Olympics in her absence. The investment made in such successful national and local programs is wasted if every effort is not made to achieve scrupulous adherence to the Policy.

166. In this context, how does common sense contribute to an assessment of the likelihood that the Athlete, on the assumption that she is now untruthful when she says she never heard of Ligandrol before being given the news of her positive test, would have risked her brilliant prospects by ingesting a synthetic product peddled and debated on the Internet without consulting her team? On the assumption that she was in need of something extra to assist her between-competition "recovery", which WADA now offers as a possibility, would she just procure and consume this substance without first getting advice? Why? All the evidence points in the other direction. And no evidence is needed to know that world-class swimmers are highly motivated, endure long years of training regimens which few would tolerate, and conscious of the sacrifices necessary to stay that course – and therefore unlikely to throw it away on a possibly calamitous impulse unless they find themselves in a particular and acute need to boost their performance or overcome a setback. None of that applies here.

167. Much was made by the Athlete of the fact the quantity detected by testing was *"pharmacologically insignificant"* and that those who use Ligandrol need to take it in significant quantities to have the intended effect of bulking up. This argument is in the end irrelevant since there is no suggestion that the Athlete needed more muscle mass. There might have been a forensic problem for her if there was evidence of increased muscle mass (after all, if that is indeed possible, she might somehow have consumed other doses of Ligandrol without being detected) but the evidence is that she did not gain mass, but to the contrary lost a small quantity.

168. If anything is speculative, it is the recovery theory now put forward by the Appellants without any indication of the Athlete's need to take a risk to achieve it in a new and unsupervised way. (She was in the habit of using approved supplements for this purpose, and that seems to have

been satisfactory.) Uncorroborated speculation is said not to avail an accused athlete; it should not in fairness avail the accuser either.

169. Given these objective circumstances, the thesis of intent or carelessness seems to require not only unscrupulousness but also a high degree of foolishness. (Foolishness is of course not a defence; intent is not excluded if the marathon runner ingests a product designed for bulk. The question is rather the implausibility of either in the case of a particular athlete.) The evidence concerning the Athlete's personal situation is therefore of interest as possibly "bolstering" her defence; it is the next subject.

170. Before addressing it, the Panel recalls that CAS 2017/A/5392 was invoked against the Athlete as indicating that the apparent "logic" of the argument that a successful athlete does not need to engage in doping should be rejected. It is not a persuasive authority in the present case. That case involved a swimmer who was given a four-year ban after his national and regional anti-doping entities had found that his violation (the use of Stanozolol) was not intentional and therefore limited his ineligibility to two years. The Sole Arbitrator found that *"the Athlete's explanations have virtually no evidentiary basis supporting them"*. The rather threadbare argument that successful and previously unsanctioned athletes do not need to cheat was a minor feature of the decision and dismissed out of hand, in the last of five sections of the lengthy para. 70 relied upon by the Appellants. It reads as follows:

"The Athlete submits that it would be illogical for him to take a prohibited substance because he was a successful, professional swimmer and that he has never before tested positive for a prohibited substance. The Sole Arbitrator reiterates with respect to the Athlete's requirement to prove the origin of the prohibited substance, that the Athlete must adduce concrete evidence to demonstrate how a particular substance entered his/her body. In the present case, the Sole Arbitrator finds that 'logic' and the fact that the Athlete has never tested positive for a prohibited substance before are not concrete evidence that prove on the balance of probability that the violation was not intentional".

171. This is a long way from the far more granular and developed factual considerations advanced on behalf of the Athlete in this case. The present Panel disagrees with the just-quoted passage when it states that *"the Athlete must adduce concrete evidence to demonstrate how a particular substance entered his/her body"*. Whatever its correctness in that case, it is over-broad, since the rule does not require it generally. What must be shown is that on the balance of probability there was no intent or recklessness, and this can be proved by any means. Identification of the source is often important (but not in and of itself sufficient), but it is not indispensable.

172. *Subjective evidence of intent: denials and the appearance of sincerity.* It should be clear from what has already been observed above that the present Panel is disinclined to give weight to uncorroborated assertions of the accused and persons close to him or her. The point is made often enough: denials and protestations of innocence are the common coin of the guilty as well as the innocent. Poor communications skills are no evidence of culpability. Indeed, if anything this criterion can be turned around to be assessed *for its absence*, i.e. to work to the detriment of an athlete whose comportment is flippant or characterized by a sense of

entitlement and a disregard of the principle of fair competition. On the other hand, the Athlete's statements on her own behalf unsurprisingly indicate mature awareness of the rules of her sport and the need not to endanger her career with ill-advised initiatives – even if one were to give her no credit for her professed aversion to cheating or substance abuse.

173. *Subjective evidence of intent: testimonials.* The entourage of prominent athletes have motivations correlated with the success of the individual in question, and the same may be said of the family member and coaches of less outstanding competitors as well.

174. But this does not mean that character references are to be dismissed, only that they must be taken with a grain of salt, and evaluated contextually with discernment. It matters if the coach is the personal trainer of the sole great athlete of a small country, or if (to the contrary) the views expressed are those the coaches or other officials of national federations working with a multitude of athletes who compete at a level at least comparable to that of the accused – whose replacement would therefore not have dramatic.

175. Australia is a leading swimming nation and has by all accounts nurtured a great pool of young talent. At the time of her positive test, the Athlete had been selected as a member of two national relay teams, not as one of Australia's representatives in individual events. The difference between her and her replacement is unlikely to be great, and certainly not enough to cause even cynical national officials to endorse her integrity insincerely, given the unnecessary risk to their own credibility of supporting a non-essential individual who might later be exposed as a cheater.

176. It is of significance in this respect that Swimming Australia, the national federation and a nominal respondent in these proceedings, adopted a neutral role these proceedings. While its Legal Counsel, Ms Lydia Dowse, followed the case closely and was present during the hearings, Swimming Australia said not a word in favour of the Athlete (nor against her) and when invited to speak at the end of the proceedings spoke very briefly, essentially to express her federation's commitment to a drug-free sport and hopes for a just and fair outcome. This was an example of absence of coming before CAS without showing nationalistic support to an athlete ("right or wrong!") and deserves recognition as such.

177. The Panel is troubled by the fact that the Athlete did not heed SIA's suggestion that she ask her partner, an accomplished hockey player with whom she was living, to provide testimony. She explained that she did not believe he had anything to contribute, since the two of them habitually used the same supplements without any untoward incident, and since she thought her family members would provide more important character evidence having known her through her entire life. Others might feel that it would have been useful for him to come forward – if for no other reason than to stop SIA from making a point of his not doing so. In the end, however, there is no warrant for speculating that he might have said something incriminating, and the Panel (not without considerable hesitation) does not conclude that the Athlete's failure to seek his statement left a fatal gap in her case.

178. *Evidence of recklessness.* The second of the two prongs of the Code's explanation in Article 10.2.3 WADC (see Paragraph 11) of what it means by *intentional* should not be forgotten. It is this rather laborious emphasized passage: *"… engaged in conduct which he or she knew constituted an anti-doping rule violation or* ***knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that rule****"* (emphasis added). The somewhat subtle distinction is not immediately captured by the habitual expression "indirect intent"; it might be more precise to speak of *constructive* or *inferred* intent, but even better – in a text not destined for lawyers – might be the word used by Ms Younan: *reckless,* which anyone should accept as a description of "disregard" for the relevant "risk" (namely an ADRV). It might also be spoken of as *culpable obliviousness to risk*. As SIA put it in its Appeal Brief: *"the definition of 'intentional' in Article 10.2.3 imports notions of fault, and goes beyond a colloquial sense of 'cheating'"*.

179. The Panel has taken note of the point that none of her team-mates tested positive for Ligandrol, but does not consider it to be of importance in light of the fact that both hypotheses in the balance are, in isolation, unlikely. The point of contact was, one may assume, isolated; otherwise there might have been something approaching an outbreak more likely to result in a public health investigation than in wholesale suspension of the Australian swimming team.

180. All the circumstances noted above with respect to the Athlete's objective competitive achievements and prospects (which are after all *objective evidence*) speak in favour of the conclusion that the accusation of "manifest disregard" of the rules makes no sense. It will never be known how the Athlete came into contact with the Prohibited Substance, but the hypothesis that she did so innocently seems on balance more likely than that she either *intended* to take this Substance or was *recklessly* oblivious to the risk of contamination in the course of her activities – although this second conclusion is reached only by a majority of the present Panel.

X. CONCLUDING COMMENTS

181. It is the nature of the relevant rules that they are inflexible in principle yet applied to a great variety of circumstances on a one-size-fits-all basis. The sanctions are uniform in their definition but not in their effect; years of eligibility have different impact on athletes depending the kind of physical prowess their sport happens to require.

182. Unfortunately the consequence of the relevant rules and the determinations that they require are such that arbitral awards that deal with these issue are unlikely to yield specific criteria by reference to which athletes and officials can quickly and conveniently predict what the outcome will be and accordingly save time – the latter by not sanctioning the athlete, the former by not pursuing an appeal.

183. Given the occasional superficiality and inaccuracy of accounts of complex legal proceedings in social and other media, the Panel feels it appropriate to summarise succinctly what has

happened in this case. The Athlete accepted at an early stage in the process that she failed to avoid ingestion of a Prohibited Substance, and as a result lost the chance to compete as a realistic medal contender in the Tokyo Olympics. Such a failure is a serious matter and results in a four-year period of ineligibility to compete. This does not mean that she was found guilty of cheating, and the rules moreover allow her the opportunity to reduce the period of ineligibility to two years by proving that she did not *intentionally or recklessly* consume the Prohibited substance. In this case a majority of the Panel finds that the Athlete has, on the balance of probability, done so.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Sport Integrity Australia on 7 December 2021 against Ms Shayna Jack and Swimming Australia Limited concerning the Award rendered in the procedure CAS A1/2020 on 16 November 2020 is dismissed.

2. The appeal filed by the World Anti-Doping Agency on 7 December 2021 against Sport Integrity Australia, Swimming Australia and Ms Shayna Jack concerning the Award rendered in the procedure CAS A1/2020 on 16 November 2020 is dismissed.

3. The Athlete's Period of Ineligibility of two years, commencing on 12 July 2019, determined in the Award CAS A1/2020 on 16 November 2020, is confirmed for the reasons set out in the present Award.

4. (…).

5. (…).

6. (…).

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