

REPUBLIC OF KENYA



**THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
APPEAL NO. AD 29 OF 2019**

IN THE MATTER BETWEEN

ANTI- DOPING AGENCY OF KENYAAPPLICANT

-versus-

PURITY JERONO TALAM.....ATHLETE

DECISION

Hearing: The first hearing proceeded on 19h November 2020 while further hearing took place on 3rd March 2021.

Panel

Mrs. Njeri Onyango. -	Panel Chair
Mr. Allan Owinyi -	Member
Ms. Mary Kimani -	Member

Appearances: Mr. Bildad Rogoncho, Advocate for the Applicant;

Mr. Franklin Cheluget of TripleOKlaw LLP Advocates, ACK Garden House, 5th Floor, Wing C, 1st Ngong Avenue, off Bishops Road, P. O. Box 43170 - 00100, Nairobi, Advocate for the Athlete.

I. The Parties

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter '**ADAK**' or '**The Agency**') a State Corporation established under Section 5 of the Anti-Doping Act, No. 5 of 2016.
2. The Respondent is a female adult of presumed sound mind, an International Level Athlete, (hereinafter '**the Athlete**').

II. Background

3. The Athlete is an International Level Athlete hence the IAAF (WA) Competition Rules, IAAF Anti-Doping Regulations, the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to her.
4. On 15th April 2018, 19th August 2018, 26th August 2018, 9th September 2018 and 4th May 2019 the Applicant alleges that the Athlete knowingly participated in the a) 2018 National Forest City Marathon series in Sichuan Province, China (APRIL) b) 2018 Hetao Rural Commercial Bank Bayannaer International Marathon in Lihle, China (AUGUST), c) Harbin International Marathon in Hama, China, (AUGUST) d) 2018 Mudanjiang Jingbo Lake International Marathon in China (SEPTEMBER) and e) Haier 2019 Qingdao Marathon Marathon in China (MAY) despite being aware that she was serving a four year ineligibility ban imposed on her on 20th February 2019. An Investigation Report (PJT1) dated 27th September 2019 was attached by the Applicant.
5. The findings were communicated to the Respondent Athlete by Mr. Japhter Rugut, ADAK Chief Executive Officer through a Notice of Charge and Mandatory Provisional Suspension dated 14th October 2019. In the said communication the Athlete was offered an opportunity to provide an explanation for the AAF by 28th October 2019, (see PJT2 in page 45 of the Charge Document).
6. The Athlete responded to the Notice from ADAK in a handwritten undated letter. She admitted the charge and further stated that her manager had invited her to China to pay her for her previous races. Upon arrival her manager requested her to participate in the various races and she could not resist. She further stated that upon completion of her races, her manager failed to remit her payments as agreed but instead sent her back to Kenya;

the Applicant attached a copy of her undated letter PJT3, see page 48 of its Charge Document.

7. The Applicant therefore preferred the following charge against the Athlete Respondent:
Violation of the Prohibition of Participation During Ineligibility
8. The Notice to Charge dated 6th November 2019 was filed at the Tribunal on 10th December 2019.
9. Upon reading the Notice to Charge dated 6th November 2019 presented by **Mr. Bildad Rogoncho** on behalf of the Applicant, the Tribunal directed and ordered as follows on 7th February 2020:
 - (i) Applicant shall serve the Mention Notice, the Notice to Charge, Notice of ADRV, the Doping Control Form, this Direction No. 1 and all relevant documents on the Respondent Athlete by Friday, 21st February, 2020;
 - (ii) The Panel constituted to hear this matter shall be as follows; Mrs. Elynah Shiveka, Panel Chair, Mrs. Njeri Onyango, Member and Mr. Peter Ochieng, Member.
 - (iii) The matter to be mentioned on Wednesday 26th February 2020 to confirm compliance and for further directions.
10. At the mention on 26th February 2020 only Mr. Rogoncho attended for ADAK and he informed the Tribunal that the Athlete wished to have the matter mentioned on 16th April 2020 to which he had no objection. Therefore the matter was slated for same date and Applicant was to serve the Athlete notice thereof.
11. On 4th June 2020 when the matter was mentioned via Zoom Mr. Rogoncho was present for the Applicant. He informed the Tribunal that the Athlete had requested that the matter be stood over to 17th June 2020 in order for her to acquire a smartphone which would allow her to participate in the proceedings virtually. He also said that the Athlete indicated that she did not require legal representation. The Tribunal issued the following directions
a) The hearing date be set for 17th June 2020 & b) The Panel remain as earlier indicated.
12. At mention on 17th June 2020 Mr. Rogoncho for the Applicant attended while the Athlete was not present. Mr. Rogoncho said the Athlete had not been able to obtain a suitable phone and that she had also requested for pro bono Counsel. The Tribunal ordered that its Secretariat arrange for pro bono Counsel and the matter be mentioned on 1st July 2020 to establish the status.

13. On 29th July 2020 a Notice of Appointment of Advocates on behalf of the Athlete was filed at the Tribunal by TripleOKLaw LLP Advocates. On same day, the matter was mentioned and Mr. Rogoncho appeared for the Applicant while Mr. Franklin Cheluget attended on behalf of the Athlete. Mr. Cheluget who confirmed he had filed his notice of appointment said he was in touch with the Athlete and requested 14 days to put in the Response to the Charge. Mr. Rogoncho did not object and the matter was set for mention on 13th August 2020 for further directions.
14. During the mention on 13th August 2020 the matter Mr. Cheluget for the Athlete sought for some time to clarify some information with the Athlete before filing his defence. Mr. Rogoncho appearing for the Applicant had no objection and the matter was scheduled for 26/8/2020 for further directions .
15. On 27th August 2020 the Statement of Defence was filed at the Tribunal. On the same day when the matter came up for mention Counsel for both the Applicant and Athlete attended. The Tribunal directed that the matter shall come up for physical hearing at the Tribunal Boardroom located at NSSF Building on Wednesday 16th September 2020.
16. On the readjusted date of 23rd September 2020 with both Counsel present the hearing did not proceed because the Athlete was not available. The matter was rescheduled for a physical hearing on 15/10/2020 at the Tribunal's NSSF Building offices.
17. At a mention on 5th November 2020 via Microsoft Teams upon hearing the Counsel for the Applicant and Respondent the Tribunal directed that the matter shall be heard on 19th November 2020 at the Tribunal's Hearing Room on NSSF Building, 24th Floor. Counsel for the Applicant was to serve Mr. Cheluget with a Hearing Notice.
18. The partial hearing took place on **19th November 2020** before a reconstituted panel of Mrs. Njeri Oyango, Panel Chair, Mr. Allan Mola, Member and Ms. Mary Kimani, Member. The Athlete led by her lawyer testified audio-phonically and was cross examined by the Applicant's Counsel.
19. The second hearing for the Applicant's witness to testify was set for 3rd December 2020 at the Tribunal's NSSF Building offices.
20. On 3rd December 2020 Counsel for the Applicant was present but Counsel for the Athlete was absent. Upon deliberations, the Tribunal directed that the further hearing shall be held on 14th January 2021.

21. On 14th January 2021 while Mr. Rogoncho for the Applicant was present, Counsel for the Athlete was unreachable therefore the matter could not proceed.
22. On 21st January 2021 when the matter next came up both Counsel were present but Mr. Rogoncho for the Applicant was not ready to proceed. By consent of both parties, the further physical hearing was set for 25/02/2021. The Applicant's Counsel was to confirm readiness to proceed with the physical hearing by 19/02/2021 with the Secretariat.
23. On 03/03/2021 the further hearing took place (physically) at the Tribunal's Hearing Room in NSSF Building where the Applicant's witness took the stand. At the end of the hearing a mention was slated for 11/03/2021 for purposes of confirming availability and sharing of the decision in the first proceedings against the Athlete plus any other relevant documents.
24. At the mention on 11th March 2021 both Counsel were present. Counsel for the Applicant had supplied the previous decision on Monday 8th March 2021. The Tribunal directed that parties file their submissions. Mr. Rogoncho for the Applicant would go first, 14 days being sufficient then Mr. Cheluget would take 21 days to respond. The next virtual mention was set for 15th April 2021.
25. During the mention on 15th April 2021 both Counsel were present. Counsel for the Athlete Mr. Cheluget confirmed that they had been served with the submissions by the Applicant. Mr. Cheluget asked for a further 7 days to file their submissions; Applicant's Counsel did not object. The matter was set for mention on 22nd April 2021 to confirm compliance by the Athlete's Counsel.
26. On 22nd April with appearances by both Counsel, Mr. Cheluget for the Athlete confirmed that he had filed and served his submissions and was happy to take a date for the decision. Upon deliberations the Tribunal directed that the matter come up for a decision 20th May 2021 via Microsoft Teams or such other medium as the Tribunal shall determine.

III. Summary of Hearings on 19th November 2020 & 3rd March 2021

19th November 2020 (Partial Hearing) - Oral Testimony of the Athlete

27. The hearing was conducted virtually; Counsel for the Athlete Mr. Cheluget put the Athlete on speaker-phone as the Athlete could not log into the Video link in use by the court. Counsel for Athlete asked the Panel to adopt their Statement of Defence

28. The Athlete's name is Purity Jerone Talam, she's 31 years old, ID No. 28661902, resident in Kaptagat, started running in 2014 after finishing her 4th Form Schooling in 2010 at St. Brigid Kipkaren, graduated with D grade. She has no other work.
29. The Athlete said she was accused of an ADRV in 2018. She came to know that she was banned last year {2020}. Asked why she raced in China, she paraphrased in Kiswahili the information she had reduced in writing in her handwritten undated explanation letter to ADAK (see copy of letter in Page 48 of the Charge Document) reproduced hereunder:

*"Purity Jerono Talam
P.O.Box 7211
Eldoret*

*To the
Chief Executive Officer
Anti Doping Agency of Kenya*

RE: FORGIVNESS FOR THE RACES I PARTICIPATED IN CHINA I

hereby grant my request to the above request.

It is true that I participated in the 2018 National Forest City Marathon Sichuan Province China. This was due to the fact that My Manager had invited me to China to pay me my money that he had not paid me in previous races.

Reaching there he requested me to participate in the Marathon and I could not resist. But it was unfortunate that after the races he could not pay me but instead he send me back home with nothing. He called me for the second time but did the same.

This other reason is that after the mail that I sent you you could not reach to me for

the reply since I was back home a remote area where the network is poor and in/act my phone was offline most of the time. I would even prefer if you make a rut to my place to prove for yourself.

I actually admit that I did wrong and I am so sorry for everything and if given a chance I will not do the same mistake. I did everything innocently.

Thanks in advances

Purity Jerono Ta/am"

30. In regard to her initial ban, she reiterated that she had not gotten a letter from the Tribunal on such a ban.

31. On cross examination by Mr. Rogoncho Counsel for the Applicant asked if she knew if she had a Tribunal case, she answered that she did not know that she was banned. She admitted to having run in China all the 5 races Mr.

Rogoncho put to her; in particular she competed in April 2018 {1 race}, August 2018 (2 races}, September 2018 {1 race) and in May 2019 {1 race).

32. She said the manager cheated them that they were getting their money and all those times she run he did not pay them. She gave the name of her manager as Obed Ition. Asked about the notification letter regarding her 19th November 2017 Sample Test, she conceded that she had seen the letter otherwise referenced as "Provincial Suspension" by Mr. Rog oncho. She lamented that "manager ndiyo alimconfuse" i.e. the manager is the one who confused her so that she ended up running the races.

33. Mr. Rogoncho pointed the Panel to his witness' written statement in Pages 43-44 of the Charge Document suggesting they go to submissions unless Mr. Cheluget wished to cross examine his witness who then could be called to take the stand.

^{3rd} **March 2021 (Further Hearing)-Testimony of Applicant's Witness**

34. The Applicant's sole witness Mr. Dennis Kiprop Keitany testified at a physical hearing held at Tribunal Secretariat offices led by Mr. Rogoncho; He said he was a Compliance Officer working with ADAK and his duties included intelligence gathering and investigations. He said he was aware of the matter involving the Athlete who participated during her period of ineligibility.

35. Presence of Oxandrolone traced in her body on 19th November 2017 was the first matter she had been charged with he said. This particular case, No. 3 of 2018, was concluded on 20th February 2019 when she was sanctioned to a 4 year ban with effect from date of her provisional suspension {12th February 2018}.

36. He said he begun investigating her case via web-searches after he got information from the Director Standards & Compliance who had picked up some lead information from Athletics Kenya (AK) and found out that she participated in 5 races in China on 15th April 2018, 19th August 2018, 26th August 2018, 9th September 2018 and 4th May 2019, (see Pages 27-42 of the Charge Document). From the articles gathered from the web he compiled a report and recorded his statement, (see Page 43 in the Charge Document).

37. The witness also said he contacted Immigration Department and got a copy of her travel history which coincided with the dates of the races she undertook during her period of ineligibility, (see Pages 15-26 of the Charge Document).

38. Cross examining the Applicant's witness, Counsel for the Athlete asked him whether his duties include prevention or was only investigative to which witness responded both, for example he investigates pharmacists & doctors who inject athletes with prohibited substances. Q. Are there measures to prevent athletes from committing ADRVs? A. We issue written warnings to athletes. He said he had been in the Compliance office since September 2018. He said he did not take any measures to prevent this Athlete and did not meet or speak to her in the course of his investigations. When he got information on her from AK he tried to trace down the Athlete. Date that the Athlete visited AK was 20th August 2019; the witness said did not know why she was seeking a Visa through AK.
39. Asked if the Athlete was notified of the SOT Decision, he answered yes, by publication of decision affecting her on the ADAK website, see Page 13 of the Charge Document. Asked if that was the law, the witness said that it was anyone's due diligence and/or that someone in AK would inform her. Athlete's Counsel queried if there was an email from legal department? Did it inform her? Witness could not be sure if it (legal department) did and/or if it was sent to her email Tallamstella@ ... Asked if he had an Affidavit of Service serving Decision on was her he answered, no. Manner of collecting electronic evidence specified? No. Athlete's Counsel put it to the witness that the *"immigration travel itinerary doesn't show what she (Athlete) went to do in China?"* **No**, answered the witness but *" [..] believe she went to compete because it can 't be coincidental[...]"*.
40. On reexamination by Mr. Rogoncho, the witness said the websites gave him information which led him to contact Immigration Department. In regard to the question of whether the Athlete was served with Decision of the Tribunal, Counsel referred Panel to the Athlete's undated letter in Page 48 of the Charge Document in particular where she prayed for *"[. ..] forgiveness for the races I participated in China[...]"*.

IV. Summary of Submissions by the Parties

41. Below is a summary of the main relevant facts and allegations based on the Parties written submissions.

*practice organized by his or her National Federation or a club which is a member of that National Federation or which is funded by a governmental agency. Further, an Ineligible Athlete may not compete in a non-Signatory professional league (e.g., the National Hockey league, the National Basketball Association, etc.), Events organized by a non-Signatory International Event organization or a non-Signatory national-level event organization without triggering the Consequences set forth in **Article 10.12.3**. The term "activity" also includes, for example, administrative activities, such as serving as an official, director, officer, employee, or volunteer of the organization described in this Article. Ineligibility imposed in one sport shall also be recognized by other sports (see Article 15.1, Mutual Recognition.)*

70. Additionally as used in WADC's Article 3.1 provides as follows:

[.../

Where the Code places the burden upon the athlete or other person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

71. Further, Article 3.2 details methods of establishing facts and presumptions:

*Facts related to anti-doping rule violations may be established by any reliable means, **including admissions**. The following rules of proof shall be applicable in doping cases:*

3.2.3 Departures from any other International Standard or other anti-doping rule or policy set forth in the Code or anti-doping organization rules which did not cause an adverse analytical finding or other anti-doping rule violation shall not i n v a l i d a t e such evidence or results. if the athlete or other Person establishes a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused an anti-

doping rule violation based on an adverse analytical finding or other anti-doping rule violation, then the anti-doping organization shall have the burden to establish that such departure did not cause the adverse analytical finding or the factual basis for the anti-doping rule violation.

3.2.4 The facts established by a decision of a court or professional disciplinary tribunal of competent jurisdiction which is not the subject of a pending appeal shall be irrebuttable evidence against the athlete or other Person to whom the decision pertained of those facts unless the athlete or other Person establishes that the decision violated principles of natural justice.

VII. MERITS

72. In the following discussion, additional facts and allegations may be set out where relevant in connection with the legal discussion that follows.

73. Arising from the pleadings by the Parties the Tribunal will address the issues as follows:

- a. Whether the Athlete's ADRV was intentional;*
- b. Reduction based on No Fault/No Negligence/Knowledge;*
- c. The Standard Sanction and what sanction to impose in the circumstance.*

Uncontested issues:

74. Following were the uncontested issues:

- o The procedural and factual enumeration of events by ADAK as conceded by the Athlete's Counsel;
- o Occurrence of an ADVN was also conceded by Athlete's Counsel; and
- o The Tribunal's jurisdiction on this matter as a first instance court.

A. Whether the Athlete's ADRV was intentional

75. WADC's Articles 7.10, 8.4, 13.5 and 14.2 all relate to notification of decisions regarding ADRVs which are relevant to this particular case;

WADC Article 7.10 *Notification of Results Management Decisions*

in all cases where an anti-doping organization has asserted the commission of an anti-doping rule violation, withdrawn the assertion of an anti-doping rule violation, imposed a Provisional Suspension, or agreed with an athlete or other Person to the imposition of a sanction without a hearing, that anti-doping organization shall give notice thereof as set forth in Article 14.2.1 to other anti-doping organizations with a right to appeal under Article 13.2.3.

76. WADC Article 8.4 *Notice of Decisions*

The reasoned hearing decision, or in cases where the hearing has been waived, a reasoned decision explaining the action taken, shall be provided by the anti-doping organization with results management responsibility to the athlete and to other anti-doping organizations with a right to appeal under Article 13.2.3 as provided in Article 14.2.1.

77. WADC Article 13.5 *Notification of Appeal Decisions*

Any anti-doping organization that is a party to an appeal shall promptly provide the appeal decision to the athlete or other Person and to the other anti-doping organizations that would have been entitled to appeal under Article 13.2.3 as provided under Article 14.2.

78. WADC Article 14.2 *Notice of Anti-Doping Rule Violation Decisions and Request for Files*

14.2.1 Anti-doping rule violation decisions rendered pursuant to Article 7.10, 8.4, 10.4, 10.5, 10.6, 10.12.3 or 13.5 shall include the full reasons for the decision, including, if applicable, a justification for why the maximum potential sanction was not imposed. Where the decision is not in English or French, the anti-doping organization shall provide a short English or French summary of the decision and the supporting reasons.

79. In all cases above, the WADC Articles clearly place on the Applicant the onus of notifying its decisions to its stakeholders, the Athlete being prime among them. The Applicant's sole witness when asked if he had notified the Athlete responded thus "[. ..] yes, by publication of decision affecting her on the ADAK website, see Page 13 of the Charge Document. Asked if that was the law, the witness said that it was anyone's due diligence and/or that someone in AK would inform her. Asked if he had an Affidavit of Service serving Decision on was her he answered, No."
80. The document marked Page 13 in the Charge Document is illegible i.e. cannot be discerned by the naked eye therefore the same would not readily count as conclusive evidence.
81. If this Panel accepted the Athlete's Counsel's word that "*service was never made upon her (Athlete) of the decision banning her from taking part in athletics*" consequent to the fact that the Applicant did not produce an Affidavit of Service otherwise notifying her of her ban over her first ADRV, would that mitigate the issue of intention and fault or negligence for the Athlete regarding her active participation in all the 5 races in China? We think not for the following reasons:
82. A reading of the WADC Articles enumerated above by this Panel reveals a multiplicity of interrelated types of decisions some of which are operative in this particular case. Article 14 titled Confidentiality and Reporting and Article 14.2 in particular indicates those Articles whose 'decisions' must be notified; Article 7.10 is one amongst those and in that particular Article, the decision of a Provisional Suspension must be notified to the Athlete appropriately by ADAK/Applicant which has Results Management responsibility towards her.
83. In the WADC, the definition of Provisional Suspension as enumerated under '*Consequences of Anti-Doping Rule Violations [Consequences]:[...] means the Athlete or other Person is barred temporarily from participating in any competitions or activity prior to the final decision at a hearing conducted under Article 8*'.
84. During giving of her oral testimony, the Athlete acquiesced Counsel for the Applicant's averment that she had view of the letter notifying her of the Applicant's decision to put her under Provisional Suspension. While the Athlete denied she was aware that she had been banned, she did not deny that a Provisional Suspension (see copy of such in Page 10 of the Charge Document) had been slapped on her. In fact the apologetic tone of her letter highly suggested that it was only because 'she could not resist' the

temptation to run the races as offered to her by her manager that she propelled herself to violate her Provisional Suspension on multiple occasions.

85. In any case, during her sworn testimony at the hearing of her first ADRV on 15th November 2018 the Athlete is quoted as having said in *para.3.4* of *SDT's ADAK v. Purity Jerono TALAM, Doping Appeal No. 3 of 2018*, "*/ know why I am before the Tribunal [. ..] Got a notice from ADAK- saw the alternatives. I got the letter late after date for response to ADRV had passed[. ..]*". *Para. 5.10* in the same decision is especially indicative of her deep interaction with the Applicant's Notification Letter which explained to her about her Mandatory Provisional Suspension; the paragraph stated; *'The Respondent also attached to her documents a response made to ADAK on 25th January 2017 upon receipt of ADAK 's notification dated 4th February 2017. In her response to the usually elaborate letter from ADAK she stated in her email of 25th February 2017 as follows "Re: Hello. Am complaining about a letter u sent to me. Before I went for the race I had a toothache [. ..]. I deny the case before me [. ..]"'*. From the foregoing and turning to the present proceedings, it is our opinion that the Athlete attended the four (4) races with reckless abandon while fully aware that she was barred from doing so and in equal probability she participated in the fifth (5) despite knowing she had a case which had not released her from prior her ineligibility. Even though trying to deflect the blame on her manager, to her credit, the Athlete served an explanation to the Applicant which was essentially was an admission of the ADRV.
86. Counsel for the Athlete did not proffer any evidence to this Panel to show that the Mandatory Provisional Suspension decision slapped upon his client by the Applicant had lapsed or been otherwise rescinded, *'prior to the final decision being reached at a hearing of (the) matter'*, (see details of the Athlete's Mandatory Provisional Suspension in Pages 9-10 of the Charge Document). Rather, in his own submissions at his No. 5, Counsel for the Athlete in fact referenced such 'suspension' as follows: "*[. ..] lack of intention is proved when the athlete demonstrates that they did not know that they were committing an ADRV at the time of committing it. We submit that absent A D A K 's irrebuttable proof that the athlete was aware of the suspension, then the fair inference is that she did not intentionally commit the ADRV "* Evident during cross-examination, while giving her oral testimony, was the fact that the Athlete was sufficiently aware of such 'suspension' referred to by her own Counsel.

87. Thus overall, it was fairly self-evident that the final 'ban' decision was safely encapsulated in the Mandatory Provisional Suspension already in the Athlete's knowledge/domain.

88. WADC's Article 3.2.4 states:

3.2.4 The facts established by a decision of a court or professional disciplinary tribunal of competent jurisdiction which is not the subject of a pending appeal shall be irrebuttable evidence against the athlete or other Person to whom the decision pertained of those facts unless the athlete or other Person establishes that the decision violated principles of natural justice.

89. The Athlete's first ADRV decision has yet to be appealed and therefore remains irrebuttable evidence against her. It is also a matter of fact that the Athlete was actively represented by pro bono Counsel during the hearing of her first ADRV right from the preliminaries through to the rendering of the final decision - see *SDT's ADAK v. Purity Jerono TALAM, Doping Appeal No. 3 of 2018 paras. 2.3, 2.5 - 4.21* - therefore, that the Athlete was not aware of her final ban decision appeared a lame excuse most especially because the previous pro bono Counsel was not called by the Athlete to testify/ support her claim.

90. Further, on the issue of intent this Panel aligns itself with *SDT's ADAK v.*

Bisluke Kipkorir Kiplagat No. 53 of 2016 para. '59. Additionally, the CAS has considerably set that intent can also be indirect intent or what is termed as " *dolus eventualis* ". In *CAS 2011/A/2677 Dmitry Lapikov vs. International Weightlifting Federation (IWF)*, para. 64 the CAS pronounced itself as follows:

"[...] the term "intent" should be interpreted in a broad sense. Intent is established - of course - **if** the athlete knowingly ingests a prohibited substance. However, it suffices to qualify the athlete's behaviour as intentional, **if** the latter acts with indirect intent only, i.e. **if** the athlete's behaviour is primarily focused on one result, but in case a collateral result materializes, the latter would equally be accepted by the athlete. If - figuratively speaking - an athlete runs into a "mine field" ignoring all stop signs along his way, he may well have the primary intention of getting

through the "minefield" unharmed. However, an athlete acting in such (reckless)

manner somehow accepts that a certain result (i.e. adverse analytical finding) may

materialize and therefore acts with (indirect) intent" (CAS 2012/A/2822, para.

8.14).

"[...] the Athlete took the risk of ingesting a Specified Substance when taking the Supplement and therefore of enhancing his athletic performance. In other words, whether with full intent or per "dolus eventualis ", the Panel finds that the Appellant's approach indicates an intent on the part of the Appellant to enhance his athletic performance.

91. It is therefore the opinion of this Panel that the Applicant managed to prove on a balance of probabilities that the Athlete was aware that she was strictly required to abstain from engagement in any sanctioned athletic endeavors until a final decision was rendered by the Tribunal but she nevertheless knowingly contravened her Mandatory Provisional Suspension and along the reckless road also contravened the final ban imposed upon her for her first ADRV.
92. The lack of intention including No Fault/No Negligence limbs as argued by the Athlete's Counsel must of necessity then collapse under the weight of the Athlete's inability to resist the temptation to participate at the multiple China races that were the genesis of her second ADRV; hence the Panel infers that the Athlete intentionally committed the asserted ADRV.

B. Reduction based on No Fault/No Negligence/Knowledge;

93. Since it is already concluded above that the Applicant succeeded in establishing that the anti-doping rule violation was committed intentionally, the Panel does not deem it necessary to assess whether the Respondent may have had No fault or Negligence in committing the anti-doping rule violation.
94. The rationale being that the threshold of establishing that an anti-doping rule violation was not committed intentionally is lower than proving that an athlete had No fault or negligence in committing an anti-doping rule violation.
95. Additionally, the Tribunal finds that the above reasoning also applies to "No significant fault or negligence" (Article 10.5 of the ADAK Rules). The Tribunal observes that the comment to Article 10.5.2 of the ADAK Rules takes away any possible doubts in this respect :

"Article 10.5.2 may be applied to any anti-doping rule violation except those Articles where intent is an element of the anti-doping rule violation [...] or an element of a particular sanction (e.g., Article 10.2.1) [...]"

C. The Standard Sanction and what sanction to impose in the circumstance;

96. With respect to the appropriate period of ineligibility, Article 10.12.3 of the WADC/ADAK ADR provides:

Violation of the Prohibition of Participation during Ineligibility

Where an athlete or other Person who has been declared Ineligible violates the prohibition against participation during Ineligibility described in Article 10.12.1, the results of such participation shall be disqualified and a new period of Ineligibility equal in length to the original period of Ineligibility shall be added to the end of the original period of Ineligibility. The new period of Ineligibility may be adjusted based on the athlete or other

Person's degree of fault and other circumstances of the case.

The determination of whether an athlete or other Person has violated the prohibition against participation, and whether an adjustment is appropriate, shall be made by the anti-doping organization whose results management led to the imposition of the initial period of Ineligibility. This decision may be appealed under Article 13

Where an athlete Support Person or other Person assists a Person in violating the prohibition against participation during Ineligibility, an anti-doping organization with jurisdiction over such athlete Support Person or other Person shall impose sanctions for a violation of Article 2.9 for such assistance.

D. Summary:

97. Following are the reflections of the Panel regarding submissions of the Counsel for the Athlete at its No. 6:

"6. Separately, honorable Tribunal, Article 10.12.3 of the Rules stipulate that where an Athlete Support Person or other Person assists a Person in violating the prohibition against participation during Ineligibility, ADAK shall impose sanctions for a violation of Article 2.9 for such assistance. " The Athlete's Counsel added that, "7. We invite you to consider the fact that despite

the Athlete blaming her coach (who is an athlete support personnel) for her participation and facilitation to travel, ADAK is yet to take any action against said coach. As the Respondent averred in her Defence, it is the coach who is the real culprit and against whom action should be taken. "

- i. Specifically in this particular case, the Athlete, for her part in violating her Mandatory Provisional Suspension is kindly but firmly reminded by this Panel of her roles/ responsibilities and her express duties towards the Anti-Doping Rules as aptly laid down in the Applicant's submission at its Nos. 14-15 respectively.
- ii. Further to this, the Athlete is strongly reminded that she is responsible for her choice of Athlete Support Personnel (ASP) and for advising her ASPs that she cannot be entered in any sanctioned competitions while she is under Mandatory Provisional Suspension, see *Comments to WADC's Article 10.4.*
- iii. On the other hand this Panel calls the Applicant's attention to its same submissions in its No. 15 above, in particular the first bullet regarding ***Ethics, fair play and honesty*** and also the eighth bullet ***Respect for rules and laws:*** that equally and very importantly, it behooves the Applicant to actively pursue (and be seen to pursue) fulfilment of the totality of WADC's Article 10.12.3 in regard to all persons implicated in the Athlete's case in order to serve, (and be perceived to serve) the spirit of fairness ingrained in the Fundamental Rationale for the World Anti-Doping Code.

98. It is noted that this was the Athlete's second ADRV.

99. The original period of Ineligibility- for the Athlete's first ADRV - was four (4) years the Panel also noted.

VIII. DECISION

100. Consequent to the discussions of the merits as above,

- i. As per WADC's Article 10.12.3 the new period of Ineligibility shall be four (4) years;
- ii. The period of Ineligibility shall be from **12th February 2022** the date on which the original period of Ineligibility shall end until **11th February 2026**.