CAS 2022/A/8970 World Anti-Doping Agency (WADA) v. Slovenian Anti-Doping Organisation (SLOADO) & Dejan Mlakar

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Jeffrey G. Benz, Attorney-at-law and Barrister in London, United Kingdom

in the arbitration between

World Anti-Doping Agency (WADA), Montreal, Quebec, Canada

Represented by Mr Nicolas Zbinden and Mr Adam Taylor, Kellerhals Carrard, Lausanne, Switzerland

Appellant

and

Slovenian Anti-Doping Organisation (SLOADO), Ljubljana, Slovenia

Represented by Mr Minu A. Gvardjančič and Mr Kevin Rihtar, Ketler & Partners, Ljubljana, Slovenia

First Respondent

&

Dejan Mlakar, Ljubljana, Slovenia

Represented by Mr Blaž T. Bolcar, Bolcar Law Office, Solkan, Slovenia

Second Respondent

I. PARTIES

1. The World Anti-Doping Agency ("WADA" or "Appellant") is the independent international anti-doping agency, recognized as such by the International Olympic Committee and other organisations and governments, constituted as a private law foundation under Swiss law with its seat in Lausanne, Switzerland, and having its headquarters in Montreal, Canada. Its aim is to promote and coordinate the fight against doping in sport internationally and to harmonise and enforce standard anti-doping rules and results management processes in sport.

2. The first respondent, the Slovenian Anti-Doping Organisation ("SLOADO" or "First Respondent"), is the WADA-recognised National Anti-Doping Organisation for Slovenia and as such is responsible for anti-doping testing and results management in Slovenia.

3. The second respondent, Mr Dejan Mlakar (the "Athlete" or "Mr Mlakar") is a 34-year-old Slovenian national-level basketball player. He plays for the Litija Basketball Club in Slovenia, which competes in the Slovenian second division. He competes in 3x3 basketball competitions and is ranked 137th in the world by FIBA in this discipline. Aside from his competing in basketball, he works as a personal trainer.

4. Individually, the Appellant and the Respondents will be referred to as "Party" and collectively as "Parties."

II. FACTUAL BACKGROUND

A. Background Facts

5. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence 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 Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning. The facts are generally not in dispute.

6. On 13 August 2021, the Athlete took part in the finals of the Slovenian national 3x3 basketball championships, during which he was subject to an in-competition doping control, where he provided urine samples A and B 4615363.

7. On or around 21 September 2021, the Athlete's A-sample 4615363 was analysed at the WADA-accredited laboratory at Seibersdorf, Austria, and an Adverse Analytical Finding (an "AAF") was returned for DHCMT.

8. The substance DHCMT is a Non-specified Substance prohibited at all times pursuant to Section 1.1 (Anabolic Androgenic Steroids) of the WADA Prohibited List.

B. Proceedings Before the Previous Instance

9. On 24 September 2021, SLOADO sent a "Notice of a suspected breach of anti-doping rules" to the Athlete in relation to potential anti-doping rule violations (individually, an "ADRV") pursuant to Article 7.1 and Article 7.2 of the Anti-Doping Rules of the Slovenian Anti-Doping Organisation ("the SLOADO ADR"). The Athlete was provisionally suspended from the same date.

10. On 29 September 2021 an interview took place between SLOADO and the Athlete, during which he confirmed that he did not request analysis of his B-sample. He also explained that he had undergone a left-knee ACL surgery one-and-a-half years ago.

11. On 30 September 2021, the Athlete provided a written statement, in which he stated that he had all or many of the supplements he had consumed at his home, in the same packaging as they were at the time of testing (presumably, the doping control) and that he was ready to bring them in for testing.

12. The Athlete also attached a table of 27 supplements and mentioned six other products/factors that he had been taking in the six months prior to him learning of the alleged ADRVs.

13. On 16 November 2021, a hearing took placed before the SLOADO Disciplinary Board.

14. On 11 January 2022, the SLOADO Disciplinary Board handed down a decision, in which it held that the Athlete had committed an ADRV and that he was to be sanctioned with a period of Ineligibility of six months ("the First Instance Decision").

15. On 30 January 2022, SLOADO appealed against the First Instance Decision, to the SLOADO Appeals Body, thereby requesting an increased period of Ineligibility of at least two years.

16. As part of the appeal, the Athlete filed a letter from the Slovenian Basketball Federation, which explained that by April 2021, the Athlete was still not fully recovered from his ACL injury, so as to be able to play competitively. The Athlete also explained that he felt himself to have had a realistic chance of qualifying for, and competing at, the Tokyo Olympic Games in the summer of 2021.

17. On 20 April 2022, a hearing was held before a panel of the SLOADO Appeals Body.

18. Also on 20 April 2022, a panel of the SLOADO Appeals Body handed down a decision, in which it held that the Athlete had committed an ADRV and that he was to be sanctioned with a period of Ineligibility of two years ("the Appealed Decision"). The reasoning of the panel of the SLOADO Appeals Body was as follows:

    (i) The panel recognised that the appropriate period of Ineligibility was four years unless the Athlete could prove that he did not take the Non-specified Prohibited Substance intentionally (para. 28).

(ii) The panel recognised that it was incumbent upon the Athlete to explain and to prove how the Prohibited Substance entered his body and also that he acted unintentionally, in order to reduce the (starting point) sanction (para. 29).

(iii) The panel held:

"*37. At no point has the athlete demonstrated how this substance came to be in his body. Regarding the suspected contamination, he merely stated that he obviously ingested the substance through the many dietary supplements to which he referred and which have supposedly not been labelled as containing a prohibited substance. However, without any proof, this is merely speculation. Likewise, his claim that he was unable to afford laboratory tests is not supported by any proof. Moreover, it is the case that the athlete could also have offered other proof, e.g. made enquiries with individual manufacturers whose products he had consumed, as the above-mentioned rules state that contamination is only established if the athlete, in addition to checking the label, made a reasonable internet search. The athlete did not state that he had made any checks, either prior to consuming the supplements or after it was established that a prohibited substance had entered his body. Therefore, no assessment can be made as to whether his checks were 'reasonable'. The athlete's assertion, i.e. that this was 'impractical', is evidence of his erroneous belief that any check is 'unreasonable', which is without foundation and contrary to the Rules.*

38. Contamination was therefore not established (proved) […]

39. The DB also gave too much weight to the athlete's denial that he had (intentionally) engaged in doping. The athlete's denial of intentional or conscious consumption of prohibited substances, no matter how convincing, is unable to prove his innocence; if it were, it would mean that it would be practically impossible to sanction any doping offence at all, i.e. it would be sufficient merely for an athlete to deny taking prohibited substances and simply say that they took a preparation in good faith. The athlete's statement that, at the time the sample was taken, he was engaged in planning a family and that his partner conceived at exactly this time is a merely an indication that should speak against deliberate doping. However, it is not a sufficiently strong argument in itself. It is not explained (stated), let alone proved, how the substances detected would affect adversely a foetus, and in what quantities, and what effect the quantity of the substance found in the athlete's sample would have in relation to the time in which in entered the body."

(iv) The panel then held that the appropriate period of Ineligibility was two years, rather than four years, because it was an unintentional violation. This appears to have been based on SLOADO's acceptance that the violation was committed unintentionally. In its submissions at first instance, SLOADO asked for a four-year period of Ineligibility unless the Athlete could prove absence of intent to dope. In its statement of appeal, SLOADO requested two years and *"(at least) two*

years" within various sections. Indeed, as SLOADO apparently only sought a period of ineligibility of two years on that basis, it was presumably not open to the panel to impose a greater sanction (paras. 40 and 44).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. On 14 June 2022, WADA filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Appealed Decision, in accordance with Articles R47 and R48 of the 2021 edition of the CAS Code of Sports-related Arbitration (the "Code"). In this submission, the Appellant requested the appointment of a sole arbitrator.

20. On 23 June 2022, the Appellant filed its Appeal Brief, in accordance with Article R51 of the Code.

21. On 27 June 2022, both Respondents agreed with the appointment of a sole arbitrator.

22. On 10 August 2022, in accordance with Article R54 CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the arbitral tribunal appointed to decide the present matter was constituted as follows:

    Sole Arbitrator: Mr Jeffrey G. Benz, Attorney-at-law in London, United Kingdom

23. On 9 and 10 August 2022, respectively, in accordance with Article R55 of the Code, the First and Second Respondent each filed their Answer.

24. On 19 August 2022, the CAS Court Office informed the parties that the Sole Arbitrator had decided to hold a hearing.

25. On 26 September 2022, the CAS Court Office provided the Parties with an Order of Procedure, which was duly signed and returned by the First Respondent on 26 September 2022, by the Second Respondent on 27 September 2022 and by the Appellant on 3 October 2022, respectively.

26. On 2 November 2022, a hearing was held by video-conference. At the outset of the hearing, the Parties confirmed that they had no objection as to the constitution and composition of the arbitral tribunal.

27. In addition to the Sole Arbitrator and Ms Delphine Deschenaux-Rochat, Counsel to the CAS, the following persons attended the hearing:

    a) For WADA:
       Mr Adam Taylor, Counsel
       Mr Ross Wenzel, General Counsel at WADA

b) For SLOADO:
Mr Kevin Rihtar, Counsel
Ms Minu Anamaria Gvardjančič, Counsel
Mr Janko Dvoršak, Director of SLOADO

c) For the Athlete:
The Athlete
Mr Blaž T. Bolcar, Counsel

28. The Sole Arbitrator heard evidence from the Player.

29. All parties were given full opportunity to present their cases, submit their arguments and to answer the questions posed by the Sole Arbitrator.

30. Before the hearing was concluded, all parties expressly stated that they had no objection to the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.

31. The Sole Arbitrator confirms that he carefully heard and took into account in its decision all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES

32. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this Award, the Sole Arbitrator has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. Appellant's Submissions

33. WADA's submissions may in essence be summarized as follows:

a. The sanction of two years was impermissible under relevant code provisions and caselaw. To prove lack of intention for purposes of reducing a sanction from 4 years to 2 years, the athlete must show how the substance entered his or her body. Even in the few CAS awards that have departed, ever so slightly, from this strict requirement and found that a lack of intention could theoretically be established without establishing the origin of the Prohibited Substance, these routes have been described as "the narrowest of corridors", "in but the rarest cases the issue is academic", and "it is not impossible". Only in the rarest of cases will an athlete be able to establish lack of intention without having demonstrated how the substance entered the athlete's body.

b. Protestations of innocence, no matter how credible they may appear, carry no material weight in the analysis of intention or lack of intention. The same rule applies to a "lack of a demonstrable sporting incentive to dope, diligent attempts to discover the origin of the prohibited substance or the athlete's clean record". An athlete must do more than simply make such protestations or declarations of innocence, they must provide actual evidence to support those statements. Mere speculation, without more, is irrelevant.

c. Here, the Athlete has not proven the origin of his ingestion of the Prohibited substance and has not proven a lack of intention to commit the ADRV of which he has been charged. The athlete provided a long list of 27 different products he claimed he was taking within the six months preceding his positive test. Some of the supplements on the list have no ingredients listed. Some have no hyperlinks to relevant websites. The majority of the working hyperlinks are to supplement shops selling the product rather than to the manufacturers' own websites. Some of the supplements listed appear to have been marketed with the type of extreme language that should have been a red flag to the athlete, such as "BCAA Xplode Powder", the link to the shop selling which contains the statement "feel a powerful anabolic explosion of your muscles", "BCAA Xplode is the extreme dose", and "the largest dose of BCAA powder on the market."

d. The Athlete has provided no evidence he actually purchased or consumed any of these supplements and he has provided no evidence of testing of any of these supplements to demonstrate that they were contaminated, although he admitted that many of those supplements were still in his possession. The Athlete also did not make any inquiry of the supplements manufacturers as to the contents of their supplements or whether there was contamination after he learned of his AAF.

e. On his doping control form for the test that gave rise to his AAF, the Athlete merely disclosed taking "D vitamin."

f. The scenario of the Athlete possibly doping is entirely realistic. He is 34 years old, approaching the end of his basketball career, in a sport that requires high levels of fitness, agility, muscular power, and explosive movements. He had recently suffered a serious injury, namely an ACL tear, requiring surgery and rehabilitation.

g. The sole factor relied upon by the Athlete as making his doping intention unlikely is that he and his partner were trying to conceive a child. The Athlete supplied no evidence that taking anabolic androgenic steroids could have any effect on fertility or the development of an embryo or foetus. Similarly, there was no evidence presented suggesting that there was any proof that he and his partner were trying to conceive a child, nor any evidence that the ingestion occurred within the window where the Athlete and his partner were allegedly trying to conceive.

h. If that was not enough, the Athlete was clearly reckless in consuming so many supplements within a single six month period without making any appropriate checks or consultations, especially given the well-known risk of contamination

linked to supplements usage.

i. Even if the Sole Arbitrator was to find lack of intention for reducing the maximum sanction from 4 years to 2 years, the Athlete could not benefit from the No Significant Fault provision of the relevant code because that specifically requires the origin of ingestion to be proven.

34. WADA requests the following relief:

"*1. The appeal of WADA is admissible.*

2. The decision dated 20 April 2022 rendered by the SLOADO Appeals Body in the matter of Mr […] Mlakar is set aside.

3. Mr […] Mlakar is found to have committed an anti-doping rule violation pursuant to Article 7.1 and/or Article 7.2 of the Anti-Doping Rules of the Slovenian Anti-Doping Organisation.

4. Mr […] Mlakar is sanctioned with a four-year period of ineligibility starting on the date on which the CAS Appeals Division award enters into force. Any period of provisional suspension and/or ineligibility effectively served by Mr […] Mlakar before the entry into force of the CAS Appeals Division award shall be credited against the total period of ineligibility to be served.

5. All competitive results obtained by Mr […] Mlakar from and including 13 August 2021 until the date on which the CAS Appeals Division award enters into force are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

6. The First Respondent, alternatively the Respondents jointly and severally, are ordered to bear the arbitration costs of these proceedings.

7. The Respondents are ordered to make a substantial contribution to WADA's legal and other costs in connection with these proceedings."

B. SLOADO's Submissions

35. SLOADO's submissions may in essence be summarized as follows:

a. The Athlete fully participated in all proceedings, he has not been previously sanctioned for an ADRV, is not a high-earning professional athlete with high aspirations in his discipline, and SLOADO and the relevant tribunal were convinced that the Athlete and his partner were trying to conceive a child during the period of alleged doping offence and since it is commonly known that the use of steroids can cause erectile dysfunction and impotence, and have a major effect on sperm production and significantly deplete sperm count, it is not unreasonable to expect

that the Athlete would not intentionally do something that would potentially endanger these efforts.

b. It is not a strict requirement that an athlete shows the origin of the substance to show lack of intention to reduce the sanction from 4 years to 2 years like it is for an athlete to show no significant fault or negligence. There are cases that suggest that CAS panels may consider other matters beyond origin or ingestion of the substance to reduce the base sanction.

c. In accordance with principles of fairness, the Athlete's burden of proof may not be too burdensome or it might never be possible for an athlete to establish the relevant threshold. This is especially true for an athlete who is not a high-earning professional as in this case. SLOADO, and its first instance and appellate organs, are better equipped than WADA to assess whether the relevant threshold has been met for this athlete. The appealed decision is correct.

d. Although SLOADO accepts that deviation from the requirement that the athlete must establish the source of the Prohibited Substance would risk principles embodied in the World Anti-Doping Code, the exceptions on source must still be reachable for athletes who truly do not intend to cheat but cannot, for whichever reason, prove the source. In the present case, while there is no objective evidence establishing contamination, SLOADO cannot agree with WADA that only such scientific evidence is relevant. There are cases where, like the present one, common sense should be taken into consideration and together with the principle of fairness enable consideration of circumstances "due to which any normal human being would sustain from Prohibited Substances, such as efforts in relation to conceiving a child and creating a family", and where the Athlete has committed to participating in the procedure at all levels, offered to participate in anti-doping awareness campaigns, and has a clean prior record.

e. SLOADO is of the view that the Sole Arbitrator should follow guidance from CAS 2020/A/7579 WADA v. Swimming Australia & Shayna Jack (companion case to CAS 2020/A/7580) as follows:

"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."

f. SLOADO also asserts that should the Sole Arbitrator not agree with its position, the arbitration costs and contribution to WADA's legal fees requests for relief made by WADA should not be accepted. SLOADO is a private entity with extremely limited resources. The agreement between SLOADO and the Slovenian government for government funding of EUR 234,000 only covers testing costs. In

this case SLOADA advocated for expedited proceedings and limited its procedural activity so as to limit the costs of these proceedings. SLOADO also does not have any control over the decisions of its independent adjudicatory bodies. Accordingly, it would not be fair, and would damage anti-doping efforts in Slovenia, to award fees and costs against SLOADO.

36. SLOADO seeks the following relief:

"*1. The Appeal of WADA is admissible but unfounded.*

2. The decision dated 20 April 2022 rendered by the SLOADO Appeal Body in the matter of Mr […] Mlakar is upheld.

3. WADA is ordered to bear the arbitration costs of these proceedings.

4. WADA is ordered to make a substantial contribution to SLOADO's legal and other costs in relation with these proceedings."

C. The Athlete's Submissions

37. The Athlete's submissions may in essence be summarized as follows:

a. The Athlete denies that he knowingly ingested any prohibited substance.

b. He contends that he must have ingested the prohibited substance from one of the 27 nutritional supplements he had been taking in the 6 months preceding the collection of the Sample.

c. He contends that he had no incentive to ingest a prohibited substance because, chiefly, he and his partner were attempting to have a child, had received advice from a doctor that he should eat healthy and otherwise act healthy in order to do so, and as a result he would not risk their efforts to have a child by ingesting a prohibited substance, in particular an anabolic steroid.

d. He contends that he is not a professional athlete and should not be treated as if he is one. He is merely a recreational athlete and should be treated as that, and accordingly the 2 year sanction was appropriate.

38. The Athlete seeks the following relief:

"*i. The WADA's Appeal to be found as unfounded and the SLOADO's Appeal Panel's decision dates 20 April 2022 in the matter of Mr. […] Mlakar to be upheld.*

ii. WADA is ordered to bear the costs of these arbitral proceedings.

iii. WADA is ordered to make a substantial contribution towards Mr. […] Mlakar's legal costs and expenses in relation to these arbitral proceedings.".

V. JURISDICTION

39. Article R47 of the Code provides in pertinent part as follows:

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

40. Article 59.2 of the SLOADO ADR provides that WADA may appeal decisions taken against athletes other than International Athletes (as set forth in Article 58.2 of the SLOADO ADR).

41. The Sole Arbitrator notes that the Appealed Decision involving the Athlete, as appealed by WADA, meets the requirements of the SLOADO for appeal.

42. Moreover, the Sole Arbitrator notes that jurisdiction of the CAS is not disputed by any Party and all Parties signed the Order of Procedure, providing further evidence of acceptance and appropriateness of CAS jurisdiction.

43. The Sole Arbitrator therefore finds that CAS holds jurisdiction to decide on the present matter.

VI. ADMISSIBILITY

44. 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. […]*"

45. The deadline for appeal found in Art. 62.1 of the SLOADO ADR corresponds to Art. R49 of the Code, setting forth the same time limit.

46. In the case of an appeal by WADA, the time limit starts running from the receipt of the complete case file, which was communicated to WADA on 24 May 2022.

47. On 14 June 2022, WADA filed its Statement of Appeal against the Appealed Decision with the CAS Court Office. Consequently, the Appellant complied with the time limits prescribed by the Code.

48. No Party has objected to the admissibility of this appeal and in fact all Parties have participated in this proceeding fully without objection on this basis.

49. The Sole Arbitrator finds that the Appeal was therefore filed in time and is admissible.

VII. APPLICABLE LAW

50. 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.*"

51. The Appealed Decision was rendered by the SLOADO Appeals Body in application of the SLOADO ADR, which are therefore applicable to the present appeal.

52. Article 7.1 and/or Article 7.2 of the SLOADO ADR provide as follows:

> "*7.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample*
>
> *7.1.1 It is the Athletes' personal duty to ensure that no Prohibited Substance enters their bodies. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 7.1.*
>
> *7.1.2 Sufficient proof of an anti-doping rule violation under Article 7.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or, where the Athlete's A or B Sample is split into two (2) parts and the analysis of the confirmation part of the split Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first part of the split Sample or the Athlete waives analysis of the confirmation part of the split Sample.*
>
> *7.1.3 Excepting those substances for which a Decision Limit is specifically identified in the Prohibited List or a Technical Document, the presence of any reported quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation. […]*

7.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

7.2.1 It is the Athletes' personal duty to ensure that no Prohibited Substance enters their bodies and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.

7.2.2 The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method."

53. Article 39.1(a) of the SLOADO ADR states in pertinent part as follows:

"*39.1 The period of Ineligibility, subject to Article 39.4, shall be four (4) years where:*

a) The anti-doping rule violation does not involve a Specified Substance or a Specified Method, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional…"

54. The comment to Article 10.2.1.1 of the WADC 2021 (the equivalent article of the 2020 World Anti-Doping Code ("2020 WADA Code")), states:

"*While it is theoretically possible for an Athlete or other Person 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.*"

VIII. MERITS

A. The Issues

55. WADA maintains that the Athlete committed an ADRV pursuant to Article 7.1 and/or 7.2 of the SLOADO ADR (presence and use, respectively, of the prohibited substance).

56. In respect of Article 7.1, the Athlete has committed an ADRV because his A-sample returned an AAF and he waived his right to B-sample analysis and did not challenge the laboratory evidence. Article 7.1 is essentially a strict liability offence when the conditions therein are satisfied. As per the comment to Article 2.1.1 in the WADC 2021: "*An anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as 'Strict Liability'.*". There is no dispute concerning the Athlete's commission of the ADRV, which is not a live issue on this appeal.

57. In respect of Article 7.2, the presence of DHCMT in the Athlete's A-sample implies that he must have Used the steroid. This is also a strict liability offence. The Athlete has therefore also committed an Article 7.2 ADRV.

58. The only issue at issue is the length of the sanction.

B. The Intention Requirement and its Treatment by CAS Cases

59. Article 39.1(a) of the SLOADO ADR states:

"*39.1 The period of Ineligibility, subject to Article 39.4, shall be four (4) years where:*

a) The anti-doping rule violation does not involve a Specified Substance or a Specified Method, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional."

60. The comment to Article 10.2.1.1 of the WADC 2021 (the equivalent article of the 2020 WADA Code), states:

"*While it is theoretically possible for an Athlete or other Person 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.*"

61. This provision of the WADA Code, and its comment, and the related organizational enactments have been interpreted repeatedly by CAS cases.

62. The test in relation to intention, in the words of the Panel in CAS 2017/A/5016 & 5036, is whether the athlete has "*proven, by a balance of probabilities, 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*".

63. For the purposes of this test, a whole series of CAS cases have held that the athlete must necessarily establish how the substance entered his/her body (see, for example, (i) CAS 2017/A/5248 WADA v. Africa Zone V RADO & ADAK & Eliud Musumba Ayiro, para. 55; (ii) CAS 2017/A/5295 WADA v. ADAK & Athletics Kenya & Sally Chelagat Kipyego, para. 105; (iii) CAS 2017/A/5335 WADA v. Mohammad Yaseen Alhasan, para. 137; (iv) CAS 2017/A/5392 FINA v. Georgia Anti-Doping Agency & Eastern Europe RADO & Irakli Bolkvadze, para. 63; and (v) CAS 2018/A/5570 Denislav Dimitrov Ivanov v. IJF, para. 51).

64. Certain CAS awards have (ever so) slightly departed from the strictness of this line of cases and found that a lack of intent could theoretically be established without establishing the origin of the Prohibited Substance, though this would be in the rarest of circumstances. For example:

(i) In CAS 2016/A/4534 Villanueva v. FINA, the Panel held that "[w]*here 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*" (para. 37).

(ii) In CAS 2016/A/4919 WADA v. WSF & Iqbal, the Panel concluded that "*while this Panel assumes in favour of the Athlete that he does not have to necessarily establish how the prohibited 19-NA entered his system when attempting to prove on a balance of probability the absence of intent, in all but the rarest cases the issue is academic*."

(iii) In CAS 2021/A/7579 & 7580 WADA v Swimming Australia, Sport Integrity Australia & Shayna Jack: "*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.*" (para. 148)

65. This principle (*i.e.*, the narrow scope of the exception) has even been codified in the WADC 2021, as already quoted above.

66. There is good reason for this interpretation. Protestations of innocence, as has been noted by many a CAS panel, are the common currency of the guilty and innocent, not just in anti-doping cases but also in other areas of society where wrongdoing is alleged against an individual. Indeed, as stated by the Panel in *Iannone* (at para. 134):

"*Even in such cases* [where intent can be demonstrated without establishing the origin], *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).*"

67. If arbitral panels were to decide the question of intention based on their subjective appreciation of an athlete's, and an athlete's entourage's, simple declarations of non-culpability alone – as opposed to some additional reference to some form of concrete and specific corroborating evidence – the proverbial floodgates would open for tribunals around the world to render inconsistent decisions based on the lowest form of evidence. This would surely risk undermining the core principles of the WADA Code and the fight against doping, in particular harmonization of sanctions, in a manner that would be unfair to all athletes' ability to compete on a level playing field.

68. Similarly, the same principle applies to a "*lack of a demonstrable sporting incentive to dope, diligent attempts to discover the origin of the prohibited substance or the athlete's clean record*" by themselves, which bases have also been consistently rejected as justifications for a plea of lack of intention (*See* CAS 2017/O/5218 IAAF v. RusAF & Kopeykin, para. 166; CAS 2018/A/5584 Zielinski v. POLADA, para. 139; CAS

2019/A/6213 WADA v. CADC & CSF & Kaskova, para. 65). An athlete must do more and provide actual evidence to support protestations of innocence.

69. In addition, mere speculation is irrelevant. In the words of the Panel in the *Abdelrahman* award:

"*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.* […] *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*."

(CAS 2017/A/5016 & 5036 Abdelrahman v. WADA & EgyNADO, para. 125; *see also* CAS 2017/A/5260 WADA v. SAIDS & Pena, para. 153; CAS 2017/A/5369 WADA v. SAIDS & Gilbert, para. 148.)

70. In terms of additional evidence that an athlete might adduce to satisfy his/her burden of proof, the case law on the establishment of origin applies by analogy. In particular, as per CAS 2014/A/3820 WADA v. Damar Robinson & JADCO, "*an athlete must provide actual evidence as opposed to mere speculation*" (para. 80). This burden lies solely on the athlete.

71. As to the standard of proof, the balance of probability standard entails that the athlete has the burden of convincing the panel that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence. In this respect, to show that an explanation is possible is not enough. As noted by the Panel in CAS 2020/A/6978 & 7068 (para. 162), "*"possible" is not the same as probable. All things which do not defy the law of science are in one sense possible. However, it was for [the athlete] to prove that his meat contamination scenario is more likely than not. And in the Panel's view, he has failed to do so at every critical stage of his submission.*"

72. In CAS 2017/A/4962 World Anti-Doping Agency v. Comitato Permanente Antidoping San Marino NADO & Karim Gharbi, the tribunal made clear that it will not suffice to afford a reduction in sanction if an athlete simply blames contamination of a supplement he or she was supposedly taking at the time, without further specific evidence regarding the contamination of the particular supplement that was allegedly taken:

"*44. However, as the CPA found, there was no evidence that supplements (allegedly) innocently taken by the Athlete were contaminated, with DHCMT or at all. Whether or not the Athlete can be excused (for financial reasons or otherwise) from testing the supplements he had taken and kept, would not, in any case, change that fact.*

45. The two published papers produced on behalf of the Athlete at the hearing on 8

May 2017 take the matter no further at all. Dated 2004 and 2008, they reported on the results of investigations in 2000-2002, largely relating to "faked" prohormones and cross-contamination. The reported fact that out of 634 samples of non-hormonal nutritional supplements, some 15% contained small amounts of various steroids, whether intentionally or not, does not add materially to the knowledge of the cause of the DHCMT in the Athlete's body.

46. *In particular, these old studies provide no specific information as regards the supplements allegedly purchased and taken by the Athlete, which might very well be entirely different in relation to any risk of accidental contamination in the light of more recent practices and standards as regards nutritional supplements in the supermarket.*

47. *This late attempt to challenge the CPA's findings on behalf of the Athlete was not properly developed and was potentially disruptive, and must in any event fail.*

[…]

51. *To establish the origin of the prohibited substance, it is nowhere near enough for an athlete to protest innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which he or she was taking at the relevant time.*

52. *Rather, an athlete must adduce actual evidence to demonstrate that a particular product ingested by him or her contained the substance in question, as a preliminary to seeking to prove that it was unintentional, or without fault or negligence.*

53. *Some previous expressions regarding this test were recently referred to in CAS 2016/A/4662 as including the following points among others:*

    a. *"The raising of an unverified hypothesis is not the same as clearly establishing the facts" (CAS 99/A/234 & 235) and "The Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred" (CAS 2006/A/1067).*

    b. *"To permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination - two prevalent explanations volunteered by athletes for such presence - do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature for the athlete's basic personal duty to ensure that no prohibited substances enter his body" (CAS 2010/A/2230).*

54. *In the present case, the Athlete's contention that he must have ingested the DHCMT from contaminated supplements had no evidentiary basis at all by reference to (including test results of) the supplements he had allegedly taken or from any other*

persuasive source. If such an "explanation" was dispositive, any athlete whose body contained a prohibited drug could assert that it had come from contaminated supplements of any sort. That would destroy the effectiveness of WADC and of the anti-doping regulations based on it and amount to a license to cheat and an abject surrender in the battle against doping."

73. Similarly, as to the need for specific evidence in contamination cases, in CAS 2012/A/2807 Al Eid v Fédération Equestre Internationale it was held:

"*10.7 The evidence of Dr. Abdelkarim, the treating veterinarian at the Riyadh International Riding School, provided an explanation for the fairly wide availability of Bute at the facility. It was argued that this evidence, when taken with all of the other evidence adduced by Al Eid, should have the cumulative effect of enabling Al Eid to meet his burden. The problem with this approach is that it would enable someone in the position of Al Eid to discharge his burden by putting forward a theory of inadvertent contamination and requiring that the theory be accepted, by default, because of the absence of any other explanation or evidence. As a CAS Panel observed in CAS 2010/A/2230, which was an anti-doping case involving a Specified Substance, at paragraph 11.5: . . .*

An athlete cannot by asserting even with what purports to be corroborative testimony to the same effect, that he did not intend to enhance sport performance thereby alone establishing how the substance entered his body. Seeking to eliminate by such an approach all alternative hypotheses as to how the substance entered his body and thus to proffer the conclusion that what remains must be the truth reflects the reasoning attributed to the legendary fictional detective Sherlock Holmes by Sir Arthur Conan Doyle in "The Sign of Four" but is reasoning impermissible for a judicial officer or body"."

74. Further as to the case quoted immediately above of CAS 2010/A/2230 International Wheelchair Basketball Federation v UKAD & Gibbs, the tribunal also held therein:

"*In the Sole Arbitrator's view, the requirement that Condition (i*) [the athlete must establish how the specified substance entered his/her body] *be satisfied is prima facie proportionate. To permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body. The Sole Arbitrator has sympathy with athletes who are – as, he accepts they can be – victims of spiking without evidence to prove its occurrence; but the possible unfairness to such athletes is outweighed by unfairness to all athletes if proferred, but maybe untruthful, explanations of spiking are too readily accepted.*"

75. In CAS 2021/A/7579 & 7580 WADA v Swimming Australia, Sport Integrity Australia & Shayna Jack, the panel reviewed the case law on the issue of proving intent. As to contamination cases specifically, it was held:

"*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.*" (para. 133)

"*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.*" (para. 155)

"*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.*" (para. 172).

76. In the present case, the Athlete has not proven the origin of ingestion, and he has not proven a lack of intention to commit the ADRV.

77. At most, the Athlete provided a long list of the many supplement products that he had supposedly been consuming, with links to the relevant websites for the supplements. As to this list:

(i) The list consisted of at least 27 different products that the Athlete was supposedly taking within the six-month period pre-dating his positive test; a veritable *smorgasbord*. This is an astonishing number of supplements.

(ii) Some of the supplements listed have no ingredients mentioned.

(iii) Some of the supplements mentioned have no hyperlinks to relevant websites. In short, they are "bare" references to supplements.

(iv) The majority of the working hyperlinks are to supplement shops selling the product, rather than to the manufacturers' own websites.

(v) At least some of the supplements appear to be marketed with the type of extreme language that should have been a red flag to the Athlete. For example, as to "BCAA Xplode Powder", the supplement shop to which the Athlete provided a link states: *"feel a powerful anabolic explosion of your muscles", "BCAA Xplode is the extreme dose"* and *"the largest dose of BCAA powder on the market"*.

78. The Athlete has provided little evidence of the nature or contents of the supplements, or his consumption of them. He has not provided any proof of purchase of any of them. He listed nothing except "D vitamin" on his Doping Control Form. He has not personally provided any images of the products (*i.e. showing them to be in his possession*). He has not provided any evidence of the products' contents, but he has instead merely provided a website hyperlink for most (but not all) of the products. He has failed to state the ingredients of several of the supplements. He has failed to provide information from the manufacturers of the products, including from the manufacturers' own websites, for many of the products.

79. Furthermore, the Athlete has taken no steps to evidence his contamination theory. He has not contacted any of the manufacturers to inquire as to their manufacturing processes and the potential for contamination therein. He has not had any of the open or unsealed supplement products tested. He has not conducted testing on any sealed samples from the same batches. In short, his contamination theory is pure speculation.

80. Yet the Athlete indicated in the first instance proceeding that he still had the supplements in his possession. He therefore had the possibility to take the necessary steps, but he did not do so. As the second instance appeal panel found, his sole excuse for not doing so, namely financial limitations, was rejected as unproven, and he offered no evidence of his financial situation in this proceeding.

81. The case for the Athlete doping here is realistic:

(i) The Athlete is 34 years old, approaching the end of his career in basketball, a sport that (especially in its 3x3 discipline) requires high levels of fitness, agility, muscular power, and explosive movement. He would therefore naturally find himself less competitive than in previous years, and this would have given him reason to seek corrective measures, of which one obvious measure is illegal doping.

(ii) The Athlete had recently suffered a serious injury, namely an ACL tear, requiring surgery and rehabilitation. In such a scenario, the Athlete would have noted his own limitations and vulnerabilities post-surgery and he would have required rapid progress in his rehabilitation. He testified he had suffered two prior serious knee or leg injuries requiring surgery earlier in his life as well. One obvious measure for accelerating the recovery process (or for hiding any residual limitations following the surgery) would be illegal doping.

(iii) The sole factor relied upon by the Athlete, and apparently the factfinder in the proceedings below, is that he and his partner were trying to conceive a child. That is unrealistic as a motivation for not doping. The Athlete has supplied no evidence to suggest that taking anabolic androgenic steroids could have any effect on the development of an embryo or foetus, which would somehow require transfer of the steroids into the spermatozoa of the Athlete. In any event, no evidence has been provided (for example from the Athlete's partner or a doctor) suggesting that

there was any context of the Athlete and his partner trying to conceive a child, nor any evidence that the ingestion occurred within the unspecified window where the Athlete and his partner were allegedly trying to conceive.

82. Assuming that, despite the evidentiary failings noted above, the Athlete was somehow able to prove that one of the supplements he allegedly took was the source of his AAF, he would still have had indirect intent to dope (recklessness with respect to his anti-doping obligation to avoid ingesting a prohibited substance). Indirect intent is present where: "*the Player i) knew that there was a significant risk that his conduct might constitute or result in an anti-doping rule violation; and ii) manifestly disregarded that risk.*" CAS 2016/A/4609 WADA v. Indian NADA & Dane Pereira, para. 62. Put more colourfully: "*If – figuratively speaking – an athlete runs into a "minefield" 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 Erkand Qerimaj v. IWF, para. 8.14.

83. CAS Panels have highlighted the likelihood of a finding of indirect intent in supplement cases, when an athlete does nothing to check ingredients, in CAS 2016/A/4716 Cole Henning v. South African Institute for Drug- Free Sport (SAIDS), at paragraph 74: "*It is clear to the Sole Arbitrator that the Appellant had to have known that his conduct in carelessly ingesting a variety of supplements and products, without investigating whether any of them contained any Prohibited Substances, particularly at a time when he was aware that certain substances are banned, highlights an awareness on the part of the Appellant that there existed a risk that this conduct might constitute of result in an ADRV, which risk he manifestly disregarded.*"

84. Indirect intent clearly applies to the Athlete's case as a result of his apparent recklessness in consuming admittedly at least 27 supplements within a single six month-period, without making any appropriate checks or consultations (*i.e.* no reference to the manufacturers re their processes, no reference to a specialist sports doctor). The Athlete is a more mature and experienced competitor, he was even in a position of responsibility and education to others as a personal trainer, and he simply should have known better. That he provided no evidence whatsoever of actual contamination or his basis for ingestion is clearly fatal to his defense.

85. The Athlete has argued that the rules that apply to professional athletes should not apply to him because he does not derive his livelihood from playing basketball and in fact loses money in his athletic endeavours in basketball. There is no authority cited for this proposition. This kind of argument sounds heavily in the realm of policy rather than law. It is not for this Sole Arbitrator to legislate a new basis for finding a defense to culpability under the WADA Code. Though the Athlete did not argue it directly, it is clear that there is no *lacuna* or gap here in the WADA Code; rather it appears that WADA considered in its drafting of the current version of the WADA Code (and in the earlier versions) who should be covered by the obligations imposed by the WADA Code, and the Athlete falls within that ambit.

86. As a result, the Sole Arbitrator determines that the Athlete has failed to establish the principal, and really the only, element that would justify reducing the standard sanction from 4 years to 2 years, namely lack of intention. Having made this determination, which is a predicate to further analysis, there is no need or basis for the Sole Arbitrator to analyse the Athlete's fault or lack thereof. It appears that in the proceeding below, the SLOADO Appeals Panel gave many reasons why it would be unable to reduce the base sanction from 4 years to 2 years but was dissuaded from doing so in its decision by submissions made by SLOADO suggesting, or agreeing, that this should be a 2-year sanction case. The Sole Arbitrator cannot find that those bases here support a reduction of the base sanction from 4 years to 2 years, for the reasons stated above.

87. With respect to disqualification of results, Article 47 of the SLOADO ADR provides as follows:

"*ARTICLE 47 DISQUALIFICATION OF RESULTS IN COMPETITIONS SUBSEQUENT TO SAMPLE COLLECTION OR COMMISSION OF AN ANTI-DOPING RULE VIOLATION*

In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Part VIII all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes."

88. In the present case, the Sole Arbitrator determines that all of the Athlete's results from 13 August 2021 should be disqualified. This is a mandatory requirement unless the Athlete can meet his burden of proof to show that fairness requires that his results should not be disqualified. That simply cannot be justified in the present case in circumstances where the origin of the prohibited substance remains entirely unclear.

IX. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by World Anti-Doping Agency on 14 June 2020 against the decision rendered by the Appeals Body of the Slovenian Anti-Doping Organisation on 20 April 2022 is upheld.

2. The decision rendered by the Appeals Body of the Slovenian Anti-Doping Organisation on 20 April 2022 is set aside.

3. Mr Dejan Mlakar is found to have committed an anti-doping rule violation pursuant to Articles 7.1 and 7.2 of the Anti-Doping Rules of the Slovenian Anti-Doping Organisation. Mr Dejan Mlakar is sanctioned with a four-year period of ineligibility starting on the date on which the CAS Appeals Arbitration Division award enters into force. Any period of provisional suspension and/or ineligibility effectively served by Mr Dejan Mlakar before the entry into force of the CAS Appeals Arbitration Division award shall be credited against the total period of ineligibility to be served. All competitive results obtained by Mr Dejan Mlakar from and including 13 August 2021 until the date set forth below are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

4. (…).

5. (…).

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

Seat of arbitration: Lausanne, Switzerland
Date: 13 June 2023

THE COURT OF ARBITRATION FOR SPORT

Jeffrey G. Benz
Sole Arbitrator