CAS A1/2020 Shayna Jack v. Swimming Australia & Australian Sports Anti-Doping Authority

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Alan Sullivan QC, Sydney, Australia

Ad hoc Clerk: Mr Harry Cook, Sydney Australia

in the arbitration between

Ms Shayna Jack, Brisbane, Queensland, Australia

Represented by Mr Peter Baston, Barrister, Brisbane, Australia

Applicant

and

Swimming Australia, Melbourne, Australia

Represented by Ms Lydia Dowse, Head of Integrity & Risk, Swimming Australia, Melbourne, Australia

First Respondent

Australian Sports Anti-Doping Authority (now known as Sport Integrity Australia), Canberra, Australia

Represented by Ms Houda Younan, Barrister, Sydney, Australia

Second Respondent

I. INTRODUCTION

1. Ms Shayna Jack ("Ms Jack" or the "Applicant") submitted an application to the Court of Arbitration for Sport ("CAS") challenging the determination by the Australian Sports Anti-Doping Authority (now known as Sport Integrity Australia") ("SIA" or "the Second Respondent") of 19 December 2019 imposing a four-year period of of ineligibility on Ms Jack under Article 10.2 of the *Swimming Australia Limited Anti-Doping Policy 2015* (the "Policy").

II. PARTIES

2. The Applicant was at the relevant time a member of the Australian Swimming Team and subject to the Policy.

3. Swimming Australia is the national governing body for the sport of swimming in Australia.

4. The SIA is Australia's national anti-doping organisation tasked with managing anti-doping rule violations.

III. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced 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, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

6. The Applicant was selected to be a member of the Australian Senior Dolphins Swimming Team in 2017.

7. On 26 June 2019, the Applicant was subject to an Out-of-Competition doping control test at Tobruk Pool in Cairns, Queensland during an Australian Swimming Team camp.

8. On 12 July 2019, the Applicant was notified that her Part A sample had been analysed by the Australian Sports Drug Testing Laboratory and returned a positive result for an Adverse Analytical Finding for Di-Hydroxy LGD-4033 ("ligandrol"). Ligandrol is a Class S1.2 (Other Anabolic Agents) substance under the *World Anti-Doping Code – International Standard – Prohibited List 2019* ("WADA Prohibited List"). Ligandrol is classified as a Non-Specified Substance and is prohibited at all times under the WADA Prohibited List.

9. On 12 July 2019, the First Respondent imposed a mandatory Provisional Suspension on the Applicant in accordance with Article 7.9.1 of the Policy.

10. On 2 August 2019, the Applicant participated in an interview with investigators from the Second Respondent. During this interview, the Applicant denied using ligandrol and informed the investigators that she did not know how ligandrol had entered her system.

11. On 21 October 2019, the Second Respondent issued the Applicant with a "Show Cause Notice" pursuant to clauses 4.06 and 4.07A of the National Anti-Doping Scheme. The Applicant did not make a submission in response to the Show Cause Notice.

12. On 7 November 2019, the matter went before the Anti-Doping Rule Violation Panel ("ADRVP") for initial consideration. The ADRVP determined that it was satisfied that possible anti-doping rule violations in respect of "Presence" and "Use" had been committed.

13. On 19 December 2019, the matter went before the ADRVP for final consideration. The ADRVP confirmed its preliminary finding that it was satisfied that there was a possible anti-doping rule violation ("ADRV").

14. On 19 December 2019, the Second Respondent on behalf of the First Respondent sent an Infraction Notice to the Applicant in accordance with Article 7.9A of the Policy. The Infraction Notice informed the Applicant that as a result of the ADRV a four-year period of ineligibility would be imposed on her, commencing from 12 July 2019 being the date on which the Mandatory Provisional Suspension was imposed by the First Respondent.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 2 January 2020, the Applicant filed a Request for Arbitration in accordance with Article R38 of the Code of Sports-related Arbitration (2019 Edition) ("CAS Code") with respect to the decision rendered by the Second Respondent on 19 December 2019.

16. In her Request for Arbitration, the Applicant requested that the matter be heard by a Sole Arbitrator and listed, among others, Mr Alan Sullivan QC as her preferred arbitrator. The First Respondent and Second Respondent consented to the matter being heard by a Sole Arbitrator and for Mr Alan Sullivan QC being appointed to that role. On 21 January 2020, with the consent of the parties, pursuant to Article R40.2 of the CAS Code, the President of the CAS Ordinary Arbitration Division appointed Mr Alan Sullivan QC as Sole Arbitrator.

17. Following a teleconference between counsel for each of the parties and the Sole Arbitrator on 23 March 2020, by Order of Procedure provided to the parties on 23 March 2020, the CAS Court Office confirmed that:

    a. the Applicant was to file and serve written submissions, any statement(s) of evidence, a bundle of documents, and a list of authorities upon which she intends to rely, as well as a list identifying the witnesses she intends to call, by 29 April 2020; and

    b. the matter be stood over for a further directions teleconference on 11 May 2020.

18. On 27 April 2020, the Applicant requested a seven (7) day extension for the filing of her statement of claim. The Respondents did not object to this extension being granted. On 28 April 2020, the Sole Arbitrator granted an extension for the Applicant to file her evidence until 6 May 2020.

19. On 5 May 2020, the Applicant requested a further extension for the filing of its statement of claim. The Respondents did not object to this further extension being granted. On 6 May 2020, the Sole Arbitrator granted a further extension for the Applicant to file her evidence until 8 May 2020 and rescheduled the further directions teleconference until 15 May 2020.

20. On 11 May 2020, the Applicant filed her statement of claim in accordance with Article R44.1 of the CAS Code.

21. On 15 May 2020, counsel for each of the parties and the Sole Arbitrator attended a further teleconference to address the state of the Applicant's evidence and to set a timetable for the arbitral proceedings. The Sole Arbitrator directed that:

    a. the Applicant remedy any deficiencies in her statement of claim by 5 June 2020;

    b. the Respondents serve their response by 26 June 2020;

    c. the Applicant file any reply by 3 July 2020; and

    d. the matter is listed for a hearing on 27 July 2020 for an estimate of 2 days by way of videoconference due to the coronavirus pandemic.

22. On 5 June 2020, the Applicant filed further evidence in accordance with the Sole Arbitrator's direction dated 15 May 2020.

23. On 12 June 2020, counsel for each of the parties and the Sole Arbitrator attended a further teleconference at which the Sole Arbitrator made orders for an amended timetable for the arbitral proceedings.

24. Following orders made by the Sole Arbitrator, on 8 July 2020 the Applicant filed letters of instruction and supporting documents provided to its expert witnesses. On 10 July 2020, the Applicant confirmed that it had filed all available instructional material provided to its expert witnesses.

25. On 31 July 2020, the Second Respondent filed its response in accordance with Article R44.1 of the CAS Code.

26. On 17 August 2020, due to numerous extension requests made on behalf of the parties, the Sole Arbitrator vacated the hearing dates set down on 15 May 2020 and rescheduled the hearing for 25 and 28 September 2020.

27. On 25 August 2020, the Applicant filed its reply in accordance with Article R44.1 of the CAS Code.

28. On 7 September 2020, the Respondent filed its second response in accordance with Article R44.1 of the CAS Code.

29. On 17 September 2020, the parties confirmed that they did not object to the hearing in this matter being held with some parties appearing in person and others appearing by way of videoconference. The coronavirus pandemic at this time in Australia had led to many state borders being closed such that the Applicant and the First Respondent were unable to physically attend the hearing in Sydney.

30. The hearing proceeded on 25 and 28 September 2020 at the CAS Oceania Registry, Sydney. The Sole Arbitrator was assisted at the hearing by Mr Harry Cook, Counsel to the CAS, as well as the following representatives for the parties:

Applicant: Mr Peter Baston, Barrister, Brisbane, Australia

First Respondent: Ms Lydia Dowse, Head of Integrity & Risk, Swimming Australia, Melbourne, Australia

Second Respondent: Ms Houda Younan, Barrister, Sydney, Australia

31. Following the hearing, the representatives for each of the parties confirmed that their respective rights to be heard had been fully respected by the Sole Arbitrator and that they had no issue with respect to the way the CAS procedure or hearing was conducted. They also confirmed that they each had no objection to the appointment of the Sole Arbitrator nor the jurisdiction of the CAS. Indeed, by signing the Order of Procedure, the parties confirmed the jurisdiction of the CAS.

V. SUBMISSIONS OF THE PARTIES

A. The Applicant's Submissions

32. The Applicant filed three sets of written submissions dated 11 May 2020, 12 June 2020 and 24 August 2020, respectively. The submissions dated 11 May 2020 and 12 June 2020 are substantially to the same effect and seek substantially the same relief. The submissions dated 24 August 2020 are in reply to the Second Respondent's submissions.

33. In her submissions dated 12 June 2020 the Applicant, in essence, submitted that although she was unable to demonstrate how the Prohibited Substance entered her system nevertheless, in the exceptional circumstances of this case, CAS should determine as follows:

(a) That the Applicant's Application be upheld;

(b) That the Infringement Notice from Swimming Australia be set aside;

(c) That the Applicant bears No Fault or Negligence and that her Period of Ineligibility should be eliminated; and

(d) In the alternative, that the Applicant's use of the Prohibited Substance was not intentional and that a period of ineligibility of one year and backdated to the date of the sample collection on 26 June 2019 be imposed.

34. In her Submissions in Reply, the Applicant appeared to vary the relief which she sought. In that document, the Applicant, having again acknowledged that she had not demonstrated or provided any evidence as to how the Prohibited Substance entered her body, nevertheless submitted that she had proved that the ADRV was not intentional and did not occur due to her recklessness. On that basis, the Applicant sought from CAS determinations as follows:

(a) That the Application had proven that the ADRV was unintentional;

(b) A finding that there was No Significant Fault or Negligence under clause 10.5 of the Policy;

(c) A determination that the Applicant's Period of Ineligibility be reduced to two years under clause 10.2 of the Swimming Australia Limited Anti-Doping Policy based on the finding of No Significant Fault or Negligence.

35. At the commencement of the oral hearing on 25 September 2020, the Sole Arbitrator raised with counsel for the Applicant, Mr Baston, the apparent discrepancy between the varying forms of relief sought by the Applicant. By way of clarification, Mr Baston informed the Sole Arbitrator that the relief claimed in the Submissions in Reply dated 24 August 2020 was inserted by mistake and that the Applicant maintained the claims for relief set forth in her Outline of Arguments dated 12 June 2020.

36. Further, during the course of the oral hearing on 25 September 2020 and 28 September 2020 the Applicant:

(a) Formally conceded that an ADRV had occurred;

(b) In the event that the Sole Arbitrator saw fit to impose a Period of Ineligibility, abandoned the submission that the Period of Ineligibility start before the date of the Applicant's Provisional Suspension (12 July 2019); and

(c) Submitted that, irrespective of the outcome, the appropriate costs order was that each party pay her or its own costs of the proceedings.

37. Accordingly, the Sole Arbitrator takes the Applicant's claims for relief to be as set forth in her Outline of Arguments dated 12 June 2020 with the exception that the Period of Ineligibility specified in that document be backdated to the date of Provisional Suspension, namely 12 July 2019.

B. The First Respondent's Submissions

38. Although the First Respondent has been represented at all times during this proceeding and appeared, through Ms Dowse, at the oral hearing, the First Respondent played little active role in the proceedings. It did not file any evidence, make any written or oral

submissions and did not ask any questions of any of the witnesses. Its role was purely a passive one. In those circumstances, each of the Applicant and the Second Respondent agreed that, irrespective of the outcome, no costs order would be sought against the First Respondent and, for its part, the First Respondent has not sought any costs order against either of the other parties.

C. The Second Respondent's Submissions

39. The Second Respondent filed a written Outline of Submissions dated 31 July 2020. In those submissions, the Second Respondent pointed out (as subsequently became common ground) that the Applicant had not demonstrated how the Prohibited Substance entered her body. In those circumstances, the Second Respondent submitted that the case did not fall within the category of "extremely rare" cases where the science is unable to quantify the likelihood of the proffered scenario, and the circumstances of the Applicant's diligence were such as to warrant passage through the "narrow corridor" of demonstrating lack of intent or fault.

40. Accordingly, the Second Respondent submitted that there was no cause to reduce the prescribed four-year Period of Ineligibility.

41. In oral submissions, at the conclusion of the Hearing, the Second Respondent maintained this position. The Second Respondent, fairly, accepted that there was no direct evidence that the Applicant, in a colloquial sense, "intentionally" ingested ligandrol to enhance performance and further submitted that while the level of the Prohibited Substance was "low" and that there was no evidence of any long-term usage of ligandrol nevertheless that the Applicant had not discharged the onus placed upon her by the Policy to prove that the ADRV was not intentional within the meaning of Article 10.2 of that Policy.

42. Insofar as costs were concerned, the Second Respondent submitted that the Applicant should pay the costs of the arbitration and also a contribution towards the Second Respondent's costs of the proceedings. The Second Respondent did not, however, make any submission as to the amount of any such contribution or otherwise provide detailed submissions on this topic.

VI. JURISDICTION

43. Article 8.4.1 of the Policy provides:

The Article 8 hearing body for the purposes of this Anti-Doping Policy at first instance is CAS or a hearing body recognised or approved in writing by ASADA on a case-by-case basis. Any appeal from a first-instance decision will be heard by CAS.

44. In the signed Order of Procedure, the parties agreed that pursuant to Article 8.4.1 of the Policy, the CAS has jurisdiction to determine, by arbitration, the dispute which is the subject of the Request for Arbitration filed by the Applicant on 2 January 2020 against the Respondents and agreed to refer the dispute to CAS for determination by arbitration.

45. The matter was filed in the Ordinary Division of the CAS. The decision of CAS will be final and binding on all parties and no party will institute or maintain proceedings in any other court or tribunal in relation to the dispute. In particular, without restricting the generality of the foregoing, no party including any affected or third party will have the right of appeal under section 34A of the *Commercial Arbitration Act* or any of the Australian States.

46. Notwithstanding the above, the parties maintain any right to appeal the decision of CAS to the Appeals Division of CAS in accordance with R47 of the CAS Code and Articles 8.8 and 13 of the Policy.

VII. APPLICABLE LAW

47. Article R45 of the Code provides as follows:

The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono.

48. The parties have agreed under Article R45 of the Code, the law of the merits, being the substantive law of the dispute, shall be the law of Victoria.

VIII. MERITS

49. Swimming Australia is a signatory to the World Anti-Doping Code ("WADC") and, accordingly, as is required, the Policy is substantially identical with the 2015 WADC. The Preface to the Policy expressly states that it implements the WADC as well as Australian legislation and that one of its objectives is to comply with the WADC.

50. Article 20 of the Policy provides, among other things:

(a) That the Policy shall be interpreted as an independent and autonomous text and not by reference to existing law or statute;

(b) That the 2015 WADC and the International Standards shall be considered integral parts of the Policy and shall prevail in the case of conflict;

(c) That the Policy is to be interpreted in a manner that is consistent with the applicable provisions of the 2015 WADC; and

(d) That the comments annotating various provisions of the 2015 WADC and the Policy shall be used to interpret the Policy.

51. It follows that guidance in the approach to determining these proceedings can be obtained from previous CAS decisions, or decisions of other responsible Tribunals, on provisions of the 2015 WADC or derivative anti-doping policies. Although decisions of the CAS or other Tribunals relating to the 2015 WADC or derivative anti-doping policies are not strictly binding upon the Sole Arbitrator, considerable weight should be

given to them bearing in mind that CAS, in particular, is the arbitral body upon whom the task of interpreting and applying the WADC principally falls (see Article 13 of the 2015 WADC) and the fact that the 2015 WADC and derivative policies are expressly "aimed at enforcing anti-doping rules in a global and **harmonised** way" (emphasis added). The need for a harmonised approach is emphasised in the introduction to the 2015 WADC which reminds the Sole Arbitrator that he "should be aware of and respect the distinctive nature of the anti-doping rules in the *Code* and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport."

52. Article 2.1 of the Policy relevantly is in the following form:

> **2.1 Presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample***
>
> **2.1.1** It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *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 violation under Article 2.1.
>
> **2.1.2** Sufficient proof of an anti-doping rule violation under Article 2.1 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 analysed; or, there the *Athlete's B Sample* is analysed 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 B Sample* is split into two bottles and the analysis of the second bottle confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the first bottle.

53. It is common ground in the present case that by reason of the ingestion of ligandrol, the athlete has committed an ADRV under Article 2.1 of the Policy.

54. Where an ADRV has been committed under Article 2.1 the sanctions are determined by Article 10 of the Policy. For relevant purposes, the provisions of Article 10 which need to be considered are Articles 10.1, 10.2, 10.4 and 10.5. Those provisions are as follows:

> **10.1 *Disqualification* of results in the *Event* during which an *anti-doping rule violation occurs***
>
> An anti-doping rule violation occurring during, or in connection with, an *Event* may, upon the decision of the ruling body of the *Event*, lead to *Disqualification* of all of the *Athlete's* individual results obtained in that *Event* with all *Consequences*, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.

Factors to be included in considering whether to *Disqualify* other results in an *Event* might include, for example, the seriousness of the *Athlete's* anti-doping rule violation and whether the *Athlete* tested negative in the other *Competitions*.

10.1.1 If the *Athlete* establishes that he or she bears *No Fault or Negligence* for the violation, the *Athlete's* individual results in the other *Competitions* shall not be *Disqualified*, unless the *Athlete's* results in *Competitions* other than the *Competition* in which the anti-doping rule violation occurred were likely to have been affected by the *Athlete's* anti-doping rule violation.

10.2 *Ineligibility* for Presence, *Use* or *Attempted Use*, or *Possession* of a *Prohibited Substance* or *Prohibited Method*

The period of *Ineligibility* for a violation of Articles 2.1, 2.2. or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:

10.2.1 The period of *Ineligibility* shall be four years where:

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

10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and *ASADA* can establish that the anti-doping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of *Ineligibility* shall be two years.

10.2.3 As used in Articles 10.2 and 10.3, the term 'intentional' is meant to identify those *Athletes* who cheat. The term, therefore, requires that the *Athlete* or other *Person* engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall be rebuttably presumed to be not 'intentional' if the substance is a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition*. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall not be considered 'intentional' if the substance is not a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition* in a context unrelated to sport performance.

10.4 Elimination of the period of *Ineligibility* where there is *No Fault* or *Negligence*

If an *Athlete* or other *Person* establishes in an individual case that he or she bears *No Fault or Negligence*, then the otherwise applicable period of *Ineligibility* shall be eliminated.

10.5 Reduction of the period of *Ineligibility* based on *No Significant Fault or Negligence*

10.5.1 Reduction of sanctions for *Specified Substances* or *Contaminated Products* for Violations of Article 2.1, 2.2 or 2.6.

10.5.1.1 *Specified Substances*

Where the anti-doping rule violation involves a *Specified Substance*, and the *Athlete* or other *Person* can establish *No Significant Fault or Negligence*, then the period of *Ineligibility* and, at a minimum, a reprimand and no period of *Ineligibility* and, at a maximum, two years of *Ineligibility*, depending on the *Athlete's* or other *Person's* degree of *Fault*.

10.5.1.2 *Contaminated Products*

In cases where the *Athlete* or other *Person* can establish *No Significant Fault or Negligence* and the detected *Prohibited Substance* came from a *Contaminated Product*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility* and, at a maximum, two years' *Ineligibility*, depending on the *Athlete's* or other *Person's* degree of *Fault*.

10.5.2 Application of *No Significant Fault or Negligence* beyond the application of Article 10.5.1

If an *Athlete* or other *Person* establishes in an individual case where Article 10.5.1 is not applicable, that he or she bears *No Significant Fault or Negligence*, then, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of *Ineligibility* may be reduced based on the *Athlete* or other *Person's* degree of *Fault*, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this Article may be no less than eight years.

55. It will be apparent from Articles 10.4 and 10.5 of the Policy that if the Applicant can establish that she bears No Fault or Negligence or No Significant Fault or Negligence then the sanction imposed upon her may be further reduced from that specified in Article 10.2.2.

56. The terms "No Fault or Negligence" and "No Significant Fault or Negligence" are defined in the Appendix to the Policy as follows:

> "***No Fault or Negligence*:** The *Athlete* or other *Person's* establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had *Used* or been administered the *Prohibited Substance* or *Prohibited Method* or otherwise violated an anti-doping rule. Except in the case of a *Minor*, for any violation of Article 2.1, **the *Athlete* must also establish how the *Prohibited Substance* entered his or her system.**" (emphasis added).
>
> *"**No Significant Fault or Negligence:*** The *Athlete* or other *Person's* establishing that his or her *Fault or negligence*, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or Negligence*, was not significant in relationship to the anti-doping rule violation. Except in the case of a *Minor*, for any violation of Article 2.1, **the *Athlete* must also establish how the *Prohibited Substance* entered his or her system**." (emphasis added).

57. Thus, in essence, the staged process by which a sanction is determined in a case such as the present is as follows:

(a) The "default" Period of Ineligibility is one of four years (Article 10.2.1);

(b) If the Applicant can establish that the ADRV was not intentional then the Period of Ineligibility is reduced to two years (Article 10.2.2);

(c) If, in addition to establishing that the ADRV was not intentional, the Applicant can also establish that she bore No Fault or Negligence then that two-year Period of Ineligibility shall be eliminated (Article 10.4);

(d) In the alternative to (c) above, if the Applicant can establish that the ADRV was not intentional and that she bore No Significant Fault or Negligence then:

  (i) If she can prove that the Prohibited Substance came from a Contaminated Product then the Period of Ineligibility can be reduced to, at a minimum, a reprimand and, at a maximum, two years ineligibility (Article 10.5.1.2); or

  (ii) If the Applicant cannot bring herself within Article 10.5.1.2, but can still establish No Significant Fault or Negligence the two-year period of ineligibility may be reduced to, at a minimum, a one-year period of ineligibility (Article 10.5.2).

58. It will be further apparent from the provisions of Article 10 of the Policy quoted above that it is incumbent upon the Applicant to establish that the ADRV was not intentional and that, even if that is proven, that she bore No Fault or Negligence or No Significant Fault or Negligence as the case may be.

59. To discharge the onus of establishing such matters the Applicant has to prove the relevant facts or circumstances required on the balance of probability (Article 3.1 of the Policy). The Sole Arbitrator does not regard this standard of proof as being a purely mechanical one, namely that of proving something is 51% probable but that, additionally, it also involves the decision maker to be "actually satisfied" or "actually persuaded" that the Applicant's defence is more likely than not to be true (see *CAS 2019/A/6313 Lawson v IAAF*; *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361).

60. Thus, in order to reduce the Period of Ineligibility from four years to two years on the basis that the ADRV was not intentional, the Sole Arbitrator must be actually persuaded or satisfied on the balance of probabilities that the Prohibited Substance was not ingested intentionally.

61. The same situation applies with respect to proving the case is one that falls within either Articles 10.4 or 10.5 of the Policy. The Applicant must prove among other things, on the balance of probabilities, how the Prohibited Substance came to be in her system.

62. In fact, it is convenient to deal with the Applicant's case in respect of those two Articles first.

63. The Sole Arbitrator is convinced that the Applicant, even if she can prove that the ADRV was not intentional, cannot rely on either Article 10.4 or Article 10.5 to further reduce the sanction imposed upon her.

64. The respective definitions of "No Fault or Negligence" and "No Significant Fault or Negligence" have been set out above. It will be noted that an essential requirement to satisfy either definition is that:

> "*The Athlete must also establish how the Prohibited Substance entered … her system.*"

65. The Applicant has not established how ligandrol entered her system. In the evidence and submissions there is speculation (and it does not rise any higher than that) that:

(a) Possibly the supplements the Applicant was using were contaminated at a manufacturing level;

(b) Possibly the supplements the Applicant was using were contaminated by being prepared or mixed in a blender which might have been used earlier to blend supplements used by her partner or brothers which, in turn, might have been contaminated or have contained ligandrol;

(c) Possibly the Applicant came into contact with the ligandrol or ingested it as a result of using pool or gym facilities open to the public in Townsville and/or Cairns whilst training for the Trials for the World Swimming Championships in May/June 2019.

66. Moreover, the Applicant candidly admitted that she did not know how the Prohibited Substance came to be in her system. She offered the possibilities referred to in the

preceding paragraph as the only possibilities she could think of. There is simply no evidence before the Sole Arbitrator upon which it could be concluded, on the balance of probabilities, that any of these speculative possibilities was in fact the reason for the presence of the Prohibited Substance in her system. In fact, there is no evidence upon which any finding could be made as to how the ligandrol found its way into the Applicant's system.

67. Yet, at the conclusion of the oral hearing, Mr Baston, appearing on behalf of the Applicant, submitted that the Applicant had discharged her onus under Article 10.4 and/or 10.5 replying on the evidence of one of the Second Respondent's experts, Professor Thevis. In his Report dated 30 July 2020, Professor Thevis concluded:

> "*The question how the substance entered the Athlete's organism (intentionally/unintentionally) cannot be answered from my point of view and solely based on the available analytical data.* ***The data support the inference that the Athlete ingested a presumably pharmacologically irrelevant dose … within days before the doping control sample was collected.*** *The provided steroid profile of the Athlete does not suggest a longer-term use of an anabolic agent such as LGD-4033 that is expected to affect the course of steroid profile markers.*" (emphasis added).

68. Mr Baston suggested that this evidence satisfied the requirement that the Applicant must establish how the Prohibited Substance entered into his or her system. With respect, the Sole Arbitrator cannot accept that submission.

69. In the first place, Professor Thevis's conclusion is based on a series of assumptions set out in his Report. Even accepting for present purposes that the Applicant has proven the correctness of those assumptions (about which the Sole Arbitrator makes no finding) nevertheless, at its highest, Professor Thevis's view only provides some evidence as to **when** the Prohibited Substance entered the Applicant's system. It does not provide any evidence whatsoever of **how** the ligandrol in fact entered the Applicant's system.

70. Therefore, the Applicant has not discharged the onus placed upon her to bring her case within the ambit of either Article 10.4 or Article 10.5 of the Policy. It follows that the critical issue in this proceeding is whether the Applicant has discharged her onus of showing that the ADRV was not intentional with the result that the default sanction of a four-year period of ineligibility is reduced to a two-year period of ineligibility. Because the Applicant cannot rely on Article 10.4 or Article 10.5, the sanction imposed upon her cannot be any less than a two-year period of ineligibility.

A. Has the Applicant discharged her onus of proving the ADRV was not intentional?

71. Had this been a case where the onus of proving whether the ADRV was intentional or not rested upon the Respondents then it would have been a comparatively easy case to determine. As properly acknowledged by the Second Respondent, there is no direct evidence that the Applicant intentionally ingested ligandrol and as set out in the very helpful written submissions of the Second Respondent. Even Professor Thevis (who gave evidence on behalf of the Second Respondent) concluded that the question how the substance entered in the Applicant's body (intentionally or unintentionally) cannot

be answered. In those circumstances, it would not have been difficult to conclude that it had not been proven that the Applicant took the Prohibited Substance intentionally.

72. However, that is not the test. Rather, the Policy specifically and expressly casts the onus upon the Applicant to establish that the ADRV was not intentional and she must do so on the balance of probabilities as already explained *supra*.

73. At the outset of the discussion on this important topic, it is necessary to refer to, and reject, one of the Second Respondent's principal submissions on this topic.

74. That submission, made both in writing and orally, was that in order to prove that the ADRV was not intentional within the meaning of Article 10.2.3 of the Policy, the Applicant had first to establish how the substance entered her body.

75. Significantly, in contradistinction to the definitions of "No Fault or Negligence" or "No Significant Fault or Negligence", the definition of "intentional" in Article 10.2.3 of the Policy does not expressly require such a threshold requirement.

76. In *CAS 2016/A/4534 Villanueva v FINA*, in a very carefully reasoned Award, a CAS Panel rejected persuasively a submission such as that advanced here by the Second Respondent (having considered all of the principal arguments going either way). Likewise, a differently composed CAS Panel arrived at the same conclusion in *CAS 2019/A/6313 Lawson v IAAF*.

77. The Sole Arbitrator, with respect, agrees with the conclusions and substantive reasoning of the Panels in the two cases just referred to. There is no strict need for the Applicant to establish the origin of the Prohibited Substance in order to prove that the ADRV was not intentional. Obviously, it would be very helpful, from the perspective of an applicant, to be able to prove how the Prohibited Substance was ingested and such proof would facilitate discharging the onus of proof placed upon her but it does not follow that, absent such proof, an applicant cannot discharge the relevant onus.

78. In this regard, in addition to the reasons given in cases such as *Villanueva* and *Lawson*, it has to be borne in mind that the default sanction, even for a first offender, for such an ADRV of four years is, on any view, a severe one. Further, the language of Article 10.2.3 of the Policy must be borne in mind insofar as it sets out the aim or objective of the relevant Article. Article 10.2.3 makes it plain that the term "intentional" is meant to identify those athletes who **cheat**. That Article makes it plain that the athlete must prove that she did not engage in conduct which she knew constituted an ADRV or that she did not know that there was a significant risk that the conduct (which in fact she engaged in) might constitute or result in an ADRV and must show that she did not manifestly disregard that risk.

79. Thus, a finding that an Athlete has intentionally committed an ADRV is tantamount to a finding that the Athlete has cheated and the sanction is appropriately proportionate to such a finding. It should not be lightly inferred that the drafters of the WADC wished to make it any more difficult for an Athlete to displace such a finding and to reduce the severe sanction than the express wording of Article 10.2.3 actually states.

80. Therefore, there is no justification, in the Sole Arbitrator's view, for reading Article 10.2.3 as requiring also that the Athlete prove how the Prohibited Substance came to be in his or her system.

81. Further, it has been suggested that, absent an athlete proving how a Prohibited Substance came into his or her system, there is "only the narrowest of corridors" or "only extremely rare cases" where an athlete will be able to discharge the onus of proving that the ADRV was not intentional (see, e.g., *Villanueva* and *Lawson*). With respect, however, the Sole Arbitrator believes that such descriptions are an unhelpful, unnecessary and unwarranted gloss on the wording employed in Article 10.2.3 or its equivalents. Given the severe default sanction, even for a first offender, the actual language employed in Article 10.2.3 and the actual practical difficulties for an applicant in seeking to discharge his or her onus of proof in circumstances such as the present, the Sole Arbitrator considers that it is unwarranted to approach the consideration of which an Athlete has discharged the onus case upon him or her from a perspective that he or she must be able to fit within "the narrowest of corridors" or show that his or her case is an "extremely rare" one. Rather, the proper approach is to determine whether, on the totality of the evidence, the Applicant has proven on the balance of probabilities that she did not, or did not attempt to, cheat.

82. For the reasons which follow, the Sole Arbitrator finds that the Applicant has discharged the onus of showing that the ADRV was not intentional.

83. The first and foremost reason for so concluding is the Applicant's own evidence. She was emphatic that she did not intentionally take the Prohibited Substance. She was emphatic that she did not know how the Prohibited Substance came into her body. Even though it would have perhaps suited her case to blame others such as her partner or brothers for using supplements which contained the Prohibited Substance and which then caused an inadvertent contamination of supplements she was using, she refused to attribute such blame. She acknowledged that possibility but said that it was her "gut" feel that that was not the cause of the contamination.

84. In her written statement, among other things, the Applicant said:

(a) That she had consistently dedicated herself to being a diligent and dedicated athlete and that that included observing and following at all times all advised protocols from her sport governing body and all anti-doping authorities;

(b) That she had always had an intense distain for intentional doping and the objective of cheating;

(c) That she did not intentionally take ligandrol and that she did not even know it was in her system.

85. The Applicant was subjected to a rigorous, thorough but very fair cross-examination by Ms Younan representing the Second Respondent. During the course of that cross-examination she gave the following further evidence:

(a) The positive finding "killed" me. I don't want to be fighting for my career. I don't want an innocent athlete like myself to go through this;

(b) I want to be a role model. I want to make people proud of me. The opinion of my parents, the public and teammates is "100%" important to me;

(c) I would never touch it (ligandrol) in my life;

(d) I am now so paranoid. Every day I am scared;

(e) I want to get to the bottom of how it happened – to avoid it happening again.

86. The evidence also shows that the Applicant took considerable steps, at considerable expense, to seek to ascertain or identify the origins of the Prohibited Substance which she came to ingest. It is true, as suggested by counsel for the Second Respondent, that, at least in hindsight, she might have done more in that regard. But the test is not one of perfection and, as submitted on her behalf, common sense must be applied especially when the task of trying to identify or ascertain the source of a Prohibited Substance is an expensive and time-consuming one. In the Sole Arbitrator's opinion, the Applicant did all that she could reasonably be expected to have done, in the circumstances, to seek to locate or identify the source or origin of the Prohibited Substance. The fact that she, perhaps, could have done more or that she might have done more to avoid any risk of ingestion of ligandrol accidentally may be relevant to whether or not she could establish the right to a further reduction of sanction under Articles 10.4 or 10.5 but, as has already been said, for other reasons those Articles are not available to her in the circumstances of the present case.

87. The Applicant greatly impressed the Sole Arbitrator as a witness. As stated, she was thoroughly but properly tested in cross-examination. But, in the Sole Arbitrator's opinion, her credibility remained completely intact. Indeed, she was one of the most impressive witness the Sole Arbitrator has seen in his more than 40 years of practice. She appeared to be completely straightforward, genuine and honest in the answers she gave. Her demeanour was excellent and her dismay and upset at the situation she found herself was evident. She became emotional at times in giving her evidence but not inappropriately or theatrically so. The Sole Arbitrator could not detect any signs of acting or disingenuousness. On the contrary, as stated, the Applicant presented as an honest, decent, reliable and very plausible witness.

88. The Sole Arbitrator is extremely conscious of the need to exercise great caution in accepting an applicant's protestations of innocence. As stated in *Villanueva* "the currency of such [denials] is devalued by the fact that it is the common coin of the guilty as well as of the innocent". While that is true, it would be an over-cynical and wrong approach to the evidence of people such as the Applicant to start with the presumption that what they say is not to be believed or can only be believed if corroborated by other objective evidence.

89. The Applicant did not come across to the Sole Arbitrator as someone who would intentionally cheat by deliberately taking a Prohibited Substance. She did not come across as a person who engaged in conduct that she knew constituted an ADRV or that

she intentionally engaged in conduct which she knew to bring with it a significant risk that it may result in an ADRV. She did not present as a person who manifestly disregarded the risk that her conduct might result in an ADRV.

90. On the contrary, the evidence she gave, and the way she presented herself, convinced the Sole Arbitrator that she was a person who conscientiously sought, at all times, to comply with the anti-doping policies of the First Respondent.

91. Moreover, numerous people - athletes, coaches, officials and doctors as well as family members gave character evidence on behalf of the Applicant. Without exception, those people spoke of the Applicant in the most glowing and praiseworthy of terms. The general tenor of their evidence was that the Applicant was a very hardworking, conscientious, likeable and motivated athlete of the highest integrity who wanted to be a role model for other younger swimmers and, in fact, had proven to be so. None of them thought she was likely to knowingly or recklessly take a Prohibited Substance.

92. Some of these witnesses were tested in, once more, proper, fair and thorough cross-examinations by Ms Younan on behalf of the Second Respondent. Each, however, came across as honest and reliable witnesses who genuinely believed in the excellent character and integrity of the Applicant.

93. Typical of the evidence given on her behalf, was the evidence of Mr Drew McGregor, the Swimming Queensland Coach Director who has known the Applicant since 2007. He impressed the Sole Arbitrator greatly when giving his evidence. He described the Applicant as "such an exceptional person – she always finds time to talk to the kids". He described her as an outstanding role model and said that he could not speak highly enough of her. He explained that, unlike some other elite swimmers, when children were around seeking autographs, she would always stay until the last of those children had obtained her autograph.

94. Likewise, her current coach, Mr Dean Boxall said that he had always been very proud of the Applicant. She was, in his mind, a "fantastic person". He also described her as a great role model and confirmed his strong belief in her as a person.

95. Among the many witnesses who gave character evidence for the Applicant (and who were not cross-examined) were the well-known Australian swimmers Cate Campbell and Bronte Campbell who, as well as being team mates of the Applicant, were, of course, also her competitors. Cate Campbell in her statement stated as follows:

> "*In my years of knowing Shayna I have never witnessed any behaviour that would suggest she would knowingly take a Prohibited Substance. She has handled the highs and lows that sport offers with class and dignity and has always conducted herself with the utmost integrity.*"

96. In a similar vein, Cate's sister, Bronte Campbell said in her witness statement:

> "*In my role at the ASA (Australian Swimmers' Association) I have been able to witness how Shayna shares this passion with the next generation of swimmers. Always generous with her time, she has participated in swim clinics and multiple*

meet and greets as a way of giving back to the sport. I know her to value integrity and have found her to be a person of her word … In all I have witnessed Shayna has always conducted herself with pride, honesty and fairness."

97. Thus, based on her own evidence and presentation and the evidence and presentations of those who know her best, the Applicant presented to the Sole Arbitrator as a person who was inherently very unlikely to intentionally or recklessly ingest a Prohibited Substance.

98. Also, it is common ground that this is a first offence for the Applicant. Indeed, the evidence shows that since February 2018 she has been tested on 10 occasions and it was only on one occasion, that the subject of these proceedings, where a positive result was recorded. This history of testing is also consistent with the Applicant's evidence of a lack of intention to cheat.

99. Finally, there is the physical and/or scientific evidence. As stated, on the state of that evidence, it is impossible to know how the Prohibited Substance entered the Applicant's body. What is known (and conceded by the Respondents) however is that there is no evidence whatsoever of any long-term use of the substance, that the amount of the metabolites found in the Applicant's system was "low", and that the amount of the Prohibited Substance found in the Applicant's body was a "pharmacologically irrelevant dose" – meaning that it was insufficient, per se, to provide any positive benefits to the Applicant.

100. It also has to be borne in mind that, as the evidence establishes, there are very limited scientific papers or the like concerning the effects of taking ligandrol or of the dosages required for a performance enhancing effect especially in the case of females, or female athletes. This was not a case where either party could present reliable, relevant scientific data supporting or disproving intentional use of the Prohibited Substance for performance enhancing reasons.

101. Overall, the Sole Arbitrator is actually persuaded, on the balance of probabilities, that the Applicant did not intentionally ingest ligandrol. The Sole Arbitrator therefore finds that the Applicant has discharged her onus of proving that the ADRV was not intentional.

102. The consequence must be that in accordance with Article 10.2.2 of the Policy the Applicant's Period of Ineligibility is one of two years. That two-year period should commence on the date of the provisional suspension, namely 12 July 2019.

IX. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

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

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

3. (…).

4. (…).

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

Seat of arbitration: Lausanne, Switzerland

Date: 16 November 2020

THE COURT OF ARBITRATION FOR SPORT

Alan Sullivan QC
Sole Arbitrator