CAS A4/2016 Sarah Klein v. Australian Sports Anti-Doping Authority and Athletics Australia

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Bruce Collins QC, Sydney, Australia

Ad hoc Clerk: Harry Cook, CAS Oceania Registry, Sydney, Australia

in the arbitration between

Sarah Klein, Somerville, Victoria

Represented by Mr Ben Ihle, Barrister, Dever's List, Melbourne, Australia

Instructed by Mr Matthew Spain, Solicitor, King & Wood Mallesons

Applicant

and

Australian Sports Anti-Doping Authority (ASADA), Canberra, Australia

Represented by Mr Patrick Knowles, Barrister, Tenth Floor Chambers, Melbourne, Australia,

Instructed by Kate Corkery and Patrick Dale, Solicitors, ASADA, Canberra, Australia

First Respondent

Athletics Australia, Canberra, Australia

Represented by Nick Holland, Manager of Compliance, Athletics Australia, Canberra, Australia

Second Respondent

I. PARTIES

1. Sarah Klein (the "Athlete") is an Athlete in the sport of athletics.

2. The Australian Sports Anti-Doping Authority ("ASADA") is Australia's national anti-doping organisation, tasked with managing anti-doping rule violations.

3. Athletics Australia ("AA") is the national governing body for the sport of athletics in Australia.

II. FACTUAL BACKGROUND

A. Background Facts

4. 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 are 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, the Sole Arbitrator refers in its Award only to the submissions and evidence it considers necessary to explain the reasoning for supporting the Award.

5. The following matters are not in dispute.

   (a) The Athlete is a long distance runner. The Athlete is a member of Athletics Australia.

   (b) Victorian Athletes become members of Athletics Victoria through their local club known as a 'Primary Club'.

   (c) On 6 April 2015, the Athlete registered for membership of Frankston Athletics Club and Athletics Victoria. The registration covered the 2015/2016 season, from 1 October 2015 to 31 March 2016.

   (d) As part of the registration process, the Athlete was required to confirm that she had read and agreed to Athletics Victoria's terms and conditions. The terms and conditions include relevantly to this matter:

> *I agree to abide by all rules and by laws of Athletics Victoria, Athletics Australia and the International Association of Athletics Federation, as amended from time to time.*

(e) The rules and laws of Athletics Australia include the Athletics Australia Anti-Doping Policy 2015 ("AA Policy").

(f) Article 2 of the AA Policy states that Athletes or other persons shall be responsible for knowing what constitutes an anti-doping rule violation ("ADRV").

(g) At the time of the ADRV, the Athlete was employed full time as a school teacher. The Athlete has represented Australia at the Glasgow Commonwealth Games in the marathon and in the 2015 IAAF World Championships and was included in the shadow squad for the 2016 Olympic Games in Rio de Janeiro.

(h) The Athlete has completed online anti-doping education facilitated by ASADA on two (2) occasions. The Athlete had also completed two (2) previous doping controls prior to 13 February 2016.

(i) On 13 February 2016, the Athlete was selected for an in-competition doping control at the Domain Athletics Centre in Hobart, Tasmania, after the Athlete had competed in the 5000m event.

(j) The Athlete was notified that she had been selected for Doping Control at the conclusion of her race and she subsequently provided approximately 20mL of urine.

(k) Between 15 February 2016 and 22 June 2016, ASADA carried out results management in relation to this sample collection. The results management included an investigation which incorporated interviewing the Athlete and obtaining witness statements from six (6) witnesses and following the statutory processes prescribed by the National Anti-Doping scheme established by the *Australian Sports Anti-Doping Authority Act* 2006 ("NAD Scheme").

(l) On 26 April 2016, ASADA issued the Athlete with a notice under clause 4.07A of the NAD scheme. On 8 May 2016, the Athlete responded to the Notice. On 19 May 2016, the Anti-Doping Rule Violation Panel ("ADRV Panel") determined that it was possible that the Athlete had committed an ADRV and proposed to make an assertion.

(m) On 23 May 2016, ASADA issued the Athlete with a Notice pursuant to clause 4.09 of the NAD Scheme. On 1 June 2016, the Athlete responded to the Notice.

On 16 June 2016, the ADRV Panel made an assertion that the Athlete had possibly committed the ADRV of Refusal or Failure to submit to sample collection and the Athlete was notified of this decision on 22 June 2016.

(n) On 22 June 2016, pursuant to Article 7.9A of the AA Policy, ASADA issued an Infraction Notice to the Athlete on behalf of AA.

(o) The Infraction Notice alleges that the Athlete committed the ADRV of Refusing or Failing without compelling justification, to submit to sample collection after notification on 13 February 2016.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

6. On 5 July 2016, the Athlete filed her application in the Ordinary Division of the Court of Arbitration for Sport ("CAS") in accordance with Article R38 of the Code of Sports-related Arbitration ("the CAS Code").

7. On 18 July 2016, the CAS Court Office formally notified ASADA and Athletics Australia of the Athlete's application and invited them to nominate a preferred arbitrator in accordance with Article R40.2 of the CAS Code.

8. The parties agreed to refer this procedure to a Sole Arbitrator, but were unable to agree on a particular CAS arbitrator. In accordance with Article R40.2 the matter was referred to the Division President of the CAS for determination.

9. On 29 August 2016, the Division President appointed Bruce Collins QC as Sole Arbitrator.

10. On 4 October 2016, a Preliminary Directions Teleconference was held between the Athlete, ASADA, Athletics Australia and the Sole Arbitrator to confirm the order of procedure. A Procedural Order then issued which contained a record of the orders and directions made in the Directions Hearing. The Procedural Order recorded inter alia the parties' agreement that the Law of Victoria governed the dispute.

11. On 10 October 2016, ASADA filed its initial written submissions and supporting evidence.

12. On 27 October 2016, the Athlete filed her initial written submissions and supporting evidence.

13. On 31 October 2016, the Sole Arbitrator made a further Procedural Order requesting a further outline of submissions from the parties on the question of 'Compelling Justification'.

14. On 3 November 2016, the Athlete filed her supplementary written submissions.

15. On 4 November 2016, ASADA filed its supplementary submissions.

16. On 7 November 2016, a hearing was held at the CAS Oceania Registry sitting in Melbourne, Australia. The Sole Arbitrator was assisted by Ms Kaelah Ford, Solicitor in Sydney, Australia, as *ad hoc* clerk. The appearances were as follows:

    For the Athlete

    - Mr Ben Ihle
    - Mr Matthew Spain

    For ASADA

    - Mr Patrick Knowles
    - Ms Kate Corkery
    - Mr Patrick Dale

    For AA

    - Mr Nick Holland

17. The following witnesses gave evidence before the Sole Arbitrator:

    FOR ASADA

    - Mr Allan Shaw (by video conference)
    - Ms Katrina Flakemore (by video conference)
    - Mr Keith Price (by video conference)
    - Ms Melissa White (by video conference)
    - A young male athlete whose name was made the subject of a confidentiality order (by video conference)
    - Mr Peter Schuwalow (in person)

    The Athlete also gave evidence before the Sole Arbitrator, in person.

18. At the conclusion of the hearing, the Sole Arbitrator requested that the parties file additional written submissions on the interpretation of clause 3.16(7) of the NAD Scheme.

19. The parties filed their additional submissions on 9 November 2016.

IV. SUBMISSIONS OF THE PARTIES

20. The Athlete's submissions, in essence, may be summarised as follows:

- The Athlete agreed that the jurisdiction of the CAS was properly invoked and that at all times she was bound by the terms of the AA Policy which had application to her by force of contract. The Athlete also submitted that the AA Policy should not be subjected to external processes of statutory interpretation nor construed subject to Australian statutory provisions.
- In view of the concession by the Respondents, correctly made, that the alleged violation was not a strict liability offence, it became unnecessary to deal with the Athlete's submission to that effect.
- The Athlete then submitted that the violation was bad for duplicity because it was said that she was not provided clarity in respect to the case which she had to meet and that the infraction alleged was bad in law and deprived the Athlete of natural justice. It was said that it should be clearly particularised whether the alleged failure to comply with the request for a sample was intentional or negligent and that an election should be made between the two alternatives.
- The next submission made by the Athlete was that the onus of proving there was no "compelling justification" for the actions of the Athlete, lay upon the Respondents.
- The Athlete then submitted that the Doping Control Officer ("DCO"), when exercising her discretion whether or not to move the Doping Control Centre ("DCS"), was affected by irrelevant considerations or failed to take relevant considerations into account or manifested an inflexible application of the policy.
- Then the Athlete submitted that it had not been shown that the Athlete failed to provide a sample for the reason that the AA Policy had not made a 90 mL sample obligatory.

- Next the Athlete submitted that there was “compelling justification" for her failure to provide the sample.
- The Athlete’s penultimate submission was that her actions did not reveal any "significant fault or negligence" within the meaning of Article 10.2.3 of the AA Policy.
- Finally the Athlete submitted that in the present case a period of ineligibility of four years resulted in oppression or injustice, was inimical to sport and was contrary to the principle of proportionality.

21. The Respondent’s Submissions:

- The parties were at issue in respect of each one of the above submissions. The conclusions of the Sole Arbitrator in relation to those individual issues appear below.

V. JURISDICTION

22. Article R39 of the CAS Code provides as follows:

Unless it is clear from the outset that there is no arbitration agreement referring to CAS, the CAS Court Office shall take all appropriate actions to set the arbitration in motion.

23. The Athlete was, at the relevant time, bound by the AA Policy by virtue of her membership with Athletics Victoria. She was therefore bound to comply with the AA Policy under the terms of her Membership from 1 October 2015 to 31 March 2016. Article 8 of the AA Policy provides that any Person who is asserted to have committed an ADRV is entitled to a hearing process.

24. Article 8.4.1 of the AA Policy provides that:

> 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.

25. Article 8.6.1 of the AA Policy provides that the CAS will determine:

(a) If the *Person* has committed a violation of this Anti-Doping Policy; and

(b) If so, what *Consequences* will apply (including the start date for any period of *Ineligibility*); and

(c) Any other issues such as, but not limited to, reimbursement of funding provided to the *Athlete* or other *Person* by a sport organisation.

26. This arbitration was convened pursuant to Articles 8.4 and 8.6 of the AA Policy. The jurisdiction of the CAS was further confirmed in the Order of Procedure executed by the parties on 4 October 2016.

VI. ADMISSIBILITY

27. Article 7.9A of the AA Policy provides as follows:

> …in the event the Person elects to have a hearing, the Person must file their application (however described) for a hearing with the hearing body recognised or approved by ASADA within 14 days of receipt of the infraction notice.

28. ASADA issued the Athlete with an infraction notice on 20 June 2016. The Athlete filed an application in the Ordinary Division of the CAS on 5 July 2016. Therefore, the Sole Arbitrator considers that the application is admissible.

VII. APPLICABLE LAW

29. Article R45 of the CAS 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.

30. By the Order of Procedure executed on 4 October 2016, the parties agreed that:

(a) the law of the merits, being the substantive law of this dispute, shall be the law of Victoria;

(b) the AA Policy is the relevant policy which applies in this dispute.

VIII. MERITS

A. The Issues To Be Determined

31. When the submissions of the parties are distilled the following questions arise for determination:

32. The first question is, was the Athlete properly notified that she had been selected for a doping control test? This question also involves answering the question whether the Athlete was notified of the consequences of a failure to comply with the request to provide a sample.

33. The second question is, was the alleged violation of Article 2.3 of the AA Policy one of strict liability? If not then has ASADA proved that the Athlete possessed the required intention to commit the offence charged?

34. The third question is whether the alleged violation is void for duplicity.

35. The fourth question is, who bears the onus of establishing or refuting as the case may be, that the Athlete's "refusal or failure" was "without compelling justification"?

36. The fifth question, is did the Athlete "refuse or fail" to submit to the sample collection on 13 February 2016?

37. The sixth question is, was there a "compelling justification" for the actions of the Athlete?

38. The seventh question is, how much urine is required to constitute a "sample" within the meaning of the relevant rules?

39. The eighth question is, was the ADRV "intentional" within the meaning of Articles 10.3.1 and 10.2.3 of the AA Policy, i.e.:

    (a) did the Athlete know that the conduct in which she engaged constituted an ADRV; or

    (b) did the Athlete know that there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk?

40. The ninth question is, what is the appropriate penalty if the ADRV is proved? Is there ground for a reduction based on "no fault or negligence" on the part of the Athlete?

41. The tenth question is, was the request to require the Athlete to go to the DCS for testing "unreasonable" within the meaning of Regulation 3.16(7) of the NAD Scheme. If it was then what are the consequences?

42. The eleventh question is, if there is no express pathway in the AA Policy through which the period of ineligibility may be reduced, does the principle of proportionality enable the Sole Arbitrator to reduce the period of ineligibility if it considers the period of four years to be disproportionate, oppressive, unjust or inimical to sport?

43. The route to a resolution of the important issues in this case lies through an analysis of the circumstances leading up to the decision of the Athlete to leave the DCS and go to the Hobart airport to take the 9:40 pm flight home from Hobart to Melbourne. That decision was recorded in the Doping Control Form ("DCF") which was read and signed by the Athlete, shortly before she left to journey to the airport in Hobart. The DCF read as follows:

> *"... Athlete chose to leave doping control to catch a flight prior to completing the test*."

The DCF was also read and signed by the Athlete's coach. On the ultimate view formed by the Sole Arbitrator the short statement in the DCF is an accurate encapsulation of exactly what happened and informs much of the analysis which is to follow.

44. The question for determination by the Sole Arbitrator is whether in making that choice in all of the proven circumstance, the Athlete violated Article 2.3 of the AA Policy. That Article provides:

> *"Evading Sample collection or, without compelling justification, refusing or failing to submit to Sample collection after notification as authorised in this Anti-Doping Policy, the NAD scheme or other applicable anti-doping rules."*

45. The Comment to Article 2.3, which is contained as a footnote to Article 2.3, reads:

> *"For example, it would be an anti-doping rule violation of 'evading sample collection' if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or testing. A violation of 'failing to submit to Sample collection' may be based on either intentional or negligent conduct of the Athlete, while 'evading' or 'refusing' Sample collection contemplates intentional conduct by the Athlete."*

B. The Information and Advice given to Ms Klein by ASADA Officials

46. The Athlete was given information and advice as to her anti-doping obligations by three experienced ASADA officials. Some of those officials repeated their advice to her.

a. Ms Melissa White

47. The first ASADA employee to advise the Athlete of her obligations under the AA Policy and the possible consequences of not doing so, was Ms Melissa White, a casual ASADA employee on duty at the event at the Domain Athletics Centre in Hobart. At about 8:30 pm Ms White informed the Athlete she had been selected to provide a urine sample for drug testing. The Athlete's immediate response was to say "Well I hope you are ready to come to the airport in the car, because I have a plane to catch." The Athlete then said "I really need to leave soon, so let's just hurry this up, where do I need to pee?" Ms White then began to state that failure to comply with the request may result in an ADRV, and that she may be sanctioned by her governing body. Ms White went on to say

that "however at this point she wasn't paying much attention to me". The Sole Arbitrator is not prepared to find that on this occasion a full warning or explanation was given to the Athlete. It bases this finding upon Mrs White's own choice of words when describing what happened and what was said.

48. The ASADA staff then moved quickly to accommodate the Athlete's desire for a rapid test procedure. Ms White rang the doping control officer, Ms Kate Flakemore on her mobile phone, explaining that the Athlete needed to catch a plane to Melbourne and that she had insisted that she needed to leave immediately. When Ms Flakemore then came over to speak to her, the Athlete again asked whether Ms White could go to the airport for testing there. Ms Flakemore immediately replied in the negative.

49. Upon arrival at the DCS, which was situated under the grandstand at the track, the Athlete again made it clear that she wanted to complete the test procedures as soon as possible. She again asked why Ms White could not go to the airport with her and Ms Flakemore explained that they were unable to move the DCS and that Ms White could not go to the airport as it was against procedures. The Athlete again repeated her request that the chaperone go to the airport with her.

50. These findings, which involve the Athlete accepting the requirement that she supply a sample, are in the opinion of the Sole Arbitrator significant, because they indicate an unqualified willingness on the part of the Athlete to submit to the testing procedure, although the Athlete continued to insist that the testing take place at the airport. That is not to suggest that athletes have carte blanche to insist upon a particular location for the test, indeed the AA Policy makes provision for this. However in the view of the Sole Arbitrator it is important that the Athlete be given credit for that willingness. At the same time however the Athlete's responses demonstrate an awareness of her obligation to undergo the drug test when requested to do so.

51. When at the DCS, Ms White read back through the notification form and also read to the Athlete what she called the "failure to comply" statement which is printed in the folders carried by each chaperone. Ms White gave evidence that her principal reason for doing this was that she did not believe that the Athlete was listening when she had earlier begun to read the notification form to her the first time.

52. The Athlete was again willing to give a sample and said "Right, where is the cup I need to pee in, let's get this over and done with". At this point the Athlete then asked

Ms White to come to the airport again to complete testing and she was informed once again by Mr White that that could not happen because "it involves more than just you and I, we have other chaperones and athletes that we are currently processing".

53. Following normal ASADA procedures, the Athlete then went to the toilet accompanied by the chaperone in order for her to produce her sample but the Athlete was not able to produce the required 90 mL. She was able to produce only a small amount of 15 to 20 mL.

54. The Athlete's coach then arrived at the DCS and asked the Athlete how long the rest of the procedure would take, saying that they needed to leave to go to the airport. Ms Flakemore then said that the Athlete had only produced a partial sample and that she would need to stay and produce more urine. The Athlete again asked why she could not complete the testing at the airport. Ms Flakemore explained that she was unable to relocate the DCS and that the chaperone was unable to go to the airport.

55. At about that time, Ms Flakemore again pointed out to the Athlete that it was her responsibility to be available for all anti-doping requests and she then read the doping rule violation warning as follows:

> *"I am required to warn you that by your actions you may be committing an anti-doping rule violation which could lead to sanctions from your sporting body".*

56. Ms White said in her statement that Mr Price, another casual employee of ASADA "concurred and supported Kate in her response to Sarah" and involved himself in the conversation. In her evidence, Ms White said that Mr Price was "involved in the conversation by trying to get Sarah to calm down and complete the test". While this was going on the Athlete's coach was noticeably looking at his telephone.

57. The Athlete then asked if ASADA would pay her accommodation overnight in Hobart and the airfares for a rebooked flight to Melbourne the next morning. She was informed that that was not possible as it was the Athlete's responsibility. The Athlete then "grabbed her things and said that she has no choice, and that she has to leave".

58. Ms White gave evidence, which is accepted by the Sole Arbitrator, that Ms Flakemore asked the Athlete several times to reconsider her decision to leave and again stated that "leaving would be committing an anti-doping rule violation". Ms Flakemore said that Sarah said that she, "didn't have a choice" and that she cannot miss her flight.

59. At this point Ms Flakemore informed the Athlete that ASADA was not able to keep her at the DCS against her will and told her:

> *"to please reconsider, and that this decision could affect her career."*

60. Mr Price, a senior ASADA official, said it was in the Athlete's best interests to remain and to produce another sample. The Athlete again said that she was sorry and that she didn't have a choice. She then "grabbed her things", walked to the door with her coach and then read and signed the DCF. Her coach also signed the DCF which was in the terms set out in paragraph 43 above.

61. Ms White worked as an office administrator in the School of Medicine at the University of Tasmania and was obviously an intelligent woman, thorough and competent in the execution of clerical tasks. The Sole Arbitrator was able to judge and evaluate Ms White's understanding of her ASADA duties and concludes that she was thorough in her resolve to carry them out to the letter. Ms White was a transparently honest witness. The Sole Arbitrator accepts Ms White's evidence without hesitation.

b. Mr Allan Shaw

62. At about 8:50 pm Mr Shaw, another ASADA casual employee, was in the testing area and located between Ms Flakemore, Mr Price, a "female athlete" and the Athlete's coach. There is no doubt that the female athlete was Ms Klein. That was not put in issue. Mr Shaw said that he heard Mr Price say "that the athlete had only provided a partial sample and that it was not enough and that the athlete needed to do another sample in order to provide a full sample". Mr Shaw said that he then heard a female, who he believed was the Athlete, ask if the test could be conducted at the airport as she had a flight to catch. Mr Shaw heard:

> *"you understand that it has been explained to you that by only providing a partial sample and refusing to stay and finish the test you may be committing a rule violation."*

63. Mr Shaw then saw the Athlete and the coach sign out and leave the DCS. The above words were obviously spoken to the Athlete. The document the Athlete read and signed is set out in paragraph 43 above.

64. Mr Shaw was an impressive young man whom the Sole Arbitrator unhesitatingly accepts was a truthful witness. Mr Shaw plainly endeavoured to think carefully before answering

questions and did so truthfully and without embellishment. His evidence was not seriously challenged in cross-examination.

65. Mr Shaw gave evidence in his statement that he heard the Athlete say words to the effect:

> *"I know I'm being unreasonable you must hate me."*

66. The Athlete also gave evidence to a similar effect. Mr Shaw then heard Mr Price say words to the effect:

> *"We don't hate you. We understand what you are saying but unfortunately this is the requirement."*

The Sole Arbitrator accepts this evidence.

c. Ms Kate Flakemore

67. In evidence which is accepted by the Sole Arbitrator, Ms Kate Flakemore said that the Athlete had said to her after attempting to produce a full sample, that she could not produce any more sample at that time and that she would leave to catch her plane. Ms Flakemore said that she informed the Athlete:

> *"… that if she chose [to] leave the doping control station without fully completing the test, she may be committing an anti-doping rule violation which could lead to a sanction from her sporting body".*

68. The Sole Arbitrator accepts this evidence. After some discussion about accommodation in Hobart Ms Flakemore said that she informed the Athlete that Athletics Tasmania may be able to provide her with assistance to arrange accommodation. The Athlete's response was to say that they "probably couldn't help". There was no apparent basis for this statement.

69. Ms Flakemore then said:

> *"I explained to Sarah again, using simple language, that her sporting career could be placed in jeopardy or ruined if she did not complete the test".*

The Sole Arbitrator accepts this evidence.

70. In the meantime, Ms Flakemore said that the Athlete "just kept saying that she had to catch her plane". Attempts by Ms Flakemore to involve the Athlete's coach who was then in the waiting area, to help encourage the Athlete to stay were not successful. The coach

told Ms Flakemore that he and the Athlete and others had a plane to catch and that they had to go.

71. Ms Flakemore gave evidence that at this point Mr Price told the Athlete that she could not be forced to stay and that it was her decision to leave if she chose to do so. With that, the balance of the doping control notification form in the terms set out in paragraph 43 above, was completed including a note on the form saying that the Athlete chose to leave doping control to catch a flight prior to completing the test.

72. Ms Flakemore was a highly experienced casual DCO, a position which she had held for about 25 years during which time she had conducted several hundred doping control missions. Ms Flakemore was a full-time schoolteacher. Despite a little initial awkwardness in giving her evidence, which resulted from difficulties in establishing a clear teleconference line with the witness, Ms Flakemore presented to the Sole Arbitrator as one would expect of such a highly experienced doping control officer. Ms Flakemore was meticulous in her endeavours to ensure that proper procedures were followed. She demonstrated a clear appreciation of the importance of detailed compliance with procedures. At the same time she conveyed to the Sole Arbitrator that she also had the interests of the Athlete at heart. Ms Flakemore's evidence is accepted without qualification, particularly on one of the main points in the case, that she informed the Athlete that if she chose to leave the doping control station without fully completing the test, she may be committing an ADRV which could lead to a sanction from her sporting body.

73. From a reading of Ms Flakemore's statement, a consideration of her oral evidence together with the evidence of Ms White and Mr Price, the Sole Arbitrator has been able to glean a clear impression of the Athlete's reactions to the situation in which she found herself. On a number of occasions in the evidence, those reactions were described as "upset" and "close to tears". The Athlete's state of mind was clearly not an ideal one in which to make a decision which might prove to be seriously adverse to her sporting career. Nevertheless blame for that cannot be placed upon the ASADA staff who were at all times polite and considerate to the Athlete. Nor does the Athlete's panicky state mean that she did not understand what had so clearly been explained to her on a number of occasions by ASADA staff. Later, the Sole Arbitrator examines the oral evidence of the Athlete in order to more thoroughly consider her mental condition, for the moment it is

enough to say that in the Sole Arbitrator's view, the Athlete knew exactly what she was doing and understood what had been explained to her by the ASADA officials .

d. Mr Keith Price

74. In his evidence of the same events in the doping control centre, Mr Price said that Ms Flakemore had told him a short time after 8:30 pm that an Athlete was concerned that proceeding with the sample collection would mean that she would miss her flight. Mr Price said that Ms Flakemore then began to organise things in order to minimise the time the Athlete would need to spend in doping control. Mr Price observed that the Athlete, Ms Klein, appeared highly agitated and was expressing concern to Ms Flakemore that not only would she miss her flight but so would the other three people who were travelling with her. The Athlete said she did not have any money to find accommodation or to rearrange her flight to Melbourne if she missed it that evening. He described the Athlete as "very animated". Mr Price said that he heard Ms Flakemore:

> *"explain to the Athlete that it was important, in order to satisfy the requirements of the notification, that they proceed with the test"*.

Mr Price then heard the Athlete say words to the effect "c'mon lets go and we'll give it a try" (sic). When he later saw the Athlete return from the testing area with what he said was obviously an insufficient urine sample he said the Athlete was "still agitated". Mr Price heard Ms Flakemore explain to the Athlete that the sample was incomplete and that she needed to make another attempt to complete the test. Having heard the Athlete tell Ms Flakemore that she was unable to produce any more urine sample and that she was still concerned about missing her flight, he then heard the Athlete say that she was going to leave doping control and go to the airport. With that, Mr Price said that he heard Ms Flakemore explain the "ramifications of leaving" before the test was completed and read to the Athlete the ADRV statement in the following terms:

> *"I am required to warn you that by your actions you may be committing an anti-doping rule violation which could lead to sanctions from your sporting body."*

75. At this point Mr Price says that the Athlete was "upset and close to tears" and that he tried to "assume the role of pacifier" in which role he said that he was *"urging the athlete to listen to the DCO and consider her actions"*. He told her that *"even though she was anxious she needed to listen to the DCO"*. (emphasis added)

76. When the test procedure at the airport was then suggested by the Athlete's support person, in Mr Price's recollection, Ms Flakemore and Mr Price both said that this was not practical and was no longer standard practice. At that point the Athlete said she could not complete the sample and was going to leave for the airport. She was again urged by Ms Flakemore to complete the test. The Athlete said it was not possible due to time constraints. The doping control notification form was then filled in. It is clear and the Sole Arbitrator so finds, that the Athlete refused within the meaning of Article 2.3 of the AA Policy, to submit to a test as requested. Repeated statements that she was prepared to complete the test at the airport, when the Athlete knew that that was not going to happen, constitute a refusal and do not ameliorate the position of the Athlete who had said several times that she would not remain at the DCS for the test to be completed. Clearly, the Athlete refused to complete the test.

77. The Athlete relies heavily upon what she said that Mr Price said to her. She said that she formed that impression, having heard the statement from Mr Price that "everything would be all right". The Sole Arbitrator has concluded that there is no justification for the Athlete attributing such significant consequences to the words of a courteous, elderly man who was simply trying to calm the Athlete down and no more. Mr Price was a retired schoolteacher who had many years' experience with ASADA's testing procedures. The Sole Arbitrator unhesitatingly accepts Mr Price's evidence.

78. Further, on the Athlete's own evidence she had been told that there would be a future investigation. Holding those beliefs it was impossible for her to believe that in some way she had been given a no fault clearance without such an investigation.

e. The male athlete

79. The remaining evidence of events in the DCS comes from a non-ASADA source, a young athlete who was in the DCS for the purposes of providing a random urine sample at the request of the ASADA officials. There is no suggestion whatsoever that this athlete had violated the AA Policy or of the anti-doping rules.

80. The young athlete observed that Sarah Klein was "distressed and crying" after she had given her urine sample. He heard the Athlete say "is this enough? Am I alright to go?" "No it's not going to be enough" was the reply. He then heard Mr Price say words to the effect "we'll write it down on the piece of paper (doping control form) that this was all you could give".

81. This young man was obviously intelligent. He gave his evidence directly in a careful manner and the Sole Arbitrator is well satisfied that he was a truthful witness giving evidence of conversations of which he had an actual recollection.

82. At the hearing, with the support of ASADA and without opposition from the Athlete, the male witness made an application for an order that his name and details remain confidential. He informed the Sole Arbitrator that he was not prepared to give evidence without such an order. The Sole Arbitrator bears in mind the provisions of Article 6A.2.3 of the AA Policy which obliges persons subject to the AA Policy to assist ASADA if required. The Sole Arbitrator is satisfied that the male athlete entertained good faith reasons for wishing to remain anonymous. He had carefully discussed those reasons with his manager and had been advised by his manager not to give evidence unless his name was not published in the Award.

83. Nothing said by him supports the conclusion that Mr Price had said anything to encourage the Athlete to leave believing that she would not be sanctioned. The language used by Mr Price is not capable of supporting the Athlete's claim or the submissions made on her behalf on this point.

84. For the above reasons the Sole Arbitrator concludes that the Athlete was properly notified that she had been selected for a doping control test. The notification was given by a duly authorised officer of ASADA in accordance with the procedure laid down by the AA Policy.

85. The Athlete has argued that she did not fail to provide a "sample" within the meaning of the Policy. The AA Policy defined sample as:

"Any biological material collected for the purposes of doping control."

What is also clear is that it must, as a matter of commonsense, be expected that a testing system of the detail described in the policy, would also make provisions for a minimum amount of test material lest the overall system of testing be rendered haphazard and unworkable. That result is avoided effectively by the operation of Article 5.1 of the AA Policy which provides that the testing shall be conducted in conformity with the provisions of the ISTI. The ISTI Suitable Volume of Urine for Analysis is designated as "a minimum of 90 mL…". In the view of the Sole Arbitrator the effect of these two linked provisions, the AA Policy and the ISTI, is to incorporate the 90 mL requirement

by reference into the AA Policy and at the same time to empower the DCO to require a minimum sample of 90 mL. The Sole Arbitrator rejects the Athlete's contention.

C. The Athlete's Submissions and Oral Evidence

86. The submissions advanced on behalf of the Athlete included a submission that Article 2.3 of the AA Policy does not create an offence of strict liability. At an early stage in the case it became clear that ASADA was not in fact contending that the alleged violation was one of strict liability. The CAS Panel decision in *FIGC v WAIA* supports that approach which, with respect, the Sole Arbitrator is in full agreement.

87. The next submission made on the Athlete's behalf was that the Violation Notice was bad for duplicity. This submission is based upon the presence of the disjunctive in Article 2.3 of the AA Policy.

88. Duplicity is a principle of the criminal law which has at its heart the policy consideration that a person accused of a criminal offence should be left in no doubt as to the charge he is called upon to answer and should not be unfairly required to attempt to mount a defence which straddles both limbs of the provision in question.

89. On the other hand the relationship between the Athlete and ASADA and AA is one which is exclusively founded on contract and it therefore follows that the Athlete may be seen to have agreed to conduct itself in accordance with those rules which are incorporated within that contract. Further, the Athlete was not placed in any position of unfairness or difficulty by reason of the way in which the Violation Notice was framed.

90. As the Athlete has submitted, "the AA Policy has legal application to Ms Klein by force of contract. It is trite to observe that it is not, and should not, be subjected to processes of statutory interpretation nor construed subject to extraneous statutory provisions. Principally, the mandates of contract construction apply to any exercise involved in construing the terms of the AA Policy."

91. In the opinion of the Sole Arbitrator the Infraction Notice dated 22 June 2016 when read, as it should, as a whole, conveys with complete and accurate particularity, exactly what is alleged against the Athlete. In the light of such particularity it cannot be suggested that the Athlete was at any disadvantage in the conduct of her defence. She was represented by diligent and competent counsel and solicitors who were of considerable assistance to the Sole Arbitrator. It was made apparent by the terms of the Infraction Notice that it was

the intentional refusal of the Athlete to provide the required sample for testing that was the gravamen of the alleged violation.

92. The Athlete submitted that it was unreasonable for the DCO to require the Athlete to remain at the DCS to provide a further sample. The Sole Arbitrator has earlier rejected the Athlete's contention that she had not failed to provide a sample. The DCO is expressly empowered to request the Athlete to provide a full sample and by a provision which mirrors that provision, the Athlete is obliged to comply with the request. On the facts there is nothing to support the allegation that the request was unreasonable. To the contrary, for the reasons advanced by the ASADA officials, it was plainly reasonable to reject the idea of a further test at the airport. Furthermore the ASADA officials properly considered the Athlete's request to be tested at the airport and did so by taking into account matters material to that decision. It should be remembered that the Athlete gave evidence that when she arrived at the airport the flight was already boarding. There was plainly no time to conduct a further test before the flight departed.

93. The Sole Arbitrator then turns to examine whether it has been demonstrated to the appropriate level of satisfaction of the Sole Arbitrator that the Athlete had the necessary intent. There is much evidence on this question including a number of statements by the Athlete herself.

94. The evidence given by the Athlete which the Sole Arbitrator accepts, was that she was aware that it was her obligation to give a sample. With that knowledge she signed the form which contained the acknowledgement that she *"chose"* to leave for the airport. [emphasis added]

95. The Athlete said that she knew that in competitions like the one in question, that testing was an obligation with which she had to comply if chosen and requested to do so. However she said that she had never turned her mind to the question that she could be drug tested on that night. There was no justification for the Athlete to think that she would not be tested. Later in her evidence, the Athlete said that she would assume ASADA would be there at that meeting and that she thought someone would be tested that night. This of course was exactly what occurred. When the Athlete was asked whether the ASADA staff ever told her she could leave without consequence the Athlete answered that she "… understood that [she] was urged to stay, um, to provide a full sample." The Athlete was then asked:

> *"Were you urged to stay because you had an obligation to provide a full sample under the policy, do you think?"*

The Athlete replied *"Yes"*.

She was then asked:

> *"And you knew that?"*

She answered:

> *"Er, yes, that I should provide a full sample."*

96. The Athlete then acknowledged that no one had told her that she could not leave the DCS and when asked:

> *"But they did say to you that there could be consequences including sanction by your sporting body if you did leave, didn't they?",*

the Athlete said:

> *"Yeah, possibly, yeah."*

97. To the extent that any of the above answers are at variance with answers given by the Athlete to the ASADA interviewer some time before the hearing, the Sole Arbitrator accepts the evidence given at the hearing considering that the Athlete, who had sat through and heard the evidence of all of the ASADA witnesses, was endeavouring to tell the truth.

98. Not all of the answers given by the Athlete at the hearing are completely consistent with those given in the ASADA interview. An important insight into the thinking of the Athlete is provided in the following exchange. The Athlete was asked:

> *"So you knew that after you left, ASADA would consider the reasons you had given for why you couldn't complete the full sample and then determine what steps it should take?*

The Athlete said:

> *"Yes."* [emphasis added]

99. That evidence is fatal to the Athlete's repeated suggestion that she had been assured everything would be "all right". It is of considerable importance when considering the "impression" that the Athlete said she formed of the words spoken by Mr Price, to bear in

mind that the Athlete knew that any later enquiry would not be conducted by ASADA staff at the event that night. The Athlete was asked :

> *"But you took a risk though didn't you, that someone else would form exactly the same view… of your own circumstances, that you formed. That was a risk, wasn't it?"*

The Athlete answered:

> *"It is a risk, but I thought that they would… I thought it was understood."*

That evidence must be considered alongside the Athlete's statement that her *"… overwhelming urge was to… leave, to catch [her] flight."*

100. Moreover, there was neither an "understanding" nor any rational basis for an understanding of the kind the Athlete was proffering.

101. The Athlete was then asked by the Sole Arbitrator:

> *"Yes but whatever the evidence I should find about this, 'it's alright' or 'we understand your position', they (Mr Price and Ms Flakemore) were not the people carrying out the investigation."*

The Athlete replied:

> *"No they weren't."*

The Sole Arbitrator asked the Athlete:

> *"So did that not increase the risk that those statements you thought you had understood, 'it's alright' were just of no value to you at all?"*

102. The answer given by the Athlete to that question starkly illustrates the nature of the Athlete's ill-judged yet informed gamble. The Athlete said:

> *"I suppose I should have thought that between what they said and between what I was saying when that would be passed on to whoever did the investigation and I never thought of who would do it, you know, ASADA, that was all I would have thought. That between whatever I was saying it would paint a picture of, oh okay she cooperated, she didn't refuse, she provided a partial sample, she had these other pressures weighing on her that, that they would agree and understand with the decision that I made and I see that is a risk."*

103. This was a grave miscalculation by the Athlete, a miscalculation that was not rationally prompted or induced by anything said by Mr Price and which ignored the wise and repeated advice given to the Athlete by Ms Melissa White, Ms Kate Flakemore and Mr Price. Just one of a number of significant conclusions to be drawn from the evidence of the Athlete which has been reproduced in the preceding paragraphs is that in order to properly consider the circumstances in which the Athlete decided to leave the DCS it is necessary to take account of the Athlete's knowledge that there was going to be an "investigation" by ASADA people other than Mr Price and Ms Flakemore and that that entailed a the risk that those who would be responsible for making a judgment would see the matter quite differently from the Athlete.

104. The Sole Arbitrator has firmly concluded that nothing said by Mr Price could legitimately be understood as an "assurance" or a promise that when a future investigation was undertaken by others, that the Athlete would be found not to have committed an ADRV.

105. The Athlete was asked:

> *"Also do you also remember him saying that 'it's in your interest to stay'?"*

The Athlete said:

> *"He possibly said that."*
>
> *"Do you remember Ms Flakemore saying that?"*
>
> *"Yeah probably."*
>
> *"You say probably, do you have a clear recollection of that?"*

The Athlete said:

> *"I remember them urging me, Kate urging me to stay and complete the sample"*.

The Athlete's suggested reliance upon the impression she said she had as consequence of what Mr Price said, was repeated in her evidence. For example the Athlete was asked:

> *"You mentioned that Mr Flakemore had said to you that there'd be an investigation,… do you understand that that meant that ASADA would consider the reasons that you've put forward for not being able to complete the sample?"*

She replied:

> *Yes, I did think that they would fix it up for the reasons why I left."*

The Sole Arbitrator has concluded that the Athlete had no basis whatever for expressing that view and rejects that evidence.

106. The Athlete's reliance upon Mr Price was described by her as having "tipped the balance", presumably when weighing the decision to leave the DCS. The Athlete was afforded repeated opportunities to explain her curious reliance on Mr Price. She was not successful in doing so.

107. The Sole Arbitrator has taken into account each one of the different formulation of "it's okay" and other variants of similar expressions advanced by the Athlete. The Sole Arbitrator finds, based fairly and squarely upon the Athlete's own statements in evidence, that nothing said by Mr Price could possibly have amounted to an assurance of any kind that the Athlete would be absolved from not providing a full sample and leaving the DCS to go to the airport, or that she had not done anything in breach of the AA Policy. The highest the matter could be put from the Athlete's point of view is that "we understand the pressure" or "that we understand your decision… that you're going to go". Indeed, it is possible to point to the precise moment in the evidence of the Athlete when perhaps wishful thinking produced the gloss in her evidence on this point. The Athlete was repeatedly asked what "we understand" or "it's okay" and "the situation" meant, as she had used those expressions in her evidence.

108. The Athlete said :

> *"I understood it as "it's okay" that we haven't got a full sample because we understand what you are up against and so that situation will be alright.*"

The Sole Arbitrator rejects the evidence of the Athlete that the words "so that situation will be all right" were spoken to the Athlete or that anything said to her was somehow a complete endorsement by the ASADA staff of her decision to leave. There was nothing said in or to that effect by ASADA representatives nor could anything which was said support that impression.

109. The quoted passage from the Athlete's evidence are not in any event what the Athlete says Mr Price said. They are an "impression" the Athlete said she entertained, or an "understanding" but as the Athlete herself said *"well he didn't say that"*, (emphasis added) and then the critical words *"but that was the assurance that I took from what he was saying"*.

110. If the Sole Arbitrator isolates what the Athlete says were her "impressions", a number of findings may be made. Firstly, the Athlete does not say that Mr Price said anything which was the equivalent of those impressions. Secondly, nor does the Athlete's coach, Mr Shaw, Ms White, Ms Flakemore or Mr Price himself give any evidence which supports the Athlete on this issue. The young male athlete's evidence also provides no support for the Athlete's so called "impression".

111. If such impressions were truly part of the Athlete's thought pattern when she made her decision to leave then that would logically have the effect of contributing important non-compelling circumstances to her decision to leave. However it is not necessary for the Sole Arbitrator to so conclude in the light of the findings it has otherwise made as to the non-availability of the alleged "compelling justification" factors which the Athlete has advanced.

112. The Sole Arbitrator is more than comfortably satisfied that the Athlete intended to carry out the actions which constituted the ADRV and did so knowing that she was obliged to provide a full 90 mL testing sample and had not done so.

D. Compelling Justification

113. The Athlete then submitted that the words "without compelling justification" in the concluding part of Article 2.3 of the AA Policy, impose an obligation upon ASADA to prove that there was no compelling justification. That is a question of the correct interpretation to be given to Article 2.3 of the AA Policy.

114. The Athlete's submissions also raise a further question of interpretation of Article 2.3, that is whether, as the Athlete contends, "… subjective states of mind inform the assessment of 'Compelling Justification'". (sic)

115. The question whether, as ASADA submits, "… the cases unanimously supported the principle that compelling justification turns only on objective considerations…" is closely related to the question of who bears the onus of proving absence or presence of compelling justification.

116. The Sole Arbitrator considers that the proper approach to be taken to the construction of Article 2.3 of the AA Policy is that which is embodied in the law of Victoria as the proper law of the contract agreed by the parties. That approach involves the Sole

Arbitrator giving the words in the AA Policy their common sense meaning in the light of the objectives to be served and the mischief to which the AA Policy has been directed.

117. The Sole Arbitrator turns firstly to the question of onus. ASADA has submitted that:

> "78. The AA Policy and World Anti-Doping Code do not prescribe what may or may not be a 'compelling justification'. However, the CAS has developed a body of jurisprudence which more fully considers this term.
>
> 79. As determined by the case law of the CAS the defence of a compelling justification is to be interpreted restrictively. In that it is not sufficient that a reason exists for not complying or even a good reason but rather any reason must be compelling. In the *Azevedo* Award (at para 75) (R16) the Panel stated:
>
> > "No doubt, we are of the view that the logic of the anti-doping tests and the doping control rules demands and expects that, *whenever physically, hygienically and morally possible, the sample should be provided despite objections by the athlete*. If that does not occur, Athletes would systematically refuse to provide samples for whatever reasons, leaving no opportunity for testing" (emphasis added).
>
> 80. Moreover, in *Troicki v ITF* (para 9.15), the Panel found that:
>
> > "*whether the athlete had a compelling justification for failing to provide a sample needs to be determined objectively. The question is not whether the Athlete was acting on good faith* [sic], *but, whether objectively, he was justified by compelling reasons to forego the test.*"
>
> 81. Athletes have an overriding duty to respect the anti-doping rules, which includes their responsibility to comply with Doping Control. In order to demonstrate that a compelling justification exists, the Athlete must have been placed in a position where she had no effective choice as to whether to comply with Doping Control, or leave Doping Control before the provision of a Sample.

82. Generally, it appears as though there must be a genuine emergency situation, evidence of which is made available to the relevant Doping Control Personnel at the time, for such circumstances to exist. To be compelling the Athlete's departure would have to have been unavoidable.

83. The decision of the CAS in *United States Anti-Doping Agency v Jonathan Page* (R18) states that there was a 'confluence of personal circumstances' which amounted to a compelling justification. ASADA submits that this case is highly distinguishable from the facts of Mr Page. Mr Page's 'personal circumstances' most notably concussion are highly distinct from those of the Athlete on 13 February 2016 and do not assist the Athlete to establish she had a 'compelling justification'."

118. When approaching the interpretation of Article 2.3, the Sole Arbitrator bears in mind that the provision is a vital part of the WADA anti-drug enforcement scheme and that a violation of the provision may have drastic consequences for the life and the career of the Athlete. Thus a construction of the Article which provides the greatest scope for the operation of the expression "compelling justification" from the Athlete's viewpoint, is to be preferred. For related reasons of common sense and efficiency it seems clear that it is the Athlete who will be in the best position to provide a full and detailed account of every circumstance which contributed to her decision not to submit to the full testing procedure. These are plainly subjective matters in the sense that they relate to her own knowledge and intention and her knowledge and anticipation of the perceived effects of external matters as well as intensely personal matters known only to her.

119. However, once those circumstances have been exposed by the Athlete in a manner in which the Athlete is satisfied will best do her case justice, then ASADA is put into a position to decide on a fully informed basis whether or not, once the full ambit of Article 2.3 is opened up to it, whether to prosecute the Athlete for an alleged violation of the AA Policy.

120. The alternative would involve ASADA endeavouring to conduct on the blind an uninformed and perhaps intrusive investigation of the Athlete's personal circumstances. That would result in ASADA formulating its decision to charge the Athlete after an inadequate consideration of what may well be a limited exposure of all of the relevant circumstances which could exclude much of the circumstances personal to the Athlete and unknown to ASADA.

121. The construction which the Sole Arbitrator has adopted is, in its view, consistent with the initial words of Article 2.3, which describe a discrete set of actions by the Athlete which are quite separate from the question of "compelling justification" yet which nevertheless require proof by ASADA that the Athlete had the necessary intent or mens rea to commit the actions which constitute the offence, while at the same time giving full play to the operation of the exculpatory provisions "compelling justification". There is a logical pivot or fulcrum once ASADA has proved a "failure" or "refusal", it is then for the Athlete to justify her actions.

122. The CAS decisions referred to by ASADA support the view that the onus is on the Athlete to demonstrate what she contends to be the "compelling justification" for her violation. The Sole Arbitrator accepts the submission by ASADA that the onus lies on the Athlete to establish a compelling justification for her actions. Even if it was to be considered that the initial onus lay upon the Respondents to establish a lack of a compelling justification, in the opinion of the Sole Arbitrator the Respondents have done more than enough to ensure that the onus has shifted to the Athlete to disprove the initial apparent absence of any compelling justification. Upon a mere reading of the Athlete's statements it is obvious that they fall short of a "compelling justification".

123. It is now necessary to resolve the second important question concerning the interpretation of Article 2.3, that is whether the Sole Arbitrator should determine its effect by applying a subjective or objective standard of assessment. The Athlete argues that subjective states of mind inform the question of "compelling justification".

124. The Sole Arbitrator accepts that the Athlete is obliged to demonstrate the effect of the alleged "compelling" circumstances upon her mind. Absent such evidence the circumstances relied upon may be academic, and may have no proven effect upon the mind of the Athlete.

125. Naturally, that evidence then falls to be evaluated by the Sole Arbitrator. Were it otherwise for example, then the subjective evidence of an athlete of extremely heightened sensitivities, or an unjustified exaggeration, would be enough to support reliance upon the words "compelling justification".

126. The Sole Arbitrator accepts the submissions of ASADA. If the position were otherwise and the Athlete's subjective evidence could carry the day the Athlete would in effect

become the sole judge of the question and the obvious purpose of Article 2.3 would be circumvented.

127. The language chosen by the drafter of the AA Policy supports this view. The word "justification" means in the present context, that the person advancing the circumstances which are said to be "justifiable" must show good reason why he or she did such a thing. The presence of good reasons must be demonstrated to the satisfaction of the Sole Arbitrator. Justification is the state of being justified. So that in the present case a justification is a demonstration that the circumstances advanced were just, right or valid. Of that condition the Sole Arbitrator is to be the judge.

128. The Sole Arbitrator accepts that the word "compelling" qualifies the word "justification". Furthermore the word compelling must be given its ordinary natural meaning of forcing, driving or constraining. These are powerful qualifiers of the word "justifiable". As a matter of language the two words in combination set the bar at a substantial height for the Athlete to clear.

129. That approach is confirmed by the CAS decisions referred to by ASADA. In the *Azeueda* Award where a Panel of Arbitrators said:

> "*No doubt, we are of the view that the logic of the anti-doping tests and the doping control rules demands and expects that, whenever physically, hygienically and morally possible, the sample should be provided despite objections by the Athlete. If that does not occur, Athletes would systematically refuse to provide samples for whatever reasons, leaving no opportunity of testing*."

130. The Sole Arbitrator respectfully agrees with this as the correct approach.

131. When they are closely considered, the list of matters advanced by the Athlete and said to constitute a compelling justification for her actions, when regarded as a whole, does not rank as a significant much less compelling justification for her actions.

132. The fact that the Athlete was "panicky" goes no further than a description of a dilemma she brought about herself and cannot qualify as a "compelling justification" although it may partially explain the impasse the Athlete caused at the DCS.

133. Lack of money was advanced by the Athlete as a contributing factor in the list of so-called compelling justifications. This was a flimsy contention. The Athlete owned a substantial property in Victoria, she had $20,000 in cash in the bank, she was employed

as a full-time school teacher and she had a debit card with her which would have enabled her to pay the small taxi fare to the CBD in Hobart.

134. Likewise, the Athlete's statement that she was worried about whether she would be able to get a taxi may be quickly rejected. Hobart is a sophisticated State capital city and the athletics track was no more than 15-20 minutes away from the centre of the city. The Athlete had a mobile phone and it was relatively early in the evening, 9 pm. The Athlete did not endeavour to make any attempt organise a ride to the city.

135. Then the Athlete said that she was worried that her colleagues would miss the flight. That has nothing to do with any kind of "compelling justification". Her colleagues were waiting outside in a car, with the "motor running" and could have left at any time they chose. The fact that her friends and colleagues might have missed their flight to Melbourne if they chose to wait for the Athlete is entirely their concern and is not relevant in any assessment of alleged compelling justification as it operated upon the mind of the Athlete.

136. Next, the Athlete said that she might miss her training run the following morning in the Dandenong Ranges outside Melbourne. This was purely a question of choice from the Athlete's viewpoint. The run was in the nature of a fun run. It was not a calendar championship event. It was not essential that the Athlete run in company with all of the other runners. Moreover, had the Athlete caught the early morning flight to Melbourne the next day she would have been ready to line up for the run. The run should have been factored in to the Athlete's travel decisions by the Athlete herself. If it was not practicably possible to compete in Hobart and to complete a drug test after the event and run in the Dandenong Ranges the next morning, then the Athlete was obliged to choose between the two events. Looked at calmly, the run in the Dandenongs barely rates as a contender for description as a "compelling justification".

137. Then the Athlete said that she had no accommodation in Hobart. The way in which the accommodation industry is organised in modern times is calculated to ensure that accommodation enquiries and bookings may be conducted as simply and as easily as possible. It beggars belief that armed with a mobile phone, the possible assistance of at least four colleagues, and a debit card, that a mature school teacher would be incapable of finding a bed for that night in Hobart, a modern capital city with a well-developed tourist and accommodation infrastructure.

138. The Sole Arbitrator is unconvinced by any of the matters which are said to be a compelling justification for the Athlete's actions. They were a hotchpotch of wholly inadequate reasons each of which had an obvious simple solution which the Athlete simply decided to bother not to investigate or to invite assistance to help her investigate.

139. The Sole Arbitrator accepts the Athlete's submission that it is appropriate to consider the aggregated effect of all of the circumstances. Doing so, the Sole Arbitrator is in no doubt whatever that the circumstances relied upon fall a long way short of any "compelling justification" and that individually and in total they were trivial and avoidable. There was nothing "compelling" about them singly or in total. The circumstances relied upon were of the Athlete's own making and each element advanced by the Athlete cannot survive the application of a common sense solution. Taking each element in turn, they presented to the Athlete tasks which at their highest may have been an inconvenience, but nevertheless were the kind of daily tasks faced by us all.

140. The Athlete tendered some photographs of the sealed tree lined road leading out from the DCS to a principal suburban road. The suggestion was that the Athlete may have had to walk along this road to get to a place from which to call or meet a taxi. It is difficult to accept that the Athlete would have been required to walk away alone from the athletics meeting while numerous people who could have driven her, remained at the event. The Sole Arbitrator is of the opinion that this contention lacks any factual basis. It was a trivial and not compelling matter. In fact, the Athlete made no enquires to obtain transport assistance.

141. The loss of the airfare that night and the new airfare next morning was said to be compelling justification. This particularly came about because, in the Athlete's own words, she had originally booked a return flight from Hobart to Melbourne leaving at 9:40 pm when her race in Hobart finished at 8:30 pm approximately. The Athlete had given no thought whatever to the possibility that she might have ASADA duties to perform after her race. The Sole Arbitrator rejects this contention.

142. When properly considering all of these circumstances the Athlete could have decided that the competing demands upon her time, measured against the flight schedules, meant that something had to give. She was not entitled to resolve that conflict by sacrificing her duty to comply with the AA Policy in favour of the relatively insignificant factors she has put forward. Article 5.2.1 of the AA Policy expressly provides that an Athlete may be required to provide a Sample 'at any time and at any place'.

143. The AA Policy cannot be interpreted in such a way that allows an Athlete to obtain the benefit of the "compelling justification" contention by deliberately setting for herself an unattainable or ambitious timetable and, when the program inevitably proves too tight, seeks to label the result as a "compelling justification" for not completing the anti-doping test.

144. These unconvincing considerations cannot be compared with *Page*, a decision relied upon by the Athlete. That was a case in which the Athlete was badly concussed and was in no condition to undergo the test procedures.

E. The So-Called Dilemma

145. As the hearing proceeded it became quite clear that the Athlete was attempting to invest great importance in what she said Mr Price said to her shortly before she and her coach and fellow Athletes left the DCS to drive to the airport. It is therefore essential that the Sole Arbitrator should examine all of the evidence upon that subject. The place to begin is the transcript of the interview conducted by Karen Smith of ASADA and the Athlete on 3 March 2016.

146. When Mr Price was first mentioned in her prior interview with an ASADA representative the Athlete said:

> *"... And then when I couldn't provide any more of a sample, we went back into the room and I sat down and filled out some more paperwork and was getting a bit panicky by this stage because it was getting closer and closer to – you know, we were getting less and less time to get to the airport and catch our flight home."*

147. Later in her interview, Ms Klein said:

> *"And – and then Keith [Mr Price] came over and said – that's when he said not to panic, "It will be okay. We understand." He actually said, "We like you. We understand. It will be okay."* ***And – and so me and my coach were sort of saying, "Do we stay? Do we go," and we had – I decided to go because I had my long run, which is – Sunday long runs at the moment are a big part of my training program and so – and then Kate said then, "I have to say to you that I advise you to stay and complete the sample." And – and then Keith came over again and he said, "You need to note this down."*** *[emphasis added] He said, 'We will*

> *note it down. We will note the circumstances down on the' – 'the form' and he was assuring me and my coach saying, 'It's noted down.' He is saying to Kate, 'Write it down,' so she wrote it down on the pink sheet and then he – Keith was assuring me and my coach, 'It will be okay. We understand,' and so we finalised the paperwork. I signed off on the numbers and everything of my – my samples and whatever and then we left. We literally ran out of there and the car was in the car park and got to the airport. Everyone was lined up, boarding the plane and we were the last ones to get on."* (emphasis added).

148. The Athlete then said that Ms Flakemore said, *"I advise you to stay"*. The Athlete gave evidence that that is when Keith Price said:

> *"... we will note this stuff down". He saying to Kate, "Write the circumstances down" and he saying, "We understand. It will be okay," and so when I left I was thinking it will be okay given the circumstances."*

149. In the course of her interview with ASADA some time prior to the hearing, when the Athlete was asked:

> *"*Ms Smith [the ASADA interviewer]: *Did someone say, "You may leave the doping control station"?*
>
> Ms Klein: *They said you can – I can leave whenever, like, no one was telling me that had to stay and so* ***they said if I left that it was my decision***. (emphasis added)
>
> Ms Smith: *Okay.*
>
> Ms Klein: *So that was, I assume, that's permission. There's no one saying that I couldn't leave.*
>
> Ms Smith: *But you are asked to make the sample?*
>
> Ms Klein: *Yes.*
>
> Ms Smith: *So I'm just a bit confused because I think you said earlier that Kate said you needed to stay.*
>
> Ms Klein: *She said "I advise you to stay".*

150. At a later point in her interview the Athlete was referred to the DCF which contained the note:

> "Athlete chose to leave doping control to catch a flight prior to completing the test".

151. The Athlete agreed that she read this note and then signed the form. When asked by Ms Smith with reference to that note:

> *Is this what Keith was referring to when he was saying "write this down, write it down"?*

The Athlete said:

> *Yes. This is what he was saying to Kate – "write down" – yes.*

The Athlete was asked:

> *Yes. Was there anything else written down at any other time?*

She replied:

> *No.*

152. The Sole Arbitrator has concluded that the note contained in the DCF (set out above in paragraph 43), read and then signed off by the Athlete and her coach, constitutes an important, accurate, contemporaneous note of the essential element in this narrative, namely the decision the Athlete chose to make, to leave to go to the airport knowing that she had refused to complete the test. Later in the interview the Athlete was asked:

> Ms Smith: And I just need to clarify, at any stage were you advised that not completing the sample would be an anti-doping board violation? Did those – did the words "anti-doping violation" did you ever hear those words?

153. The Athlete replied that she had "never heard those words". The Sole Arbitrator does not accept that evidence and prefers the clear and credible evidence of Ms White, Ms Flakemore, Mr Price, Mr Shaw and the young male athlete. The Athlete went on to say:

> Ms Klein: *And – like, I left with the overwhelming feeling of it will be okay. We understand and it will be okay. That was the feeling that I left with. And you know, the word "violation" is a pretty scary word when it comes to sport and ASADA and drug testing and that's not a word that I would want to mess around with. I never heard that word. Yeah. And I walked away with the understanding that it will be okay.*

> Ms Smith: *Did anyone talk about that there may be consequences for not completing the test?*
>
> Ms Klein: *No. It was only – the only thing that Kate said was that we advise you to stay and that was all.* (The subsequent evidence of the Athlete reveals this answer to be incorrect.)
>
> Ms Smith: *Did she say anything else?*
>
> Ms Klein: *I can't remember words exactly. Because it was, sort of, Kate was saying to stay and then Keith was coming over the top and saying it will be okay. There –* ***they might have said that we will need to look into this or something along those lines. You know, but – or there may be an investigation afterwards*** (emphasis added). *But between, like, Kate saying you should stay in Keith saying everything will be alright I'm not exactly sure of the words; the exact words.*
>
> Ms Smith [the ASADA interviewer]: *Okay. But you think you may have recalled something about an investigation being mentioned?*

154. The acknowledgement by the Athlete that she was told that "…we will need to look into this..." and "there may be an investigation afterwards" is quite inconsistent with the understanding the Athlete said she had that everything will be "alright". An Athlete holding those beliefs could not at the same time have held the belief that she was in the clear on the say-so of Mr Price.

155. The Sole Arbitrator cannot accept that in all of the circumstances, or indeed, only those referred to by the Athlete, that there was some kind of exculpation or assurance that if she left the DCS without completing the test that there would be no adverse consequences for her. That evidence is consistent with the unjustified wishful thinking in which the Athlete engaged when she decided to leave the DCS.

156. Furthermore, once again the evidence of the Athlete is contrary to the evidence of Mr Shaw, Ms White, Ms Flakemore, Mr Price and the male athlete which the Sole Arbitrator has accepted.

157. The Sole Arbitrator also rejects the Athlete's unwarranted further development or expansion of Mr Price's evidence in which the Athlete sought to add greater significance to Mr Price's statement by referring to it as an "assurance". The Athlete said:

> "*I was happy to provide a sample on the night as well and to cooperate but I just didn't have the sample in me at the time and we – all the other pressures I have decided to leave on the assurance that everything would be alright and not, you know, I don't feel good about being in the situation that I'm in at – right now*."

158. In the view of the Sole Arbitrator there is no rational basis for the Athlete to describe what Mr Price said "as an assurance that everything would be alright".

159. If that is truly what the Athlete then thought it was irrational, not supported by any evidence and contrary to the substantial body of evidence including the oral evidence given by the Athlete at the hearing.

160. The Sole Arbitrator has carefully considered the oral evidence given by the Athlete. Much of that evidence itself is consistent with and strongly supports the Sole Arbitrator's analysis of the Athlete's decision to leave the DCS as a fatally flawed decision which ran counter to the careful advice repeatedly given to the Athlete by the three experienced ASADA staff.

F. The Case in a Nutshell: a Summary of Significant Elements

161. The case may be viewed as one in four parts.

162. The first was an honest, open attempt by the Athlete to furnish a full urine sample. At the end of her race, the Athlete moved quickly with the cooperation of ASADA, in an attempt to comply with the request to provide a sample even though she began to ask from the outset, that the test procedure should be carried out at the airport.

163. The second was that the Athlete hydrated immediately and attempted to provide the best sample of which she was capable. When unable to do so she began to panic and become upset. The Athlete was influenced unhelpfully by her coach and her fellow athletes who were anxious to get to the airport.

164. The third was that at the end of the episode in the DCS the Athlete deliberately weighed up her priorities, which regrettably did not include completion of the urine test, and made a *choice* to leave for the airport because it did not suit her to stay. She advanced a series of reasons at the time and after the event which constituted an attempt to justify her decision. The Sole Arbitrator has rejected her evidence that she had any basis for thinking that she was blameless or exculpated from her failure to provide a full sample.

165. The fourth element is that the Athlete's own evidence makes it abundantly clear that she knew when she made her decision to leave the DCS that there would be at least an investigation or an enquiry to be undertaken by people other than those whom she says in effect exculpated her in advance. Again the Athlete's own evidence recognises that she took a risk, one that was completely miscalculated. The Sole Arbitrator has concluded that the Athlete has committed a violation, a single violation, of Article 2.3 of the AA Policy in that she has intentionally failed or refused to submit a 90 mL urine sample, when properly requested to do so and that the Athlete did so without compelling justification.

166. The next question the Sole Arbitrator must answer is whether or not, within the meaning of Article 10.3.1 of the AA Policy, the Athlete has established that the commission of the violation was not intentional.

167. Article 10.2.3 defines the term "intentional" as:

> *"…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.*"

168. If the Athlete succeeds in showing that the violation was not intentional then by the application of Article 10.3.1, the period of eligibility shall be two not four years.

169. The Sole Arbitrator has concluded that the oral evidence given by the Athlete at the hearing clearly establishes to the comfortable satisfaction of the Sole Arbitrator, that she knew her conduct could constitute an ADRV and that she knew that there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk.

G. Proportionality

170. Taking all of the relevant matters into account which the Sole Arbitrator has outlined earlier in this Award, the Sole Arbitrator places special emphasis upon the following matters:

(a) The Sole Arbitrator acknowledges the importance of the provisions of the AA Policy which operate to impose a penalty of four years. That should not be disturbed without good reason and only in rare cases;

(b) The "refusal or failure" in the present case was not initially an outright refusal or failure. It came about after the Athlete had honestly and cooperatively done everything she could to provide a full sample, however she was unable to deliver more than a 20 mL sample;

(c) Although it may seem now after the event, that it would not have been possible to complete the test at the airport, nevertheless, right from the outset the Athlete requested that the full testing procedure be undertaken at the airport and when an inadequate sample was produced at the DCS she continued to offer to complete the procedure if she was permitted to do so at the airport;

(d) The Sole Arbitrator finds that the Athlete was not endeavouring to evade the full test procedure in order to conceal the ingestion of any prohibited substances. The Sole Arbitrator accepts the evidence for the Athlete that she had never been a user of prohibited or performance enhancing drugs;

(e) The small sample given by the Athlete was sufficient to enable a negative result for all substances except EPO which would could not be tested using such a small sample;

(f) When the Athlete made her conscious decision to leave the DCS without completing the test the Athlete was "upset and panicking". Overreaction that may have been, yet the evidence of all those present clearly describes the highly emotional state in which the Athlete found herself;

(g) The feelings of panic were not helped by the actions of her coach and fellow Athletes who were booked to fly back to Melbourne with her. There was at least one phone call to the coach of which the Athlete was aware. The Athlete was acutely conscious that her colleagues were anxiously waiting outside of the DCS to drive to the airport. The Athlete's coach said that the Athlete's colleagues "had the motor running". The Athlete did not receive the prudent advice she was entitled to expect from her coach;

(h) The Athlete is 30 years old. She is a dedicated distance runner who has plans and perhaps good prospects to continue competitive running with a measure of success;

(i) The Athlete would be 34 years old when the four year ban expired and although there are cases where long-distance runners have continued their careers into their late 30s and beyond, a four-year period of ineligibility at this stage in the Athlete's career may take on the significance of a near lifetime ban from top-level international competition.

171. The Athlete has strongly submitted that the Sole Arbitrator is bound to consider whether the period of four years ineligibility which would be imposed upon the Athlete by the operation of the AA Policy was "just and proportionate" in all the circumstances.

172. In the present case this submission is of considerable importance to the Athlete who has, unsuccessfully attempted to reduce the period of eligibility in reliance upon Article 10.3 and 10.4 of the AA Policy.

173. There is no express provision in the AA Policy which empowers the Sole Arbitrator or CAS to undertake an overall analysis of whether the penalty otherwise imposed was "just and proportionate". However, the Athlete relies upon CAS decisions which she submits, demonstrate that steps may be taken by the CAS "… to avoid, so far as it is possible, unjust and disproportionate retribution". The Athlete relies heavily upon the decision of the CAS in *Puerta v ITF* which her counsel describes as an "emphatic and seminal decision".

174. Giving such a vital gatekeeping role to the CAS is predicated in the *Puerta* case, upon there being "a gap or lacuna in the WADC [such that] that gap or lacuna must be filled by the Panel…" "… in those very rare cases" or that "tiny number of cases" where it is felt that the imposition of the WADC sanctions results in oppression or injustice".

175. In reply to the submissions of the Athlete on proportionality, ASADA has submitted that "the Sole Arbitrator should ordinarily give effect to the principle of fixed sanctions as determined by the AA Policy".

176. ASADA submitted that it is only in rare cases where proportionality has any role to play. For the reasons advanced in *Puerta* itself such an intervention should occur only in the rarest of cases. The Sole Arbitrator agrees, with respect, with such a formulation of principle.

177. Another, and the Sole Arbitrator considers to be an equally important reason for that approach, is the view that the 2003 rewrite of the AA Policy was to some extent an attempt to build proportionality into the AA Policy so that it truly functions as a policy.

Examined, it is said, in that way there is no room for a supervening general doctrine of proportionality.

178. In its initial written submissions on this issue ASADA argued that:

> "*113. The CAS has recognised that the inflexible application of anti-doping policies may, in rare cases, result in sanctions which are inconsistent with the principle of proportionality. In this respect the CAS has, on occasion, determined that where the range of sanctions mandated are so disproportionate to the conduct to which they are directed, the principle of proportionality obliges the Sole Arbitrator dealing with the matter to consider whether the "regime" has properly allowed the Tribunal to take all matters into account. This is even so where the sanction imposed may not strictly conform with the express provisions as set out in the Code, or range of sanctions, available under the Code in the given case. In saying that, it must be emphasised that the circumstances which might give rise to such a conclusion are likely to be very rare. This is because the WADA Code (and hence the AA Policy) is already drafted with consideration of the principles of proportionality.*
>
> *114. The leading case which supports this proposition is in the Appeal division of the CAS in the Puerta v ITF:*
>
> > *[I]n all but the very rare case, the WADC imposes a regime that, in the Panel's view, provides a just and proportionate sanction, and one in which, by giving the athlete the opportunity to prove either "No Fault or Negligence" or "No Significant Fault or Negligence", the particular circumstances of an individual case can be properly taken into account.*
> >
> > *But the problem with any "one size fits all" solution is that there are inevitably going to be instances in which the one size does not fit all. The Panel makes no apology for repeating its view that the WADC works admirably in all but the very rare case. It is, however, in the very rare case that the imposition of the WADC sanction will produce a result that is neither just nor proportionate. It is argued by some that this is an inevitable result*

of the need to wage a remorseless war against doping in sport, and that in any war there will be the occasional innocent victim. There may be innocent victims in wars where bullets fly, but the Panel is not persuaded that the analogy is appropriate nor that it is necessary for there to be undeserving victims in the war against doping. It is a hard war, and to fight it requires eternal vigilance, but no matter how hard the war, it is incumbent on those who wage it to avoid, so far as possible, exacting unjust and disproportionate retribution…

In the Panel's view, the answer is clear, albeit not without problems and difficulties. Any sanction must be just and proportionate. If it is not, the sanction may be challenged. The Panel has concluded, therefore, that in those very rare cases in which Articles 10.5.1 and 10.5.2 of the WADC do not provide a just and proportionate sanction, i.e., when there is a gap or lacuna in the WADC, that gap or lacuna must be filled by the Panel….

The Panel is satisfied that its decision does not represent "the thin edge of the wedge" or in any way a weakening of the war against doping. It believes that when properly understood it represents a desire to ensure that so far as possible the sanction imposed in every case will be, and be seen to be, just and proportionate, and that there will not be a tiny number of cases in which anti-doping Tribunals, athletes and international federations feel that the imposition of the WADC sanctions results in oppression or injustice."

115. *In Puerta, the CAS Appeal Division found that facts of the case amounted to an engagement of the No Significant Fault and Negligence provision of the Code and reduced the period of ineligibility by the maximum reduction available. However, it considered that this still produced an unjust result. It further reduced the sanction beyond that which the provisions of the Code allowed.*

116. Whilst a four (4) year ineligibility period in this case may, at first consideration, appear severe it reflects the significance of the Athlete's

> *conduct related to this ADRV [emphasis added]. The sanction for this ADRV can be the same as if an athlete tested positive for a prohibited substance or method and there is good reason for that circumstance.*

179. In *Puerta,* the Panel said it was authorised to fill a gap or lacuna in the WADC. This was not an exercise in the construction of the language of the WADC rather, to use the language of the Panel "that gap or lacuna, which the Panel very much hopes will be filled when the WADC is revised in the light of experience in 2007, is to be filled by the Panel applying the overarching principle of justice and proportionality on which all systems of law, and the WADC itself, is [sic] based".

180. There are a number of CAS Panel decisions rendered before the introduction of the new AA Policy in which the principle of proportionality was considered and applied. Although it is said that the new AA Policy has at least to some extent incorporated or at least endeavoured to incorporate the principle of proportionality, it does not seem that the Sole Arbitrator has been relegated to the role of a slot machine or one size fits all.

181. There are pointers in the new AA Policy which serve as indicators of the degree of censure and the extent of disapproval by the drafters of the AA Policy, so that a Sole Arbitrator is still able to calibrate the particular circumstances of an offence which can then be measured against other offences, other circumstances and other offences and their corresponding penalties. It is still possible to find in the new AA Policy a recognition of the confidence reposed by the drafters in the CAS/Sole Arbitrator on the question of penalty.

182. The AA Policy establishes a series of gateways to be negotiated by the Athlete so that the circumstances which are unique to the Athlete are progressively winnowed down to a resting point where at the end of an analysis and where the Athlete has failed to establish the defences in the AA Policy, there is exposed a clear, deliberate breach of the AA Policy to which the penalty of four years applies. However, as the present case shows, that may not be the end of the story.

183. In the AA Policy there are a range of penalties from four maximum years which may drop to zero in certain circumstances. By this means the draftsmen of the AA Policy have made it clear that in certain circumstances a deliberate violation of Article 2.3 accompanied by a failure of the Athlete to establish any of the exculpating circumstances is to be met with the higher penalty of four years.

184. From that level there are different pathways to a zero penalty and to a two-year penalty. The final result depends upon an analysis of the special circumstances referable to each Athlete. In *Puerta*, the Panel found in effect, that the schema in the Policy did not address the distinctive position of the athlete in that case.

185. The backdrop to this analysis is the critical importance of the testing procedure to the fulfilment of the aims of the WADC and the worldwide campaign against doping in sport. Clearly, the single most important weapon in the arsenal of sporting authorities is the testing procedure.

186. Other features of the AA Policy also demonstrate that efforts have been made to confer a discretion upon the Sole Arbitrator when fixing the period of ineligibility. That discretion is clearly not applicable to Article 2.3, see for example Article 10 of the AA Policy.

187. Even if it may be thought that a four-year period of ineligibility is on the high side, when that level of ineligibility is measured against the success or failure of the worldwide anti-doping program, a balance may be discerned in the AA Policy. However, in the provisions of the AA Policy referred to above, there are plain signs of the attempts by those who put the AA Policy together to ensure that in their determination to fight doping in sport that they did not drag an Athlete arbitrarily into the wake of that determination unless there was a deliberate breach with knowledge of the consequences and without compelling justification. A thread of proportionality is evident in the AA Policy in the sense that the particular facts of each case may be relied upon to bring about a determination which is proportionate.

188. The Athlete relies on the CAS decision in *Puerta* in support of her submission that the period of ineligibility imposed is disproportionate in the sense in which that term is used in *Puerta.* In that case the foundation upon which the Tribunal based its reasoning was that there was a "gap or lacuna" in the WADC and it was the duty of the Tribunal in those circumstances to fill that gap to avoid serious injustices. It seems clear that the exercise of gap filling in that case was not avowedly the result of the process of interpretation of the agreement between the Athlete and the Respondent.

189. There is no binding system of precedent which applies in the CAS jurisprudence however it is important that in each individual case, the Sole Arbitrator and/or Panel, should carefully consider prior CAS decisions which are on point and extend to those decisions the respect due to them while at the same time bearing in mind the important

considerations of comity having regard to the importance of multiple decisions of the CAS from many different parts of the world.

190. In the present case the Sole Arbitrator is not to be taken to be engaging in a frontal attack on the headline penalty of four years. The drafters of the AA Policy have gone to particular lengths to establish an interrelated structure of specific provisions which either apply or do not apply as the case may be in a variety of circumstances which the Sole Arbitrator is required to consider having commenced the analysis from a starting point of a four-year period of ineligibility. What the drafters have not done is to refer in any way to the special circumstances of this case and to expressly make a provision which enables the Sole Arbitrator to take those circumstances into account while at the same time penalising the Athlete for her refusal to complete the test. At the same time, no matter how the AA Policy is approached, there is no way the Athlete can be given credit for those special circumstances.

191. The Sole Arbitrator also bears in mind the repeated emphases in the *Puerta* Award which disclaim the existence or reliance upon any sweeping general power reposed in the Tribunal to substitute its own view of the four year initial starting point in the computation of the period of ineligibility. It is important and instructive to bring to mind the various statements which the panel made in *Puerta* to that effect. Before doing so attention should be drawn to the fact that the drafters of the AA Policy have decided that in the case of a number of other violations the same initial starting point of a period of four years ineligibility applies.

192. The approach to the way in which the period of ineligibility is to be treated in the present case commences from what might be described as a preliminary or conditional provision stipulating a period of ineligibility of four years subject to a cascading analysis which only appears to apply if the Athlete is unable to satisfy the leeway in the AA Policy. These leeways may or may not result in the reduction or elimination altogether of the four year initial period, depending upon the entirely personal and case specific examination of each of the circumstances peculiar to the Athlete, which are raised for consideration by different provisions of the AA Policy.

193. By that means, any suggestion or criticism that the AA Policy is arbitrary and is driven by a "one size fits all" approach, is convincingly refuted insofar as the AA Policy makes provision for particular circumstances. Yet again, however, those circumstances do not embrace the present case.

194. Beginning from the starting point of a four-year period of ineligibility, by reason of the provisions of Article 2.3 and Article 10.2.1 of the AA Policy the period of ineligibility "subject to potential reductions or suspension pursuant to Articles 10.4, 10.5 or 10.6" *shall* be four years.

195. So far as the alleged violations of Article 2.3 are concerned specific provision is made for that in Article 10.3.1 which provides as follows:

> "*For violations of Article 2.3 or Article 2.5, the period of Ineligibility shall be four years unless, in the case of failing to submit to Sample collection, the Athlete can establish that the commission of the anti-doping rule violation was not intentional (as defined in Article 10.2.3), in which case the period of Ineligibility shall be two years.*"

196. The parties in the present case correctly submitted that proof of a violation of Article 2.3 must be accompanied by proof of mens rea or the necessary mental element. At that initial level of a consideration of an allegation of a violation of Article 2.3 the Sole Arbitrator is immediately required to consider the personal circumstances of the Athlete in that regard, rather than conclude that a violation has been committed after the application of a strict liability approach.

197. Before entering upon the next level of examination demanded by the AA Policy it is important to note that there are other violations of the AA Policy where the period of ineligibility is also stated to be four years. See for example Articles 10.3.1, 10.2.1 and 10.3.4.

198. The AA Policy's emphasis upon the particular circumstances in which the Athlete found herself, is maintained in the subsequent provisions of the AA Policy. The Sole Arbitrator will return to examine those provisions below.

199. Before doing so, it is of considerable importance that the terms of Article 2.3 be examined for it is there that the AA Policy's preoccupation with the varying personal circumstances which will necessarily differ from athlete to athlete, are placed at the very front of the words which create the violation. Leaving aside for a moment the requirement that consideration be given to questions of onus, Article 2.3 raises the critical question whether or not the Athlete refused or failed to submit to Sample collection "without compelling justification". If the Athlete is able to establish that there was a

compelling justification for her actions then it becomes unnecessary to embark upon a consideration of the questions thrown up by subsequent provisions of the AA Policy.

200. To summarise, the position at which the Athlete finds herself when confronted with an alleged violation dependent upon Article 2.3, it is only after the proof of the necessary intent and after the failure of the Athlete to demonstrate the existence of a "compelling justification" for her actions, that it becomes necessary to examine the subsequent provisions of the AA Policy.

201. The next limb in the analysis of an Article 2.3 violation is to be found in Article 10 of the AA Policy under the heading "sanctions on individuals". Before commencing that analysis, it is helpful to set out what is described as "the comment to Article 10" which reads as follows:

> "*Harmonisation of sanctions has been one of the most discussed and debated areas of anti-doping. Harmonisation means that the same rules and criteria are applied to assess the unique facts of each case. Arguments against requiring harmonisation of sanctions are based on differences between sports including, for example, the following: in some sports the Athletes are professionals making a sizable income from the sport and in others the Athletes are true amateurs; in those sports where an Athlete's career is short, a standard period of Ineligibility has a much more significant effect on the Athlete than in sports where careers are traditionally much longer. A primary argument in favour of harmonisation is that it is simply not right that two Athletes from the same country who test positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports. In addition, flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting organisations to be more lenient with dopers. The lack of harmonisation of sanctions has also frequently been the source of jurisdictional conflicts between international federations and National Anti-Doping Organisations*."

202. The explanatory note to Article 10 and the proper construction of the relevant articles, reveal a neat and attractive dichotomy. On the one hand the Sole Arbitrator is given the broadest opportunity to take into account all of the considerations which are personal to the Athlete and which are placed in the mix by the various expressions in the Articles to which reference is made. On the other hand, once there has been an all embracing

examination of all of those personal considerations then the penalty should be fixed. The foregoing analysis *in some cases* enables the penalty to be set by the Sole Arbitrator within the established parameters.

203. The next important provision in the articles which conforms to that overall logical structure is Article 10.3.1 which is set out at paragraph 195 above.

204. Article 10.3.1 is driven by Article 10.2.3 which defines the use of the word "intentional" as it is used in Article 10.3.1. Article 10.2.3 reads as follows:

> "*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…*"

The balance of 10.2.3 is not relevant for the present purposes.

205. The result of this is that the period of ineligibility of four years will only apply after each of the relevant stages of that analytical process have been negotiated.

206. In those circumstances, while views may differ as to the length of the period of ineligibility, that period of ineligibility is in truth a period which resides somewhere in a potential sliding scale which is effected by the application of the above provisions of the Articles at various stages of the analysis. The starting point of four years and the varying scale have been formulated by a body specifically charged to do so and possessed of extensive expertise and experience which is not possessed by the Sole Arbitrator or CAS Panels, however experienced in the disposition of drug disputes they may be.

207. Moreover the provisions of the AA Policy have been the subject of intense discussion, examination and revision and the present form of the AA Policy is as a result of a thorough process of revision. One can therefore approach the scheme developed by the drafters as one in which arbitrariness has in large measure been eliminated by a variety of measures.

208. That is not the end of the attempts by the drafters to formulate a fair and equitable regime, which not only examines findings of the particular circumstances in which each athlete finds himself and herself, but also endeavours to utilise those findings and apply

them as integers in the final determination of the period of ineligibility, balancing those personal circumstances against the criticality of the testing procedure.

209. The final stage of the analysis to which the Sole Arbitrator refers is to be found in Article 10.4 which, under the heading of "Elimination of the Period of Ineligibility Where There Is No Fault or Negligence", provides as follows:

> "*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."*

210. The comment to Article 10.4 which is to be found in footnote 32 page on page 53 of the AA Policy again makes plain that all of the personal considerations bearing upon the conduct of the Athlete are to be examined. If Article 10.4 applies, then the period of ineligibility is *eliminated*.

211. The ultimate provision of the AA Policy which enables an appropriate period of ineligibility to be set somewhere between 2 and 4 years is the provision in Article 10.6.3 which under the heading "Prompt Admission of an Anti-Doping Rule Violation after Being Confronted with a Violation Sanctionable under Article 10.2.1 or Article 10.3.1", provides as follows:

> "*An Athlete or other Person potentially subject to a four-year sanction under Article 10.2.1 or 10.3.1 (for evading or refusing Sample Collection or Tampering with Sample Collection), by promptly admitting the asserted anti-doping rule violation after being confronted by ASADA (or another Anti-Doping Organisation), and also upon the approval and at the discretion of both WADA and the Anti-Doping Organisation with results management responsibility, may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete or other Person's degree of Fault*."

212. In the present case the Athlete chose not to seek to rely upon the provisions of Article 10.6.3 and decided to develop her defence principally in reliance upon the "compelling justification" provisions found in Article 2.3. The Sole Arbitrator has found that there was at best only flimsy support for that contention.

213. Each of the discrete steps which have been identified above in the overall process are evidence of the drafter's repeated focus upon the appropriate penalty *in the particular circumstances of each case*. The AA Policy does so by constructing opportunities at a number of intersections for the Sole Arbitrator to consider and, if appropriate, apply a wide range of factors applicable to the Athlete personally and then determine a penalty within a band stipulated in the AA Policy.

214. The overall objective of the anti-doping policy is of such basal significance that one can understand why a violation of the AA Policy constituted by a refusal to complete a test should in certain circumstances attract a penalty of four years but that penalty should not arbitrarily be applied without giving the Athlete an opportunity to prove circumstances which either eliminate the penalty or reduce it by reference to ameliorating circumstances. From the starting point of four years the drafters provided a number of possibilities which are not arbitrary, not unguided and which are not inconsistent with a fair and equitable approach.

215. All of that said, the above analysis also demonstrates that despite the detail of the AA Policy there is simply no mechanism by which the Sole Arbitrator can give any effect to or recognise the most significant factors in this case. For example, as the Respondents have submitted "it is difficult to see how an intentional…" act of the Athlete, could leave room for the "no fault or negligence" defence.

216. An examination of the foregoing pathways and their end points has this consequence: a conclusion by the Sole Arbitrator that there are evident reasons for the penalties which have been stipulated to apply to special circumstances. Any judgment by the Sole Arbitrator that four years is too long a period of ineligibility for the range of circumstances dealt with in the AA Policy, would be to do the very thing that even the Sole Arbitrator in *Puerta* said could not be done. Such a judgment would be a direct challenge to the application of the four year penalty per se.

217. The Sole Arbitrator cannot simply substitute its own judgment in the face of obvious and careful attempts by the experienced and knowledgeable draftsmen of the AA Policy to develop a proportional structure to the *circumstances* to which the policy applies. *Where, as here, those circumstances are simply not engaged by the AA Policy then difference considerations come into play*.

218. All of that said, it seems to the Sole Arbitrator that there are the seven circumstances enumerated in paragraph 234 below in the present case which clearly distinguish and separate it from a clear cut case of evasion or failure yet at the same time still provide sufficient warrant for the imposition of a significant penalty for the Athlete's refusal to complete the test procedure.

219. The process of arbitration is essentially consensual. It is the parties' agreement which enlivens the process. The parties are free to select any system of law, part of any system or any combination of legal systems or principles upon which they decide and then agree upon. Once the parties have done so they are then free to choose absent any formalities which legal principles they authorise the arbitral panel to apply in the resolution of the subject dispute. In their respective submissions the parties in this case have specifically argued that in rare cases the CAS Tribunal may apply the principle of proportionality.

220. In the present case the Athlete has submitted that:

> "*The CAS has recognised that the inflexible application of anti-doping policies may, in rare cases, result in sanctions which offend the principles of proportionality. In this respect the CAS has (and other anti-doping tribunals have) determined that where the range of sanctions available are disproportionate to the conduct to which its attention is focused, the principle of proportionality behoves the Tribunal to impose sanctions which are just and proportionate in all the circumstances. This is even so whether sanction imposed is not strictly conformed with the express provisions for range of sanctions, available under the Code or policy*."

221. The Athlete then went on to submit:

> "*In assessing the proportionality of a sanction, the consequences of that sanction are to be taken into account. This includes, at least, the likely impact on the career of an Athlete and also sensibly extend to the financial impact of the sanction as well is reputational and personal considerations*."

222. After quoting extensively from the CAS decision in *Puerta* the Athlete submitted that there was in the present case:

> *"… a contrast between the present circumstances and other circumstances (such as the deliberate use of doping agents, such as steroids, to cheat or the*

> *employment of concerted efforts to evade doping control tests) which would attract a four years sanction, are stark."*

223. The Athlete submitted that a period of ineligibility of four years could not be considered to be proportionate to any violation she may have committed or that she deserves the same penalty as a deliberate calculated user of performance enhancing drugs.

224. In their submissions in reply on the question of proportionality the Respondents joined issue with the Athlete's submissions and contended that:

> "*The Tribunal should ordinarily give effect to the principle of fixed sanctions as determined by the AA Policy and the Code*."

The Sole Arbitrator accepts that submission.

225. The Respondents argued that:

> *"it is unhelpful to ask in every case whether one particular person found to have committed an ADRV is as blameworthy as another culprit. It is only in rare cases where proportionality has any role to play. For the reasons advanced in the initial submissions, this is not the case."*

226. It is important to note that in its specific reply to the Athlete's proportionality submission, the Respondents accepted that there was room for the application of the proportionality principle although that was to be confined to very rare cases and this was not one of them.

227. It is of importance to note that in its submissions in chief which were filed on 10 October 2016 the Respondents also did not contend that the principle of proportionality could never have any application.

228. To the contrary, the submissions advanced by the Respondents expressly acknowledged that the principle of proportionality could, albeit in rare cases, be applied. The Respondents' submissions make it abundantly clear that they accept that the principle of proportionality applies to the AA Policy although in "rare cases". The Respondents accepted that:

> "*The CAS has recognised that the inflexible application of anti-doping policies may, in rare cases, result in sanctions which are inconsistent with the principle of proportionality. In this respect the CAS has, on occasion, determined that where the range of sanctions mandated are so disproportionate to the conduct to which*

> *they are directed, the principle of proportionality obliges the Tribunal dealing with the matter to consider whether the "regime" has properly allowed the Tribunal to take all matters into account. This is even so where the sanction imposed all may not strictly conform with the express provisions as set out in the Code, or range of sanctions, available under the Code. In saying that, it must be emphasised that the circumstances that give rise to such a conclusion are likely to be very rare. This is because the WADA Code (and hence the AA Policy) is already drafted with consideration of the principles of proportionality*."

229. In their helpful submissions on this point the Respondents also accepted that the leading case which supports the proposition is *Puerta v ITM* in the appeal division of the CAS. The Respondents' submissions accepted that "…a four (4) year ineligibility in this case may, at first consideration, appear severe" and then went on to contend that in any event the ineligibility period reflected the significance of the Athlete's conduct related to this ADRV. The Respondents contended that "the sanction for this ADRV can be the same as if an Athlete tested positive for a prohibited substance and there is good reason for that circumstance". That reasoning is said to be that "testing is the cornerstone of an effective anti-doping program". The Sole Arbitrator has concluded that there is no basis in the present case for equating the actions of the Athlete with those of an athlete who has tested positive for a prohibited substance and that conclusion is the turning point of this case.

230. The Athlete contended in her submissions that the "CAS has recognised that the inflexible application of anti-doping policies may, in rare cases, result in sanctions which offend the principle of proportionality. In this respect the CAS has (and other anti-doping tribunals have) determined that where the range of sanctions available are disproportionate to the conduct to which attention is focused, the principle of proportionality behoves the Tribunal to impose sanctions which are just and proportionate in the circumstances. This is even so where the sanction imposed does not strictly conformed with the express provision, or range of sanctions, available under the Code or policy".

231. Thus it can be seen that in essence both parties have fully accepted that the principle of proportionality applies to cases under the AA Policy although both parties also accept that that will be so only in rare cases.

232. The principle of proportionality has often been referred to and applied in CAS awards and the substance and the possible application of the principle are not in doubt. Moreover the nature and character of the principle is clearly defined with the result that any reference to it is well and precisely understood by those working in the field. It is an accepted principle applied specifically in relation to the AA Policy itself. It is in an important sense a part of the AA Policy. When giving consideration to whether the principle applies or not, the Sole Arbitrator is obliged to give regard to numerous admonitions such as those which are often referred to in *Puerta*, to the effect that it is only in very rare cases that it would apply.

233. It is with that approach in mind that as shown above the Sole Arbitrator has endeavoured to work through the whole of the relevant structure of violations, penalties and offences in the AA Policy with a view to answering the following questions:

- is the penalty of four years when applied to the facts as found by the Sole Arbitrator "just and proportionate in all the circumstances";

- is there a gap or lacuna in the AA Policy in the sense that there is no capability afforded to the Sole Arbitrator to impose a penalty which is consistent with the facts in the present case rather than some of the other cases;

- without attacking the penalties which have been specifically provided in the AA Policy for violations which materially differ from the present violation in the AA Policy, can the Sole Arbitrator decide upon a penalty which does not result in oppression or injustice where the Policy makes no provision for the instant case;

- has there been any provision made in the detailed structures of violations and penalties which fairly and squarely covers the events which have happened;

- whether, in line with the CAS Appeals Panel in *Kutrovsky*, the sanction of four years has set a wrong benchmark "inimical to the interests of sport".

234. Save for the penultimate question which must be answered in the negative each of the remaining questions should, in the view of the Sole Arbitrator, be answered in the affirmative. This approach is not a direct challenge to the scheme of penalties which has been provided for in the specific circumstances in the AA Policy and has been made the subject of analysis above. It is not an attack on the four-year penalty itself. The approach

continues to allow a strict application of the AA Policy which involves a recognition of the importance of the violation of refusal to give a full sample. In the present case even though the Athlete gave a sufficient sample to enable it to be demonstrated that the results were negative (excepting that EPO testing was not possible for such a low sample) the AA Policy, despite the detail revealed above, does not make any provision for a recognition of that circumstance. It seems to the Sole Arbitrator that no proper assessment of the present case should fail to take account of the following circumstances which differentiate the case from anything which has been analysed above. Those circumstances are:

- the Athlete took steps to immediately comply with the request for the provision of the sample;
- those steps included a hurried journey to the DCS and an immediate attempt to hydrate herself so that the prospects of being able to provide a full sample were enhanced;
- the Athlete attempted bona fides to supply a full sample;
- at the outset the Athlete had said that she was willing to provide a sample (or further sample) at the airport and that, together with her attempt to provide a sample of the DCS, takes her case outside the case of immediate outright refusal;
- the Athlete is not a drug cheat and her actions did not constitute a dishonest attempt to avoid a positive test;
- although the Athlete gave only a small sample, she returned negative results for all drugs except EPO for which the sample was inadequate to test;
- in the view of the Sole Arbitrator no analysis of the present case would be balanced, fair or complete without proper recognition of those circumstances. The detailed examination of the various provisions of the AA Policy as revealed and as the AA Policy is structured at the moment shows that there is no opportunity presented to the Sole Arbitrator to give any effect to those factors.

235. The result of imposing a four-year period of ineligibility on the Athlete would be to lump the Athlete together with those Athletes who have committed AA Policy violations which

on any view are far more severe than those which have been committed by the Athlete, for example a deliberate dishonest drug cheat who has knowingly ingested a prohibited substance. The Sole Arbitrator accepts that it is completely unsatisfactory for an Athlete to refuse to provide a full sample but when this case is carefully considered on its facts as it should be, it is the view of the Sole Arbitrator that if the Athlete is to be subject to a two-year period of ineligibility then that two-year period adequately reflects the disapproval of the drafters of the AA Policy to the case where an Athlete has refused to provide a full sample.

236. In the present case the Sole Arbitrator has concluded that all of the unsatisfactory features of the Athlete's behaviour may be adequately and properly dealt with by the imposition of a two-year penalty but the same cannot be said with the imposition of a four-year penalty which in the circumstances of the present case is the equivalent or almost the equivalent of a lifetime ban for the Athlete and is for that reason disproportionate, harsh and unjust.

237. A thorough examination of the relevant provisions of the AA Policy reveals that, once the facts in the present case are established, it can be seen that the AA Policy makes no provision for a number of critical factors which on any view are essential elements of the Athlete's conduct.

238. The failure of the AA Policy to attach any consequences to any of the above factors special to this case is compounded by the fact that the AA Policy contains several instances where a substantial discretion is reposed in the Sole Arbitrator enabling an appropriate penalty to be settled upon by choosing a point along the discretionary range. That is not the case in the present proceedings.

239. The mere absence of specific provisions in the AA Policy which would enable such highly material circumstances to be taken into account is not sufficient of itself to engage the proportionality principle. However, where the absence of such an adjustment mechanism leads to the imposition of a period of ineligibility which is out of all proportion to the penalties imposed elsewhere in the AA Policy, and where it can be said to be contrary to the deliberate intention of the drafters to confer a discretion upon the Sole Arbitrator, the result is a combination of such circumstances to produce a harsh and unjust result. It is in those circumstances that the doctrine of proportionality applies, as the parties have agreed it can, in rare cases.

240. When such an analysis is undertaken it may be seen that the Athlete remains liable for the commission of a serious offences against the AA Policy. On the approach taken by the Sole Arbitrator, for that conduct and that conduct alone the Athlete pays a substantial penalty of two years which is equal to the available penalty stipulated in a number of other instances of violations of the AA Policy. To impose a four year period of ineligibility is an unwarranted excess.

241. Such an approach is not to make a collateral attack on what might be called the head sentence of four years. However it is a recognition of what *Puerta* describes as a "gap or lacuna". Once again it is not the mere presence of a gap or lacuna which engages the principles of proportionality. It is the presence of such a gap or lacuna which has the result of producing a harsh and unjust result, which motivates the analysis.

242. The Sole Arbitrator has concluded that when a proper measure of blame is considered, the appropriate penalty should be two years rather than four years. As shown above, not only are the factors required to justify a four-year penalty not present in the instant case, there are a significant number of ameliorating circumstances which also operate to support a penalty of two years.

243. The indiscriminate nature of an imposition of the maximum penalty of four years in the present case may be considered against the background of what may have occurred had the Athlete returned a sample considerably greater than 20 mL but nevertheless not enough to satisfy the 90 mL requirement. In such a case it is more than possible that a sufficient sample may have been returned to enable the full testing regime to be undertaken for all prohibited substances including EPO and those tests may have been returned negative. In a case such as the present where the Athlete had done everything she could to provide a “full” sample she nevertheless would have committed a violation of the AA Policy and have been liable for the full four year penalty. In the opinion of the Sole Arbitrator that cannot have been the intention of the drafters. It would be an offence to good conscience for an athlete in those circumstances to be subject to a period of ineligibility greater than that which may be imposed upon a deliberate and persistent drug cheat.

244. When all factors in the present case are taken into account, the discordant element which weighs heavily in favour of a reduction of the four-year period is this – a four year period of ineligibility is the penalty applicable to a proven drug cheat who has deliberately

injected a prohibited substance. The Athlete's case stands far removed from such a case and she should not be penalised as if the two cases were equally blameworthy.

H. Conclusion

245. For the reasons which have been set out above the Sole Arbitrator answers the questions stated in paragraphs 31-42 as follows:

Question 1: Yes (to each sub-question)

Question 2: No to the first part and yes to the second part

Question 3: No

Question 4: The Athlete bears the onus

Question 5: Yes

Question 6: No

Question 7: 90 mL

Question 8: (a) Yes

(b) Yes

Question 9: The Athlete has not established no fault or negligence therefore there is no room for a reduction in penalty on that ground

Question 10: No

Question 11: Yes

IV. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

(1) The application to the Court of Arbitration for Sport filed by Ms Sarah Klein on 5 July 2016 succeeds in part.

(2) Ms Klein has committed an Anti-Doping Rule Violation contrary to Article 2.3 of the Athletics Australia Anti-Doping Policy by refusing or failing to submit to Sample collection after notification on 13 February 2016.

(3) The period of ineligibility of four years imposed on Ms Klein is set aside.

(4) In lieu of the period of four years imposed upon Ms Klein a period of ineligibility of two years is imposed.

(5) The period of ineligibility is to commence on 13 February 2016.

(6) (…).

(7) (…).

(8) All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Place of arbitration: Melbourne, Australia

Date: 25 May 2017

THE COURT OF ARBITRATION FOR SPORT

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Bruce Collins QC
Sole Arbitrator

Harry Cook
Ad hoc Clerk