CAS 2022/A/9286 World Anti-Doping Agency (WADA) v. Russian Anti-Doping Agency (RUSADA) & Mariya Guschina

ARBITRAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Jacques Radoux, Référendaire, Court of Justice of the European Union, Luxembourg

in the arbitration between

World Anti-Doping Agency (WADA), Lausanne, Switzerland

Represented by Mr Nicolas Zbinden and Mr Anton Sotir, Attorneys-at-Law with Kellerhals Carrard, Lausanne, Switzerland

Appellant

and

Russian Anti-Doping Agency (RUSADA), Moscow, Russia

Represented by Mr Graham Arthur, Attorney-at-Law with GM Arthur, Liverpool, United Kingdom

First Respondent

&

Mariya Guschina, Nizhniy Tagil, Russia

Represented by Mr Sergei A. Mishin and Mr Sergei R. Lisin, Attorneys-at-Law with Lisin & Partners, Moscow, Russia

Second Respondent

I. PARTIES

1. The World Anti-Doping Agency (the "WADA" or the "Appellant") is a Swiss private-law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. The WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms.

2. The Russian Anti-Doping Agency (the "RUSADA" or the "Second Respondent") is the National Anti-Doping Organisation for Russia and a signatory to the World Anti-Doping Code (the "WADC"). Its registered office is located in Moscow, Russia. It has a number of responsibilities pursuant to the All-Russian Anti-Doping Rules (the "ADR") and the individual provisions thereof.

3. Ms Mariya Guschina (the "Athlete" or the "Second Respondent") is a professional cross-country skier from Russia and a member of the cross-country ski team from the Khanty-Mansiysk Region – Yugra.

4. The WADA, the First Respondent and the Second Respondent are collectively referred to as the "Parties".

II. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced in this procedure. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

6. On 20 July 2020, the Athlete was subject to a doping control. In the related Doping Control Form (the "DCF"), she noted, *inter alia*, that she had undergone three plasmapheresis procedures of 530 ml each.

7. On 6 August 2020, the RUSADA informed the Athlete that it was launching an investigation into a possible anti-doping rule violation ("ADRV") under Rule 2.2 "Use or Attempted Use of a Prohibited Substance or Prohibited Method" of the ADR, namely the use of M1 "manipulation of blood and blood components" of the 2020 WADA Prohibited List. RUSADA invited the Athlete to provide her explanations as well as medical documentation in this regard.

8. In the explanations she provided, the Athlete stated that, in May 2020, after a biopsy of a thyroidal nodule, she experienced pain that was increasing day by day. After having consulted a doctor and taken some antibiotics for four (4) days, the pain and her general condition worsened. Thus, she consulted another doctor, who recommended, *inter alia*, three sessions of plasmapheresis. None withstanding the fact that her team doctor had tried to dissuade her from using plasmapheresis, she decided to proceed with this

method and the results of the analysis came back to normal and she started feeling much better. Considering that she had nothing to hide, she indicated the use of plasmapheresis on the DCF.

9. In January 2021, RUSADA requested some information from the medical center in which the plasmapheresis was allegedly performed. In its response, the medical center confirmed that from 17 June to 22 June 20202, three sessions of plasmapheresis were performed on the Athlete via Haemonetics MCS+ device with the volume of plasma exclusion of 530ml per session, with replacement with the solution of crystalloids (normal saline of 1,500ml).

10. On 22 March 2021, the RUSADA notified the Athlete of a possible ADRV of "Use" of a Prohibited Method under both M1.1 (in relation to the plasmapheresis procedures) and under M2.2 (in relation to the multiple intravenous infusions received in the medical centre) and granted her a deadline of seven days to submit a written explanation.

11. On 28 May 2021, in response to an application for a retroactive Therapeutic Use Exemption ("TUE") for the Athlete's use of plasmapheresis, the TUE Committee of RUSADA rejected that application on the ground that "*according to the standards of care for subacute thyroiditis [...] and the recommendations of the association of endocrinologists for 2020, plasmapheresis is not recommended as treatment remedies for subacute thyroiditis*".

12. On 24 September 2021, the Athlete provided her explanations in relation to the alleged ADRV and admitted having intentionally used plasmapheresis. However, she contested having committed a fault as she was just thinking about her health and did not seek to running faster or improving her results.

13. On 1st October 2021, RUSADA charged the Athlete with an ADRV for use of a prohibited method M1.1 as an unintentional violation of Rule 2.2. of the ADR and Article 2.2. of the WADC. The case was submitted to the RUSADA Disciplinary Anti-Doping Committee ("DADC").

14. Before the DADC, RUSADA, in view of all the circumstances of case, requested the imposition of an ineligibility period of two (2) years and the disqualification of the Athlete's results since 17 June 2020. The Athlete admitted that she had committed ADRVs but claimed that she acted without Fault or Negligence or, at least, with No Significant Fault or Negligence ("NSFN") and that there should, thus, be no period or ineligibility or a reduced one. On top, she should benefit from a further reduction of the period of ineligibility for having admitted the ADRVs.

15. On 14 October 2021, the DADC held a hearing and the members of the DADC adjourned the hearing in order to get clarifications regarding the rejection of the Athlete's retroactive TUE application.

16. On 5 April 2022, the DADC asked the TUE Committee of RUSADA, *inter alia*, whether it was possible, on basis of the documentation provided by the Athlete, to reconsider

granting a retroactive TUE and whether, on basis of the material of the case, there were any grounds for issuing such retroactive TUE.

17. On 27 May 2022, the TUE Committee of RUSADA answered to the DADC's demand, *inter alia*, that "*there are no data confirming the positive effect of plasmapheresis on the course of thyrotoxicosis in domestic and foreign literature. […]. It is not appropriate to reconsider granting a retroactive TUE for a prohibited method*" and that there "*are no grounds for issuing a retroactive TUE for the use of a prohibited substance/method, based on the case file and the results of the hearings held*".

18. On 23 June 2022, the DADC rendered its decision (the "Appealed Decision"). In the relevant part of the Appealed Decision, the DADC acknowledged that the Athlete had violated Article 2.2 of the ADR and, in view of the circumstances of the case, decided to impose a "*reprimand without imposing ineligibility*".

19. On 27 September 2022, RUSADA notified the Appealed Decision to the WADA. The latter requested, on 12 October 2022, the case file of the Appealed Decision. On 31 October 2022, the WADA received the case file.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 21 November 2022, the Appellant filed its Statement of Appeal in accordance with Articles R47 *et seq*. of the Code of Sports-related Arbitration (the "CAS Code") (edition 2022) and in application of Articles 15.1.2 and 15.2.3.1 of the 2021 ADR against the Appealed Decision. In its Statement of Appeal, the Appellant requested that this procedure be referred to a Sole Arbitrator.

21. On 12 December 2022, in absence of any reaction form the Respondents regarding the Appellant's request that the procedure be referred to a Sole Arbitrator, the CAS Court Office informed the Parties that, according to Article R50 of the CAS Code, the President of the CAS Appeals Arbitration Division had decided to submit the present case to a Sole Arbitrator.

22. On 4 January 2023, the CAS Court Office informed the Parties that Mr Jacques Radoux, Référendaire, Court of Justice of the European Union, Luxembourg, had been appointed as Sole Arbitrator. None of the Parties challenged the appointment of the Sole Arbitrator within the prescribed deadline.

23. On 3 February 2023, after having been granted several extensions of the deadline with the agreement of the respondents, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.

24. On 6 February 2023, the CAS Court Office acknowledged receipt of the Appellant's Appeal Brief and invited the Respondents to submit their Answer within the deadline set out in Article R55 of the CAS Code, highlighting that if a Respondent failed to do so, the Sole Arbitrator may nevertheless proceed with the arbitration and deliver an award.

25. On 27 February 2023, the First Respondent was granted an extension of the time limit to file its Answer until the 9 March 2023. The time limit was, subsequently, extended until 16 March 2023.

26. On 28 February 2023, the Second Respondent was granted an extension of the time limit to file her Answer until 19 March 2023. After a further request by the Second respondent, she was granted an extension of that time limit until 30 April 2023.

27. On 16 March 2023, the First Respondent filed its Answer.

28. On 9 May 2023, the CAS Court Office acknowledged the filing, by email, of the Second Respondent's Answer on 2 May 2023. The Cas Court Office noted however that, until 9 May 2023, it had not received the hardcopies of the Answer by courier and that the Answer had not been uploaded on the CAS e-filing platform. The Second Respondent was thus invited to advise the CAS Court Office of whether she had filed her Answer by courier within the prescribed deadline, and if so, to provide a tracking number.

29. On 10 May 2023, the Appellant and the First Respondent were invited to state whether, in view of the explanations given by the Second Respondent in an email dated 9 May 2023, the agreed to admit the Second Respondent's Answer to the case file.

30. On 16 May 2023, the Appellant informed the CAS Court Office of its objection to the admission of the Second Respondent's Answer to the case file.

31. On the same day, the First Respondent informed the CAS Court Office that it had no objection the answer filed on behalf of the athlete to being admitted to the case file.

32. On 5 June 2023, the CAS Court Office informed the parties, on behalf of the Sole Arbitrator, that the Second Respondent's Answer, filed on 2 May 2023 by email only, was deemed inadmissible and was, therefore, excluded from the case file. The Parties were informed that the reasons for this decision would be provided in the final Award. The Parties were further advised that the Sole Arbitrator had decided to hold a hearing in the present matter.

33. On 30 June 2023, CAS Court Office notified an Order of Procedure to the Parties, which the Appellant signed and returned on the same day. The First Respondent signed the Order of Procedure on 5 July 2023, whereas the Second Respondent signed and returned a copy of the Order on 7 July 2023. In her Order of Procedure, the Second Respondent mentioned that the "*Athlete's rights in connection with the exclusion of her Answer from the case file are expressly reserved*".

34. On 10 July 2023, a hearing was held via Cisco-Webex. The Sole Arbitrator was assisted by Ms Delphine Deschenaux-Rochat, CAS Counsel. In addition to the Sole Arbitrator and the CAS Counsel, both physically present at the CAS Court Office in Lausanne, Switzerland, the following participants attended the hearing:

<u>For the Appellant:</u>

Mr Nicolas Zbinden, counsel;

Mr Antin Sotir, counsel;

Mr Cyril Troussard, WADA Associate Director

For the First Respondent:

Mr Graham Arthur, counsel

For the Second Respondent:

Mr Sergei Lisin, counsel;

Mr Sergei Mishin, counsel.

35. At the outset of the hearing, the Parties confirmed that they had no objections to the constitution of the Panel. During the hearing, the Parties were given a full opportunity to present their case, submit their arguments and submissions, and answer the questions posed by the Sole Arbitrator. At the end of the hearing, the Appellant and the First Respondent confirmed that their respective rights to be heard and their rights to a fair trial had been respected in the present procedure. The Second Respondent also confirmed that during the hearing her right to be heard and her right to a fair trial have been respected. However, she reiterated her position according to which these rights were infringed by the Sole Arbitrator's decision to declare her Answer inadmissible.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant's Submissions

36. In its Appeal Brief, the Appellant notes that according to Article 2.2 of the ADR, the "*Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method*" is prohibited and adds that plasmapheresis constitutes a Prohibited Method under M1.14 of the WADA Prohibited List. Given that the Athlete admitted having underwent three plasmapheresis procedures, the ADRV would be established and uncontested.

37. In such a case, the period of ineligibility is, pursuant to Article 10.2.1.1 of the ADR, four (4) years, except if the Athlete can establish a lack of intent, in which case the period of ineligibility is two (2) years. In the present case, the Appellant does not challenge the DADC's finding that the ADRV was not intentional. Thus, the starting point in terms of sanction shall be a two-year period of ineligibility. It follows from Articles 10.5.2, 10.6.2 and 10.6.4 of the ADR, that the applicable period of ineligibility has to be determined in two stages: (i) the Sole Arbitrator has to determine whether the Athlete bears NSFN (Article 10.5.2) and, if she does, to what extent the otherwise applicable period of ineligibility (*i.e.* two years) should be reduced and (ii) the Sole Arbitrator needs to consider whether the Athlete deserves a reduction for Admission (Article 10.6.2) and, if so, to what extent the otherwise applicable period of ineligibility should be further reduced "*but not below one-half of the period of Ineligibility otherwise applicable*".

38. Regarding the application of NSFN, the Appellant argues that, in the present case, the Athlete has not established that her level of fault was not significant in relationship to the ADRV. In this respect, the Appellant recalls that it follows from the comment to Article 10.4 of the 2015 WADC and from constant CAS jurisprudence, that a disposition like Article 10.5.2 only applies in "*exceptional circumstances*". Further, according to constant CAS jurisprudence it is not sufficient for an athlete to simply rely on a doctor's prescription to establish No Significant Fault or Negligence. An athlete would have to make his/her own investigations in relation to a medication he/she gets prescribed (CAS 2017/A/5015; CAS 2017/A/5139).

39. The Appellant considers that the Athlete's explanations for the ADRV show that she has not done any of the five checks that the CAS Panel in the case CAS 2013/A/3327 & CAS 2013/A/3335 has considered to be the basic checks that are objectively required from an athlete. Indeed, the Athlete does not claim that she checked whether plasmapheresis procedures were prohibited under the WADA Prohibited List; she did not ask any of her doctors (either the endocrinologist or the team doctor) whether plasmapheresis was prohibited; her team doctor had concerns in relation to the plasmapheresis; the Athlete was treated in a hospital (where Prohibited Substances and Methods are commonly used) and received three plasmapheresis – *viz.* serious medical procedures – with no precautions whatsoever. Given that the Athlete, who had been tested more than thirty (30) times in her career, is a very experienced athlete and was, as shown by the fact that she contacted RUSADA on 17 June 2020, *i.e.* the same day when the first plasmapheresis procedure was conducted, and on 18 June 2020, to enquire whether Prednisone and Bisoprolol were prohibited out-of-competition, manifestly aware of her anti-doping obligations, it would seem surprising that she never asked anyone whether plasmapheresis procedures were prohibited. Had she done so, the ADRV would likely have been avoided. Moreover, the Athlete having admitted that she knew that "*blood transfusion is forbidden, that is, 'infusion' of blood*", it would be difficult to accept that she did not suspect that plasmapheresis, which also implies a re-infusion of blood, was prohibited. The fact that the plasmapheresis procedures have been administered in a medical context makes no difference in this regard as, *inter alia*, her treatment was not a case of emergency and left her with enough time to ask the right questions to the right people, which she did not.

40. The Appellant adds that the explanations brought forward by the Athlete relate to "subjective" elements of fault and that such elements alone are not enough to consider that an athlete's fault falls within the category of NSFN.

41. In view of the above, the Appellant argues that the Athlete cannot be found to have established NSFN and considers that the Appealed Decision was wrong to find that the Athlete's ADRV met the strict requirements of Article 10.5.2 of the ADR.

42. As regards a possible reduction of the period of ineligibility for admission under Article 10.6.2 of the ADR, the Appellant, despite some concerns in relation to the questions whether the Athlete's admission of the ADRV was made knowingly given that she argued that she did not know that plasmapheresis procedures were prohibited at the time of the violation, concedes to accept, in the Athlete's favour, that the Athlete's admission was made voluntarily and that Article 10.6.2 of the ADR thus applies in the present

matter. However, given that the starting point should have been a period of ineligibility of two years, the Athlete should have received a period of ineligibility of one year as a minimum.

43. Concerning the further grounds for reduction of the ineligibility period taken into consideration in the Appealed Decision, the Appellant argues that, in any event, the DADC was wrong in finding that the Athlete's sanction could be reduced below what should have been the bottom sanction of six months as a result of applying Articles 10.5.2 and 10.6.2 together and to their fullest extent. The decision to impose only a reprimand was fundamentally wrong. Indeed, (i) there was no basis under Article 10.6.4 of the ADR to reduce the sanction below a period of ineligibility of six months, as this provision does not provide for a separate reduction and the reduction can only be applied by reference to the relevant provisions of Articles 10.4 to 10.6 of the ADR, without being able to go below "*one-fourth of the otherwise applicable period of Ineligibility*", *i.e.* in this case a maximum reduction down to six months ; (ii) there was no basis in the rules to reduce the sanction to a reprimand as this sanction is only available in relation to ADRVs involving a Specified Substance or a Contaminated Product in the ADR – which is not the case in the present matter; (iii) the principle of proportionality is, according to consistent CAS jurisprudence, embodied in the anti-doping regulations through the "No Fault or Negligence" and the "No Significant Fault of Negligence" exceptions (CAS 2008/A/1489, CAS 2018/A/5546, CAS 2018/A/5571). Thus, it would be clear that, even accepting the DADC's favourable assessment of NSFN, which was unsupported by the facts of this case, the sanction could not, as a matter of law, be reduced below a period of ineligibility of six months.

44. The Appellant adds that, pursuant to Article 10.10 of the ADR and considering that the ADRV occurred on 17 June 2020, any competitive results obtained by the Athlete from that date until 22 June 2022, shall be disqualified, including forfeiture of any medals, titles, ranking points, prize and appearance money.

45. Finally, as regards the costs of these proceedings, the Appellant argues that, according to the CAS jurisprudence, in a case like the present, where the Appealed Decision is taken by an independent tribunal or any other body, that Decision is attributed to the Anti-Doping Organisation with results management responsibility, *i.e.* RUSADA (CAS 2017/A/5369, CAS 2017/A/5260, CAS 2018/A/5990 and CAS 2019/A/6157). Therefore, it would be for RUSADA to bear the costs of these proceedings. The fact that the 2021 WADC states that the hearing panels of the national anti-doping organizations, like RUSADA, should be institutionally and operationally independent from the organization that appointed them would not mean that the national anti-doping organization responsible for the results management, which includes all the steps of this management until the final decision, including in appeals before the CAS, cannot, when it comes to the costs of the arbitration before the CAS, be held financially liable for the costs arising from the hearing panel's decision. In the present matter, the DADC's decision to knowingly disregard the applicable rules and the WADC compelled the Appellant to appeal the Appealed Decision and to seek the imposition of a WADC-compliant period of ineligibility. Thus, RUSADA, to whom the Appealed Decision must be attributed, should be ordered to bear the costs of the arbitration and to significantly contribute to the Appellant's legal and other costs.

46. In its Appeal Brief, the Appellant submitted the following requests for relief:

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

2. The decision dated 23 June 2022 rendered by the RUSADA DADC in the matter of Mariya Guschina is set aside.

3. Mariya Guschina is found to have committed one or more anti-doping rule violations under article 2.2 of the RUSADA ADR.

4. Mariya Guschina is sanctioned with a period of ineligibility of one year, or in the alternative between six months and one year, starting on the date on which the CAS award enters into force.

5. All competitive results obtained by Mariya Guschina from and including 17 June 2020 until 23 June 2022 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

6. The arbitration costs shall be borne by RUSADA or, in the alternative, by the Respondents jointly and severally.

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

B. The First Respondent's Submissions

47. The First Respondent points out that, in general terms, it agrees with the approach taken by the Appellant in relation to the application of the ADR provisions but that its position somewhat diverges from the Appellant's in relation to the potential application of the provisions concerning NSFN. Indeed, given that he ADRV is not contested and that the ADRV can be considered as having been committed without intent, the starting point for ADRV at hand is, pursuant to Article 10.2.2 of the ADR, a period of ineligibility of two (2) years.

48. For the sake of convenience, and in view of the fact that the Appellant has accepted, for the purpose of the present matter, that the Athlete can benefit from the application of Article 10.6.2 of the ADR, which relates to the admission made by the Athlete of the ADRV, the applicable sanction would be reduced to a period of ineligibility of one (1) year.

49. Regarding what it considers to be the only other possible ground for reduction, *i.e.* NSFN as set out in Article 10.5.2 of the ADR, the First Respondent considers that in order to determine whether an athlete's fault was significant or not, the most is "*the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk*". According to the First Respondent, the Athlete was not in any realistic position to second guess the medical advice she got to use plasmapheresis. However, the Athlete had a duty under the ADR, *i.e.* Article 22.1.4 of the 2016 ADR, to "*inform medical personnel of [her] obligation not to Use [...] Prohibited Methods and to take responsibility to make sure that any medical treatment received [did] not violate*

antidoping policy and local acts adopted according to these Rules". The Athlete failed to make sure that her use of plasmapheresis did not contravene the ADR.

50. Concerning the question whether this fault was "significant", the First Respondent notes that the Athlete contacted RUSADA to enquire whether she needed a TUE for other medication she was using, and that the ADR required her to have done more to look into the doping risks associated with plasmapheresis, *i.e.* enquire at RUSADA. That's what would have been "expected", and the definition of fault therefore provides that "*the circumstances considered must be specific and relevant to explain the Athlete's departure from the expected standard of behaviour*". The Athlete's explanation, according to which she did not believe that the use of plasmapheresis would carry a doping risk and that, in the absence of any advice from her medical personnel, she did not consider that she needed to raise its use with RUSADA, does not absolve her of Fault. Even though one could expect that the team doctor would have raised the anti-doping issue in respect to the plasmapheresis by herself, she fell short in that aspect and did not. However, ultimately the Athlete was still responsible for the actions of her team doctor as is clear from the CAS jurisprudence. This would nonetheless not necessarily mean that the Athlete acted with Significant Fault.

51. The First Respondent argues that there is CAS jurisprudence in which athletes with considerably more experience than Ms Guschina have been found to have acted with NSFN in not dissimilar circumstances, *i.e.* CAS 2017A/5015 and CAS 2016/A/4643. The fault of these athletes was to have relied on medical personnel and they were, in turn, required to be accountable for the errors committed by these medical personnel. However, these athletes benefitted from a reduction under the NSFN. If the Sole Arbitrator were to find, contrary to the Appellant's submission, that the circumstances of the present case do not preclude the application of Article 10.5.2 of the ADR, then these precedents would provide some guidance as to the appropriate sanction.

52. The First Respondent adds that it shares the Appellant's view according to which the DADC was wrong in granting a further reduction of the Athlete's sanction.

53. Regarding the costs of the procedure the First Respondent disagrees with the Appellant and submits that the 2021 WADC has changed things significantly when it comes to who should bear the costs in a case like the present as it introduced the concept of an "operationally independent hearing panel". However, an operationally independent hearing panel would be, by definition, something a National Anti-Doping Agency ("NADA") like the RUSADA could not have any control over. From a political point of view, it would be understandable that WADA would want the NADA to be accountable for the decisions taken by a NADA's independent hearing panel. However, from a legal point of view, the situation would be different as there is nothing in the WADC or the CAS Code that supports the notion that a NADA should be accountable for the decision of such a hearing panel. The Second Respondent considers that it should not be held accountable for the Appealed Decision as the DADC is an operationally independent panel and because it cannot influence the decisions of that panel. The question would thus be how Article R64 of the CAS Code should be applied in a case like the present. In any event, in the present case, it would not be for the Athlete to bear

the arbitration costs or the legal costs of the Appellant and the First Respondent as she was not responsible for the Appealed Decision.

54. The First Respondent requests for relief read as follows:

"*Ms Guschina has committed an anti-doping rule violation arising from the use of plasmapheresis in June 2020. The standard sanction in this regard is a two year Period of Ineligibility as per ADR Article 10.2.2, to be reduced to a period of one year by the application of ADR Article 10.6.2.*

If the Sole Arbitrator finds that Ms Guschina has provided evidence that she acted without Significant Fault, then the consequences to be imposed upon Ms Guschina should be those as provided for in ADR Article 10.5.2 and ADR Article 10.6.4, being a Period of Ineligibility of between six months and one year".

C. The Second Respondent's Submissions

55. The Second Respondent notes that in the present matter, the Parties agree that there has been an ADRV and that it was unintentional. The Parties also agree that the Athlete should benefit from a reduction due the fact that she admitted the ADRV. Hence, the only point that needs to be determined is the level of the Athlete's fault and the adequate sanction in relation to that degree of fault.

56. As a liminary point, the Second Respondent observes that a literal interpretation of Article 10.6.4 of the ADR gives the DADC the possibility to eliminate the sanction completely in a case like the present. The English translation of the 2016 ADR provided by the WADA would be incorrect. The words "suspended" and "suspension" used in that translation should read "eliminated" and "elimination". Further, a literal interpretation of this provision means that the panel may, at its discretion, eliminate the sanction completely or reduce it to one-fourth of the otherwise applicable sanction.

57. Regarding the determination of an athlete's level of fault, the Second Respondent recalls that according to the constant CAS jurisprudence (CAS 20213/A/3335 and CAS 2017/A/5301), the objective and the subjective elements have to be taken into consideration.

58. As regards the objective elements, the Athlete admits that she did not expressly ask her team doctor whether plasmapheresis was a Prohibited Method. This would certainly constitute a fault from her part. But that fault was not significant as it can be explained by the circumstances and the subjective elements of the case.

59. First, as would be clear from the WhatsApp correspondence between the Athlete and the team doctor, the Athlete did discuss plasmapheresis with her team doctor, but the latter was negligent and failed to provide a proper advice in relation to the anti-doping rules in regard to plasmapheresis and did not inform the Athlete that she would need a TUE for that procedure.

60. Second, the Athlete was not allowed to delegate her anti-doping obligations to another doctor than the team doctor. Dr Oleneva was the only official team doctor, and she was entrusted by the team to give guidance to the athletes regarding the anti-doping obligations.

61. Third, the Athlete was under intense stress because of her medical condition. She was afraid to not be able to continue her career of professional athlete and was even afraid that she could not fulfill her duties as mother anymore. In the mental state she was in, she was not able to react in a way it would be expected from a reasonable athlete.

62. Fourth, the Athlete did not think plasmapheresis presented an anti-doping risk. In her view, only blood transfusions presented such a risk. This could be explained by the fact that she had only received very basic anti-doping education by RUSADA. Further, even if the Athlete had checked on the RUSADA website or done a Google-search for "plasmapheresis", she would have found no information according to which there was an anti-doping issue. Even on the WADA website, plasmapheresis would only be mentioned on the FAQ page. However, this page exists only in English – which the Athlete does not understand.

63. Finally, the Athlete notes that the DADC seems to have considered that the refusal of the TUE Committee to retroactively grant the requested TUE was based on the fact that plasmapheresis was not part of the Russian official protocols for the treatment of thyroiditis and has taken this into account in the Appealed Decision.

64. All in all, in view of the circumstances of the case, the Second Respondent considers that her degree of fault is in only "light" and that, according to the literal interpretation of Article 10.6.4 of the ADR, the Sole Arbitrator has a discretion to reduce the sanction applicable to the Athlete to ¼ of the otherwise applicable sanction, *i.e.* from twenty-four (24) months down to six (6) months, or even to totally eliminate that sanction and not impose any period of ineligibility.

65. In response to a question from the Sole Arbitrator, the Second Respondent pointed out that it is clear from the endocrinologist's report on the Athlete (annex 9. to her submissions to the DADC) that the Athlete's anti-doping obligations were discussed with the doctor; that the Athlete was advised to consult with a sports doctor whether plasmapheresis could be performed in light of the anti-doping regulations, and that, according to the Athlete's explanations, the sports doctor had authorized the plasmapheresis treatment.

66. In view of these considerations, the Second Respondent requested the Sole Arbitrator to find that the Athlete had committed an ADRV but that her level of fault was "light". In consequence and in application of Article 10.6.4 of the ADR, declare that no period of ineligibility is imposed on the Athlete. In case the Sole Arbitrator considered that the literal interpretation of Article 10.6.4 of the ADR could not be followed, the Athlete should still benefit from a reduction of the applicable sanction on the basis of (i) NSFN and (ii) early admission and see the otherwise applicable sanction reduced to six (6) months. Finally, the costs of the proceedings should not be borne by the Athlete.

V. JURISDICTION

67. Article R47 of the CAS Code provides as follows:

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

68. It is uncontested between the Parties that the procedural aspects of the present matter are governed by the 2021 ADR.

69. Pursuant to Article 15.1.1 of the 2021 ADR

“*The scope of the review on appeal shall include all matters relevant to the case and shall not be limited to the issues or scope of review before the initial decision maker. Any party to the appeal may submit evidence, legal arguments and claims that were not raised in the first instance hearing, so long as they arise from the same cause of action or same general facts or circumstances raised or addressed in the first instance hearing.*

In making its decision, CAS shall not give deference to the discretion exercised by the body whose decision is being appealed.”

70. Article 15.1.2 of the 2021 ADR states that where “*WADA has the right to appeal under chapter XV of the Rules and no other party has appealed a final decision pursuant to these Rules, WADA may appeal such decision directly to CAS without having to exhaust internal remedies specified by the rules*”.

71. Article 15.2 of the 2021 ADR provides as follows:

“*The decisions specified below may be appealed exclusively pursuant to the procedure stipulated by Clause 15.2 hereof:*

- *A decision that the Rules` violation was committed*
- *A decision to impose or not to impose Consequences for the Rules violation*

[…] ”

72. Article 15.2.1 of the 2021 ADR states that decisions involving International-Level Athletes “*may be appealed exclusively to CAS*”.

73. According to Article 15.2.3.1 lit.f) of the 2021 ADR, in cases stipulated in Article 15.2.1 and 15.2.2, the persons entitled to appeal are, *inter alia*, “*WADA*”.

74. In the present case, it is undisputed that the Athlete is an “International-Level Athlete” within the meaning of the 2021 ADR.

75. Neither Party objected to the jurisdiction of the CAS to hear this appeal. Moreover, all Parties confirmed such jurisdiction by signing the Order of Procedure.

76. The Sole Arbitrator, therefore, confirms that CAS has jurisdiction to decide this appeal.

VI. ADMISSIBILITY

77. Article R49 of the CAS Code provides as follows:

"*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties.*"

78. Pursuant to Article 15.2.3.4 of the 2021 ADR, the "*time to file an appeal by WADA shall be the latter of:*

a) [...]

b) *Twenty-one (21) days after WADA's receipt of a complete file relating to the decision*".

79. In the present case, WADA received the complete case file from the RUSADA on 31 October 2022 and subsequently filed its Statement of Appeal on 21 November 2022. By doing so, the Appellant respected the twenty-one (21) day deadline set out in the 2021 ADR. Thus, the present appeal was filed on a timely basis and is admissible.

VII. APPLICABLE LAW

80. Article R58 of the CAS Code provides as follows:

"*The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*"

81. The Appealed Decision was rendered under the ADR, more particularly as regards the substantive issues the 2016 ADR, and there is not dispute as to the applicability of either the 2021 ADR – for the procedural aspects – and the 2016 ADR – for the substantive aspects – in the present matter. According to Article 20.3 of the 2021 ADR, the

comments annotating various provision of the WADC "*are incorporated by reference into these Rules. The comments shall be treated as if set out fully herein and shall be Used to interpret these Rules*". The 2016 ADR contained the exact same provision in Rule 20.7 and provided, in Article 20.5, that the "*Code and the International Standards shall be considered integral parts of these Rules and shall prevail in case of conflict*".

82. Article 2.2.1 of the 2016 ADR reads as follows:

"*It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method*".

83. According to Article 10.2 of the 2016 ADR, the "*period of ineligibility for a violation of Article [...] 2.2 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:*

10.2.1. The period of ineligibility shall be four years where:

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

[...]

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

84. Article 10.5.2 of the 2016 ADR states,

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

85. Pursuant to Article 10.6.2 of the 2016 ADR:

"*Where an Athlete or other Person voluntarily admits the commission of an anti-doping rule violation before having received notice of a Sample collection which could establish an anti-doping rule violation (or, in the case of an anti-doping rule violation other than Article 2.1, before receiving first notice of the admitted violation pursuant to Article VII) and that admission is the only reliable evidence of the violation at the time of admission, then the period of Ineligibility may be reduced, but not below one-half of the period of Ineligibility otherwise applicable*".

86. Article 10.6.4 of the 2016 ADR, entitled "Application of Multiple Grounds for Reduction of a Sanction" provides, according to the translation provided by the Appellant:

"*Where an Athlete or other Person establishes entitlement to reduction in sanction under more than one provision of Article 10.4, 10.5 or 10.6, before applying any reduction or suspension under Article 10.6, the otherwise applicable period of Ineligibility shall be determined in accordance with Articles 10.2, 10.3, 10.4, and 10.5. If the Athlete or other Person establishes entitlement to a reduction or suspension of the period of Ineligibility under Article 10.6, then the period of Ineligibility may be reduced or suspended, but not below one-fourth of the otherwise applicable period of Ineligibility*".

87. According to the Second Respondent, the translation provided by the Appellant is not correct. The literal translation of the same provision would read as follows:

"*Where an Athlete [...] establishes entitlement to reduction in sanction under more than one provision of Article 10.4, 10.5 or 10.6, before applying any reduction or elimination under Article 10.6, the otherwise applicable period of Ineligibility shall be determined in accordance with Articles 10.2, 10.3, 10.4, and 10.5. If the Athlete [...] establishes entitlement to a reduction or suspension of the period of Ineligibility under Article 10.6, then the period of Ineligibility may be eliminated or reduced, but not below one-fourth of the otherwise applicable period of Ineligibility*".

VIII. PROCEDURAL ISSUES

88. Regarding the Second Respondent's claim that the Sole Arbitrator's decision to declare her answer inadmissible violates the latter's right to be heard and right to a fair trial, the Sole Arbitrator recalls that the right to be heard and the right to a fair hearing/trial, as set in Article 6 of the European Convention of Human Rights, are not absolute and may be subject to some restrictions, provided that these restrictions correspond to objectives of general interest pursued by the measure in question and that they do not entail, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.

89. As recalled in the CAS Court Office letter from 6 February 2023, according to Article R55 of the CAS Code, the Respondents were requested to submit their Answer within twenty (20) days upon receipt of said letter.

90. Further, pursuant to Article 31 al.3 of the CAS Code, the "*request for arbitration, the statement of appeal and any other written submissions, printed or saved on digital medium, must be filed by courier delivery to the CAS Court Office by the parties in as many copies as there are other parties and arbitrators, together with one additional copy for the CAS itself, failing which the CAS shall not proceed. If they are transmitted in advance by facsimile or by electronic mail at the official CAS email address (procedures@tas-cas.org), the filing is valid upon receipt of the facsimile or of the electronic mail by the CAS Court Office provided that the written submission and its*

copies are also filed by courier or uploaded to the CAS e-filing platform within the first subsequent business day of the relevant time limit, as mentioned above".

91. Finally, according to Article R31 al.4 of the CAS Code, "*[f]iling of the above-mentioned submissions via the CAS e-filing platform is permitted under the conditions set out in the CAS guidelines on electronic filing*".

92. The procedural deadlines set out in the CAS Code are specifically aiming at safeguarding the procedural rights and equality of arms of the parties to a procedure. As follows from the jurisprudence of the Swiss Federal Tribunal, the right to be heard, as set out in Article 4 of the Swiss Constitution, which includes the right to administer relevant evidence, has to be exercised within the given time ("rechtzeitig") and according to the formal requirements ("formrichtig") (BGE 106 II 170, BGE 101 Ia 103).

93. However, in the present case, while the Second Respondent did send her Answer by email on 2 May 2023, *i.e.* on the last day of the prescribed deadline considering that 1st May was a public holiday in Russia, she neither filed that Answer by courier nor uploaded it to the CAS e-filing platform within the first subsequent business day. By not doing so she manifestly failed to respect the provisions of Article R31 of the CAS Code.

94. Given the Appellant's refusal to admit the Second Respondent's Answer to the file and in absence of any exceptional circumstances that might validly explain why the Second Respondent failed to submit her Answer according to the prescribed rules, her Answer must be declared inadmissible. As the Second Respondent did not exercise her right to be heard within the given time ("rechtzeitig") and/or according to the formal requirements ("formrichtig") set out in the CAS Code, the Sole Arbitrator's considers that his decision does not violate the Second Respondent's right to be heard and right to a fair trial. In addition, the Second Respondent had the opportunity to present her case orally at the hearing.

IX. MERITS

95. In the present matter, it is common ground between the Parties that the Athlete committed an ADRV in the sense of Article 2.2 of the 2016 ADR by undergoing three plasmapheresis procedures. The Parties also agree that the ADRV was committed without Intent. It is further uncontested that, in such circumstances, the eligibility period set out in Article 10.2.2 of the 2016 ADR "*shall be two years*".

96. Further, as follows from the Appellant's submissions, the latter does not contest that the Athlete may, as found in the Appealed Decision, benefit from a reduction of that period of ineligibility on the basis of Article 10.6.2 of the 2016 ADR, pursuant to which "*[w]here an Athlete [...] voluntarily admits the commission of an anti-doping rule violation before having received notice of a Sample collection which could establish an anti-doping rule violation [...] and that admission is the only reliable evidence of the*

violation at the time of admission, then the period of Ineligibility may be reduced, but not below one-half of the period of Ineligibility otherwise applicable".

97. As this finding of the DADC has not been appealed, the mandate of the Sole Arbitrator is limited to the only points in contention between the Parties which are whether or not the Athlete may benefit from a further reduction of the period of ineligibility on basis of Article 10.5.2 of the 2016 ADR, *i.e.* based on NSFN, and, in the affirmative, to determine whether her degree of Fault was "light" or "normal" and to what kind of reduction from the otherwise applicable period of Ineligibly she would be entitled.

98. As a liminary remark, the Sole Arbitrator notes that the facts, as described by the Athlete before the DADC, are not in dispute.

99. Regarding the concepts of "Fault", "No Fault or Negligence" and "No Significant Fault or Negligence", their definition is set out in the Appendix 1 of the 2016 ADR.

100. According to this Appendix, Fault is defined as "*[a]ny breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.*".

101. No Fault or Negligence is defined as follows:

"*The Athlete or other Person's establishing that he or she did not know or suspect and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system*".

102. For its part, the definition of No Significant Fault or Negligence reads as follows:

"*The Athlete or other Person's establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system*".

103. These definitions are mostly identical to the ones contained in the Appendix of the WADC and, in the Sole Arbitrator's view, the small deviations in wording in these definitions have no substantive effect. The same is true for the differences between the provisions of the 2016 ADR and the provisions of the WADC. Indeed, first, as set out in Article 20.6 of the 2016 ADR, "*[t]hese Rules have been adopted pursuant to the applicable provisions of the Code and shall be interpreted in a manner that is consistent with applicable provisions of the Code. Relative Code provisions were incorporated to these Rules without substantive change except non-substantive changes to the language in order to refer to the organisation's name, sport, section numbers, etc. Code provisions that were not incorporated into these Rules shall be applied in virtue of the Convention*". Moreover, as set out in Article 20.5 of the 2016 ADR, the "*Code and the International Standards shall be considered integral parts of these Rules and shall prevail in case of conflict*".

104. In view of the above, first, contrary to what the Second Respondent has argued, Article 10.6.4 of the 2016 ADR cannot be interpreted strictly according to its Russian wording, but must be interpreted in line with Article 10.6.4 of the WADC which reads as follows: "*[w]here an Athlete [...] establishes entitlement to reduction in sanction under more than one provision of Article 10.4, 10.5 or 10.6, before applying any reduction or suspension under Article 10.6, the otherwise applicable period of Ineligibility shall be determined in accordance with Articles 10.2, 10.3, 10.4, and 10.5. If the Athlete [...] establishes entitlement to a reduction or suspension of the period of Ineligibility under Article 10.6, then the period of Ineligibility may be reduced or suspended, but not below one-fourth of the otherwise applicable period of Ineligibility*".

105. Second, Article 10.5.2 of the 2016 ADR and the concept of NSFN contained therein must be interpreted in a manner that is consistent with the WADC in general and Article 10.5.2 thereof in particular. Regarding Article 10.5.2 of the WADC, it has to added that, according to the comment to Article 10.4 of the WADC, Article 10.4 and "*Article 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor [...]*".

106. The fact that NSFN should only apply in exceptional circumstances has been reaffirmed by numerous CAS panels when they held that a period of ineligibility can be reduced based on NSFN only in cases where the circumstances justifying a deviation from the duty of exercising the "*utmost caution*" are truly exceptional, and not in the vast majority of cases (CAS 2016/A/4643).

107. The Sole Arbitrator fully adheres to this approach and shares the view, adopted by the CAS panel in the Sharapova case (CAS 2016/A/4643), according to which "*a claim of NSF is (by definition) consistent with the existence of some degree of fault and cannot be excluded simply because the athlete left some 'stones unturned'. As a result, a deviation from the duty of exercising the 'utmost caution' does not imply per se that the athlete's negligence was 'significant'; the requirements for the reduction of the sanction under Article 10.5.2 of the TADP can be met also in such circumstances*".

108. The Sole Arbitrator is also aware that, according to CAS jurisprudence, athletes are permitted to delegate elements of their anti-doping obligations and that if, in such a situation, "*an anti-doping rule violation is committed, the objective fact of the third party's misdeed is imputed to the athlete, but the sanction remains commensurate with the athlete's personal fault or negligence in his/her selection and oversight of such third party or, alternatively, for his/her own negligence in not having checked or controlled the ingestion of the prohibited substance. In other words, the fault to be assessed is not that which is made by the delegate, but the fault made by the athlete in his/her choice*" (CAS 2016/A/4643). Thus, an athlete who delegates his/her anti-doping responsibilities to another person is at fault if he/she chooses an unqualified person as her delegate, if he/she fails to instruct that delegate properly or set out clear procedures the delegate must follow in carrying out his task, and/or if he/she fails to exercise supervision and control over the delegate in the carrying out of the task (CAS 2016/A/4643). All the Parties seemed to endorse the approach followed by the panel in CAS 2016/A/4643 even if that approach led them to different conclusions. The Sole Arbitrator accepts that this approach has some relevance in the present case and has, thus, to be taken into consideration.

109. As is clear from the definitions of "Fault", "No Fault or Negligence" and "No Significant Fault or Negligence", these concepts are interlinked and the starting point for any examination of the degree of fault of an athlete is to be found in the definition of "Fault", this concept being primarily based on an objective element as it refers to "*[a]ny breach of duty or any lack of care appropriate to a particular situation*".

110. The obligation at issue in the present case is set out in Article 2.2.1 of the 2016 ADR, according to which it is each athlete's personal duty to ensure that no Prohibited Method is used. The starting point for the level of diligence expected of athletes is therefore their primary responsibility to ensure that they comply with anti-doping provisions and that they do not use any prohibited method (CAS 2017/A/5301 and CAS 2017/A/5320).

111. Further, in accordance with that definition, it is necessary to take into consideration "*the degree of risk that should have been perceived*" by the athlete. Moreover, the circumstances considered when assessing the degree of fault must be specific and relevant to explain that the athlete's "*departure from the expected standard of behavior*". The Sole Arbitrator considers that the determination both of the "*degree of risk that should have been perceived*" and the "*expected standard of behavior*" has to me made on the basis of purely objective factors. The definition of "Fault" contains thus a clear reference to the athletes' liability to exercise the utmost diligence when using a substance or a method (CAS 2017/A/5320 and CAS 2022/A/8740) and the degree of fault of an athlete must therefore assessed in the light of the deviation from the expected standard (of the utmost diligence).

112. In the present case, the Athlete argues that her fault consisted of not having explicitly asked anti-doping advice from her team doctor, which was, according to the Athlete, her anti-doping delegate, in relation to the plasmapheresis. However, the weight of her fault would be diminished by the fact that the team doctor herself was negligent as she did not by herself warn the Athlete about any anti-doping issues in relation to the plasmapheresis.

113. Regarding this fault, the Sole Arbitrator notes, first, that in the present case the Athlete has not submitted the terms of the delegation she gave or had to give to the team doctor. Assuming that such delegation had occurred, the Athlete was under the obligation to instruct that delegate properly or set out clear procedures the delegate was to follow in carrying out her task and to exercise supervision and control over the delegate in the carrying out of that task (CAS 2016/A/4643).

114. In the present matter, this has obviously not been done. As is clear from the WhatsApp conversation on file and as the Athlete admitted herself, she only requested "general" medical advice from her team doctor in relation to the plasmapheresis procedures and not specific anti-doping advice. This fault or negligence is all the more serious in view of the fact that, as the Athlete pointed out in response to a question from the Sole Arbitrator, the potential anti-doping issue arising from the use of plasmapheresis was discussed with the endocrinologist and that the latter had invited the Athlete to check with her anti-doping specialist which, according to the endocrinologist's final report, the Athlete had allegedly done.

115. Obviously, the Athlete could have respected her obligation to show outmost caution or diligence in respect to the use of plasmapheresis by other means than asking her team doctor and the Athlete did in fact know how to do that. Indeed, it is uncontested between the Parties, that when she was prescribed Prednisolone and Bisoprolol by her endocrinologist, the Athlete contacted RUSADA – once by calling its hotline and once by sending an email – to ask whether there were some anti-doping issues in relation to the intake of these medications or whether she had to "*apply for a TUE in a given time period*". However, she did not make any such enquiry with RUSADA with regards to plasmapheresis.

116. The Second Respondent's argument according to which she was simply not aware that there could be an anti-doping issue with plasmapheresis as she only considered blood transfusions to be prohibited is, in the Sole Arbitrator's view, contradicted by the fact, mentioned above, that according to the final report from the endocrinologist, the Athlete was recommended to seek advice as to the anti-doping implications of the envisaged plasmapheresis procedures.

117. Further, the Sole Arbitrator holds that the Athlete must be considered as being an experienced athlete in anti-doping matters. Indeed, it is undisputed that she underwent more than thirty (30) anti-doping tests in her career. Moreover, although the Athlete argued that she had received no or hardly any anti-doping education, the factual elements of the case show that she was well aware of the fact that she had some anti-doping obligations and that she knew she could find the most reliable information regarding substances or methods by directly contacting RUSADA. Had she showed the same caution and taken the same steps regarding the use of plasmapheresis as she did in relation to the use of Prednisolone and Bisoprolol, she could have avoided the ADRV.

118. The fact that she did not is all the more incomprehensible as, first, she contacted RUSADA on 17 June 2020, *i.e.* one day after her endocrinologist had suggested to carry out plasmapheresis procedures to relieve the Athlete's symptoms and the same day on which she accepted and underwent the first of the suggested plasmapheresis procedures.

Second, according to a general explanation, plasmapheresis consists of the removal, treatment and return or exchange of blood plasma or components thereof from and to the blood circulation. Thus, the Athlete cannot have reasonably ignored that the envisaged plasmapheresis involved a withdrawal of blood and a re-injection of her own cleansed plasma, making it very similar to blood transfusions, which the Athlete knew constituted a Prohibited Method. Incidentally, as is clear from the WhatsApp conversation, which is on file, the team doctor informed the Athlete, on 16 June 2020, that plasmapheresis would not speed up the healing process "*but cleanse the blood a little*". Third, the plasmapheresis procedures were performed in a clinical environment which should have raised the Athlete's awareness regarding a potential anti-doping rule issue even more.

119. In view of the above elements, the Sole Arbitrator considers that the Athlete should have perceived that there was a high risk that the use of plasmapheresis could constitute an ADRV and should, thus, have shown a high level of diligence to avoid the use of this Prohibited Method. The fact is, however, that the Athlete did not take the most elementary steps to avoid the ADRV, *i.e.* ask her alleged anti-doping delegate for advice and/or ask RUSADA for information regarding the status of plasmapheresis. On basis of the objective elements of the case, the Sole Arbitrator finds that the Athlete significantly failed in her duty of care to prevent the use of a Prohibited Method. It is further evident that her failure was "*significant in relation to the*" ADRV for the purposes of the definition of NSFN as without it, the ADRV had most probably not occurred.

120. In the present case, the Sole Arbitrator sees no room to follow the reasoning according to which an "*athlete who acted, in objective terms, with a 'significant degree of fault' could, due to the existence of exceptional circumstances closely linked to the subjective aspects of the case, have her degree of fault reduced from a 'significant degree of fault' to a 'normal degree of fault'*" (CAS 2013/A3335 and CAS 2012/A/7983 & 8059) .

121. Indeed, regarding the subjective elements brought forward by the Second Respondent, *i.e.* (i) the team doctor was negligent and failed to provide proper advice in relation to the anti-doping rules; (ii) the Athlete was not allowed to delegate her anti-doping obligations to another doctor than the team doctor; (iii) the Athlete was under intense mental stress because of her medical condition and not able to react in a way it would be expected from a reasonable athlete; (iv) the Athlete did not perceive the anti-doping risk as she had only received a very basic anti-doping education by RUSADA and even if she had searched for information about plasmapheresis, such search would not have provided her with the necessary information to understand that there was an anti-doping issue, the Sole Arbitrator notes that points (i), (ii) and (iv) have already been addressed above and have, in his view, no impact on the Athlete's degree of fault in the present case.

122. As regards the argument drawn from the Athlete's alleged mental stress, the Sole Arbitrator notes that a day prior to accepting the use of plasmapheresis the Athlete was alert enough to seek some advice, although only general medical advice, from her team doctor and that, on the day she underwent the first plasmapheresis, she was diligent enough to contact RUSADA by phone for an enquiry about Prednisolone and

Bisoprolol. These uncontested factual elements lead the Sole Arbitrator to conclude that the mental stress the Athlete was allegedly suffering from was not of such gravity that she could, at the time, not be compared to a reasonable athlete. This conclusion is corroborated by the circumstance that, the day after her phone call to the RUSADA hotline, the Athlete sent an email to RUSADA with the request to get a written confirmation of the consultation she had received via the hotline. Such an approach is, in the Sole Arbitrator's view, that of a reasonable athlete who is well aware of her/his anti-doping obligations and shows the expected level of caution/diligence. Thus, this argument has no effect either on the degree of fault established on basis of the objective elements of the present matter.

123. Finally, with respect to the parallels drawn, by the First Respondent, between the present matter and CAS 2017/A/5015 as well as CAS 2016/A/4643, the Sole Arbitrator considers that there are significant factual differences between the present matter and the two mentioned cases and that the line of reasoning followed in these two cases may not be transposed to the present.

124. Indeed, first, in the Johaug case, the prohibited substance was contained in a medication that was prescribed by the team doctor who was the anti-doping specialist. In the present case, the plasmapheresis was not prescribed by the anti-doping specialist, *i.e.* the team doctor, and she only acknowledged the Athlete's information that she would undergo plasmapheresis with a "gut" ("good"). Second, in the Sharapova case, the athlete, who had delegated some elements of the anti-doping obligations to medical personnel, had taken the same medication/substance over a long period of time (10 years) without any anti-doping issue which was one of the reasons why the panel in that case considered that the athlete could have a reduced perception of risk. In the present matter however, the Athlete found herself with a health issue and a situation that was totally new for her and was advised to use a procedure which she had never used before and had no knowledge of.

125. In view of all of the above considerations, the Sole Arbitrator considers that Athlete's degree of Fault is significant and that, accordingly, she cannot benefit from a reduction of her period of ineligibility for NSFN on the basis of Article 10.5.2 of the 2016 ADR.

126. Thus, in application of Articles 2.2, 10.2.2 and 10.6.2 of the 2016 ADR and in regard of the Appellant's requests for relief, the Sole Arbitrator determines, under the totality of the circumstances, that a period of ineligibility of twelve (12) months is appropriate in the present matter.

127. Given that the Appealed Decision has only pronounced a reprimand and not imposed any period of Ineligibility, the Appeal has to be upheld and the Appealed Decision partially set aside.

128. According to Article 10.3 of the 2016 ADR, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility, *i.e.* in the present case the date of the notification of the present Award.

129. Finally, pursuant to Article 10.10 of the 2016 ADR, in "*addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article IX, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In- Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes*".

130. In the present case, it is uncontested that the ADRV occurred on 17 June 2020. Given that the Athlete has not been provisionally suspended, the period of disqualification would thus stretch from that date until the date of notification of the present award, *i.e.* approximately three-and-a-half years. In the present case, the Sole Arbitrator considers that, in view of the fact that the Athlete's period of ineligibility is only twelve (12) months long and the period of disqualification does not appear proportionate in relation to the gravity of the ADRV, which was committed without intent, and the length of the imposed period of ineligibility. Thus, in application of the principle of fairness, the Sole Arbitrator holds that the disqualification of results, with all corresponding consequences, should not exceed a period of twelve months, *i.e.* starting on 17 June 2020 and ending on 16 June 2021.

131. In view of the above considerations, the Sole Arbitrator concludes that the Appellant's appeal is partially upheld and that the Appealed Decision is partially set aside.

132. Any other and further claims or requests for relief on the merits are dismissed.

X. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by the World Anti-Doping Agency (WADA) against the Russian Anti-Doping Agency (RUSADA) and Ms Mariya Guschina with respect to the decision rendered by the Disciplinary Anti-Doping Committee of the RUSADA on 23 June 2022 is partially upheld.

2. The decision rendered by the Disciplinary Anti-Doping Committee of the RUSADA on 23 June 2022 is partially set aside.

3. Ms Mariya Guschina is sanctioned with a twelve (12) months period of ineligibility, starting on the date of the present Award. Any results achieved by Ms Mariya Guschina between 17 June 2020 and 16 June 2021 shall be disqualified with all resulting consequences including forfeiture of any medals, points and prizes.

4. (…).

5. (…).

6. All other and further claims or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: xx October 2023

THE COURT OF ARBITRATION FOR SPORT

Jacques Radoux
Sole Arbitrator