

## **Decision of the IBSF Anti-Doping Hearing Panel**

in the matters of

Mr Aleksander Kasjanov,

IF ID 130619

Mr Ilvir Khuzin,

IF ID 130617

Mr Aleksei Pushkarev,

IF ID 130625

Mr Aleksander Zubkov,

IF ID 130635

To: each of the individual Athletes

Bobsleigh Federation of Russia  
President Aleksander Zubkov  
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Date: January 16, 2019

## **I. Introduction: The Notification**

1. The International Bobsleigh & Skeleton Federation ( the "**IBSF**") has sent on December 4, 2018 (in the matters of Mr Kasjanov and Mr Pushkarev), on December 6, 2018 (in the matter of Mr Khuzin) respectively on December 13, 2018 (in the matter of Mr Zubkov) a notification letter (collectively referred to as the "**Notification Letter**") to the aforementioned athletes, hereinafter collectively also referred to as the "**Athletes**".
2. In the Notification Letter the Athletes were informed as follows:
  - 2.1. The Athletes are being charged with a violation of the IBSF Anti-Doping Rules ("the IBSF ADR").

- 2.2. The Athletes are subject and bound to comply with the IBSF ADR. The IBSF ADR 2009 version applies to the question of which Anti-Doping Rule has been violated.
3. In the Notification Letter the facts of the subject matters are described as follows:
  - 3.1 The Athletes have been notified by the International Olympic Committee (IOC), that disciplinary proceedings before the IOC Disciplinary Commission (the "IOC DC") have been initiated against them because of possible ADRVs in connection with the Olympic Winter Games 2014 in Sochi.
  - 3.2 The hearing of the IOC DC was held on 6 respectively 23 November 2017 at the IOC Headquarters in Lausanne, Switzerland.
  - 3.3. By decision of the IOC DC of 24 respectively 29 November 2017 (operative part) and 6 respectively 20 December 2017 (reasoned decision) (the "**IOC Decision**"), the Athletes have been found to have committed Anti-doping rule violations (the "**ADRV**") pursuant to Article 2 of The International Olympic Committee Anti-Doping Rules applicable to the XXII Olympic Winter Games in Sochi 2014, Russia.
  - 3.4. On 1 December 2017, the Athletes filed an appeal against the IOC Decision with the Court of Arbitration for Sport (CAS). The hearing took place on 22 – 27 January 2018 in Geneva, Switzerland.
  - 3.5. The CAS issued its decision on 1 February 2018 (operative part) and on 23 April, 2018 respectively 11 and 23 July 2018 (reasoned decision). It found that the Athletes committed ADRVs pursuant to the IOC Anti-Doping Rules applicable to the XXII Olympic Winter Games in Sochi, Russia, in connection with the World Anti-Doping Code (WADC), (the "**CAS Award**").
4. The Notification Letter sets out that:
  - 4.1. the jurisdiction of the IOC is restricted to the Olympic Games only. Consequently, it may impose sanctions for an ADRV only within the realm of the Olympic Games (e.g. disqualification from Olympic events, return of

- diplomas and medals won at the Olympic Games, non-eligibility for future Olympic Games, withdrawal of the accreditation to the Olympic Games, expulsion from the Olympic Village);
- 4.2. if an ADRV established by the IOC and confirmed by CAS constitutes also an ADRV under the Anti-Doping Rules of the International Federation to which the athlete belongs, the respective International Federation is obliged to examine whether additional sanctions must be imposed, especially whether a period of ineligibility outside of the Olympic Games applies.
  - 4.3. the finding of an ADRV under the WADC as set out in the CAS Award can no longer be challenged and has become legally binding and enforceable ("res judicata").
  - 4.4. the IBSF ADR 2009 correspond to the IOC Anti-Doping Rules applicable to the XXII Olympic Winter Games in Sochi 2014, Russia and the WADC 2009.
  - 4.5. the ADRVs established by the IOC DC as confirmed by the CAS constitute ADRVs also under the IBSF ADR 2009.
5. The Notification Letter formally charged the Athletes under the IBSF ADR 2009 with the commission of ADRVs in violation of Article 2.2 IBSF ADR in connection with M2.1 of the 2014 WADA Prohibited List for the Use of a Prohibited Substance and the Use of a Prohibited Method, i.e. urine substitution of the samples with, for:
- Mr Mr Aleksander Kasjanov:  
no 2891780 provided on 14 February 2014
  - Mr Ilvir Khuzin:  
no 2891905 provided on 15 February 2014
  - Mr Aleksei Pushkarev  
No 2889191, provided on 23 February 2014
  - Mr Aleksander Zubkov  
no 2889141 provided on 23 February 2014
6. The Notification Letter summarizes the consequences of the ADRV as follows:

- 6.1. Both ADRVs mentioned above committed by each of the Athletes are considered as one single violation when determining the consequences for each of them according to Article 10.7.4 IBSF ADR 2009.
- 6.2. For all Athletes the ADRVs are their first violation. Therefore, each of them will be subject to the consequences specified in Article 10.2 IBSF ADR for a first offence, which means a period of ineligibility of maximum 2 years.
- 6.3. The IBSF ADR provide for certain circumstances, which may lead to an elimination or reduction of the standard period of Ineligibility, such as
  - No Fault or Negligence (Article 10.5.1 IBSF ADR 2009),
  - No Significant Fault or Negligence (Article 10.5.2 IBSF ADR 2009).
- 6.4. Any period of Provisional Suspension shall be deducted from the otherwise applicable period of ineligibility (Article 10.9.3 IBSF ADR 2009).
- 6.5. In addition to the automatic disqualification of the results in the Olympic Winter Games 2014, all other competitive results obtained from the date the ADRV occurred, may be disqualified with all of the resulting consequences, including forfeiture of any medals, points and prizes (art. 10.8 IBSF ADR 2009).
  
7. The Notification Letter informed the Athletes about the consequences of their ADRV (the "**Consequences**") in the subject cases as follows:
  - 7.1. Under the given circumstances, the IBSF has proposed a period of ineligibility of two (2) years, starting from the date of the final decision of the IBSF, from which any period of Provisional Suspension shall be deducted.
  - 7.2. The Athletes shall be disqualified of all competitive results since 14, 15 respectively 23 February 2014 with all of the resulting consequences, including forfeiture of any medals, points and prizes.
  
8. The Athletes are invited in the Notification Letter to come up with an adequate explanation for the ADRV within 7 days upon receipt of the Notification Letter in order to avoid being Provisionally Suspended in accordance with article 7.9.1 IBSF ADR from participating in any IBSF-

sanctioned Competition prior to the final decision being reached at a hearing of the subject matters.

9. The Athletes are furthermore invited in the Notification Letter to comment on the charge of an ADRV and the Consequences proposed no later than within 20 days after receipt of the Notification Letter by either accepting the charge and the Consequences, or by challenging the charge and/or the Consequences.
10. If the Athletes would challenge the Consequences the Notification Letter announced that in that event the IBSF will assign the case to the IBSF Anti-Doping Hearing Panel (the "ADHP") for hearing and adjudication according to Article 8.1.3 IBSF ADR.
11. By submission of written statements and annexes each of the Athletes challenged both the Provisional Suspension (written statement of 11 respectively 19 December, 2018) and the proposed Consequences (written statement of December 24, 2018).
12. The IBSF referred each of the matters of the Athletes to the Anti-Doping Hearing Panel of the IBSF (the "**ADHP**") in order to have the matters considered and decided. The ADHP convened a hearing for each of the Athletes individually on January 3, 2019, which hearing took place in the Hilton Hotel at Munich Airport at said date.

## **II. Procedural Aspects**

14. The ADHP in the matter of the Athletes consists of Dr Alessia di Gianfrancesco, Prof Dr Peter J Hemmersbach, Prof Dr Ian Blackshaw, Mr. Dolf Segaar (chairman), sports lawyer. As secretary to the ADHP, Raik Bauerfeind, IBSF Anti-Doping Administrator, was present.
15. The Athletes were present at the hearing and represented by their lawyer Mr Artem Patsev. A Russian translator was available by Skype.

16. The Athletes requested in accordance with Article 7.3.3 of the ADR IBSF to regard the hearing as an expedited final hearing in accordance with Article 8.
17. Since the matters for each of the Athletes were materially similar the Athletes requested a combined hearing in which each of the matters was discussed in their presence.

### **III. Submission of the Athletes**

18. Each of the Athletes provided to the ADHP materially similar submissions against their provisional suspension and the Consequences of their ADRV and because of the combined hearing, the Doping Hearing Panel considered it appropriate and efficient to render a single, combined decision for the four subject matters.
19. The Athletes have emphasized in their submissions clearly not to be involved in any ADRV and not to play or have played any role in the allegations mentioned in the McLaren Reports, the IOC Decision and the CAS Awards. They have brought forward in their submissions the following (summarised):
  - The Athletes are elite athletes already for a number of years.
  - During those years none of the Athletes tested positive or were convicted for committing any ADRV. Each of them was tested on various occasions.
  - Each of the Athletes have declared that they have not been confronted with the alleged tampering of their samples.
  - Dr Rodchenkov is anyone but a reliable and trustworthy witness.
  - Alternative theories for the salt levels in the urine samples of each of the Athletes.
  - The subject alternative theories have been rejected by CAS without a reasonable basis.

#### **IV. Considerations of the ADHP**

##### **A. Applicable Anti-Doping Rules**

20. Parties are in agreement that the IBSF ADR 2009 shall apply on the merits of each of the cases as well as on the possible consequences of an ADRV for each of the Athletes.

##### **B. Proof of doping**

21. According to Article 3 of the IBSF ADR 2009 the IBSF shall have the burden of establishing that an ADRV has occurred. The standard of proof shall be whether the IBSF has established an ADRV to the comfortable satisfaction of the ADHP bearing in mind the seriousness of the allegation that is made.
22. Article 3.2 of the IBSF ADR 2009 stipulates that facts relating to ADRV's may be established by any reliable means, including admissions.
23. According to Article 3.2.3 of the IBSF ADR 2009 the facts established by a decision of a court or professional disciplinary tribunal of competent jurisdiction which is not subject of a pending appeal shall be irrefutable evidence against the Athletes, unless the Athletes establish that the decision violated principles of natural justice.
24. For each of the individual Athletes ADRVs have been established by CAS in the relevant CAS Awards<sup>1</sup>. These CAS Awards are not subject of a pending appeal and the facts that have been established by CAS are therefore irrefutable evidence against the Athletes in the current matter also. In each of the CAS Awards parties have acknowledged that they are satisfied with the procedural handling of the dispute before CAS and that they had the full opportunity to make their case (Paragraph D. Due Process Violations of the

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<sup>1</sup> in the matters versus IOC of Mr Kasjanov: CAS 2017/A/5425, of Mr Pushkarev: CAS 2017/A/5426, of Mr Khuzin: CAS 2017/A/5427, in the matter Aleksander Zubkov: CAS 2017/A/5422

CAS Awards). The Athletes have not challenged before the ADHP the CAS Awards for violating principles of natural justice.

25. The ADHP comes therefore to the conclusion that in accordance with Article 3.2.3 of the IBSF ADR 2009, the Panel is bound to the facts established by CAS in the CAS Awards as "irrefutable evidence against the Athletes".

### **C. Facts**

26. The Athletes have confirmed in their submissions and oral pleadings during the hearing that they are bound to the decision of CAS relating to the facts that established ADRVs, but they have argued that the ADHP is responsible in the subject matters to decide on the sanction in each of the cases. In each of the submissions it is said:

"11. The binding effect of the IOC Disciplinary Commission decision [ ] (substituted later by the CAS Award) extends to the doping violation itself only – in other words, to the establishment of an ADRV. At the same time, it is the IBSF ADHP who owns all the rights and responsibilities to decide on sanctions (Consequences, in the terms of the FIBT ADR 2009) which extend beyond legal consequences for the Olympic Games".

### **D. CAS Awards**

27. The ADHP is in agreement with the Athletes where they have argued that CAS has not supported IOC in a number of alleged violations of Anti-Doping Rules. Reference is made to the subject CAS Awards.
28. Having said so, the ADHR cannot deny the fact that the CAS Awards have established ADRVs for each of the Athletes relating to the Use of a Prohibited Substance and the Use of a Prohibited Method (i.e. urine substitution of the samples).
29. The ADHP is as mentioned before committed to the facts that CAS brought to the conclusion of the above ADRVs.

30. Relevant in this respect are the following facts that are considered by CAS in each matter and that the ADHP is bound to and will follow. The following citations come from the CAS Award in the matter CAS 2017/A/5425 Alexander Kasyanov v. International Olympic Committee, but have been considered as material the same way (but in some of the awards to be numbered differently) by CAS in the other matters as well:

### **D1. On the use of a prohibited method**

- "776. The Panel has examined each of the individual features of the alleged scheme with a view to determining whether these features, if proven by direct or circumstantial evidence, would constitute, individually or collectively, an ADRV involving the use of a prohibited method by the Athlete.
777. As the Panel has explained above, in order to be comfortably satisfied that the Athlete has committed an ADRV of use of a prohibited method, it is insufficient merely to establish the existence of a general sample-swapping scheme; rather, the Panel must be comfortably satisfied that the Athlete was personally and knowingly implicated in particular acts that formed part of, and facilitated the commission of, the substitution of his urine within that scheme.
778. The Panel has concluded that the results of the scientific analysis of the content of the Athlete's urine samples from the Sochi Games - namely the physiologically impossible level of sodium in one of the Athlete's samples - establish to the Panel's comfortable satisfaction that the Athlete provided clean urine in advance of the Sochi Games; that he did this for the purpose of enabling the subsequent swapping of his urine samples during the Sochi Games; and that his samples at the Sochi Games were in fact subsequently swapped, with salt being added to the substituted urine in an effort to conceal the existence of the substitution. Accordingly, the Panel is comfortably satisfied that the Athlete thereby committed an ADRV under Article 2.2 of the WADC in connection with M2.1 of the Prohibited List in the form of the use of a prohibited method".

## **D2. On the use of a prohibited substance**

" 800. [ ] as explained above, in the circumstances of the present case the Panel considers that the Athlete's deliberate facilitation of the substitution of his urine samples by providing clean urine in advance of the Sochi Games gives rise to an inescapable inference that the purpose of that course of conduct was to conceal his use of a prohibited substance. Accordingly, the Panel is comfortably satisfied that the Athlete used a prohibited substance during the Sochi Games."

### **E. Application of article 3.2.3. IBSF ADR 2009 by ADHP**

31. The Athletes have interpreted article 3.2.3. of the IBSF ADR 2009, as such that the ADHP is bound only to the facts of the CAS Awards and not to the conclusions of CAS derived from those facts. According to the Athletes there is room for the ADHP contrary to CAS not to sanction the Athletes for the ADRVs established by CAS because they lack fault or negligence for the presented facts in the CAS Awards.
32. Even in the event the ADHP would follow the Athletes in this strict interpretation of article 3.2.3 of the IBSF ADR and therefore accepts the room to draw itself conclusions and come up with suitable sanctions following the facts in the CAS Awards, the ADHP has no reason to deviate from the CAS conclusions in the subject matters.
33. The conclusions by CAS in the subject matters follow logically from facts that have been established by CAS in a due process (which has been confirmed by parties). The ADHP does not see any justifiable reason to come to different conclusions than CAS.  
The alternative theories that the Athletes have submitted to the ADHP are not substantiated with (convincing) evidence for such theories and will therefore be left aside by the ADHP.

### **F. Fault or Negligence**

34. The Athletes have argued not to bear any fault or negligence with regard to the facts and findings that has led CAS to the conclusion of ADRVs of

each of the Athletes. Each of the Athletes have stated for his case in each of their submissions of December 24, 2018:

"60. The Athlete, referring to the above and also to the content of both the CAS Award and to the cross-examinations of Dr. Rodchenkov and Prof. McLaren, respectfully submits that **he bore no fault or negligence in this particular case**, since his responsibility for his sample was over when he signed the relevant DCF in the presence of a DCO and other persons, confirming that the sample was provided according to the WADA Standard for Testing and Investigations and other applicable rules and regulations. The Athlete had absolutely no even slightest clues that someone in the future may open somehow a securely sealed bottle with his sample(s) and spike it with some grains of salt. "

35. The above statement of the Athletes is consistent with the CAS Awards, where CAS considered (again: numbering refers to the Kasjanov award, but is materially similar in the other matters):

"706 It follows that Article 2.2 of the WADC, when applied in conjunction with M2.1 of the Prohibited List, is principally intended to apply to the substitution of urine by an athlete at a doping control station.

707. The Panel notes that the IOC does not allege that any of the Sochi Appellants personally substituted their own urine, and there is no suggestion that the Athlete personally reopened his sealed sample bottles and swapped the contents of the bottles for clean urine. Under these circumstances, the Panel considers that Article 2.2 of the WADC in connection with M2.1 of the Prohibited List requires that the Athlete must have committed an act or an omission that was intrinsically linked to the substitution of his urine in order to be guilty of the ADRV of using a prohibited method. In other words, the Athlete must have done something, or not done something, that directly contributed to the substitution of his urine sample by another person."

36. CAS follows, addressing in each of the cases the question of "intent, fault, negligence or knowing use on the Athletes part":

"708. In situations of direct personal use of a prohibited method or prohibited substance, Article 2.2.1 of the WADC provides that "*it is not necessary that intent, fault, negligence or knowing use on the Athlete's part be demonstrated*" in order to establish an ADRV under Article 2.2 of the WADC. The Panel does not consider, however, that this principle of strict liability applies in an identical fashion where the Athlete is alleged to have committed an act or omission that contributed to the substitution of the Athlete's urine by another person. Were it otherwise, then any athlete who provided a urine sample as part of normal

doping control procedures would automatically commit an ADRV if a third party who is entirely unconnected with the athlete, and in respect of whom the athlete has no knowledge or control, later substitutes the content of the athlete's sample. Consequently, logic and fairness both dictate that strict liability under Article 2.2 of the WADC cannot automatically extend to everything that is done to an athlete's urine sample after he/she has provided it in accordance with a normal doping control procedure.

709. In the Panel's view, an athlete can only be held liable under Article 2.2 of the WAD for the substitution of their urine by another person if: (a) the athlete has committed some act or omission that facilitates that substitution; and (b) they have done so with actual or constructive knowledge of the likelihood of that substitution occurring. Thus an athlete who commits an act which contributes to the subsequent substitution of their urine sample by another person, and who knew or ought to have known that such substitution was likely to occur, is guilty of an ADRV under Article 2.2 of the WADC.
710. The Panel, therefore, concludes that an athlete who committed an act or omission that facilitated the later substitution of their own urine sample by the Sochi Laboratory will have committed an ADRV under Article 2.2 of the WADC if he/she committed the relevant act or omission with actual or constructive knowledge that their own urine sample was likely to be substituted."
37. The ADHP comes to the conclusion that fault or negligence are according to this CAS Jurisprudence a given in matters where there is sufficient evidence that to the comfortable satisfaction of the panel an athlete has committed an act or omission that facilitated the later substitution of their own urine sample.
38. Where CAS has the comfortable satisfaction in the subject matters "that the Athlete provided clean urine in advance of the Sochi Games; that he did this for the purpose of enabling the subsequent swapping of his urine samples during the Sochi Games; and that his samples at the Sochi Games were in fact subsequently swapped, with salt being added to the substituted urine in an effort to conceal the existence of the substitution" it follows from the above that fault or negligence in the subject matters are a given as well.
39. The ADHP will therefore not follow the Athletes in their opinion that the Athletes bear no fault or negligence "since (their) responsibility for (their) sample was over when (they) signed the relevant DCF in the presence of a DCO and other persons, confirming that the sample was provided

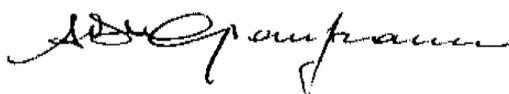
according to the WADA Standard for Testing and Investigations and other applicable rules and regulations".

## **V. Decision**

40. The ADHP comes to the conclusion that Mr Aleksander Kasjanov, Mr Ilvir Khuzin, Mr Aleksei Pushkarev and Mr Aleksander Zubkov have committed an ADRV for the use of a Prohibited Substance and the Use of a Prohibited Method (i.e. urine substitution) in violation of Article 2.2 of the IBSF ADR in connection with M2.1 of the 2014 WADA Prohibited List. These violations are for each of the Athletes regarded as one single violation according to Article 10.7.4 IBSF ADR 2009.
41. For each of the Athletes the ADRVs are their first doping violations. There are no circumstances that will lead to an elimination or reduction of the standard period of ineligibility.
42. Mr Aleksander Kasjanov, Mr Ilvir Khuzin and Mr Aleksei Pushkarev, are already provisionally suspended as per December 13, 2018. Mr Aleksander Zubkov is provisionally suspended as per December 19, 2018.
43. For the ADRVs mentioned above Mr Aleksander Kasjanov, Mr Ilvir Khuzin Mr Aleksei Pushkarev and Mr Aleksander Zubkov will each be sanctioned with a period of ineligibility of two years, starting from the day of their provisional suspension, for the first 3 Athletes mentioned this being December 13, 2018, therefore ending on December 12, 2020, for Mr Zubkov this being December 19, 2018 and therefore ending on December 18, 2020, during which period they are not entitled to participate in any competition or activity. The term "activity" also includes, for example, administrative activities, such as serving as an official, director, officer, employee, or volunteer of the organization.

44. In addition to the automatic disqualification of the results at the Olympic Winter Games 2014, Mr Aleksander Kasjanov, Mr Ilvir Khuzin Mr Aleksei Pushkarev and Mr Aleksander Zubkov are disqualified of all competitive results (medals, points and prizes) since:  
For Mr Aleksander Kasjanov: 14 February 2014  
For Mr Ilvir Khuzin: 15 February 2014  
For Mr Aleksei Pushkarev: 23 February 2014  
For Mr Aleksander Zubkov: 23 February 2014
45. The Athletes have the right of Appeal of this decision with the Court of Arbitration for Sport.
46. Parties did not request for any compensation of costs. Therefore, each party shall bear its own costs.

**IBSF Doping Hearing Panel, January 16, 2019**



Dr Alessia di Gianfrancesco



Prof Dr Peter Hemmersbach



Prof Dr Ian Blackshaw



Dolf Segaar