Arbitration CAS 2021/A/8449 Jovan Lekić v. Bosnia and Herzegovina Anti-Doping Control Agency, award of 11 August 2022

Panel: Mr James Drake QC (United Kingdom), Sole Arbitrator

Aquatics
Doping (higenamine)
Scope of CAS review of sanctions imposed in first instance proceedings
Reduction of period of ineligibility in case of Contaminated Product
Contaminated Product
"No Significant Fault or Negligence"
Standard of proof to establish source of the Prohibited Substance

1. **According to Article R57 of the CAS Code, a CAS panel shall have full power to review the facts and the law, and may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. Far from excluding or limiting the power of a CAS panel to review the facts and the law involved in the dispute heard, the jurisprudence according to which the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence only means that a CAS panel would not easily 'tinker' with a well-reasoned sanction. As a result, the CAS panel is not bound by the findings of the first instance tribunal, however well- reasoned they might be, but has full power to examine *de novo* the evidence and arguments before it, in order to verify whether the sanction imposed in the first instance is grounded or not.**

2. **Article 10.6.1.2 of the World Anti-Doping Code (WADC), headed "Contaminated Products", provides that in case the athlete *"… can establish both No Significant Fault or Negligence and that the detected Prohibited Substance … came from a Contaminated Product"*, the period of ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two (2) years ineligibility, depending on the athlete's degree of fault. Accordingly, an athlete who wishes to avail himself of this provision must establish (a) that the prohibited substance found in his sample came from a contaminated product, as that term is defined in the WADC, and (b) that he bears no significant fault or negligence, as that term is defined in the WADC, for the presence of the prohibited substance.**

3. **The term "Contaminated Product" is defined under the WADC as *"A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable internet search"*. As regards the internet search, it is reasonable for an athlete to check the contents of the supplement by checking what is said by the manufacturer as to the 'supplement facts' and to rely on what is said there.**

Put differently, for the purpose of determining whether a product is contaminated or not, the obligation is not to conduct an exhaustive search but to conduct a reasonable one. In case a careful review of a product does not disclose the presence of the prohibited substance detected in the athlete's sample and further, the fact that the product does contain the prohibited substance is not disclosed in information available in a reasonable internet search, the product in question may be characterised as a contaminated product.

4. **The definition of *"No Significant Fault or Negligence"* incorporates, by reference, the criteria for *"No Fault or Negligence"*. When taking the criteria for the assessment of *"No Fault or Negligence"* into account when assessing whether there has been no significant fault or negligence, the question to be asked is how far did the athlete depart from those criteria in relation to the anti-doping rule violation: if the departure was significant then the test would not be met whilst if the departure was not significant, then the athlete could be said to bear no significant fault or negligence. This involves an exercise of judgment and is a fact specific exercise according to the particular circumstances of the case. The bar for a finding of *"No Significant Fault"* should not be set too high, thereby maintaining a real distinction between the two standards *i.e. "No Fault or Negligence"* and *"No Significant Fault or Negligence"*. *"No Significant Fault"* is by definition consistent with the existence of some degree of fault and cannot be excluded simply because the athlete left some "stones unturned" for even in such a case it is possible that an athlete is able to meet the requirements for the reduction of the sanction. *E.g.*, in case an athlete tested positive for a prohibited substance which was contained in what is found to be a contaminated product, and where such athlete had undertaken research about the product in question on the manufacturer's website, but no further internet researches, it may be found that the athlete's level of fault was not significant. It would go too far to ask the athlete to undertake a prior laboratory test on the supplement.**

5. **The standard of proof in order to establish *"how the Prohibited Substance entered the Athlete's system"* is on the balance of probabilities.**

I. PARTIES

1. The Appellant, Mr Jovan Lekić (the "Athlete"), is a competitive swimmer with the 'Akademski Plivački Klub 22 April' (the "22 April Club") swimming club in Banja Luka, Bosnia and Herzegovina. He was born in September 2003 so that, at the time of the events in question (mid-2021), he was 17 years old.

2. The Respondent, Bosnia and Herzegovina Anti-Doping Control Agency (the "Respondent"), is the national anti-doping organization for Bosnia and Herzegovina and a signatory to the World Anti-Doping Code ("WADC") issued by the World Anti-Doping Agency ("WADA").

In compliance therewith the Respondent has also adopted its own anti-doping rules (the "BiH Anti-Doping Rules").

II. OUTLINE OF THE APPEAL

3. The Athlete appeals against a decision of the Bosnia and Herzegovina Anti-Doping Control Agency Hearing Panel (the "Hearing Panel") rendered on 26 October 2021. The Hearing Panel found that the Athlete had violated Rule 2.1. of the WADC and Article 2.1. of the BiH Anti-Doping Rules and imposed a period of ineligibility of two years from the date of its decision.

4. The Athlete appeals against the decision of the Hearing Panel. The Athlete accepts the Anti-Doping Rule Violation ("ADRV") but submits, as set forth in some detail below, that he bears no significant fault or negligence and that, accordingly, the two-year period of ineligibility should be reduced.

III. FACTUAL BACKGROUND

5. Set out below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced in these proceedings. While the Panel has considered all the facts, allegations, arguments and evidence submitted by the Parties, reference is made in this Award only to the submissions and evidence considered necessary to explain the reasoning and decision.

6. On 26 June 2021, the Athlete competed in the *"10th International Swimming Meeting"* in Banja Luka. He used this event as preparation for the upcoming European Junior Swimming Championships, which took place in Rome from 6 to 11 July 2021. After the race, he was subjected to an anti-doping urine test. He tested positive for higenamine. It is common ground that higenamine is a prohibited substance (both in and out of competition) under the WADA Prohibited List 2021.

7. The Athlete duly competed at the European Junior Swimming Championships in Rome on 10 July 2021 at which event he was once again selected for an anti-doping control (post-race) and once again tested positive for higenamine. It should be noted, however, that the notice of charge in respect of the first incident in Banja Luka had not at that time been issued by the Respondent, so that it is only the positive test returned in Banja Luka that is the subject of these proceedings. That being so, it was common ground that the Athlete was to be regarded for all purposes as a first offender.

8. On 22 July 2021, the Respondent issued what in English is described as "The Announcement" by which the Athlete was informed that he had returned a positive test for higenamine, that *"higenamine is a prohibited substance (class S3 Beta – Agonist), that has been on the WADA List of prohibited substances in 2021"*, and that there was sufficient evidence of an ADRV in breach of Article 2.1 of the WADC. The Athlete was also informed that he was provisionally suspended *"until the final decision on this case"*.

9. The Athlete waived his right to test the B sample but requested a hearing.

10. A hearing duly took place before the Hearing Panel on 19 October 2021. The Hearing Panel found that the Athlete had violated Article 2.1. of the WADC and Article 2.1. of the BiH Anti-Doping Rules. The Hearing Panel imposed a sanction of a period of ineligibility of two years from the date of its decision, 26 October 2021. The Hearing Panel considered whether the circumstances warranted a reduction of that period of ineligibility but declined to reduce the period on the principal basis that the Athlete had failed to show how the prohibited substance entered his body.

11. The Athlete challenges this decision (which will be referred to herein as the "Challenged Decision"). As noted, there is no challenge to the determination that there has been an ADRV; the challenge is that the sanction imposed should, in all the circumstances, be reduced.

IV. THE APPEAL BEFORE THE COURT OF ARBITRATION FOR SPORT

12. By a Statement of Appeal filed with the Court of Arbitration for Sport ("CAS") on 15 November 2021 in accordance with Articles R47-R49 of the Code of Sports-related Arbitration (the "CAS Code"), the Athlete instituted this appeal against the Challenged Decision seeking a reduction of the sanction. In his Statement of Appeal, the Athlete nominated Ms Janie Soubliere as arbitrator.

13. On 24 December 2021, the Athlete filed his Appeal Brief dated 23 December 2021 (the time for so doing being extended) in accordance with Article R51 of the CAS Code.

14. On 12 February 2022, the Respondent filed its Answer (the time for so doing also being extended). The Respondent made no nomination of arbitrator.

15. On 14 February 2022, the CAS Court Office asked the Parties to say whether or not they would prefer a hearing to be held in this matter. The Athlete did so prefer, while the Respondent regarded a hearing as *"superfluous"* but left it to the discretion of the Panel.

16. On 31 March 2022, the CAS Court Office on behalf of the Deputy President of the CAS Appeals Arbitration Division, and pursuant to Article R54 of the CAS Code, informed the Parties that the Arbitral Panel in this reference would be constituted by Mr James Drake QC (as Sole Arbitrator).

17. On 5 June (the Athlete) and 6 June (the Respondent) 2022, the Parties signed and returned the Order of Procedure issued by the CAS Court Office on behalf of the Sole Arbitrator. The Order of Procedure noted, *inter alia*, that the jurisdiction of the CAS was not contested and was confirmed by the signature of the Order.

18. A hearing took place on 11 and 13 May 2022. (The 11 May 2022 hearing was cut short as a result of an internet failure in the Respondent's offices and the hearing was resumed on 13 May 2022.) The hearing was conducted remotely via Webex. The following people took part in the hearing:

- The Sole Arbitrator
- The Appellant:
    i. The Athlete
    ii. Mr Matthew Kaiser, Counsel
    iii. Dr Grahovac, the Athlete's coach
    iv. Dr Ponorac
    v. Dr Grahovac, representative of the 22 April Club
    vi. Mr Scott, scientific expert
    vii. Ms Labotić, interpreter (11 May 2022)
- The Respondent:
    i. Mr Slavo Marić, Director
    ii. Mr Amir Advagić, Assistant Director
    iii. Dr Predrag Jovanovic, expert
    iv. Mr Mukinović, interpreter (on 11 May 2022)
    v. Mr Jahic, interpreter (on 13 May 2022)
- CAS Court Office:
    i. Ms Carolin Fischer, Counsel.

19. The Respondent had indicated that it would call Dr Nihada Ahmetovic, Professor at the Faculty of Medicine and Expert Advisor for Doping Control and Therapeutic Exemptions at the Respondent and Mr Sead Mulic, Senior Expert Associate at the Respondent but in opening announced that those two witnesses would not be called.

20. At the outset of the hearing each of the Parties confirmed that (a) there was no objection to the jurisdiction of CAS and (b) there was no objection to the appointment of the Sole Arbitrator.

21. At the conclusion of the hearing, the Athlete confirmed that he had had a full and fair opportunity to present his respective case, that his right to be heard had been fully respected, and that he had no objection to the manner in which the proceedings had been conducted. The Respondent provided the same confirmation with the qualification that the Respondent

complained that it had been precluded from calling Dr Jasmina Alihodzić as a witness (as to which see below) which it regarded as unfair.

V. THE PARTIES' EVIDENCE

A. The Athlete

22. The Athlete relied on his own evidence (he gave a witness statement and gave evidence at the hearing) and he adduced witness statements and/or oral evidence from the following witnesses: Dr Grahovac (the Athlete's coach), Dr Ponorac (a doctor consulted by Dr Grahovac in respect of the supplement), and Mr Scott (the head of a laboratory retained by the Athlete to analyse the supplement).

23. The salient evidence from the Athlete himself may be summarised as follows.

- The Athlete joined the 22 April Club in 2012. The coach at the club was and still is Dr Goran Grahovac, the *"best coach in the country"*.

- Prior to 2019, the Athlete bought his own supplements. That stopped in 2019 when Dr Grahovac directed that he would buy all of the Athlete's supplements *"as a way to ensure that the supplements … were not contaminated"*.

- It was the Athlete's understanding that Dr Grahovac checked all of the supplements with Dr Ponorac to ensure that *"they were clean"*.

- The Athlete placed his *"full trust"* in Dr Grahovac that the supplements he was providing were safe and clean.

- The Athlete read the container labels of all supplements that were given to him by Dr Grahovac.

- On 26 June 2021, the Athlete competed in the 10th International Swimming Meeting in Banja Luka. He used this event as preparation for the European Junior Swimming Championships, taking place in Rome from 6 to 11 July 2021.

- About 30 minutes before the Athlete's race, Dr Grahovac gave a supplement to the Athlete to take pre-event: it was the ALLMAX Impact Igniter supplement. The Athlete added it to his water bottle and drank it. Before doing so, the Athlete read the label and noted the ingredients but saw nothing untoward.

- After the race, the Athlete was selected for an anti-doping control. It was his first. He had never been tested previously. He was escorted to the facility and completed and signed the paperwork. As to the supplement, he could not remember the name of it but he declared (on the doping control form) the ingredients that he could remember – namely, citrulline, caffeine and beta alanine.

- The Athlete competed in Rome at the European Junior Swimming Championships. On 10 July 2021, he was again selected for testing.

- The Athlete received the letter ('The Announcement') on 20 August 2021 that he had tested posted for higenamine. He discussed the matter with Dr Grahovac. They reviewed the supplements but none, including the ALLMAX, contained any reference to higenamine.

- Dr Grahovac told him that he had discovered that the ALLMAX product *"could contain higenamine"*, and that a sample of the product had been sent to a laboratory for testing.

- It was only when the results were returned as positive for higenamine that the Athlete knew that the ALLMAX supplement was the source of the prohibited substance in his urine test(s).

B. The Coach

24. The evidence from Dr Grahovac may be distilled in the following way.

- Dr Grahovac was a professional swimmer. He retired in 2004.

- He started the 22 April Club in 2010.

- He earned a PhD in swimming at the University of Banja Luka and is currently an associate professor in the Faculty of Physical Education and Sport at the University of Banja Luka.

- The positive test returned by the Athlete was the first ever for the club.

- He is the one who buys supplements for his athletes. He tells them not to buy supplements for themselves. He keeps the athletes' supplements in his bag, maintaining possession so as to prevent any chance of the supplement being *"spiked"*.

- In order to ensure that the supplements he buys are safe, he has them *"reviewed and approved"* by Dr Ponorac. Dr Ponorac checks the supplements *"to make sure that they do not contain prohibited substances"*.

- Dr Grahovac bought the supplement used by the Athlete in this case, the ALLMAX Impact Igniter. At the time in question, Dr Grahovac was looking to buy a new pre-workout supplement that contained citrilline *"because citrilline helps reduce lactic acid"*.

- Because the local stores were closed due to Covid, he searched online and visited the marketplace "olx.ba". On that site, he searched *"sport supplement sellers"* and was provided with a list of such sellers, from which list he chose one seller, *"sele137137"* (the "Seller").

- He contacted the Seller by telephone and via Viber and a discussion took place as to the available supplements and ALLMAX Impact Igniter was one of the supplements recommended by the Seller. The Seller sent photographs and a description of each of the supplements. In this discussion, Dr Grahovac made clear to the Seller that the supplements were for *"my swimmer who is an Olympic Candidate for Tokyo so you have to be very careful about this supplement"*.

- Dr Grahovac bought six supplements, one of which was the ALLMAX Impact Igniter. He chose this one because it had citrilline and because he recognised ALLMAX as *"a famous US company"*.

- Dr Grahovac received the supplements by courier on 16 January 2021. Dr Grahovac paid 340KM (about £150) in cash, confirmed by a receipt.

- The ALLMAX Igniter Impact that was delivered to Dr Grahovac bore the lot number: A165700720 and an expiration date of July 2022. In the top right-hand corner of the front label it bore a red square in which the words "HIGH STIM PRE" appeared in black letters one on top of the other. In the left-hand top corner of the front label it bore a red square in which the words "ENERGY FOCUS VOLUME" appeared in black letters one on top of the other. The ingredients were listed on the back label. There was no mention of higenamine (or any other prohibited substance).

- After receiving the supplements, Dr Grahovac *"went online to each supplement's official website to verify the ingredients on the containers. The ingredients on the ALLMAX Impact Igniter were the same as those on the ALLMAX website"*.

- An internet search of the ALLMAX website as at 11 March 2020 shows that, for the product ALLMAX Impact Igniter, there is no higenamine listed in the ingredients. (Contrast the same website as at 4 January 2019 which did identify higenamine as an ingredient.)

- Later in January 2021, Dr Grahovac met with Dr Ponorac and gave him the supplements, including the ALLMAX Impact Igniter, to review. Dr Ponorac conducted an on-line check and confirmed *"that none of the supplements contained any prohibited substance"*.

- Dr Grahovac gave the ALLMAX Impact Igniter to the Athlete for the first time at a competition in Greece in May 2021. The second time was at the Banja Luka event.

- At the Banja Luka, one of the anti-doping control officers approached Dr Grahovac and asked who should be selected for testing. Dr Grahovac suggested the Athlete.

- Dr Grahovac was shocked when the test returned positive for higenamine. He had never heard of higenamine. He conducted some further on-line research and learned that higenamine *"could be found in some pre-workouts"*.

- He searched if there was any connection between ALLMAX Impact Igniter and higenamine. To his *"surprise"*, he found that the ALLMAX Impact Igniter had previously contained higenamine but the label on the ALLMAX Impact Igniter did not list higenamine.

- This was a reference to a search conducted by Dr Grahovac on USADA's 'Supplement 411', which in an entry dated 22 June 2021 said this about a certain lot number of the ALLMAX Impact Igniter:

  "Brand Name: Impact Igniter (2021 version)

  Manufacturer: AllMax Nutrition

  Could Contain: Stimulants

  Notes: Testing of a sealed container of Lot #A165700720 that expires July 2022 revealed the presence of higenamine. An earlier version of this product listed higenamine on the Supplement Facts panel. This version does not list higenamine, but was tested and found to contain higenamine. WADA has prohibited higenamine as a Beta-2 agonist, and therefore, higenamine is prohibited at all times, both in- and out-of-competition. In addition, higenamine is on the FDA Dietary Supplement Ingredient Advisory List. The advisory list is intended to quickly alert the public when the FDA identifies ingredients that do not appear to be lawfully included in products marketed as dietary supplements. Please see the FDA Advisory List.

  What the label says: The Supplement Facts panel lists a variety of ingredients.

  Updated: 06/22/2021".

- In order to check whether the ALLMAX Impact Igniter that he had bought via the OLX marketplace contained higenamine, Dr Grahovac arranged for a sample of it to be tested at a laboratory in Belgrade. It came back as positive for higenamine.

- *"When it came back positive we realised how [the Athlete] consumed higenamine".*

C. The Doctor

25. The evidence of Dr Ponorac may be summarised as follows.

- Dr Ponorac is a sports medicine specialist and is currently associate professor in the Department of Physiology, Faculty of Medicine at the University of Banja Luka.

- Dr Ponorac has more than 15 years of experience in anti-doping and was the European Anti-Doping Control Delegate from 2009 to 2013 and consulted on the establishment of the Respondent agency.

- Dr Ponorac has known Dr Grahovac for twenty years, first as his student and now as friends.

- The practice in place between them is that when Dr Grahovac buys a supplement to give to his athletes he first asks Dr Ponorac to *"check all the ingredients on the labels to make sure they do not contain prohibited substances"*.

- In January 2021, Dr Grahovac came to his office at the university with some supplements to review, one of which was ALLMAX Impact Igniter. *"There is no product testing laboratory at the Faculty of Medicine where I work, so I cannot actually test what is in any of the supplements that [Dr Grahovac] gives me. When I receive a supplement to review, I check each composition on the product label separately online to make sure the components are not on the Prohibited List. I first read all of the ingredients on the label. … I go to the manufacturer's website … to review the ingredients. If I do not recognise any of the substances, then I go to the website of [the Respondent] and review the prohibited substances list"*.

- When Dr Ponorac was given the ALLMAX Impact Igniter in January 2021, *"I looked at the ingredients on the label and then went to www.ALLMAXnutrition.com. Everything I read about the supplement was all right and I couldn't find anything that was prohibited"*.

- Dr Ponorac informed Dr Grahovac that there was no single substance on the Prohibited List.

D. The Expert

26. Mr Paul Scott is the chief executive officer and laboratory director of Korva Scientific, Inc. ("Korva"), based in Azusa, California. The Athlete (by his counsel) retained Korva to analyse the ALLMAX Impact Igniter that Dr Grahovac had purchased and the Athlete had taken as described above.

27. By its report dated 7 December 2021 signed by Mr Scott, the analysis undertaken confirmed the presence of higenamine in a concentration of 0.6 mg/g.

28. Mr Scott was slated to give evidence at the hearing and was present when the hearing began on 11 May 2022 but was not available to attend the resumed hearing on the morning of 13 May 2022, it being the middle of the night in California. Accordingly, leave was given for the Athlete to adduce a letter from Mr Scott *in lieu* of his oral evidence.

29. According to Mr Scott: (a) higenamine was not listed as an ingredient of the ALLMAX Impact Igniter; (b) the levels found in the supplement were equal to the levels found by USADA in a different, sealed bottle but with the same lot number and expiration date; and (c) the levels found in the Athlete's urine samples are consistent with the Athlete's pre-race ingestion: *"the higenamine contaminated Impact Igniter by ALLMAX is almost certainly the cause of the athlete's adverse results"*.

E. The Respondent

30. The evidence relied upon by the Respondent included the following:

- The doping control forms and the related laboratory analyses of the samples. In the form for Banja Luka, which calls for a declaration of current medication and supplements, the Athlete declared that he was taking *"BCAA, glutamine, brufen, creatine, magnesium, arginin, beta alanine, kofein [caffein], vitamins"*. In that for Rome, he declared *"beta alanine, BCAA, glutamine, pre-work out, zinc, magnesium"*.

- The transcript (audio and written) of the hearing before the Hearing Panel.

- Two (undated) photographs of the Athlete at an anti-doping training class. These photographs showed the Athlete (who was around 10 years old at the time) attending a pool-side training session which was said to be on anti-doping.

- A list of those athletes participating in the open category competition in Banja Luka, which list included the Athlete.

31. At the outset of the hearing, a question arose as to the participation of two of the Respondent's intended witnesses. The Respondent sought to call as witnesses two members of the Hearing Panel, namely Dr Jasmina Alihodzić, a professor of international law and the chair of the Hearing Panel and Dr Predrag Jovanović, a medical doctor and internist and a member of the Hearing Panel. The Respondent wished to call these witnesses to give an account of what took place at the hearing below and, further, to call Dr Alihodzić as an expert on the legal issues arising in this matter and Dr Jovanović for his expert medical evidence in relation to the characteristics and availability of higenamine.

32. The Athlete objected to this on the basis that it was inappropriate for members of the Hearing Panel to participate as witnesses in this hearing before the CAS. The Athlete made what was in effect an application for an order excluding these witnesses.

33. The Sole Arbitrator agreed. As a matter of principle, it is manifestly inappropriate for the members of the panel that issued the decision being challenged to participate in the appeal from that decision. Nevertheless, the Respondent was permitted to call Dr Jovanović to give expert medical evidence as to the characteristics of higenamine -- but nothing else. The hearing therefore proceeded on that basis.

34. Dr Jovanović's evidence may be summarised as follows:

- Higenamine acts as a stimulant, with performance-enhancing effects, particularly for swimmers in that increases both heart rate and lung capacity. In particular, it acts to expand the bronchi, increase the blood pressure and the heart rate and improve the overall performance, particularly in sprints sports such as running, cycling and swimming.

- There is an article on the ALLMAX website dated 21 December 2017 that describes synephrine, higenamine and hordenine in the ALLMAX Impact Igniter supplement.

- If one visits the iHerb website, which is the main distributor of the legal supplements in Bosnia and Herzegovina, it lists the product's ingredients including higenamine. (The website pages were not in evidence.)

VI. THE PARTIES' SUBMISSIONS

A. The Applicable Rules

35. The Parties agreed that the applicable rules are the BiH Anti-Doping Rules but that, because these rules accord with the WADC, the relevant provisions of the WADC 2021 were applicable to this appeal and the appeal should be determined on that basis (In any event, save for the translation of a few selected provisions of the BiH Anti-Doping Rules, the copy provided to the Sole Arbitrator was not translated).

36. The salient provisions of the WADC 2021 are as follows:

"Article 2 ANTI-DOPING RULE VIOLATIONS

…

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

2.1.1 It is the Athletes' personal duty to ensure that no Prohibited Substance enters their bodies. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.

…

Burdens and Standards of Proof

The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.18 Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, except as provided in Articles 3.2.2 and 3.2.3, the standard of proof shall be by a balance of probability.

ARTICLE 10 SANCTIONS ON INDIVIDUALS

10.1 Disqualification of Results in the Event during which an Anti-Doping Rule Violation Occurs

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

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

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

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

The period of Ineligibility for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential elimination, reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:

10.2.1 The period of Ineligibility, subject to Article 10.2.4, shall be four (4) years where:

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

10.2.1.2 The anti-doping rule violation involves a Specified Substance or a Specified Method and the Anti-Doping Organization can establish that the anti-doping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, subject to Article 10.2.4.1, the period of Ineligibility shall be two (2) years.

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

10.2.4 Notwithstanding any other provision in Article 10.2, where the anti-doping rule violation involves a Substance of Abuse:

10.2.4.1 If the Athlete can establish that any ingestion or Use occurred Out-of-Competition and was unrelated to sport performance, then the period of Ineligibility shall be three (3) months Ineligibility. In addition, the

period of Ineligibility calculated under this Article 10.2.4.1 may be reduced to one (1) month if the Athlete or other Person satisfactorily completes a Substance of Abuse treatment program approved by the Anti-Doping Organization with Results Management responsibility.60 The period of Ineligibility established in this Article 10.2.4.1 is not subject to any reduction based on any provision in Article 10.6.

10.2.4.2 If the ingestion, Use or Possession occurred In-Competition, and the Athlete can establish that the context of the ingestion, Use or Possession was unrelated to sport performance, then the ingestion, Use or Possession shall not be considered intentional for purposes of Article 10.2.1 and shall not provide a basis for a finding of Aggravating Circumstances under Article 10.4.

…

10.5 Elimination of the Period of Ineligibility where there is No Fault or Negligence

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

Comment to Article 10.5: This Article and Article 10.6.2 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. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.6 based on No Significant Fault or Negligence.

10.6 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

10.6.1 Reduction of Sanctions in Particular Circumstances for Violations of Article 2.1, 2.2 or 2.6. All reductions under Article 10.6.1 are mutually exclusive and not cumulative.

10.6.1.1 Specified Substances or Specified Methods

Where the anti-doping rule violation involves a Specified Substance (other than a Substance of Abuse) or Specified Method, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two (2) years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

10.6.1.2 Contaminated Products

In cases where the Athlete or other Person can establish both No Significant Fault or Negligence and that the detected Prohibited Substance (other than a Substance of Abuse) came from a Contaminated Product, then the

period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two (2) years Ineligibility, depending on the Athlete or other Person's degree of Fault.

Comment to Article 10.6.1.2: In order to receive the benefit of this Article, the Athlete or other Person must establish not only that the detected Prohibited Substance came from a Contaminated Product, but must also separately establish No Significant Fault or Negligence. It should be further noted that Athletes are on notice that they take nutritional supplements at their own risk. The sanction reduction based on No Significant Fault or Negligence has rarely been applied in Contaminated Product cases unless the Athlete has exercised a high level of caution before taking the Contaminated Product. In assessing whether the Athlete can establish the source of the Prohibited Substance, it would, for example, be significant for purposes of establishing whether the Athlete actually Used the Contaminated Product, whether the Athlete had declared the product which was subsequently determined to be contaminated on the Doping Control form.

This Article should not be extended beyond products that have gone through some process of manufacturing. Where an Adverse Analytical Finding results from environment contamination of a "non-product" such as tap water or lake water in circumstances where no reasonable person would expect any risk of an anti-doping rule violation, typically there would be No Fault or Negligence under Article 10.5.]

10.6.2 Application of No Significant Fault or Negligence beyond the Application of Article 10.6.1

If an Athlete or other Person establishes in an individual case where Article 10.6.1 is not applicable, that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Article 10.7, 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 (8) years.

…

10.10 Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation

In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, 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.

10.13 Commencement of Ineligibility Period

Where an Athlete is already serving a period of Ineligibility for an anti-doping rule violation, any new period of Ineligibility shall commence on the first day after the current period of Ineligibility has been served. Otherwise, except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.

10.13.1 Delays Not Attributable to the Athlete or other Person Where there have been substantial delays in the hearing process or other aspects of Doping Control, and the Athlete or other Person can establish that such delays are not attributable to the Athlete or other Person, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified.

10.13.2 Credit for Provisional Suspension or Period of Ineligibility Served

10.13.2.1 If a Provisional Suspension is respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If the Athlete or other Person does not respect a Provisional Suspension, then the Athlete or other Person shall receive no credit for any period of Provisional Suspension served. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal.

10.13.2.2 If an Athlete or other Person voluntarily accepts a Provisional Suspension in writing from an Anti-Doping Organization with Results Management authority and thereafter respects the Provisional Suspension, the Athlete or other Person shall receive a credit for such period of voluntary Provisional Suspension against any period of Ineligibility which may ultimately be imposed. A copy of the Athlete or other Person's voluntary acceptance of a Provisional Suspension shall be provided promptly to each party entitled to receive notice of an asserted anti-doping rule violation under Article 14.1.

10.13.2.3 No credit against a period of Ineligibility shall be given for any time period before the effective date of the Provisional Suspension or voluntary Provisional Suspension regardless of whether the Athlete elected not to compete or was suspended by a team. …

…

13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, Provisional Suspensions, Implementation of Decisions and Authority

A decision that an anti-doping rule violation was committed, a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation, or a decision that no anti-doping rule violation was committed; a decision that an anti-doping rule violation proceeding cannot go forward for procedural reasons (including, for example, prescription); a decision by WADA not to grant an exception to the six-months' notice requirement for a retired Athlete to return to competition under Article 5.6.1; a decision by WADA assigning Results Management under Article 7.1; a decision by an Anti-Doping Organization not to bring forward an Adverse Analytical Finding or an Atypical Finding as an anti-doping rule violation, or a decision not to go forward with an anti-doping rule violation after an investigation in accordance with the International Standard for Results Management; a decision to impose, or lift, a Provisional Suspension as a result of a Provisional Hearing; an Anti-Doping Organization's failure to comply with Article 7.4; a decision that an Anti-Doping Organization lacks authority to rule on an alleged anti-doping rule violation or its Consequences; a decision to suspend, or not suspend, Consequences or to reinstate, or not reinstate, Consequences under Article 10.7.1; failure to comply with Articles 7.1.4 and 7.1.5; failure to comply with Article 10.8.1; a decision under Article

10.14.3; a decision by an Anti-Doping Organization not to implement another Anti-Doping Organization's decision under Article 15; and a decision under Article 27.3 may be appealed exclusively as provided in this Article 13.2.

13.2.1 Appeals Involving International-Level Athletes or International Events

In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS.

Appeals from Decisions under Article 24.1 A notice that is not disputed and so becomes a final decision under Article 24.1, finding a Signatory noncompliant with the Code and imposing consequences for such non-compliance, as well as conditions for Reinstatement of the Signatory, may be appealed to CAS as provided in the International Standard for Code Compliance by Signatories.

…

13.2.3.4 Appeal Deadline for Parties Other than WADA

The deadline to file an appeal for parties other than WADA shall be as provided in the rules of the Anti-Doping Organization conducting Results Management".

37. For their part, the BiH ADR provide as follows in relation to the admissibility of appeals.

"13.2.1 … In cases arising from participation in an International Competition or in cases involving International Level Athletes, the decision may be appealed exclusively to CAS.

13.6.1 Appeals to CAS

The deadline to file an appeal to CAS shall be twenty-one (21) from the date of the receipt of the decision by the appealing party. …".

B. The Athlete's Submissions

38. It is the Athlete's submission that he bears no significant fault or negligence and that, based on all the circumstances, his degree of fault is light and warrants a period of ineligibility of between four and eight months. (The Athlete does not contend that there was no fault or negligence.)

39. The Athlete argued that there were *"multiple ways"* under Article 10.6.1 of the WADC in which he can establish that he bears no significant fault or negligence.

a) Contaminated Product

40. The first 'way' is that because the higenamine found in the Athlete's samples came from a contaminated product then, pursuant to Article 10.6.1.2 of the WADC, the Athlete bears no significant fault or negligence and is eligible to receive a reduction in his period of ineligibility. In this respect, the Athlete makes the following submissions.

41. The higenamine found in the sample came from the ingestion of a *"contaminated product"*. That is a defined term in the WADC as follows: *"A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable internet search"*. In this case, the ALLMAX Impact Igniter meets that definition in that: (a) higenamine is not listed on the label; and (b) both Dr Grahovac and Dr Ponorac conducted reasonable internet searches and yet found no relationship between the supplement and higenamine.

42. In light of the fact that the supplement was a contaminated product, then Article 10.6.1.2 of the WADC comes into play. Under Article 10.6.1.2, if an athlete can establish (a) that the prohibited substance came from a contaminated product and (b) no significant fault or negligence then, depending on the athlete's degree of fault, the period of ineligibility shall be, at a minimum, a reprimand and, at a maximum, two years.

43. As to the former, *i.e.*, the provenance of the prohibited substance, the standard of proof is on the balance of probabilities: CAS 2009/A/1926 & 1930. Here, for the following reasons, the Athlete is able to show on the balance of probabilities that the prohibited substance came from the ALLMAX Impact Igniter supplement that he took pre-race in Banja Luka.

44. First, the Athlete is able to show that he was using this specific contaminated ALLMAX Impact Igniter prior to his two doping control tests on 26 June 2021 and 10 July 2021 because:

- Dr Grahovac corresponded with the Seller, who was the only seller of ALLMAX Impact Igniter on the OLX online marketplace.

- The Viber messages show the Seller sent the ALLMAX Impact Igniter to Dr Grahovac.

- The ALLMAX Impact Igniter was the only pre-workout supplement sent to Dr Grahovac.

- The Viber messages show the Seller included the cost of the ALLMAX Impact Igniter as part of the total (340 KM) for all the supplements ordered.

- The receipt from the post office links the purchase discussed over Viber to Dr Grahovac because (i) Dr Grahovac's name is on the receipt, (ii) the payment of 340 KM matches the amount agreed-upon by Coach Grahovac and the Seller in the Viber messages; and (iii) the recipient of the 340 KM (Mr Sead Selović) listed on the receipt can be connected to the name of the Seller with the username sele137137 (not only does his last name partially match the OLX username, but the phone number matches the number given on the OLX website for sele137137) for Sead Selović on Viber matches the number given on the OLX website for sele13713727).

- Dr Ponorac remembers checking the ingredients on the ALLMAX Impact Igniter in January 2021.

- No other supplement used by the Athlete at the time had higenamine listed as an ingredient.

- The Athlete declared on both his 26 June 2021 and 10 July 2021 doping control forms his use of a pre-workout supplement with citrulline and caffeine in it, which can only be associated with the ALLMAX Impact Igniter.

- The high levels of higenamine found in the Athlete's samples correspond to the high levels of higenamine found in the specific ALLMAX Impact Igniter he was using.

45. Second, the Athlete can show that the ALLMAX Impact Igniter contained higenamine:

- Laboratories in Belgrade, Serbia and the United States (Korva Scientific laboratory) detected higenamine in the specific ALLMAX Impact Igniter that the Athlete was using.

- A WADA-accredited laboratory also detected higenamine in a sealed version of ALLMAX Impact Igniter with the same lot number and expiration date as the one used by the Athlete.

- Both the Korva laboratory and WADA-accredited laboratory found similarly high levels of higenamine in their respective containers of ALLMAX Impact Igniter.

46. As to the latter, the requirement under Article 10.6.1.2 of the WADC that there is no significant fault or negligence, the Athlete submits as follows:

- "Fault" is defined in the WADC as *"any breach of duty or lack of care appropriate to a particular situation"*. This is a fact specific inquiry in that whether or not an athlete's fault is significant in relation to the ADRV at issue will depend on the particular circumstances of the athlete and the violation. The standard of proof is on the balance of probabilities: see *e.g.* CAS 2016/A/4643.

- In this case, the two factors that show that the Athlete bears no significant fault. The first is that the Athlete committed the ADRV inadvertently in that he could not have known that the prohibited substance was in the supplement because it was contaminated. Second, the Athlete was a minor (*i.e.*, under 18 years) and he used the supplement knowing that his coach and Dr Ponorac had reviewed the supplement and declared it safe.

47. Accordingly, because the Athlete can establish (on the balance of probabilities) that the source of the adverse analytical finding was a contaminated supplement and that he bears no significant fault or negligence then the applicable range of ineligibility is between a reprimand and two years, depending on the Athlete's degree of fault. Here, the Athlete's degree of fault is "light" according to the guidance provided by the panel in CAS 2013/A/3327 & 3335.

48. In CAS 2013/A/3327 & 3335, the Panel recognized three degrees of fault within the 0-24 month range: (1) light degree of fault: 0-8 months, with a "standard" light degree of fault leading to a suspension of 4 months, (2) normal degree of fault: 8-16 months, with a "standard" normal degree of fault leading to a suspension of 12 months and (3) significant degree of or

considerable fault: 16-24 months, with a "standard" significant fault leading to a suspension of 20 months.

49. In this case, the Athlete's degree of fault is light because of the following objective and subjective elements:

- The Athlete, Dr Ponorac, and Dr Grahovac all read the label on the container of the ALLMAX Impact Igniter and did not find any prohibited substances.

- Because neither higenamine nor any of its alternative names were on the ALLMAX Impact Igniter label, no amount of cross-checking the ingredients against the prohibited list would have revealed the supplement contained higenamine.

- Dr Grahovac went online to the ALLMAX official website to examine the ingredients in the supplement and found no prohibited substances.

- The Athlete got the product from a very reliable source, Dr Grahovac, and knew Dr Grahovac had ensured it was free of prohibited substances by first having it checked by Dr Ponorac, an anti-doping expert with impressive credentials.

- Dr Ponorac, an anti-doping expert with over 15 years of experience, was consulted before Dr Grahovac gave the supplement to the Athlete. Dr Ponorac examined the ingredients on the label as well as on the ALLMAX official website and did not find any prohibited substances associated with the supplement.

- The Athlete was a minor at the time. (It was contended in the Appeal Brief that the Athlete was a protected person, but that contention was withdrawn at the hearing.)

- The Athlete is an inexperienced athlete as demonstrated by the fact that the 26 June 2021 test was his first-ever doping control test.

- The Athlete has received negligible anti-doping education: the only time he received any type of formal anti-doping education was when he was very young – about 10 years old.

- The Athlete knew the ALLMAX Impact Igniter had been approved by an experienced anti-doping expert prior to Dr Grahovac giving it to him.

- The Athlete declared his use of ALLMAX Impact Igniter on both of his doping control forms.

50. According to the Athlete, as these factors show, under the totality of the circumstances, his degree of fault is light, meaning his sanction *"must"* fall between 4 and 8 months.

51. The Athlete's degree of fault is also to be regarded as "light" when compared with the conduct of other athletes who have tested positive from contaminated supplements: see UKAD v Warburton and Williams SR/0001201227; ITF v Bossi 11 November 2019; and SAIDS v

Nomzanga 18 March 2016. Each of these cases demonstrates that a minor athlete with minimal anti-doping experience who tests positive due to a contaminated supplement has a light degree of fault and *"must"* receive a period of ineligibility of between four to eight months.

52. In all these circumstances, the period of ineligibility imposed on the Athlete should be at the lower end of the range, closer to four months than eight months.

b) Specified Substance

53. The second of the ways that the Athlete argued for a reduction in sanction was pursuant to Article 10.6.1.1 of the WADC on the basis that the supplement was a specified substance and that, once again, the Athlete bears no significant fault or negligence.

54. It was submitted that, for all of the reasons set forth above, the Athlete's degree of fault is light such that the appropriate and proportionate period of ineligibility, taking into account the totality of the circumstances, is between four and eight months.

C) Protected Person

55. In his Appeal Brief, the Athlete contended that he was a Protected Person pursuant to the WADC and that, accordingly, a third way for a reduction in sanction was pursuant to under Article 10.6.1.3 of the WADC. This contention was withdrawn during the course of the hearing.

C. The Athlete's Requests for Relief

56. The Athlete's prayers for relief are as follows.

> *"WHEREFORE, Jovan Lekic respectfully requests that this Panel*:
>
> *"(1) Find he has established No Significant Fault or Negligence under either Article 10.6.1.1 or 10.6.1.2 of the Code;*
>
> *(2) Determine his degree of fault is in the light range and issue a period of ineligibility between 4 - 8 months;*
>
> *(3) Backdate the start of his period of ineligibility to 26 June 2021;*
>
> *(4) Give Jovan credit for the time he has already served his suspension since it began on 26 October 2021;*
>
> *(5) Order any other relief for Jovan that this Panel deems to be just and equitable".*

D. The Respondent's Submissions

57. The Respondent opposed the appeal on the basis that the Hearing Panel was right to impose a period of ineligibility of two years and it would not be right to reduce that sanction.

58. The Respondent submitted that there are two principal reasons why the appeal should fail.

59. In the first place, the supplement was not a contaminated product. Even if higenamine was not disclosed on the label (which is not accepted), a reasonable internet search would have revealed that higenamine was an ingredient of the ALLMAX Impact Igniter supplement. The website of the manufacturer contains an article that speaks about the 'benefits' of higenamine in the ALLMAX Impact Igniter.

60. Second, in any event, pursuant to Article 10.6 of the WADC, the period of ineligibility due to the presence of the specified substance higenamine is two years, unless the Athlete *"unequivocally determines the manner in which the prohibited substance entered the Athlete's body"* in which case the panel *"may examine whether the absence of … significant fault or negligence has been proved"*.

61. In this case, the Athlete *"failed to prove with reasonable probability how the prohibited substance entered his body. Having in mind all the circumstances of the case it is obvious that the Athlete's fault or negligence is significant"*.

62. Fault is defined under the WADC as *"any breach of duty or any lack of care appropriate to a particular situation"* and whether an athlete's fault is significant is based on the particular circumstances affecting the athlete.

63. According to CAS 2013/A/3327 & 3335, it is helpful to consider both the objective level and subjective level of fault, where the objective element describes what standard of care could have been expected from an athlete in the Athlete's position while the subjective element describes what could have been expected from the Athlete himself. Based on both elements, *"it is not possible to apply the grounds for reducing the ineligibility period"* by reason of the following:

- Higenamine is a prohibited substance which improves athletic performance.
- The official ALLMAX website says that the supplement should not be used by people under 18, something *"knowingly ignored"* by the Athlete and his coach.
- The Athlete (and his club) received anti-doping education, organised by the Respondent.
- The Athlete did not list the supplement on the doping control form either in Banja Luka or in Rome. He listed some of the ingredients but he did not name the supplement.
- The Athlete did not perform a simple internet search. A search of the official website of the manufacturer would have shown that higenamine was an ingredient.
- Neither Dr Grahovac nor Dr Ponorac researched the product before it was used by the Athlete.
- If one conducts a search of the product on the official website of the manufacturer (*i.e.*, ALLMAX) it could be seen that the supplement *"contained and still contains higenamine"*.

- Although the Athlete was a minor, the event at Banja Luka was an open category international competition, the effect of which is that he cannot be regarded as a protected person.

- It is a matter for the Athlete to prove how the higenamine entered his body. This the Athlete did not do.

- In a written statement to the Hearing Panel Dr Grahovac said that he had bought the supplement from a supplement store in Sarajevo. During the hearing before the Hearing Panel, the Athlete and Dr Grahovac were asked to *"declare the origin and purchase"* of the supplement and to send such information to the Hearing Panel. In response, Dr Grahovac submitted his Viber communications *"with the person he claims to have purchased the product from, via the olx.ba website, instead, as he had previously alleged, from the specialised supplement store"*.

- The Athlete did not submit the invoice from the Seller, nor a certified statement from the Seller that the Seller had the supplement in stock.

- When one looks at the Viber communications, including the photographs therein of the supplement, *"it is obvious that the higenamine is listed as a component on the label of the product"*.

- It is not open to the Athlete to contend that the supplement was a contaminated product because from the photograph in the Viber communications it is clear that higenamine is listed as a component on the label.

- The photographs of the ALLMAX Impact Igniter which the Seller sent (as seen in the Viber communications) do not match the photographs of the product that the Athlete says he received. The photographs of the supplement that were submitted to the Hearing Panel show that higenamine is listed as an ingredient. The photographs submitted on this appeal do not show higenamine listed as an ingredient.

- It is not accepted that the higenamine came from the ALLMAX Impact Igniter bearing lot number A165700720 as is alleged by the Athlete.

- It is not accepted that the Athlete used the same product that was tested by USADA which was found to contain higenamine. *"What is more probable after he was informed on AAF, his team including Coach Grahovac and Dr Ponorac found the results of USADA Analyses and decided to claim that the higenamine detected during doping control test came from the same product"*.

- It is more probable that the product purchased from the Seller is not the product bearing the lot number A165700720, as the Athlete contends, *"but rather other Allmax Impact Igniter supplement which contains higenamine on its label"*.

- Nor is it accepted that the high levels of higenamine found in the Athlete's urine samples corroborate his use of the contaminated supplement. *"Rather, we think that levels of*

higenamine found in [the Athlete's] sample come from the Allmax Igniter Product which undoubtly [sic] contains higenamine on its label, and which coach Grahovac actually purchased from the seller 137137".

- The sample sent to the Belgrade laboratory for analysis *"cannot be taken as valid evidence that the substance higenamine found in the Athlete's urine undoubtedly originates from the ALLMAX Impact Igniter product"*. The laboratory report states that it received a *"solid pink sample in a zip lock bag"* and therefore has no independent knowledge of the provenance of the sample.

64. In summary therefore:

- Had the Athlete, or Dr Grahovac or Dr Ponorac, conducted reasonable internet enquiries, they would have learned that the ALLMAX Impact Igniter supplement contained the prohibited substance higenamine.

- It cannot be concluded that the higenamine found in the doping sample originates from the ALLMAX Impact Igniter bearing lot number A165700720 which does not contain higenamine on the label; it is more probable that the sample originates from a different version of the ALLMAX Impact Igniter, consistent with the photograph provided by the Seller, which does list higenamine on its label.

- It has therefore not been proven with reasonable probability that the higenamine found in the doping sample originates from a contaminated product.

- When it comes to substances that are *"always prohibited"*, such as higenamine, *"the athlete must be especially careful"* and take measures to avoid the use of such products; here, all the Athlete did was to check the declaration on the label.

- The Hearing Panel rightly concluded that the Athlete failed to prove, on the balance of probabilities, how the prohibited substance entered his body. He had an obligation to do so in order to receive a reduction for no significant fault of negligence.

E. The Respondent's Requests for Relief

65. For its part, the Respondent sought the following relief:

"Therefore, ADA BH respectfully requests that this Panel:

- *Find that Lekic has established Significant Fault or Negligence under the provisions of the Code*

- *Issue a period of ineligibility of 24 months*

- *Lekic's period of ineligibility should not be backdated, as a suspension had already been repealed".*

VII. JURISDICTION OF THE CAS

66. 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 Player has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.*
>
> *An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".*

67. The WADC 2021, which the Parties agree is to apply to this reference, provides by Article 13.2.1 that the decision of the Hearing Panel at first instance shall be subject to appeal to CAS.

68. In addition, the jurisdiction of CAS was confirmed by the Parties' signature of the Order of Procedure.

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

VIII. ADMISSIBILITY OF THE APPEAL

70. As to admissibility, the WADC 2021, which the Parties agree is to apply to this reference, provides by Article 13.2.1 that the decision of the Hearing Panel at first instance shall be subject to appeal to CAS and that the time limit for the appeal shall be that set forth in the *"rules of the Anti-Doping Organization conducting Results Management"*, which, for present purposes, is the Respondent's BiH ADR.

71. As set forth above, the BiH ADR provide that an appeal must be filed within 21 days of the challenged decision. The Challenged Decision is dated 26 October 2021 and the Statement of Appeal was lodged with CAS on 15 November 2021, within the stipulated period.

72. This appeal is therefore admissible, as is common ground between the Parties (as confirmed in the signed Order of Procedure).

IX. SCOPE OF THE APPEAL

73. According to Article R57 of the CAS Code, *"the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance …".*

74. In this respect, what was said in CAS 2016/A/4643 as to the power of a CAS arbitral panel to review sanction bears repeating.

"62. In this regard, this Panel notes the dictum in the award of 21 May 2010, CAS 2009/A/1870, at para. 125, under which "the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (see TAS 2004/A/547, §§ 66, 124; CAS 2004/A/690, § 86; CAS 2005/A/830, § 10.26; CAS 2005/C/976 & 986, § 143; 2006/A/1175, § 90; CAS 2007/A/1217, § 12.4)".

However, such jurisprudence, confirmed in several other CAS awards, far from excluding or limiting the power of a CAS Panel to review the facts and the law involved in the dispute heard (pursuant to Article R57 of the Code), only means that a CAS Panel "would not easily 'tinker' with a well-reasoned sanction, i.e. to substitute a sanction of 17 or 19 months' suspension for one of 18" (award of 10 November 2011, CAS 2011/A/2518, § 10.7, with reference to CAS 2010/A/2283, § 14.36).

63. As a result, this Panel is not bound by the findings of the Tribunal, however well reasoned they are. More specifically, this Panel has full power to examine de novo the Player's actions, and the evidence before it, in order to verify whether the Player's plea of NSF, dismissed by the Tribunal, is grounded or not. Such exercise is linked to the appellate structure of CAS proceedings".

X. APPLICABLE LAW

75. 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".

76. There was no issue between the Parties as to the applicable regulations. It was common ground that the WADC 2021 applied to this reference. The salient provisions have been set forth above.

XI. THE ATHLETE'S APPLICATION

A. Application in relation to Witnesses

77. At the outset of the hearing, a question arose as to the participation of two of the Respondent's witnesses. The Respondent sought to call as witnesses two members of the Hearing Panel, namely Dr Jasmina Alihodzić, a professor of international law and the chair of the Hearing Panel, and Dr Predrag Jovanović, a medical doctor and internist and a member of the Hearing Panel. The Respondent wished to call these witnesses to give an account of what took place at the hearing below and, further, to call Dr Alihodzić as an expert on the legal issues arising in this matter and Dr Jovanović for his expert medical evidence of in relation to the characteristics and availability of higenamine.

78. The Athlete objected to this on the basis that it was inappropriate for members of the Hearing Panel to participate as witnesses in this hearing before the CAS. The Athlete made what was in effect an application for an order excluding these witnesses.

79. The Sole Arbitrator agreed. As a matter of principle, it is manifestly inappropriate for the members of the panel that issued the decision being challenged to participate in the appeal from that decision. Nevertheless, the Respondent was permitted to call Dr Jovanović to give expert medical evidence as to the characteristics of higenamine -- but nothing else. The hearing therefore proceeded on that basis.

XII. THE MERITS

80. The Sole Arbitrator notes that while it has carefully considered the entirety of the submissions made and the evidence adduced by the Parties it only relies below on those matters which it deems necessary to decide the dispute.

81. As noted above, there is no challenge to the finding of an ADRV. The challenge is limited to sanctions.

82. As a starting position, the following things are common ground:

- Pursuant to Article 2 of the WADC, the Athlete is under a personal duty to ensure that no prohibited substance enters his body.
- This is the Athlete's first violation and that he was, at all material times, a minor.
- Pursuant to the WADC Prohibited List, higenamine is a prohibited substance, both in and out of competition.
- Whatever the circumstances surrounding the Athlete's ingestion of higenamine, it was not intentional.
- The applicable period of ineligibility, unless reduced pursuant to Article 10.6 of the WADC, is two years.
- Insofar as the Athlete seeks to invoke the provisions of Article 10.6 of the WADC to reduce the sanctions imposed on him at first instance then, pursuant to Article 3 of the WADC, the Athlete bears the burden of proving the requisite elements on the balance of probabilities.

83. The applicable provisions of the WADC are set out above but it bears noting especially that the comment to Article 10.5 of the WADC goes out of its way to point out that the various circumstances listed there that would not avail an athlete seeking to argue no fault or negligence may well be relevant where, as here, an athlete is arguing that he or she bears no significant fault

or negligence. Thus, the following circumstances (the list manifestly is not exhaustive) could result in a reduced sanction under Article 10.6 of the WADC:

- a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement;
- the administration of a prohibited substance by the athlete's personal physician or trainer without disclosure to the athlete; and
- sabotage of the athlete's food or drink by someone within the athlete's circle of associates.

84. In his Appeal Brief, the Athlete argued that there were multiple ways by which he was entitled to a reduction in sanctions. In fact, just two ways were put forward: (a) under Article 10.6.1.2 of the WADC on the basis that the supplement was a contaminated product and (b) under Article 10.6.1.1 of the WADC on the basis that the supplement was a specified substance.

85. As to the first, Article 10.6.1.2 is headed "Contaminated Products" and provides, as noted above, that *"In cases where the Athlete … can establish both No Significant Fault or Negligence and that the detected Prohibited Substance (other than a Substance of Abuse) came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two (2) years Ineligibility, depending on the Athlete or other Person's degree of Fault".*

86. In this respect, the comment to Article 10.6.1.2 set out above bears repeating:

> *"Comment to Article 10.6.1.2: In order to receive the benefit of this Article, the Athlete or other Person must establish not only that the detected Prohibited Substance came from a Contaminated Product, but must also separately establish No Significant Fault or Negligence. It should be further noted that Athletes are on notice that they take nutritional supplements at their own risk. The sanction reduction based on No Significant Fault or Negligence has rarely been applied in Contaminated Product cases unless the Athlete has exercised a high level of caution before taking the Contaminated Product. In assessing whether the Athlete can establish the source of the Prohibited Substance, it would, for example, be significant for purposes of establishing whether the Athlete actually Used the Contaminated Product, whether the Athlete had declared the product which was subsequently determined to be contaminated on the Doping Control form".*

87. It follows therefore that if the Athlete wishes to avail himself of this provision he must establish (a) that the higenamine found in his sample came from a contaminated product, as that term is defined in the WADC, and (b) that he bears no significant fault or negligence, as that term is defined in the WADC, for the presence of the higenamine.

88. The second route to reduction on which the Athlete relies is Article 10.6.1.1. It is entitled *"Specified Substances or Specified Methods"* and provides in relevant part that *"Where the [ADRV] involves a Specified Substance … and the Athlete … can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two (2) years of Ineligibility, depending on the Athlete's or other Person's degree of Fault".*

89. If the Athlete wishes to avail himself of this provision he must establish (a) that the higenamine is a specified substance and (b) that he bears no significant fault or negligence, as that term is defined in the WADC, for the presence of the higenamine.

90. Accordingly, in the event that the Athlete is able to establish: (a) either that the higenamine came from a contaminated product or that it is a specified substance (it is not necessary that both be proven) and (b) that he bears no significant fault or negligence then the applicable sanction shall be somewhere on the scale between a reprimand and no period of ineligibility (at one end) to a period of two years of ineligibility (at the other end), calibrated according to the Athlete's degree of fault.

91. Four questions thus arise:

- Is higenamine a specified substance under the Prohibited List?
- Did the higenamine that was found in his urine sample come from a contaminated product, as that term is defined in the WADC?
- If the answer to either is yes, can it be said that the Athlete bears no significant fault or negligence, as that term is defined in the WADC, for the presence of the higenamine in his sample?
- If the answer to that is yes, upon an assessment of the Athlete's degree of fault (or negligence) where on the scale is the appropriate sanction for the Athlete in all the circumstances?

92. Consider each in turn.

A. Is higenamine a specified substance under the Prohibited List?

93. The short answer is that it is. It is listed in Class S3, as a beta-2 agonist, and it is noted that all prohibited substances in the class are specified substances. This was the Athlete's position and nothing to the contrary was submitted by the Respondent.

B. Did the higenamine come from a contaminated product?

94. In light of the fact that higenamine is a specified substance it is not strictly necessary to determine this issue but (a) because it was argued at some length and (b) the considerations here have relevance elsewhere (namely as to fault) it will be addressed.

95. This issue involves two questions: was the ALLMAX Impact Igniter contaminated and was it the source of the higenamine found in the Athlete's sample?

96. "Contaminated Product" is a defined term under the WADC. It is defined as *"A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable internet search".*

97. On balance, the Sole Arbitrator accepts the evidence of the Athlete as to how the product was purchased and which product was purchased.

- It is the evidence of Dr Grahovac that he purchased the ALLMAX Impact Igniter product from the Seller via the OMX marketplace. While it appears (from the transcript of the hearing below) that he first told the Hearing Panel that he bought the supplement at a shop in Sarajevo, his evidence (in writing and in person), supported by the Viber correspondence with the Seller, is clear and credible.

- The Viber correspondence corroborates Dr Grahovac's evidence as to the purchase of the ALLMAX Impact Igniter. It also demonstrates that the Seller sent the ALLMAX Impact Igniter to Dr Grahovac and, of the supplements sent by the Seller, that the ALLMAX Impact Igniter was the only pre-workout supplement sent to Dr Grahovac.

- It is Dr Grahovac's evidence that the product delivered to him by the Seller on Saturday 16 January 2021 was the ALLMAX Impact Igniter bearing lot A165700720 -- and without any reference to higenamine on the label.

- It is true, as the Respondent points out, that the photographs of the product in the Viber communications show a different version of the product. Nevertheless, Dr Grahovac gave clear evidence that the product that was delivered to him was that bearing lot A165700720 and Dr Grahovac was able to rely on a photograph of his own depicting all of the supplements he received from the Seller which plainly shows the product bearing lot A165700720.

- The Respondent also contends that the Viber photographs of the ingredients list for the ALLMAX Impact Igniter *"clearly"* shows higenamine. In truth, the Viber photograph of the ingredients is almost impossible to read and it is certainly not the case that it clearly shows higenamine. Higenamine is discernible if one magnifies the photograph to 400% and even then one could not say with any confidence whether higenamine was listed.

- The purchase by Dr Grahovac from the Seller is also corroborated by the receipt from the post office showing payment to the Seller of the agreed-upon amount.

98. On balance, therefore, it is the Sole Arbitrator's view it is more probable than not that the product in fact delivered to Dr Grahovac, and then used by the Athlete, is that bearing lot number A165700720 and an expiration date of July 2022, not least because that is the clear and credible evidence of Dr Grahovac and because that evidence is corroborated by the contemporaneous photograph taken by Dr Grahovac of all of the products received from the Seller.

99. A careful review of this product reveals that higenamine is <u>not</u> listed as an ingredient.

100. That being so, the question becomes whether the information that the product did contain higenamine was disclosed in information available in a reasonable internet search. On this, as described above the evidence is that Dr Grahovac and Dr Ponorac conducted an internet search by looking what was said about the product on the manufacturer's website. This inquiry did not, and does not if performed again today, disclose that higenamine is an ingredient of the ALLMAX Impact Igniter.

101. The Respondent says that further searches should have been conducted and submitted that the relationship between higenamine and the supplement was well known. In the Sole Arbitrator's view, however, that is asking too much. It should, in the Sole Arbitrator's view, be sufficient for an athlete to refer to the manufacturer's website when making inquiries as to the contents of any given supplement and to take them at their word. It should be remembered that, for present purposes (*i.e.*, as to whether a product is contaminated or not), the obligation is not to conduct an exhaustive search but to conduct a reasonable one. In the Sole Arbitrator's view, it is reasonable for an athlete, and was reasonable for this Athlete, to check the contents of the supplement by checking what was said by the manufacturer as to the 'supplement facts' and to rely on what was so said. We are not, it should also be remembered, concerned to ask what would have happened had the Athlete searched for higenamine because, by definition, the Athlete did not know, because it was not listed on the ingredients label, that higenamine was an ingredient.

102. In the result, it is the Sole Arbitrator's view that, because the product label did not disclose the presence of higenamine and information that it did so was not disclosed in information available in a reasonable internet search, the ALLMAX Impact Igniter in this case is to be characterised as a contaminated product.

C. No Significant Fault or Negligence?

103. The question therefore arises whether it can be said that the Athlete bears no significant fault or negligence, as that term is defined in the WADC, for the presence of the higenamine in his sample.

104. "No Significant Fault or Negligence" is a defined term under the WADC. It is defined as follows:

> *"No Significant Fault or Negligence: The Athlete or other Person's establishing that any 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 Protected Person or Recreational Athlete, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered the Athlete's system".*

105. There are two important matters to note. First, it can be seen that it incorporates by reference the criteria for "No Fault or Negligence". This too is a defined term under the WADC as follows:

"No Fault or Negligence: The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered the Athlete's system".

106. The criteria therefore to be taken into account with respect to an assessment of no significant fault or negligence is whether the athlete 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 the particular prohibited substance. In taking these criteria into account when assessing whether there has been no significant fault or negligence in this case, the question to be asked is how far the Athlete departed from those criteria in relation to this ADVR: if the departure was significant then the test would not be met whilst if the departure was not significant then the Athlete could be said to bear no significant fault or negligence. Plainly this involves an exercise of judgment and is, as various CAS cases have made clear, a fact specific exercise according to the particular circumstances of the case.

107. The second matter of importance is that the definition also requires the Athlete to establish how the prohibited substance entered his system (the 'route of ingestion'). Accordingly, the Athlete must prove, on the balance of probabilities, how the higenamine entered his system: see *e.g.*, CAS 2009/A/1926 & 1930. Absent such proof, the Athlete will not establish that there has been no significant fault or negligence on his part.

108. As a consequence, two matters arise for consideration:

- Has the Athlete established, on the balance of probabilities, how the higenamine entered his system?

- If yes, how far has the Athlete departed from the above-mentioned criteria in relation to this ADVR? Has the departure been significant or not significant?

109. As to the first, the Athlete submitted that, on the basis of the evidence adduced, he had shown on the balance of probabilities that the higenamine came from the ALLMAX Impact Igniter purchased by Dr Grahovac via the OMX marketplace from the Seller and given to the Athlete before the swim in Banja Luka. This was ALLMAX Impact Igniter bearing lot number A165700720 – which does not mention higenamine on the ingredients label (or anywhere else).

110. For its part, the Respondent submitted that it was more probable that the higenamine came not from that particular product but from the version of the product that was depicted in the Viber communications between Dr Grahovac and the Seller, which had different labelling and which did include higenamine on its list of ingredients. The Respondent submits that it was more probable than not that it was this supplement that Dr Grahovac purchased, and the Respondent goes so far as to suggest that the reliance on the ALLMAX Impact Igniter bearing lot number A165700720 is a fiction thought up by Dr Grahovac when he subsequently learned in July 2021 that USADA had tested a product with the very same lot number and found it to contain higenamine yet not list it on the ingredients. The suggestion, implied but never articulated or

put to any of the witnesses, was that Dr Grahovac obtained this product from somewhere (it was not said where) and then promoted it as the one he bought from the Seller and gave to the Athlete.

111. As noted above, the Sole Arbitrator accepts the evidence of the Athlete as to how the product was purchased and which product was purchased. The only remaining question therefore is whether that product was the source of the higenamine in the Athlete's sample.

112. As to this:

- It is Dr Grahovac's clear evidence that he gave the ALLMAX Impact Igniter to the Athlete about 30 minutes prior to the Athlete's race at the Banja Luka competition on 26 June 2021.

- It is the Athlete's clear evidence that Dr Grahovac gave him the ALLMAX Impact Igniter about 30 minutes prior to his race at the Banja Luka competition on 26 June 2021. He put a scoop of it into his water bottle and drank it. He also said that the only other supplement that he took before the race contained glucose.

- The Athlete declared on both his 26 June 2021 and 10 July 2021 doping control forms that he was using a pre-workout supplement which contained citrulline and caffeine, which is consistent with the ALLMAX Impact Igniter.

- The high levels of higenamine found in the Athlete's samples correspond to the high levels of higenamine found in the ALLMAX Impact Igniter.

- Dr Grahovac sent samples of the supplement used by the Athlete to the University of Belgrade and to Korva, both of which confirmed the presence of higenamine.

- In June 2021 (*i.e.* just prior to the event in Banja Luka but well after the purchase of the supplement), a WADA laboratory detected higenamine in a sealed version of ALLMAX Impact Igniter with the same lot number and expiration date as the one used by the Athlete.

113. In all, the Sole Arbitrator finds that the Athlete has shown, on the balance of probabilities, that the higenamine entered his system as a result of him ingesting the ALLMAX Impact Igniter bearing lot A165700720, and that this product did not specify higenamine as an ingredient on its label.

114. It follows therefore that the next question to be asked is: How far has the Athlete departed from the criteria set forth in the definition of no fault or negligence, namely the exercise of utmost caution? As posed in UKAD v Warburton and Williams: *"The fault or negligence is the extent to which the individual athlete departed from the ideal of utmost caution in the circumstances of the case"*.

115. The panel in CAS 2016/A/4643 put it this way (where 'NSF' means no significant fault):

> *84. First, a period of ineligibility can be reduced based on NSF 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. However, in the Panel's opinion, the "bar" should not be set too high for a finding of NSF. In other words, 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. It is in fact clear to this Panel (as noted in [CAS 2013/A/3327 & 3335], §§ 74-75) that an athlete can always read the label of the product used or make Internet searches to ascertain its ingredients, crosscheck the ingredients so identified against the Prohibited List or consult with the relevant sporting or anti-doping organizations, consult appropriate experts in antidoping matters and, eventually, not take the product. However, an athlete cannot reasonably be expected to follow all such steps in each and every circumstance. To find otherwise would render the NSF provision in the WADC meaningless.*

116. It is not entirely clear to the Sole Arbitrator on what basis it is said that, to qualify as no significant fault, the departure from 'utmost caution' must be limited to *"truly exceptional"* circumstances. There is a risk that this is putting things too high and may have the inadvertent effect of emasculating the intended difference between no fault on the one hand and no significant fault on the other. It seems that the panel recognized this difficulty by going on to say that the bar for no significant fault should not be set too high, thereby maintaining a real distinction between the two standards. As the panel in that case made clear, no significant fault is by definition consistent with the existence of some degree of fault and cannot be excluded simply because the athlete left some "stones unturned" for even in such a case it is possible that an athlete is able to meet the requirements for the reduction of the sanction.

117. Applying these general principles, can the Athlete here establish that his level of fault in and about his ingestion of higenamine was not significant? This question involves a consideration of the steps taken by and on behalf of the Athlete prior to the ingestion of the supplement.

118. The starting position must be the recognition that the Athlete, like all athletes, bears responsibility for (a) knowing what constitutes an ADRV and the substances that have been included on the Prohibited List and (b) ensuring that whichever supplements he takes are clean (see, *e.g.*, WADC Article 2.2 and the comment to Article 10.5). Higenamine is a prohibited substance both in and out of competition, such that it must follow that the Athlete (and those around him) were under a high duty to be careful not to allow the Athlete to ingest that substance.

119. As to the other circumstances that bear on this issue, the Sole Arbitrator takes account of the following:

- The Athlete was 17 at the time of the ADRV. The Athlete joined the 22 Club when he was nine years old and has worked with Dr Grahovac since that time. The Athlete was thus young and inexperienced. Whilst this is not an excuse it is a relevant circumstance.

- On the evidence, save for a singular occasion when he was 10 years old, the Athlete has not received any anti-doping education or training. (Quite how this was the position is difficult to understand but it was certainly the case.)

- Dr Grahovac is a former professional swimmer, now with a PhD in swimming from the University of Banja Luka and is also an associate professor in the Faculty of Physical Education and Sport at the University of Banja Luka.

- In 2019, the Athlete and Dr Grahovac put in place a system by which the Athlete would not take his own supplements but would, instead, only take those supplements obtained and provided by Dr Grahovac.

- The Athlete placed his *"full trust"* in Dr Grahovac that the supplements he was providing were safe and clean. The Athlete trusted Dr Grahovac, someone who had been his coach for a number of years. He entrusted to him the task of providing supplements, which, as the Athlete knew, would be checked by both Dr Grahovac and Dr Ponorac.

- Dr Grahovac took it upon himself to procure supplements for his swimmers. He put in place a system by which these supplements were reviewed and checked by the very experienced Dr Ponorac before he, Dr Grahovac, gave them to his athletes.

- The Athlete read the container labels of all supplements that were given to him by Dr Grahovac.

- Dr Grahovac added an additional layer of protection for the athletes (including the Athlete) by putting in place a system by which all supplements intended to be used by his athletes are sent to Dr Ponorac for review and approval.

- Dr Ponorac is a sports medicine specialist and is associate professor in the Department of Physiology, Faculty of Medicine at the University of Banja Luka. Dr Ponorac has extensive experience in anti-doping and was the European Anti-Doping Control Delegate from 2009 to 2013. He taught Dr Grahovac when Dr Grahovac was a student at the university.

- The system put in place was that before using any supplement which Dr Grahovac had bought for any of his athletes, the supplement would be sent to Dr Ponorac to *"check all the ingredients on the labels to make sure they do not contain prohibited substances"*. According to Dr Ponorac's unchallenged testimony: *"There is no product testing laboratory at the Faculty of Medicine where I work, so I cannot actually test what is in any of the supplements that [Dr Grahovac] gives me. When I receive a supplement to review, I check each composition on the product label separately online to make sure the components are not on the Prohibited List. I first read all of the ingredients on the label. … I go to the manufacturer's website … to review the ingredients. If I do not recognise any of the substances, then I go to the website of [the Respondent] and review the prohibited substances list"*.

- As described in detail above, Dr Grahovac bought the supplement in question from the Seller via the OMX marketplace. Buying supplements via an online marketplace from an unknown seller was plainly a risk. Dr Grahovac explained that he did so because the stores were all closed due to COVID. Nevertheless, one can imagine that there were other, safer means available to Dr Grahovac. But, in the end, it was not the provenance of the product that was the problem. It was, instead, that the product sold by the Seller did not identify higenamine as an ingredient and neither did the manufacturer's website at the relevant time.

- There was nothing in the course of the transaction with the Seller that should have put Dr Grahovac on notice as to the presence of a prohibited substance. The photograph of the back label in the Viber communication was so indistinct that no one could be expected to have discerned the presence of higenamine. Moreover, Dr Grahovac told the Seller in terms that the supplement was for an Olympic hopeful so that they had to be careful that no supplement contained any prohibited substance.

- In January 2021, after receiving the supplements, Dr Grahovac *"went online to each supplement's official website to verify the ingredients on the containers. The ingredients on the ALLMAX Impact Igniter were the same as those on the ALLMAX website"*. Neither the product nor the website refereed to higenamine.

- In late January 2021, Dr Grahovac took to Dr Ponorac the supplements he had purchased via OMX, including the ALLMAX Impact Igniter. Dr Ponorac reviewed the ingredients on the label and then conducted a search of the manufacturer's website (*i.e.*, www.ALLMAXnutrition.com). Dr Ponorac saw no mention of any prohibited substance for the supplement, and duly reported back to Dr Grahovac that there was no substance on the Prohibited List.

- As it happens, higenamine was at one time listed on the label and on the manufacturer's website as an ingredient but was removed from both in March 2020. This was made plain by comparative editions of the website from 2019 and 2020.

- On 26 June 2021, the Athlete competed in the 10th International Swimming Meeting in Banja Luka. He was using this event as preparation for the European Junior Swimming Championships, taking place in Rome from 6 to 11 July 2021. The relevance of this is that, according to the Athlete, it would make no sense for him to use a performance-enhancing supplement when he was using the event solely as preparation.

- About 30 minutes before the Athlete's race, Dr Grahovac gave the Athlete the ALLMAX Impact Igniter supplement. The Athlete added it to his water bottle and drank it. Before doing so, the Athlete read the label and noted the ingredients but saw nothing untoward. Given the above finding that the product purchased by Dr Grahovac was that bearing lot number A165700720 it certainly said nothing about higenamine on the label.

- After the race, the Athlete was selected for an anti-doping control. He had never been tested previously. He was escorted to the facility and completed and signed the paperwork. As to the supplement, he could not remember the name of it but wrote down on the doping control form those ingredients that he could remember – citrulline, caffeine and beta alanine.

120. In the Sole Arbitrator's view, when all of these circumstances are weighed in the balance, the Athlete has established that his level of fault in this case was not significant. To be sure, the Athlete could have undertaken a prior laboratory test on the supplement but that is asking too much of this or any athlete. The failure on the part of the Athlete (and those around him) was to conduct further enquiries beyond the manufacturer's website. Had they done so they may have seen (as the Hearing Panel itself did below) that there were internet references to the ALLMAX Impact Igniter supplement containing higenamine. Had the Athlete exercised utmost caution he would have conducted such further searches and this information may (not would, but may) have come to light. But his failure to do so does not render his fault significant when weighed against the various other circumstances.

D. The Appropriate Sanction

121. The final question therefore becomes: upon an assessment of the Athlete's degree of fault or negligence, where on the scale (from a reprimand and no period of ineligibility through to a period of two years of ineligibility) is the appropriate sanction for the Athlete in all the circumstances? The question concerns a consideration of the specific circumstances that relevantly explain the Athlete's departure from the expected standard of behaviour.

122. Both Parties submitted that the guidance set forth in CAS 2013/A/3327 & 3335 should be followed. In CAS 2013/A/3327 & 3335, the panel calibrated three degrees of fault and the concomitant sanctions: (a) significant degree of or considerable fault (16-24 months, with a midpoint of 20 months; (b) normal degree of fault (8-16 months, with a midpoint of 12 months); and light degree of fault (0-8 months, with a midpoint of 4 months). The panel also took the view that it was helpful to consider both the objective and the subjective level of fault, the former describing what standard of care could be expected from a reasonable person in the athlete's position, the latter describing what could have been expected from the particular athlete in light of his personal characteristics and capacities.

123. CAS 2013/A/3327 & 3335 was, self-evidently, a case about fault *per se* and was not concerned to calibrate the degrees of 'no significant fault'. Nevertheless, what is aid there may be used as a guide in assessing where on the scale the degree of fault in this case lies. Bearing in mind the same matters brought to account when considering whether there was here no significant fault, the Sole Arbitrator is of the view that the degree of fault on the part of the Athlete is at the lower end of the scale, 'light' in CAS 2013/A/3327 & 3335 calibration. This too is in keeping with the sanctions imposed in the other cases to which reference was made. That being so, the Sole Arbitrator accepts the submission of the Athlete that the appropriate sanction falls between four and eight months, and imposes a period of ineligibility on the Athlete at the mid-point of six months.

124. In his Appeal Brief, the Athlete argued that the period of ineligibility should be backdated to the date of the ADRV, 26 June 2021, because of delays not attributable to him pursuant to Article 10.13.1 of the WADC. This was however not pressed at the hearing.

125. In the event, the Athlete's submission in this respect was that the Athlete should be given credit for the period he has served under suspension pursuant to Article 10.13.2.1. of the WADC. The Athlete has been suspended from the date of the Hearing Panel's decision, 26 October 2021.

126. In light of the above determination, the Sole Arbitrator agrees that credit should be given. The six-month period of suspension has therefore come to an end.

XIII. CONCLUSION

127. In view of all the above considerations, the Sole Arbitrator holds and determines that the appeal brought by the Athlete should be allowed. In particular:

- The Athlete is sanctioned with a period of ineligibility of six (6) months starting from the date of the Challenged Decision, namely 26 October 2021.

- The Athlete shall be given credit for the period of suspension served from 26 October 2021 to the date of this Award.

- All of the Athlete's competitive results for 26 June 2021 and 10 July 2021 shall be automatically disqualified pursuant to Article 9 of the WADC and all other competitive results from 26 June 2021 shall be disqualified, with all of the resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Jovan Lekic on 15 November 2021 against Bosnia and Herzegovina Anti-Doping Control Agency with respect to the decision rendered by the Bosnia and Herzegovina Anti-Doping Control Agency Hearing Committee on 26 October 2021 is upheld.

2. Mr Jovan Lekic is sanctioned for an Anti-Doping Rule Violation with a period of ineligibility of six (6) months starting from the date of the Challenged Decision, with credit for the period of suspension served from 26 October 2021 to the date of this Award.

3. All competitive results achieved by Mr Jovan Lekic from 26 June 2021 shall be disqualified, including forfeiture of any titles, awards, medals, points and prize money and appearance of money.

4. (…).

5. (…).

6. All other or further requests for relief are hereby dismissed.