

The Honourable Michael J Beloff QC (Chairman)

Mr Akira Kawamura

Mr Thomas Murray

In the matter of: a Challenge by (1) Mr Joseph Kinyua (2) Mr Isaiah Kiplagat and (3) Mr David Okeyo to the Extension of their Provisional Suspensions under the IAAF Code of Ethics and Procedural Rules of the IAAF Ethics Board

DECISION

Introduction

1. The Panel has to decide on challenges to the extensions by Michael Beloff QC, Chairman of the IAAF Ethics Board, on 20 May 2016,¹ of the provisional suspensions from any office in the IAAF or Athletics Kenya, originally imposed by him on 29 November 2015 (with effect from 30 November 2015), on Mr Kiplagat, Mr Okeyo and Mr Kinyua.
2. All three are currently subject to investigation into alleged breaches of the IAAF Code of Ethics (the “Code”), namely:
 - a) Diversion of sums paid to Athletics Kenya by Nike to their direct or indirect personal benefit (allegation/evidence against Mr Kiplagat, Mr Okeyo and Mr Kinyua).

¹ The propriety of Mr Beloff’s involvement in determining these appeals was originally challenged by Mr Kinyua (Grounds of Challenge §19(b)) but in the light of an explanation given by one of the Ethics Board’s legal secretaries was not pursued (§§20 and 22). The Panel reiterates that there can be no objection in principle to a person who has made an ex parte order hearing a challenge to it inter partes absent some particular indication of apparent bias (see *Sengupta v Holmes* [2002] EWCA Civ 1104, in particular Laws LJ at paragraphs 35-36).

- b) Receipt, personally or by Athletics Kenya, of gifts from the Qatar Association of Athletics Federation of motor vehicles in or around October 2014, at the time when Qatar was seeking to host the 2019 Athletics World Championships (allegation/evidence against Mr Kiplagat).
- c) Seeking to suppress positive doping tests of Kenyan athletes and seeking to extort money from athletes who had failed doping tests in order to conceal their positive test results (allegation/evidence against Mr Kiplagat, Mr Okeyo and Mr Kinyua).

All three deny that they have perpetrated any such breaches.

- 3. The Original Notices of provisional suspension explained the reasons for them as follows:

"4. I have reached this decision on the basis that in the absence of such suspension the integrity of the sport would otherwise be seriously undermined.

5. Amongst other factors, I have taken into account the seriousness of the prima facie breaches, which involve potential subversion or attempted subversion of the doping control process, endangering both the integrity of the sport and the health of Kenyan athletes, as well as significant financial corruption."

- 4. No challenge was made by any of the three individuals to the original provisional suspensions.

- 5. The Notices of extension of the original suspension explained the reasons for them as follows:

"I have reached that decision on the basis that (i) the investigation into the serious prima facie cases against you is continuing and (ii) while the independent Investigator, Mr Sharad Rao, has not reached any final conclusions in his investigation, he has informed me that, to date, he has not been presented with any evidence that has led him to conclude that he will definitely not be recommending that the allegations against you should proceed to adjudication.

As to (i) while every effort is being taken to expedite the investigations into the serious prima facie allegations against you, the breadth and complexity of the allegations mean that it has not yet been possible for Mr Rao to conclude his investigations. It is plainly of crucial importance to the sport but also, of course to you, that these allegations are investigated properly and thoroughly.

As to (ii) as I have already noted, Mr Rao has informed me that no facts or matters have arisen in the course of his investigation to date which have led him to conclude that you should no longer be suspended. In the absence of any such conclusion on his part, the analysis that led me to consider that it was appropriate to impose a provisional suspension in November – including consideration of the seriousness of the prima facie cases – remains unchanged.

I continue to consider that it would be inappropriate for you to resume your offices and positions within the IAAF in Athletics Kenya in advance of the allegations being resolved.

In those circumstances I have concluded that were I not to extend your provisional suspension the integrity of the sport could be seriously undermined.”

6. Both Notices emphasised that their imposition in no way prejudged the outcome of the investigation being carried out by Mr Sharad Rao, the Ethics Board’s appointed investigator, or of any disciplinary charges which may ensue following his investigation and that all three continued to enjoy the presumption of innocence. The Panel repeats that the position in this regard remains unchanged.
7. The grounds of challenge of Mr Kiplagat, Mr Okeyo and Mr Kinyua (all of which the Panel has carefully read and considered) are summarised in paragraph 17 below and evaluated in paragraphs 19 to 32.
8. Only Mr Okeyo asked for a hearing pursuant to the Ethics Board’s Procedural Rules (the “Rules”), Rule 13(28). This took place via video link allowing the matter to be conducted on Friday 24 June 2016 with the Chairman of the Panel in the UK,

Mr Akira Kawamura in Japan, Mr Thomas Murray in the USA and Mr Okeyo and his lawyer, Mr James Ochieng' Oduol of Triple OK Law, in Kenya.

Approach

9. The criterion for provisional suspension is that set out in Rule 13(27): i.e. that, in the absence of such suspension *"the integrity of the sport could otherwise be seriously undermined"* (the Panel notes that the word "could" imposes a less demanding standard than the word "would"). Although the power to suspend is located in the part of the rules dealing with discipline, the suspension of the three Appellants is not punitive – no charges under the Code have to date been brought, still less found proven – but precautionary. Imposing a suspension on a precautionary basis involves consideration of *inter alia* the nature of the allegations (including how serious they are), whether the person against whom the allegations are made is in a position of authority and what, as a result, is the likely risk to the integrity of the sport of allowing the person to be or to continue to be in office during the pendency of the investigation.
10. A provisional suspension shall be valid for a maximum of 180 days. It may, however, be extended by the Chairperson of the Ethics Board or of a Panel *"for additional periods not to exceed a further 180 days in the case of each extension"* (Rule 13(29)).
11. The issue which the present appeals require the Panel to consider is on what basis a challenge under Rule 13(28) to an extension of a provisional suspension can be made. With respect to a concern raised by Mr Kinyua at paragraph 19(a) of his Statement of Challenge, i.e. *"Whether Rule 13(28) is applicable to a challenge of an extension to provisional suspension since the said rule only refers to a challenge of provisional suspension imposed under the preceding Rule 13(27)"* the Panel has no doubt that it is implicit, if not expressly stated in that Rule that a person whose original suspension has been extended enjoys a right of challenge to that extension.
12. In an earlier case of a challenge to an original provisional suspension another Panel² held:

² The case of Decision Number 03/2016, dated 24 March 2016, paragraph 13ff.

- a) *“It is relevant that under the rules (i) a person will not be suspended (prior to any charge being brought) unless also under investigation (ii) an investigation will not be instituted unless there is a prima facie breach of the Code; and (iii) the purpose of the investigation is to determine whether that prima facie case remains intact (or is enhanced or diminished) and whether in the light of the outcome of the investigation a disciplinary case should proceed to adjudication. Neither a prima facie case, a provisional suspension nor a decision to proceed to adjudication of a disciplinary case abrogates the principle of the presumption of innocence.”*
- b) *“[...] it would be inconsistent with the language, purpose and policy of the rules (subject to the proviso set out below) that a panel seized of such challenge should usurp the function of the investigator and purport to determine the strength of the case against the person suspended, especially when it could not resolve disputed issues of fact without a hearing involving both the accusers and accused (i.e. the suspended person) which the rules do not contemplate.³”*
- c) *“The proviso is this. There may be a case where the person suspended can show dispositively (or possibly all but so) that the complaint is false e.g. in a case such as this, compelling alibi evidence. However unless such person can go that far, the case against him remains a prima facie case based on exactly the same (**and no less**) material as has been previously held to warrant suspension. That it is disputed does not mean it is less of a prima facie case. The rights and wrongs of the dispute are precisely that which the appointed Investigator must seek to resolve.⁴”*

³ By analogy the Court of Appeal of England and Wales held in *GMC v Hiew* [2007] EWCA Civ 369; [2007] 1 WLR 2007 that it was not the function of a court reviewing an interim suspension order (in that case an interim suspension imposed by the Interim Orders Panel of the General Medical Council) to make findings of fact or resolve disputes (§42). Similarly, it is not for the IOP itself to make findings of fact or resolve disputes of fact. We say by analogy in recognition of the fact that the rules are governed by Monegasque, not English law.

⁴ Also by analogy, in *Abdullah v GMC* [2012] EWHC 2506 (Admin) the High Court of England and Wales upheld a decision of the Interim Orders Panel of the General Medical Council that a practitioner should be suspended while allegations of sexual misconduct were investigated, despite the fact that the police had investigated and concluded that there was insufficient evidence to proceed and that the PCT had concluded that suspension was not justified. The Court concluded that given the seriousness of the allegations the decision to suspend was both necessary and proportionate, despite the fact that there were some deficiencies in the GMC’s evidence (§§97 – 99).

13. The Panel respectfully adopts this analysis which is applicable to the current challenges, with such appropriate modifications as may reflect the fact that they are to an extension of an original suspension, not the original suspension itself.
14. The Panel in particular must acknowledge in the case of an extension of a provisional extension the greater (because longer) deprivation of the right to exercise the powers attendant on the suspended person's office. Nonetheless it must also bear in mind that Rule 13(29) itself recognises that multiple suspensions of 180 days are not by themselves inappropriate. Investigators are obviously under an obligation to conduct their investigations with all deliberate speed and not unnecessarily to delay, but it is obvious that the more complex the investigation and the more elusive the evidence to be garnered and considered, the more protracted may the investigation be without the investigator being subject to any legitimate criticism.
15. The Panel notes too that the duration of provisional suspensions shall be taken into account in any final decision Rule 13(30), that is to say, if charges of breaches of the Code are both brought and proven then the periods of suspension will be deducted from any period of ineligibility otherwise to be imposed (although the Panel recognises that this is of no consolation to a suspended person against whom charges are not brought, or, if brought, not proven).
16. There are various possible outcomes to an investigation and any subsequent disciplinary proceedings. At root, the Panel have to consider whether the risk of damage to the integrity of the sport if suspensions were lifted in the case of persons later found guilty of breaches of the Code is outweighed by the damage to persons suspended who are subsequently not charged at all, or charged but acquitted, if the suspensions are extended.

Application

17. The following are the main points arising from the respective Grounds of Challenge:⁵

⁵ References to § are to the paragraph numbers of the respective Grounds of Challenge of Mr Kinyua, Mr Kiplagat and Mr Okeyo.

- i) The Chairman's extension of suspension on 20 May 2016 was premature (and hence unlawful) since the original suspension had not expired until 27 May 2016 (Okeyo §§4.1-4.7);
- ii) In consequence of the Notices of Suspension (both original and extended) the Appellants have been subjected to damaging media publicity (Kiplagat §§4.8-4.14) (Okeyo §8.0), including "*the agony of the perception*" created by the suspension suffered by family and friends (Okeyo §8.5) and aggravated by the alleged failure of the Ethics Board or the Investigator to correct the false impression of guilt (Kiplagat §§4.13-15) which may make a fair trial of any charges brought impossible (Kiplagat §4.9); a broadcast of an interview with the Investigator suggested that, contrary to the Notice of Prima Facie case, Mr Okeyo was involved in the Qatar bribery allegation (Okeyo §7.1);
- iii) The investigation has been marked by inordinate and unexplained delay (Kiplagat §4.16-4.21) (Okeyo §4.9-4.15) (Kinyua §23(a)) compounded by the Investigator's published statements of an anticipated conclusion first in mid March 2016 and next in mid May 2016 (Okeyo §7.0) (Kinyua §24(a)) whereas because of the nature of the allegations and the damaging media publicity expedition was mandatory (Okeyo §§4.9-4.15). The allegations are not so complex as to justify the time taken (Kinyua §24(a)) and certain of the allegations do not relate to all three Appellants e.g. the Qatar bribery allegation (Kinyua §24(b));
- iv) In Mr Kiplagat's case, he has suffered "*irreparable harm and infinite prejudice*" to his health in consequence of the suspension to the extent that, were charges to be brought, he might be seriously impaired in his ability to defend himself (Kiplagat §§4.22-4.25);
- v) The Chairman in his explanation of his reasons for the extension (see above paragraph 5) misdirected himself as to the evidentiary burden of proof (Kiplagat §5.3) (Okeyo §6.8) (Kinyua §24), indicating predetermination of the outcome of the investigation (Kiplagat §5.4) (Okeyo §6.9). Nor can it be correct to extend the suspension "*on a waiting basis for evidence to emerge as stated or desired*" (Okeyo §5.2 and §6.3);

- vi) The Chairman failed to take into account (i) the impact of the extension on the Appellants (Kiplagat §§5.5-5.8) (Kinyua §25) and (ii) the Appellant's co-operation with the Investigator (Kiplagat §5.6);
- vii) The extension for the maximum period of 180 days is unwarranted (Kinyua §24(d)).
18. While for clarity and convenience the Panel has aggregated these grounds collectively and will address them in order in the same way it has nonetheless considered whether there are particular matters relating to each of the three that would justify any different outcome to the challenges.
- (i)**
19. The Panel rejects this procedural point. If correct it would mean that any suspension would have to lapse before it could be extended which would be an irrational intention to ascribe to the makers of the rules. The Panel confirms that periods of suspension themselves must be consequential.
- (ii)**
20. The way in which media report the suspensions is not within the Panel's control. Both the Chairman (and the Investigator in his published comments) have made it clear that Mr Kinyua, Mr Kiplagat and Mr Okeyo enjoy the presumption of innocence; and each of them are entitled to draw the media's attention to this. Whether or not media reports have made or would make a fair trial impossible before an independent EB panel at some future date is not an issue which presently arises. None of the three have yet been charged with any breach of the Code and the time when a decision will have to be taken (if at all) as to whether they should be charged pursuant to the rules has not arrived.
- (iii)**
21. There is, as already noted (paragraph 14 above) no fixed time within which an investigation has to be concluded. The Panel accepts that an investigator should conclude his investigation within a reasonable time, but what is reasonable depends primarily upon the subject matter of the investigation. The complexity of the allegations refers to the challenges posed by that subject matter from an

investigatory perspective rather than to the nature of that subject matter itself. There is no evidence that the highly experienced investigator has been in any way derelict in carrying out his functions. His optimistic estimates of an earlier conclusion to his inquiry than has been in the event fulfilled itself shows that he is conscious of the need for reasonable expedition but, it may be inferred, because of the inquiry's complexity his estimates have been frustrated. The Panel would observe that it is not in the interest of the objects of an inquiry that the investigator should cut corners. Mr Kinyua correctly says that not all the allegations under investigation involve him (Mr Okeyo could make the same point) but others (financial corruption and subversion of the doping process) did and no challenge was made, or in the Panel's view, could sensibly have been made to the decision to allocate to the investigator the function of investigating all three at the same time. The Panel is of the view that in the light of the investigatory challenges in this case, the period of time that has currently elapsed (just over 6 months) is certainly not unreasonable.

(iv)

22. The Panel naturally regrets if the duration of the investigation has had an adverse impact on Mr Kiplagat's health; but it is premature to consider whether he would, if charged, in consequence be unable properly to defend himself. The Panel refers to the second and third sentence of paragraph 20 above.

(v)

23. This ground of challenge appears to be based on a misunderstanding of the Chairman's letter of 20 May 2016. There was no inversion of the burden of proof. Instead, the Chairman was referring to the principle (as set out at paragraph 12.b) and 12.c) above) that unless a person subject to a suspension can show, or the Investigator has discovered, that there is some evidence which shows all but dispositively that the complaint is false, the prima facie case will continue to be based on exactly the same material as had previously been held to warrant a suspension.

24. In his Grounds of Challenge Mr Kiplagat provided copies of loan documents which, he suggests, indicate that the allegation that he received vehicles from Qatar are unfounded (Kiplagat §4.19(e)). He also maintains his denials of the allegations of financial corruption and subversion of the doping process (Kiplagat §2.2.5).

25. Similarly, Mr Ochieng' Oduol set out orally on behalf of Mr Okeyo the circumstances why he said that the allegation of financial corruption and of subversion of the doping process were unfounded.
26. Mr Kinyua for his part stresses that he has explained to the Investigator the position in relation to funds received by Athletics Kenya from Nike and that he remains willing to comment on the financial transactions in question (Kinyua §24(c)). As to the allegation of subversion of doping controls Mr Kinyua explained that he has denied the allegations (Kinyua §24(bc)).
27. The Investigator has informed the Chairman that neither Mr Kiplagat, Mr Okeyo nor Mr Kinyua had to date produced a 'knock out blow' such as would destroy the prima facie case which caused the original suspension to be imposed and that he has not as yet, in the course of his investigation, identified one. Having considered, inter alia, the respective arguments summarised in paragraphs 24-26 above the Panel sees no reason to disagree. The fact that Mr Kiplagat has produced documents indicating that (i) a company 'Sweetland Holdings Limited' purchased a Toyota Landcruiser and (ii) that he purchased a Toyota Space Wagon, cannot by itself prove that he was not also given vehicles by Qatar. The denial of all three of involvement in financial corruption and subversion of the doping process raises but does not, and cannot by itself, resolve the issue as to whether the allegations are well founded.
- (vi)**
28. The prejudice suffered by a suspended person forms part of the balancing exercise set out at paragraph 16 above, namely whether the risk of damage to the integrity of the sport if suspensions are lifted in the case of persons later found guilty of breaches of the Code is outweighed by the damage to persons suspended who are subsequently not charged at all, or charged but acquitted, if the suspensions are extended. The Chairman did not need to set out expressly the impact of the extensions, which would necessarily be to the detriment of each of the three individuals. In any event, Mr Okeyo succinctly described it from his perspective in his oral evidence to the Panel as did Mr Kinyua in his written representations at §25 and Mr Kiplagat in his at §§4.22-24. The Panel has taken into account that prejudice

in reaching its decision.

29. Co-operation is not only to be expected but is required by the Procedural Rules (Rule 7). The consequences of such cooperation will not be known until the Investigator reports.

(vii)

30. The extension for 180 days, as distinct from some lesser period, reflects the fact that there can be no certainty as to when the Investigator will have completed his investigation or the Ethics Board reacted to it in the manner prescribed by the procedure rules. There are circumstances conceivable in which any such suspension could be terminated earlier (see further paragraph 37 below).
31. The Chairman explained to the parties in the Notice of Extension on 20 May 2016 that were the case against any of them to be closed or otherwise concluded before the end of the 180 day extension their provisional suspension would of course be reviewed.
32. As such, in circumstances where the Investigator is acting with all reasonable expedition, and where the Panel has stressed that the presumption of innocence continues to apply, no prejudice is suffered by the maximum period of 180 days being imposed as opposed to a shorter period.
33. In the Panel's assessment the case for an extension of the suspension is essentially the same as the case for its original imposition. The breaches of the Code of which the prima facie case subsists are serious; the Investigator is not presently in a position to say that such case has been shown by his inquiry to date to be unsubstantiated. The potential for damage to the sport if persons under investigation for such serious matters could resume their offices or return to an active role in athletics administration is in the Panel's judgement clear. The countervailing factors well summarised orally and in writing by Mr Ochieng' Oduol on behalf of Mr Okeyo, and equally cogently developed in writing by Kemboy & Company Advocates on behalf of Mr Kiplagat and by Mr Kinyua himself do not in the Panel's view tilt the scales against such extension.

34. The Panel considered whether since Mr Kiplagat has neither intention nor it may be, because of his poor health, capacity, to resume any office or take up another office afresh, a continued suspension, even if otherwise justified, would serve no purpose. For the same reason, however, its extension would cause only limited prejudice, and its lifting would only relieve him of such prejudice if accompanied by a recognition that there was no case against him, which the Panel cannot give. Moreover Mr Kiplagat is still under investigation and potentially (a word the Panel would stress) vulnerable to charges in future.
35. The Panel would wish to stress three points. First, it hopes that the Investigator will take note of the need to conclude his investigation as soon as can properly be achieved bearing in mind the various stresses that suspension creates for the three individuals.
36. Second, it naturally assumes, as the Investigator explained in his first letter to the three (“[...] *the investigations will be conducted objectively, will be fair and will be conducted in compliance with the Rules of Natural Justice*”) that before he concludes his investigation he will give a full opportunity to each of them to present their defences, if he deems it necessary face to face. The three Appellants each say that they have not been contacted by the Investigator since submitting their responses to the allegations in January 2016. How the investigator conducts his investigation is not a matter with which the Panel can interfere (see Rule 13(7)-(9)) but the Panel presumes that the Investigator has decided – which would be entirely reasonable – to ascertain what, if any, support there is for the prima facie case before putting any provisional conclusion, together with any evidence to support it, to Mr Kinyua, Mr Kiplagat and Mr Okeyo.
37. Third, the fact that the Panel has confirmed the Chairman’s extension of the suspension for a further 180 days is not to be taken as an indication that all that time will be required before a report is produced and considered as required by the rules (Rule 13(9)); it may but equally it may not.
38. For the above reasons each of the three appeals against the extensions is dismissed.

The Honourable Michael J Beloff QC (Chairman)

Mr Akira Kawamura

Mr Thomas Murray

29 June 2016