SPORT RESOLUTIONS (UK)

SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/Adhocsport/178/2018
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IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF THE INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS

Before:
Michael J Beloff QC (Chair)
Anna Bordiugova
Dennis Koolaard

BETWEEN:

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (IAAF)

Anti-Doping Organisation

-and-

KIPYEGON BETT

Respondent

DECISION OF THE DISCIPLINARY TRIBUNAL

INTRODUCTION

1. The Claimant, the International Association of Athletics Federations ("**IAAF**"), is the international federation governing the sport of Athletics worldwide.[1] It has its registered seat in Monaco.

2. The Respondent, Mr. Kipyegon Bett ("**Mr Bett**") is a 30-year-old middle-distance runner from Kenya.

3. Mr Bett faces two charges: the first concerns a refusal or failure to submit to Sample collection (without compelling justification) after notification as authorised under the IAAF Anti-Doping Rules ("**ADR**") on 24 February 2018 ("**the first charge**''); the second relates to the presence, contrary to the ADR, of recombinant-erythropoietin ("**r-EPO**") in a urine sample collected from him on 31 July 2018 ("**the second charge**").

4. This award will address both charges in specific sequence after dealing with general issues.

THE HEARING

5. The deliberations in respect of both charges were held in the absence of the parties. No evidential hearing was held.

6. The ADR permits a hearing to take place, in the athlete's absence, subject to fulfilment of the condition precedent that the athlete charged had had *"notice of the hearing*'' pursuant to Article 8.8.3 ADR.

7. The Panel is satisfied that the condition precedent is fulfilled in respect of both charges for the following reasons:

[1] The IAAF is represented in these proceedings by the Athletics Integrity Unit ("**AIU**") which has delegated authority for results management and hearings, amongst other functions relating to the implementation of the ADR, on behalf of the IAAF pursuant to Article 1.2 of the IAAF Anti-Doping Rules.

(i) On 10 September 2018, a Preliminary Meeting was convened between the parties before The Hon. Michael J Beloff QC, Chairman of the Panel. Despite Mr Bett's prior confirmation that he would attend and repeated attempts to contact him during the Preliminary Meeting using a variety of contact numbers, he did not attend and the meeting (at which procedural Directions dated 10 September 2018 were issued for the determination of this matter ("**the Directions**")) proceeded in his absence pursuant to Article 8.7.1 ADR. However, Mr Bett was promptly sent the Directions which set out a timetable for provision of submissions and specified a provisional hearing date on 31 October 2018 and acknowledged their receipt during a telephone call with Sport Resolutions ("**SR**") (responsible for the administration of the proceedings) on 18 September 2018, during which he did not demur from any of them including the provisional hearing date. He was therefore in the Panel's view necessarily aware that, absent a material change of circumstances, e.g. a successful application by either him or the AIU, the hearing of the first charge would take place on 31 October 2018.

(ii) Mr Bett never thereafter responded to any of the numerous communications to him from SR made by telephone or sent by e-mail (or to respond to communications from pro bono counsel appointed on his behalf) albeit (a) all were directed to numbers and addresses that he himself had provided, and (b) they included that used when he was on his own acknowledgment successfully notified of the Directions.

(iii) After service of the second charge, sent by the AIU on 14 September 2018 again to his usual email address, he did not respond before the deadline of 21 September 2018 granted to him. Nonetheless after the AIU on 13 October 2018 invited Mr Bett to confirm how he wished to proceed with the second charge, and that if he would fail to do so he would be deemed to have admitted the second charge, Mr Bett replied by email dated 19 October 2018, stating that he "[…] *never used EPO and am ready for the case and iam not ignoring your texts kindly* [sic]''. Also, on 19 October 2018, Mr Bett replied as follows to an email received from the AIU: *"Noted with thanks"*.

8. In particular, the Panel has no reason to doubt that SR's emails dated 19 (informing Mr Bett that the procedures related to the two charges would in his own interest be consolidated) and 22 October 2018 (informing Mr Bett that both charges would be dealt with together on 31 October 2018) were received by Mr Bett, as they were sent to the email address Mr Bett had himself used.

9. It is hard to avoid the inference that Mr Bett, for whatever reason, was deliberately choosing to respond selectively only to efforts made to contact him in connection with the hearing but, whatever it was, the Panel concludes, as already indicated, that he must have been aware that the hearing of the two charges would take place together on the designated date (ie. on 31 October 2018)

10. Therefore Mr Bett having failed to confirm that he would attend the hearing scheduled for 31 October 2018 at 12.45pm GMT, and following a request from the AIU, the Chairman of the Panel decided on 30 October 2018 that the two charges would be determined together on the papers, without an evidential hearing being held. The Panel was at one with that decision.

11. In the circumstances, the Panel deliberated *inter se,* without the benefit of oral submissions or *viva voce* testimony, on the basis of the written record which included the several explanations provided by Mr Bett to all of which it paid careful attention.

12. Since this issue of non-communication is not unique to this case, the Panel must emphasise that athletes faced with charges brought by the AIU cannot by such evasive expedient avoid the Panel's consideration and determination of them.

13. To determine a hearing in the absence of a defendant is in no way discrepant with acknowledged principles of justice. In R v Jones 2002 UKHL 5, Lord Bingham said:

> "**[8]** *The European Court of Human Rights and the Commission have repeatedly made clear that it regards the appearance of a criminal defendant at his trial as a matter of capital importance: see, for example, Poitrimol v France (1993) 18 EHRR 130, at p 146, para 35; Pelladoah v Netherlands (1994) 19 EHRR 81, at p 94, para 40; Lala v Netherlands (1994) 18 EHRR 586, at p 597, para 33. That court has also laid down*

(1) that a fair hearing requires a defendant to be notified of the proceedings against him: Colozza v Italy (1985) 7 EHRR 516, at pp 523-524, para 28; Brozicek v Italy (1989) 12 EHRR 371;

***[9]** All these principles may be very readily accepted. They are given full effect by the law of the United Kingdom. **But the European Court of Human Rights has never found a breach of the Convention where a defendant, fully informed of a forthcoming trial, has voluntarily chosen not to attend and the trial has continued**."*

14. The position must be accepted *a fortiori* where disciplinary as distinct from criminal proceedings are concerned.

JURISDICTION

15. Article 1.2 ADR states as follows:

*"In accordance with Article 16.1 of the IAAF Constitution, the IAAF has established an Athletics Integrity Unit ("**Integrity Unit**") with effect from 3 April 2017 whose role is to protect the Integrity of Athletics, including fulfilling the IAAF's obligations as a Signatory to the Code. The IAAF has delegated implementation of these Anti-Doping Rules to the Integrity Unit, including, but not limited to the following activities in respect of International-Level Athletes and Athlete Support Personnel: Education, Testing, Investigations, Results Management, Hearings, Sanction and Appeals. The references in these Anti-Doping Rules to the IAAF shall, where applicable, be references to the Integrity Unit (or to the relevant person, body or functional area within the Unit)."*

16. The application of the ADR to athletes, athlete support personnel and other persons is set out in Article 1.7 ADR, including:

"1.7 These Anti-Doping Rules also apply to the following Athletes, Athlete Support Personnel and other Persons, each of whom is deemed, by condition of his membership, accreditation and/or participation in the sport, to have agreed to be bound by these Anti-Doping Rules, and to have submitted to the authority of the Integrity Unit to enforce these Anti-Doping Rules:

a) *all Athletes Athlete Support Personnel and other Persons who are members of a National Federation or of any affiliate organisation of a National Federation (including any clubs, teams associations or leagues);*

b) *all Athletes, Athlete Support Personnel and other Persons participating in such capacity in Competitions and other activities organized, convened, authorized or recognized by (i) the IAAF (ii) any National Federation or any member or affiliate organization of any National Federation (including any clubs, teams, associations or leagues) or (iii) any Area Association, wherever held;*

c) *all Athlete Support Personnel and other Persons working with, treating or assisting an Athlete participating in his sporting capacity; and*

d) *any other Athlete, Athlete Support Person or other Person who, by virtue of an accreditation, licence or other contractual arrangement, or otherwise, is subject to the jurisdiction of the IAAF, of any National Federation (or any member or affiliate organization of any National Federation, including any clubs, teams, associations or leagues) or of any Area Association, for purposes of anti-doping."*

17. The applicable rules are the ADR, which apply to all athletes who are members of a National Federation and to all athletes participating in competitions organised, convened, authorised or recognised by the IAAF.

18. Within the overall pool of athletes set out in Article 1.7, Article 1.9 ADR specifies those athletes that are classified as international-level athletes for the purpose of the ADR as follows:

*"1.9 Within the overall pool of Athletes set out above who are bound by and required to comply with these Anti-Doping Rules, each of the following Athletes shall be considered to be an International-Level Athlete ("**International-Level Athlete**") for the purposes of these Anti-Doping Rules and therefore the specific provisions in these Anti-Doping Rules applicable to International-Level Athletes shall apply to such Athletes:*

(a) An Athlete who is in the International Registered Testing Pool;

[…]*"*

19. At the material times, Mr Bett was a member of Athletics Kenya, an IAAF Member Federation. Moreover, in 2017, Mr Bett won a bronze medal in the 800m at the IAAF World Championships in Athletics in London, UK. Accordingly, Mr Bett was subject to the ADR by reason of Article 1.7(b) and Article 1.9(a) at the time of the events giving rise to both the first and second charges.[2]

20. Article 7.2 ADR confers jurisdiction for results management on the AIU in certain circumstances, including:

> *"7.2 The Integrity Unit shall have results management responsibility under these Anti-Doping Rules in the following circumstances:*
>
> *7.2.1 For potential violations arising in connection with any Testing conducted under these Anti-Doping Rules by the Integrity Unit, including investigations conducted by the Integrity Unit against Athlete Support Personnel or other Persons potentially involved in such violations."*

21. The sample collection was attempted pursuant to testing undertaken by the AIU on behalf of the IAAF on 24 February 2018, and the out of competition test was carried out by the AIU on behalf of the IAAF on 31 July 2018. The AIU therefore has jurisdiction for results management in both matters.

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[2] In 2018, achieved results in the following competitions that were authorised and/or recognised by the IAAF: [2]

1.1. 4 May 2018 – Doha IAAF Diamond League (QAT);
1.2. 25 May 2018 – Eugene Prefontaine Classic (USA);
1.3. 31 May 2018 – Roma Golden Gala – Pietro Mennea (ITA);
1.4. 8 June 2018 – Chorzow Janusz Kusorcinski Memorial (POL); and
1.5. 10 June 2018 – Stockholm BAUHAUS-galan (SWE).

By participating in these competitions, Mr Bett was also subject to the jurisdiction of the ADR pursuant to Article 1.7(b) ADR

22. The IAAF has established the Disciplinary Tribunal in accordance with Article 1.5 ADR, which provides that the Tribunal shall determine anti-doping rule violations asserted under the ADR.

23. Article 8.2(a) ADR sets out that the Tribunal shall have jurisdiction over all matters in which:

> *"(a) An Anti-Doping Rule Violation is asserted by the Integrity Unit against an International-Level Athlete or Athlete Support Person in accordance with these Anti-Doping Rules;*
>
> [...]"

24. The Panel was duly appointed from members of the Tribunal pursuant to Article 8.5.1 ADR. The Panel therefore has jurisdiction over both charges.

25. Mr Bett has at no time denied that he is subject to the ADR or to the jurisdiction of the AIU or this Panel.

THE FIRST CHARGE - FACTUAL BACKGROUND

The attempted testing

26. The following is a summary of the factual circumstances taken from the witness statement of Mr Franklin Rono, the doping control officer ("**the DCO**") dated 7th August 2018. His statement was not challenged in its essential elements, had support in the contemporary documents, and appears to the Panel to be coherent and credible.

27. On 24 February 2018, the DCO was authorised by the IAAF to collect a Sample from Mr Bett pursuant to Mission Order M-730014292. Mr Bett's whereabouts information provided in ADAMS for that date indicated that he would be at the following address between 09:00AM and 10:00AM:

[redacted]

28. The DCO arrived at the above address at 08:59AM and attempted to locate Mr Bett for testing. In doing so, he spoke with a female who was identified as Mr Bett's sister, Purity Kirui. The DCO identified himself and Ms Kirui understood that the DCO was attending the address to collect a sample from Mr Bett. Ms Kirui informed the DCO that Mr Bett was not present.

29. Ms Kirui asked why the DCO was attending alone and she asked to see the DCO's identification documentation. The DCO replied that he had come to see Mr Bett and had identification and documents to show to Mr Bett and that he would wait outside for the next one hour for Mr Bett to return. Mr Bett did not return within the allotted hour.

30. At 10:07AM the DCO therefore called Mr Bett and informed him that he had attended the above address to collect a sample from him on behalf of the IAAF.

31. Mr Bett informed the DCO that he was at Sosiot (approximately 10km away) and asked the DCO to wait for him to return to the address indicated in his ADAMS whereabouts information. The DCO agreed to wait for Mr Bett to return.

32. After approximately 15-20 minutes Mr Bett arrived at [redacted] by car.

33. The DCO confirmed his identity to Mr Bett by showing him his identification and attempted to explain the circumstances of his attendance but was unable to do so.

34. The DCO's evidence is that Mr Bett repeatedly interrupted him and frustrated his attempts to explain himself and that Mr Bett informed him, the DCO, that he (Mr Bett) had been subject to testing recently and enquired why the DCO was attending the address alone.

35. Again, the DCO attempted to explain himself but was unable to do so. Mr Bett told the DCO that he would not be tested. The DCO informed Mr Bett that there would be consequences for not providing a Sample and that he would have to report the matter and then left the location. In so far as Mr Bett's version of his interchanges with the DCO is discrepant the Panel will consider it below.

The investigation

36. On 4 April 2018 the AIU wrote to Mr Bett informing him that it was investigating whether he had committed any anti-doping rule violation. The AIU requested *inter alia* Mr Bett's written account of events that took place on the morning of 24 February 2018, in Kiptere, Kenya.

37. On 27 April 2018 Mr Bett provided his explanation to the AIU (dated 24 April 2018). In summary, Mr Bett explained that early in the morning of 24 February 2018 he was contacted by phone by another Athlete, Mr Ferguson Rotich. Mr Bett claimed that Mr Rotich had requested that Mr Bett attend his (Mr Rotich's) home address in Kiptere to provide a Sample to representatives of the IAAF who had presented themselves at Mr Rotich's address to collect a Sample from Mr Rotich and Mr Bett's sister, Ms Kirui. Mr Bett explained that he had travelled to Mr Rotich's address and provided a Sample.

38. Mr Bett asserted that between half an hour and one hour after providing a Sample at Mr Rotich's home address, that he was contacted by phone by Ms Kirui, who informed him that the DCO was present at her home address to collect a Sample from Mr Bett.

39. According to Mr Bett he "*showed up*" and met the DCO, who identified himself. However, Mr Bett claimed that the DCO looked "*suspicious*" to him, that he had doubts and did not trust the DCO because he had already provided a Sample at Mr Rotich's address earlier that morning. Mr Bett acknowledged that no Sample was provided to the DCO on 24th February 2018 but stated that he was tested the following day.

Notice of Charge

40. On 15 August 2018, the AIU sent Mr Bett a Notice of Charge for a violation of Article 2.3 ADR. The Notice of Charge set out that the AIU had reviewed Mr Bett's explanation dated 24 April 2018 and had concluded that it was inadequate to explain the events of 24 February 2018.

41. The AIU confirmed that there were no records that representatives of the IAAF had attended Mr Rotich's address to collect a Sample from Mr Rotich and Mr Bett's sister on 24 February 2018, and that neither Mr Rotich nor Mr Bett's sister provided a Sample on that date.

42. The AIU also confirmed that there were no records to support Mr Bett's claim that he had provided a Sample earlier in the morning of 24 February 2018, before being met by the DCO.

43. However, as set out in the Witness Statement of another DCO, Mr Paul Scott (''Scott''), it was noted that Mr Bett did provide a urine Sample on 21 February 2018 at 11:48 and that Mr Rotich had also provided a Sample earlier that same day at 09:50.

44. The AIU noted Mr Bett's claim, that he had provided a Sample to the DCO the next day, i.e. on 25 February 2018, to be also at odds with the documentary record which showed that he had in fact provided a Sample four days later, on 28 February 2018.

45. In the circumstances, Mr Bett was charged with committing a violation of Article 2.3 ADR.

46. On 24 August 2018, Mr Bett responded to the Notice of Charge through his appointed counsel at the time Landa & Co Advocates confirming that he denied the Charge and requested a hearing before the Disciplinary Tribunal.

47. In support of his denial Mr Bett submitted a deposition in which he confirmed that his previous explanation for the events of 24 February 2018 provided on 24 April 2018 should be withdrawn and provided a further and different explanation for those events.

48. In that deposition Mr Bett accepted:

- that the DCO had attended the address indicated in Mr Bett's whereabouts information on 24 February 2018 to collect a Sample from him;
- that the DCO had shown Mr Bett his identification; and

- that the DCO had advised him of the consequences of not providing a Sample.

49. However, Mr Bett denied that he had intentionally refused to give a Sample on 24 February 2018.

50. By way of explanation Mr Bett reiterated that he was "*very suspicious*" of the DCO for cumulative reasons, including:

    - that this constituted the first time that a single individual had attempted to collect a Sample from him and that education sessions provided by the Anti-Doping Agency of Kenya ("**ADAK**") had confirmed that two persons would always be present when Samples were being collected;
    - that enquiries with ADAK on the day had confirmed that it had not sent the DCO to collect a Sample from Mr Bett;
    - that the DCO had refused to identify himself to Mr Bett's sister or his father;
    - that Mr Bett was unable to verify the authenticity of the ID produced by the DCO to identify himself;
    - that there were rumours of people masquerading as DCOs; and
    - that he himself had been tested only three days previously.

THE FIRST CHARGE - APPLICABLE RULES

51. Article 2 ADR specifies the circumstances and conduct that constitute anti-doping rule violations. This includes Article 2.3 ADR, which specifies:

> "***2.3 Evading, Refusing or failing to Submit to Sample Collection***
>
> *Evading Sample collection, or without compelling justification, refusing or failing to submit to Sample collection after notification as authorized under these Anti-Doping Rules or other applicable anti-doping rules."*

52. Article 2.3 ADR contemplates three distinct violations in respect of Sample collection i.e. (i) evading, (ii) refusing and (iii) failing to submit. The comment to Article 2.3 of the World Anti-Doping Code 2015 ("**the Code**") (upon which the ADR is based) provides added context for each of these violations:

> *"[Comment to Article 2.3: For example, it would be an anti-doping rule violation of "evading Sample collection" if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or Testing. A violation of "failing to submit to Sample collection" may be based on either intentional or negligent conduct if the Athlete while "evading" or "refusing" contemplates intentional conduct by the Athlete.]"*

53. Article 3.1 ADR provides that the IAAF shall have the burden of establishing that an anti-doping rule violation has occurred to the comfortable satisfaction of the Tribunal:

> *"3.1 The IAAF or other Anti-Doping Organisation shall have the burden of establishing that an Anti-Doping Rule Violation has been committed. The standard of proof shall be whether the IAAF has established the commission of the alleged Anti-Doping Rule Violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that 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."*

54. Article 3.2 ADR states that facts relating to anti-doping rule violations may be established by any reliable means.

55. In that regard, Article 3.2 ADR also states:

> *"3.2.2 Compliance with an International Standard (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the International Standard were performed properly.*
>
> *3.2.3* […]
>
> *3.2.4 Departures from any other International Standard, or other anti-doping rule or policy set out in the Code or these Anti-Doping Rules that did not cause the facts alleged or evidence cited in support of a charge (e.g., an Adverse*

Analytical Finding) shall not invalidate such facts or evidence. If the Athlete or other Person establishes the occurrence of a departure from an International Standard or other anti-doping rule or policy set out in the Code or these Anti-Doping Rules that could reasonably have caused the Adverse Analytical Finding or other facts alleged to constitute an Anti- Doping Rule Violation, then the IAAF or other Anti-Doping Organisation shall have the burden to establish that such departure did not cause such Adverse Analytical Finding or the factual basis for the Anti-Doping Rule Violation."

56. The Panel accepts the AIU's submissions on the construction of Article 3.2 ADR. In the Panel's view, to sustain a charge that an athlete refused without compelling justification to provide a Sample after notification as authorised under the ADR in violation of Article 2.3 ADR, the AIU must prove, to the comfortable satisfaction of the Panel three elements i.e. that:

- the athlete was properly notified that he was required to provide a Sample for drug testing purposes;
- he refused to provide the Sample required, and;
- his refusal was intentional.

57. In the Panel's view, to sustain the alternative charge of a failure to submit to Sample collection, the AIU must prove to the same standard failure after proper notification to provide the Sample requested either intentionally or negligently

58. In the Panel's view it is not for the AIU also to prove that the athlete had no "compelling justification" for his (or her) refusal or failure. Instead, if the AIU establishes the elements set out above, to the comfortable satisfaction of the Panel, the AIU has established its *prima facie* case, and the burden shifts to the athlete to prove, on the balance of probabilities, that there was a "compelling justification" for the refusal or failure. This interpretation flows from the language of the relevant provision and is fortified by the consideration that the athlete alone is likely to be aware of any facts which could amount to such justification.

59. The AIU further submits (and the Panel accepts) that the Panel can be comfortably satisfied that Mr Bett was properly notified that he was required to provide a Sample inasmuch as:

- the DCO states that he spoke with Mr Bett by telephone at 10:07 on 24 February 2018 and informed him that he was present at Mr Bett's address to conduct testing on behalf of the IAAF

- Mr Bett accepts:

  (i) that he was called by his sister *"indicating that someone was looking for me* [him] *to collect samples for anti-doping tests";*

  (ii) that the DCO identified himself as such when Mr Bett subsequently returned to his address;

  (iii) that the DCO made it clear to him that there would be consequences for Mr Bett in failing to provide a Sample.

These versions were consistent the one with the other.

60. It is not in issue that this attempted Sample collection from the Mr Bett was authorised under the ADR as appears from a copy of the specific Mission Order for this testing.

61. The AIU also submits (and the Panel accepts) that the Panel can be comfortably satisfied that Mr Bett refused to provide a Sample. The DCO confirms that Mr Bett stated that he would not be tested (which Mr Bett does not dispute) and in point of fact no Sample was collected from him on that day.

62. The Panel also accepts the AIU's submission that Mr Bett's refusal was "intentional", within the meaning of Article 2.3 ADR. While the comment to Code Article 2.3 requires that the refusal be intentional, without defining what is meant by the term in this context, the natural and ordinary meaning of the term is that the athlete deliberately declined to provide a Sample and it is clear that Mr Bett had such intent His decision to refuse to provide a Sample was on his own admission, deliberate in full knowledge that there would be consequences for so-doing, in particular because Mr Bett confirms that the DCO so informed him .

63. The Panel concludes that the AIU has established a *prima facie* case of intentional refusal by Mr Bett to submit to Sample collection under Article 2.3 ADR and the

only remaining issue as to whether the first charge is made good is whether Mr Bett can show Compelling Justification for such refusal.

64. The Panel would accept and endorse the following propositions vouched for by a variety of jurisprudence;

(i) *"If the Athlete can prove on a balance of probability that his act was compellingly justified, his rejection of the test will be excused";* ***Brothers v FINA****, CAS 2016/A/4631*, para. 76

(ii) the existence vel non of such justification shall be determined objectively, the issue is not "*whether the Athlete was acting in good faith, but, whether objectively he was justified by compelling reasons to forego the test*". ***Troicki v ITF***, CAS 2013/A/3279, para. 9.15 ;

(iii) the phrase "compelling justification" in Article 2.3 ADR must be construed "e*xtremely narrow[ly*]", because otherwise testing efforts would be completely undermined. See e.g., ***Wium v IPC****,* IPC Management Committee decision dated 7 October 2005, para 3: *"an efficient out-of-competition testing programme can only work if the boundaries of "compelling justification" are kept extremely narrow. Only truly exceptional circumstances should be allowed to justify refusal to submit to testing."*

(iv) For this purpose the athlete must show that the failure to provide a Sample, was unavoidable. See e.g., ***Jones v WRU***, NADP Appeal Tribunal decision dated 9 June 2010, para. 57: *"The phrase "compelling justification" connotes that the reason for an athlete refusing must be exceptional, indeed, unavoidable".* See also SDRCC DT 07-0058 ***CCES v Boyle***, decision dated 31 May 2007, para. 53.

(v) *"[i]f it remains "physically hygienically and morally possible" for the sample to be provided, despite objections by the athlete, the refusal to submit to the test cannot be deemed to have been compellingly justified".* See ***Brothers v FINA****,* CAS 2016/A/4631 para 79, quoting ***Azvedo v FINA****,* CAS 2005/A/925 para. 75.

65. In this case Mr Bett relies by way of justification exclusively upon the suspicion that he says he held concerning the authenticity of the DCO on the morning of 24 February 2018.

66. The Panel accepts the AIU's submission that Mr Bett's explanation taken at face value as to what occurred at Mr Bett's residence on the 24th February 2018, does not evidence unavoidable circumstances that made it physically, hygienically or morally impossible for him to provide a Sample.

67. The Panel is not accordingly obliged to express any view as to the genuineness of Mr Bett's suspicion or to investigate further why he produced different explanations at different times of which the one on which he now relies is inconsistent with the documentary record; nor is it required to adjudicate upon any differences between the version of events of what transpired on the 24th February 2018 in terms of their confrontation given by the DCO on the one hand and by Mr Bett on the other, an exercise which is intrinsically made more difficult when the main participants are not subject to cross-examination. It suffices for it to say that the differences appear insubstantial.

68. The Panel nonetheless would observe that Mr Bett's asserted suspicions as to the authenticity of the DCO are peculiar. According to the witness statements of both the DCO as well as Mr Scott, the DCO had introduced himself as a DCO to Mr Bett already on 21 February 2018 (i.e. when Mr Bett was subjected to another doping control by Mr Scott). On that occasion Mr Bett does not appear to have had any doubts about the authenticity of Mr Scott and knew also that Mr Scott and the DCO were colleagues. The Panel is accordingly not convinced that Mr Bett had any real basis to question the authenticity of the DCO when they met again three days later.

69. It is the Panel's view, for the foregoing reasons, that Mr Bett has not surmounted the high hurdle of establishing any compelling justification for his refusal to submit to a doping test on 24 February 2018.

THE FIRST CHARGE - CONSEQUENCES FOR THE ANTI-DOPING RULE VIOLATION

Period of Ineligibility

70. Given that this is Mr Bett's first anti-doping rule violation, his case is governed by Article 10.3.1 ADR which provides:

> *"10.3.1 For an Anti-Doping Rule Violation under Article 2.3 or Article 2.5 that is the Athlete or other Person's first anti-doping offence, the period of Ineligibility imposed shall be four years unless, in a case of failing to submit to Sample collection, the Athlete can establish that the commission of the Anti-Doping Rule Violation was not intentional (as defined in Article 10.2.3), in which case the period of Ineligibility shall be two years."*

71. Here, Mr Bett cannot establish that his commission of the offence was not intentional; the offence itself contained required proof of intention. A period of Ineligibility of four years must therefore be imposed pursuant to Article 10.3.1 ADR.

72. The period of Ineligibility shall commence in accordance with Article 10.10.2, the normal rule being that it starts on the day that it is imposed by the Panel. Mr Bett must, however, receive credit for the period of Provisional Suspension already served since 15 August 2018 against the total period of ineligibility imposed.

Disqualification of Results and Other Consequences

73. Article 10.8 ADR provides that any results achieved by Mr Bett subsequent to his anti-doping rule violation "shall" be disqualified, with all medals, titles, points, prize and appearance money forfeited, unless he is able to show that "fairness requires otherwise". It is clear from the wording of the provision that disqualification of results is the norm, not the exception. ***ITF v Bogomolov***, Independent Tribunal decision dated 26 September 2005, para. 109: *"The question is one of fairness on the facts of each case, but the starting point is indeed […] that disqualification is the norm and not the exception. Otherwise the rule would have been drafted the other way round, so as to make non-disqualification the norm unless the Tribunal considers that fairness requires disqualification".*

74. The Panel accepts, in application of Article 10.8 ADR, that there must be disqualification of all results, including the forfeiture of any medals, titles, points, prize and appearance money, that Mr Bett achieved between 24 February 2018 (i.e. the date of the anti-doping rule violation) and 15 August 2018 (i.e. the date Mr Bett was provisionally suspended).

THE SECOND CHARGE - FACTUAL BACKGROUND

75. Analysis of the Sample collected from Mr Bett on 31 July 2018 showed the presence of r-EPO, a prohibited substance according to S2 of the WADA 2018 Prohibited List, i.e. an Adverse Analytical Finding ("**AAF**").

76. On 23 August 2018 Mr Bett was notified of the AAF by e-mail to his e-mail address and required to respond by 31 August 2018. In addition, Mr Jackson of the AIU confirmed that Mr Bett had received the e-mail of 23 August 2018 in a conversation with Mr Bett by telephone on 29 August 2018. Mr Bett (who was also reminded to respond in a Whatsapp message of 29 August 2018) undertook to provide an explanation for the AAF and a response to the AIU concerning the B Sample analysis by the deadline of 31 August 2018.

77. However, Mr Bett failed to respond by the 31 August 2018 deadline, or at all. Pursuant to Article 7.3.3(e) ADR, he was therefore considered to have waived his right to the B Sample analysis.

78. Mr Bett has claimed that he *"never used EPO"* (see e-mail of 19 October 2018). Beyond that bare denial he has not sought to provide an explanation for the AAF.

THE SECOND CHARGE - APPLICABLE RULES

79. Article 2 ADR specifies the circumstances and conduct that constitute anti-doping rule violations. This includes Article 2.1 which provides:

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

2.1.1 It is each Athlete's duty to ensure that no Prohibited Substance enters his body. 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."

80. Article 2.2 ADR also states that use of a prohibited substance or prohibited method constitutes an anti-doping rule violation:

> *"**2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method***
>
> *2.2.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his body and that no Prohibited Substance is Used. Accordingly, it is not necessary that intent, Fault, negligence, or knowing Use on the Athlete's part be demonstrated in order to establish an Anti-Doping Rule Violation under Article 2.1."*

81. Articles 2.1.1 and 2.2.1 ADR provide that it is each athlete's personal duty to ensure that no prohibited substance enters his body and that no prohibited substance or prohibited method is used. Athletes are strictly responsible for any prohibited substance or its metabolites or markers found in their samples and both foregoing provisions provide:

> *"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 […]."*

82. With regard to the presence of a prohibited substance or its metabolites or markers in an athlete's sample, Article 2.1.2 ADR states:

> *"2.1.2 Sufficient proof of an Anti-Doping Rule Violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or, where the Athlete's B Sample*

is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle."

83. In relation to an athlete's use of a prohibited substance or prohibited method, Article 2.2.2 ADR provides:

> *"2.2.2 The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an Anti-Doping Rule Violation to be committed."*

84. The presence of a prohibited substance or its metabolites or markers in an athlete's sample is therefore sufficient to establish that an athlete has committed an anti-doping rule violation pursuant to Article 2.1 ADR. Additionally, the use of a prohibited substance or a prohibited method is sufficient for an anti-doping rule violation to be committed under Article 2.2 ADR.

85. Article 3.1 ADR provides that the IAAF shall have the burden of establishing that an anti-doping rule violation has occurred to the comfortable satisfaction of the Tribunal:

> *"3.1 The IAAF or other Anti-Doping Organisation shall have the burden of establishing that an Anti-Doping Rule Violation has been committed. The standard of proof shall be whether the IAAF has established the commission of the alleged Anti-Doping Rule Violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that 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."*

86. Article 3.2 ADR states that facts relating to anti-doping rule violations may be established by any reliable means.

87. In that regard, Article 3.2 ADR also states:

> *"3.2.2 Compliance with an International Standard (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude*

that the procedures addressed by the International Standard were performed properly.

3.2.3 WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in compliance with the International Standard for Laboratories. The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred that could reasonably have caused the Adverse Analytical Finding. In such an event, the IAAF shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

3.2.4 Departures from any other International Standard, or other anti-doping rule or policy set out in the Code or these Anti-Doping Rules that did not cause the facts alleged or evidence cited in support of a charge (e.g., an Adverse Analytical Finding) shall not invalidate such facts or evidence. If the Athlete or other Person establishes the occurrence of a departure from an International Standard or other anti-doping rule or policy set out in the Code or these Anti-Doping Rules that could reasonably have caused the Adverse Analytical Finding or other facts alleged to constitute an Anti- Doping Rule Violation, then the IAAF or other Anti-Doping Organisation shall have the burden to establish that such departure did not cause such Adverse Analytical Finding or the factual basis for the Anti-Doping Rule Violation."

THE SECOND CHARGE - ANALYSIS

88. It is each athlete's personal duty to ensure that no prohibited substance enters his/her body and that no prohibited substance is used. Accordingly, it is not necessary for the IAAF to demonstrate intent, fault, negligence or knowing use by the Athlete in order to establish that the anti-doping rule violations have occurred. An athlete is strictly liable for the presence and use of prohibited substances.

89. The Laboratory is presumed to have conducted all analysis procedures in compliance with the International Standard for Laboratories ("**ISL**") pursuant to Article 3.2.3 ADR.

90. The AIU has reviewed the AAF in accordance with Article 7.3 ADR. Mr Bett does not have a valid Therapeutic Use Exemption ("**TUE**") justifying the presence or use of r-EPO and no departures from the ISTI or the ISL have been identified.

91. Therefore, juxtaposing in particular the unchallenged AAF with Mr Bett's bare denial of use, the Panel accepts the AIU submission that Mr Bett has committed anti-doping rule violations under Article 2.1 ADR and Article 2.2 ADR.

THE SECOND CHARGE - CONSEQUENCES

Period of Ineligibility

92. Article 10.2 ADR provides the sanction to be imposed for anti-doping rule violations under Article 2.1 ADR (presence) and Article 2.2 ADR (use) as follows:

> "***10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method***
>
> *The period of Ineligibility to be imposed for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6 that is the Athlete or other Person's first anti-doping rule violation shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:*
>
> *10.2.1 The period of Ineligibility shall be four years where:*
>
> *(a) The Anti-Doping Rule Violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the Anti-Doping Rule Violation was not intentional."*

93. r-EPO is not a specified substance. The period of Ineligibility shall therefore be four years pursuant to Article 10.2.1(a) ADR, unless Mr Bett can establish that the anti-doping rule violations were not intentional.

94. The Panel accepts and endorses the following principle from a variety of jurisprudence:

(i) For the purpose of satisfying the burden which lies upon him or her the athlete must presumptively establish how the substance entered his/her body. See, for example, CAS 2016/A/4377 WADA v. IWF & Alvarez, at 51; CAS 2016/A/4662 WADA v. Caribbean RADO & Greaves, at 36; CAS 2016/A/4563 WADA v. EgyNADO & ElSalam, at. 50; CAS 2016/A/4626 WADA v. Indian NADA & Meghali; CAS 2016/A/4845 Fabien Whitfield v. FIVB;

(ii) Even if there is a theoretical possibility that an athlete might be able to rebut the presumption of intentionality without establishing the origin of the prohibited substance, it has been made crystal clear that this will be the case only in the most exceptional of circumstances. See, for example, CAS 2016/A/4534 ***Villanueva v. FINA***, where the Panel referred to the "*narrowest of corridors*"; CAS 2016/A/4919 ***WADA v. WSF & Iqbal***, where the Panel held that "*in all but the rarest cases the issue is academic*" (para. 66);

(iii) In that an athlete must provide concrete evidence of the origin of a prohibited substance: see for example ***WADA v. Damar Robinson & JADCO*** CAS 2014/A/3820, at paragraph *80. ''In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide* ***actual evidence*** *as opposed to mere speculation";*

(iv) By way of corollary, an athlete must do more than simply deny the deliberate ingestion of a prohibited substance. See for example ***José Paulo Guerrero v FIFA*** CAS 2018/A/5546 and ***WADA v. FIFA & José Paulo Guerrero*** CAS 2018/A/5571, award dated 30 July 2018, at paragraph 65:

> *"It is insufficient for an athlete to deny deliberate ingestion of a prohibited substance and accordingly assert that there must be an innocent explanation for its presence in his system;"*

and in ***International Wheelchair Basketball Federation v. UK Anti-Doping & Simon Gibbs,*** CAS 2010/A/2230, award of a Sole Arbitrator dated 22 February 2011, which provided:

> *"To permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body"* (para 11.12);

(v) Evidence which goes not further than to establishing that a scenario is possible is insufficient to establish the origin of the prohibited substance. See for example, the Panel in CAS OG 16/25 ***WADA v. Yadav & NADA*** "*found the sabotage(s) theory possible, but not probable and certainly not grounded in real evidence*". Ultimately, "*the nature and quality of the defensive evidence put forward by the athlete, in light of all the facts established, must be such that it leaves the tribunal actually satisfied (albeit not comfortably so) that the athlete's defence is more likely than not* [to be] *true*".

95. In the present case as already noted, Mr Bett has provided no explanation for the AAF other than a bare denial.

96. In these circumstances, Mr Bett has necessarily failed to establish how r-EPO entered his body in order to satisfy the burden placed upon him to demonstrate that the Article 2.1 and 2.2 ADR violations were not intentional, or to establish in any way that his AAF was committed without intent.

97. Mr Bett must therefore be subject to a period of Ineligibility of four years in accordance with Article 10.2.1(a) ADR, but may receive credit against the period of Ineligibility for the period of Provisional Suspension served from the date of its imposition pursuant to Article 7.10.1ADR upon notification to Mr Bett of the AAF on 23 August 2018.

Disqualification of Results and other Consequences

98. Pursuant to Article 10.8 ADR, any results obtained by Mr Bett from the date of the Article 2.1 ADR violation *viz.* 31 July 2018 until the date of his Provisional Suspension for that violation on 23 August 2018 shall be disqualified, with all resulting consequences, including the forfeiture of any medals, titles, awards, points, prize and appearance money. However, according to the IAAF's records, all of Mr Bett's results in 2018 were obtained prior to the date that the violation occurred on 31 July 2018. Application of Article 10.8 ADR therefore has no practical consequences on his results.

POSTSCRIPT

99. Given that Mr Bett was served with notice of the first charge on 15 August 2018, while he committed the second ADR violation already on 31 July 2018, this is not a case of multiple violations under ADR 10.7.

100. In such case, Article 10.7.4.a ADR states as follows:

> *"For purposes of imposing sanctions under Article 10.7, an Anti-Doping Rule Violation will only be considered a second Anti-Doping Rule Violation if the Integrity Unit can establish that the Athlete or other Person committed the second Anti-Doping Rule Violation after the Athlete or other Person received notice, or after the Integrity Unit made a reasonable attempt to give notice, of the first alleged Anti-Doping Rule Violation. If the Integrity Unit cannot establish this, the Anti-Doping Rule Violations shall be considered together as one single Anti-Doping Rule Violation for sanctioning purposes, and the sanction imposed shall be based on the Anti-Doping Rule Violation that carries the more severe sanction."*

101. Given that the sanctions to be imposed for the first and second charge are identical, the Panel finds that a four year period of Ineligibility is to be imposed on Mr Bett.

102. Even though two ADRV's are established to have been committed, in accordance with Article 10.7.4.a ADR, this is to be considered as one single ADRV. Article 10.7.6 ADR, determining, inter alia, that *"the Ineligibility periods for the separate offences*

shall run sequentially, not concurrently" is therefore not applicable, as a consequence of which the period of ineligibility to be served by Mr Bett is four years.

COSTS

103. The AIU has requested a contribution towards the IAAF's legal costs in these proceedings. Costs are a matter for the Panel's discretion pursuant to ADR 8.6.1.(j).

104. As the losing party in respect of both charges, Mr Bett is ordered to pay to AIU the total amount of £500 as a contribution towards the legal fees and other expenses incurred in connection with these proceedings within 28 days of notification of this decision

ON THESE GROUNDS THE PANEL RULES

105. Mr Bett had violated Article 2.3 ADR in that he intentionally refused to submit to Sample collection on 24 February 2018.

106. Mr Bett had violated Articles 2.1 and 2.2 ADR in that he used a prohibited substance and that a prohibited substance was found to be present in his urine Sample numbered 3122261 provided out-of-competition on 31 July 2018.

107. A four year period of Ineligibility is imposed on Mr Bett, which shall run from 15 August 2018 (the date Mr Bett was provisionally suspended in relation with the first charge) and shall end on 14 August 2022.

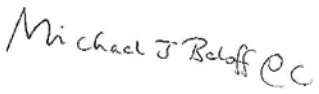
108. Mr Bett's competition results between 24 February 2018 and 15 August 2018 are disqualified with all resulting consequences, including the forfeiture of any medals, titles, awards, points, prize and appearance money.

109. Mr Bett may return to train as part of a team or to use the facilities of a club or other member organisation of a Signatory's member organisation during the last two months of his period of Ineligibility.

110. Mr Bett is ordered to pay to AIU the total amount of £500 as a contribution towards the legal fees and other expenses incurred in connection with these proceedings within 28 days of notification of this decision.

RIGHT TO APPEAL

111. This decision may be appealed in accordance with Article 13 ADR and its subsections.



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