**CAS 2020/A/6763 Trinidad and Tobago Olympic Committee (TTOC) v. World Athletics**

**ARBITRAL AWARD**

**delivered by the**

**COURT OF ARBITRATION FOR SPORT**

**sitting in the following composition:**

Sole Arbitrator: Mr. James Drake Q.C., Barrister, London, United Kingdom

**in the arbitration between**

**Trinidad and Tobago Olympic Committee**, Trinidad and Tobago

Represented by Mr Dave A. Williams, Attorney-at-Law, Port of Spain, Trinidad, West Indies

**Appellant**

**and**

**World Athletics**, Monaco

Represented by Mr Tony Jackson, Athletics Integrity Unit of World Athletics, Monaco, and Mr Ross Wenzel, Attorney-at-Law with Kellerhals-Carrard, Lausanne, Switzerland

**Respondent**

## I. THE PARTIES

1. The Appellant, the Trinidad and Tobago Olympic Committee (the "**Appellant**" or "**TTOC**"), is the National Olympic Committee ("**NOC**") for the Republic of Trinidad and Tobago as recognised by the International Olympic Committee ("**IOC**"). TTOC brings this appeal in its capacity as the National Anti-Doping Organisation of Trinidad and Tobago.

2. The Respondent, World Athletics, was formerly known as the International Association of Athletics Federations (or the "**IAAF**") and is the international governing body of the sport of athletics, recognised as such by the IOC. World Athletics has its seat and headquarters in Monaco. It is a signatory to the World Anti-Doping Code (the "**WADA Code**") and in compliance therewith has adopted a set of rules, the "**World Athletics Anti-Doping Rules**", in an effort to eradicate doping in athletics. It has also established an 'Athletics Integrity Unit' (the "**Athletics Integrity Unit**") which is charged with responsibility for the day-to-day administration of the World Athletics Anti-Doping Rules, and a World Athletics disciplinary tribunal (the "**Disciplinary Tribunal**") to hear Anti-Doping Rule Violations ("**ADRV**") under the World Athletics Anti-Doping Rules.

## II. THE DECISION ON APPEAL

3. As more fully described below, TTOC appeals against a decision of the Disciplinary Tribunal to the effect that Ms Michelle-Lee Ahye ("**Ms Ahye**" or the "**Athlete**") had committed three 'whereabouts failures' within a 12-month period so as to amount to an ADRV under the World Athletics Anti-Doping Rules, with the consequence that a period of ineligibility of two years was imposed on Ms Ahye and her results disqualified. (It is inferred that TTOC brings this appeal on the Athlete's behalf but Ms Ahye is neither a party nor a witness in these proceedings.)

## III. THE FACTUAL BACKGROUND

4. Ms Ahye is a 27-year-old track athlete from Trinidad and Tobago. She is a specialist sprinter, and competes in the 100m and 200m events at international level. She won the gold medal in the 100m sprint at the 2018 Commonwealth Games in Australia.

5. It is common ground that Ms Ahye was at all material times in the World Athletics' International Registered Testing Pool[1] and, as such, was an "International-Level Athlete" for the purposes of the World Athletics Anti-Doping Rules and was thus required to provide her whereabouts information to the Athletics Integrity Unit (as provided by Article 5.7 of the World Athletics Anti-Doping Rules, Appendix A of the World Athletics Anti-Doping Regulations, and the International Standard for Testing and Investigations ("**ISTI**")).

6. In summary, this meant that Ms Ahye was obliged to do the following things: (a) advise the Athletics Integrity Unit of her whereabouts on a quarterly basis; (b) update that information as necessary so that it remained accurate and complete at all times; and (c) make herself available for testing by a Doping Control Officer (or "**DCO**") at such whereabouts. (For the detailed requirements, see the World Athletics Anti-Doping Regulations at Appendix A.)

7. In August 2019, Ms Ahye was reported for having three Missed Tests (see below for definition) during a 12-month period beginning 23 June 2018. The first was on 23 June 2018 (the "**First Missed Test**"), the second on 23 February 2019 (the "**Second Missed Test**"), and the third on 19 April 2019 (the "**Third Missed Test**").

8. The factual matters surrounding the three Missed Tests are common ground; indeed, insofar the facts and matter surrounding the Third Missed Test are concerned, the TTOC expressly accepts

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[1] That is: "*The pool of highest priority Athletes established by the [Athletics] Integrity Unit at the international level who are subject to focused In-Competition and Out-of-Competition Testing as part of the Respondent's Test Distribution Plan and therefore are required to provide whereabouts information as provided in Article 5.7 and the International Standard for Testing and Investigations.*"

and does not challenge the factual account given by DCO (per email from counsel for the Appellant dated 14 August 2020).

9. The starting point, but only the starting point, is World Athletics' Notice of Charge dated 30 August 2019, which described each of the Missed Tests in the following terms:

> *1. Facts*
>
> *A. First Whereabouts Failure: Missed Test dated 23 June 2018*
>
> *1.1. On 25 June 2018, the AIU wrote to you by e-mail requesting your explanation for an apparent Missed Test that occurred on 23 June 2018. Your Whereabouts information for 23 June 2018 provided that you would be available at the following location between 7:00AM and 8:00AM: [...][2].*
>
> *1.2 You were asked to provide your explanation for this apparent Missed Test by no later than 9 July 2018, in the absence of which, the apparent Missed Test on 23 June 2018 would be confirmed against you.*
>
> *1.3. On 4 July 2018, at 13:59, the AIU received your explanation for the apparent Missed Test on 23 June 2018. In summary, you did not dispute the apparent Missed Test on 23 June 2018. You apologised for not being located and available for Testing on 23 June 2018. You stated that you originally planned to leave for the Trinidad Championships later in the day on 23 June 2018 but had changed your flight late the night before 'due to personal reasons'. Therefore, you stated that you did not update your Whereabouts because 'I was rushing around all night and in the morning prior to flying to Trinidad'.*
>
> *1.4. You also stated that you understood the requirement to provide accurate and complete whereabouts and that the occasion was unique for you. You concluded in your explanation that you would 'endeavour to comply with the AIU and Whereabouts filing going forward'.*
>
> *1.5. On 22 November 2018, the AIU wrote to you and confirmed the apparent Missed Test on 23 June 2018 against you. You were afforded the right to request an Administrative Review of that decision by no later than 6 December 2018 and advised that if you failed to do so then the Missed Test would be considered as a Whereabouts Failure for the purposes of Article 2.4 ADR.*
>
> *1.6. You did not ask for an Administrative Review.*
>
> *1.7. Therefore, the AIU recorded a Missed Test against you effective 23 June 2018.*
>
> *B. Second Whereabouts Failure: Missed Test dated 23 February 2019*
>
> *1.8. On 5 March 2019, the AIU wrote to you by e-mail requesting your explanation for an apparent Missed Test that occurred on 23 February 2019. Your Whereabouts information for 23 February 2019 provided that you would be available at the following location between 6:00AM and 7:00AM:*
>
> *1.9. [...][3]*
>
> *1.10. In summary, the DCO arrived at the above address at 06:00 and noted a FedEx package at the front door. The DCO rang the doorbell and knocked on the door continuously from 06:00 until 06:30 and again from 06:40 to 06:51 but got no response. The DCO then called the first telephone number given in your Whereabouts information but "got a strange message" and "Thought I [they] had [the] wrong number". The DCO*

[2] The stated location was Ms Ahye's apartment in Texas, the precise details of which have been omitted for obvious reasons.
[3] Likewise.

*therefore called the second telephone number in your Whereabouts information and received a message saying "wireless customer unavailable, please call later."*

*1.11. The DCO called the first telephone number again at 07:01 and was able to speak with you. You confirmed that you were in Trinidad.*

*1.12. The DCO reminded you to update your Whereabouts information and then left the address.*

*1.13. At 13:41GMT on 23 February 2019, you updated your overnight accommodation and 60-minute time slot in your Whereabouts information for the period 23 February to 10 March 2019 to an address in Trinidad.*

*1.14. You were asked to provide your explanation for the apparent Missed Test on 23 February 2019 by no later than 19 March 2019, in the absence of which, the apparent Missed Test on 23 February 2019 would be confirmed against you.*

*1.15. You failed to respond and to provide any explanation concerning the apparent Missed Test on 23 February 2019.*

*1.16. On 20 March 2019, the AIU wrote to you and confirmed the apparent Missed Test on 23 February 2019. You were afforded the right to request an Administrative Review of that decision by no later than 3 April 2019 and advised that if you failed to do so then the Missed Test would be considered as a Whereabouts Failure for the purposes of Article 2.4 ADR.*

*1.17. You did not request an Administrative Review.*

*1.18. Therefore, the AIU recorded a Missed Test against you (effective from 23 February 2019) as your second Whereabouts Failure in the twelve-month period beginning 23 June 2018.*

*C. Third Whereabouts Failure: Missed Test dated 19 April 2019*

*1.19. On 3 May 2019, the AIU wrote to you by e-mail requesting your explanation for an apparent Missed Test which occurred on 19 April 2019. Your Whereabouts information stated that you would be available at the following location between 06:00 and 07:00AM on 19 April 2019:*

*1.20. [...]*[4]

*1.21. In summary, on 19 April 2019, a DCO arrived at the above address at 05:50 and attempted to reach you by "knocking 3 times and ringing door bell [sic] with every knock" at each of 06:00, 06:16, 06:31 and 06:45. The DCO also called you using the telephone numbers listed in your Whereabouts information at 06:55 (to the first number) and at 06:56 (to the second number) but was unable to reach you. Having been unable to reach you, the DCO left at 07:02.*

*1.22. You were asked to provide your explanation for failing to be available for Testing on 19 April 2019 between 06:00 and 07:00AM at the above-mentioned location by no later than 17 May 2019.*

*1.23. On 3 May 2019, the AIU received your explanation for the apparent Missed Test on 19 April 2019. You stated the following: 'Missed test I was home on that day you can not knock on the door because I would not hear it my room is all the way on the 3rd level that's why there is a doorbell... this miss test is not my fault because I was home'.*

*1.24. On 10 May 2019, the DCO provided a supplementary report concerning his attempts to locate you for Testing on 19 April 2019. The DCO stated:*

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[4] Likewise.

*1.25. 'To make clearer, when I knock on the door it is 3 raps on the door. So each attempt had the 3 rings of the door bell then 9 raps on the door. I rang the doorbell then 3 raps with 30 second to a minute between each ringing of the doorbell. I did that 3 times on each attempt.'*

*1.26. On 15 July 2019 the AIU wrote to you and informed you that it had concluded that the DCO did what was reasonable to locate you on 19 April 2019 in accordance with Article 4.3(c) of Appendix A of the IAAF Anti-Doping Regulation.*

*1.27. After careful review of your explanation, the AIU concluded that you had failed to prove that no negligent behaviour on your part caused or contributed to your failure to be available for Testing on 19 April 2019 and confirmed the Missed Test against you.*

*1.28. You were afforded the right to request an Administrative Review of that decision by no later than 29 July 2019 and advised that if you failed to do so, then the Missed Test would be considered as a Whereabouts Failure for the purposes of Article 2.4 ADR.*

*1.29. The AIU also informed you that the Missed Test on 19 April 2019 was your third Whereabouts Failure in the twelve-month period which began on 23 June 2018 and that you could expect to receive further correspondence from the AIU in relation to those Whereabouts Failures.*

*1.30. You did not request an Administrative Review.*

*1.31. Therefore, the AIU recorded a Missed Test against you effective from 19 April 2019 as your third Whereabouts Failure in the twelve-month period that began on 23 June 2018.*

10. These factual accounts require some elaboration in light of the subsequent evidence, at least insofar as they relate to the First and Third Missed Tests.

11. As to the First Missed Test, at the hearing before the Disciplinary Tribunal (as to which see further below), Ms Ahye accepted that she misled the Athletics Integrity Unit in relation to the reason for her failure to comply. Contrary to her statement to the Athletics Integrity Unit that she had to change her flight to Trinidad at the last minute and take one the night before (as per the Notice of Charge at 1.3), she was, in fact, already in Trinidad and competing at the Trinidad Championships. No satisfactory explanation was offered for this, and nor is one now.

12. As to the Third Missed Test, in light of the contest on this appeal as to what should have been done by Ms Ahye and by the DCO on 19 April 2019, it is necessary to go into some detail. It is important to point out as well that none of the evidence in respect of the Third Missed Test is contested by TTOC on this appeal. It follows therefore that the account of the facts given in the documents – including as set forth in the transcript of the hearing before the Disciplinary Tribunal – is accepted and unchallenged.

13. As noted in the Notice of Charge, Ms Ahye's whereabouts filing in respect of 19 April 2019 stated that she would be available between the hours of 06:00 and 07:00 on 19 April 2019 at her apartment in Texas.

14. The DCO, Mr Thomas, submitted an (undated) "Unsuccessful Attempt Report" in relation to 19 April 2019. The salient elements are these:

    a. He arrived at the apartment building 05:50 and left at 07:02.

    b. He knocked and or rang the bell 12 times, at 06:00, 06:16, 06:31 and 06:45.

    c. He telephoned Ms Ahye twice. He called her at 06:55 on one of the provided telephone numbers, there was no answer, and it went to a recording. He called her again at 06:56 on the second of the provided telephone numbers, with the result that there was again no answer but on this occasion the message said that the person was not available.

15. Mr Thomas also filed a "Supplementary Report" dated 10 May 2019. He said this, all of which is self-explanatory: "*I saw in the comments section of the unsuccessful attempt report that it states I rang the doorbell and knocked 3 times on each attempt and the time I made each attempt. To make clearer when I knock it is 3 raps on the door. So each attempt had the 3 rings on the doorbell then 9 raps on the door. I rang the doorbell then 3 raps with 30 seconds to a minute between each ringing of the doorbell. I did that 3 times on each attempt. Also states in the comments that athlete was called at 0655 at primary number and 0656 at secondary number listed.*"

16. Mr Thomas gave evidence (and was cross-examined) before the Disciplinary Tribunal. Amongst other things, Mr Thomas told the tribunal that he saw "*a lady*" come out of the apartment complex with her dog: "*there was a lady who did come out and walk her dog but she never passed in front of me*". The woman came from a different building in the apartment complex, different that is to where Ms Ahye lived. Mr Thomas told the tribunal that he did not speak with her because she was not from Ms Ahye's building, that she was from a "*completely different building*" some 50-60 yards away from Ms Ahye's apartment, and that if he went over to speak with her he would lose sight of Ms Ahye's apartment.

17. For her part, Ms Ahye said that she was at home on 19 April 2019 but had not heard the doorbell or the knocking on the door or the telephone. She offered a number of reasons for that failure:

    a. She said that she did not hear the DCO's knock on the door because her apartment is on the third floor, which is why, she said, there was a doorbell. She said that the missed test was not her fault because she was at home.

    b. She said that the doorbell could not be heard on the second or third floors of her apartment building and that she had complained of that to the building manager in March 2019, ie a month before the Third Missed Test. Despite best efforts, she was unable to solve the problem, with the result that the doorbell could not be heard in her apartment on 19 April 2019.

    c. She said that the situation with the doorbell had remained the same since she had first moved into the property a year or so before the Third Missed Test.

## IV. THE DECISION OF DISCIPLINARY TRIBUNAL

18. The Notice of Charge is dated 30 August 2019. Ms Ahye was provisionally suspended from that date.

19. On 2 September 2019, Ms Ahye denied the charge and sought a personal hearing before the Disciplinary Tribunal. That hearing took place by video-link on 19 September 2019, at which Ms Ahye and World Athletics appeared and were represented by legal counsel. The Disciplinary Tribunal issued its decision on 7 January 2020. The Disciplinary Tribunal decided as follows:

    a. "*The Athlete has committed an ADRV under Article 2.4 of the IAAF Anti-Doping Rules.*

    b. *A period of Ineligibility of two years is imposed upon the Athlete commencing on 19th April 2019.*

    c. *The Athlete's results from 19th April 2019 until the date of the provisional suspension on 30th August 2019 shall be disqualified with all resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money.*"

20. It is instructive to summarise the proceedings before the Disciplinary Tribunal:

    a. It was common ground that Ms Ahye had been reported for three Missed Tests during the 12-month period from 23 June 2018.

b. Ms Ahye accepted that the First and Second Missed Tests amounted to breaches of the World Athletics Anti-Doping Rules. Arguments were made as to the level of fault with respect to the Second Missed Test but it was never said that it did not, of itself, amount to a breach of the World Athletics Anti-Doping Rules.

c. My Ahye did however contest the Third Missed Test and contended that it was not to be characterised as a Missed Test because World Athletics had failed to discharge its burden of proof in relation to the actions taken by the DCO. This was how it was put before the Disciplinary Tribunal: "*the AIU cannot meet its burden of proving a "missed test" unless it can prove (i) that during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances; and (ii) that the Athlete's failure to be available for Testing at the specified location during the specified 60-minute time slot was at least negligent*".

d. As to that, the Disciplinary Tribunal decided that World Athletics had established that the DCO did all that he reasonably could in the circumstances to gain access to the Athlete and that, accordingly, World Athletics had established, to the tribunal's comfortable satisfaction, that there had been a rule violation by reason of the three Missed Tests.

e. In light of that determination, Ms Ahye argued that, nevertheless, there was no fault or negligence on her part in relation to the Third Missed Test so that, pursuant to Article 10.4 of the World Athletics Anti-Doping Rules, the period of ineligibility was to be "*eliminated*".

f. The Disciplinary Tribunal concluded that Ms Ahye had not carried her burden of showing no fault or negligence for several reasons:

   i. One, the tribunal concluded that Ms Ahye was aware of the requirements upon her to meet her whereabouts responsibilities and that, in circumstances where she already had two Missed Tests confirmed against her, she "*should therefore have been on her guard in April 2019 about the possible consequences of missing a third test*".

   ii. Two, the tribunal concluded that Ms Ahye had failed to take sufficient steps to remedy whatever problems she was experiencing with her doorbell, concluding that her efforts in this respect were "*at best, desultory*" and that her failure to do anything about the issue over a number of months was "*reprehensible*".

   iii. Three, on the assumed basis that there was nothing more that could have been done about the doorbell on 19 April 2019, the tribunal concluded that Ms Ahye could have either (i) been awake during the nominated slot and/or slept on the second floor of her apartment building so as to be closer to the door and *thus "better placed"* to hear the bell or a knock on the door.

   iv. Four, the tribunal noted that Ms Ahye had not taken steps to make sure that she could hear her own telephone in the event of any need on the part of the DCO to contact her that way.

21. In the event, the Disciplinary Tribunal concluded that:

a. Ms Ahye had failed to demonstrate that no negligent behaviour on her part caused or contributed to her failure to be available for testing on 19 April 2019, that this constituted her third Missed Test in the 12-month period beginning on 23 June 2018, and that, accordingly, Ms Ahye had committed an ADRV pursuant to Article 2.4 of the World Athletics Anti-Doping Rules; and

b. the mandatory period of ineligibility should not be reduced.

22. The Disciplinary Tribunal therefore issued the orders set forth above.

## V. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. By its Statement of Appeal, TTOC appeals from the decision of the Disciplinary Tribunal.

24. On 10 February 2020, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "**CAS Code**"), TTOC filed is Statement of Appeal dated 31 January 2020.

25. On 21 February 2020, TTOC filed its Appeal Brief with various appendices and exhibits, in accordance with Article R51 of the CAS Code. TTOC requested (a) expedition and (b) the appointment of a sole arbitrator.

26. World Athletics submitted it Answer Brief on 27 March 2020 in accordance with Article R55 of the CAS Code. It too was accompanied by various exhibits (including the hearing bundle from the hearing before the Disciplinary Tribunal). World Athletics (a) declined to agree to expedition and (b) reserved its position on a sole arbitrator until the nomination had been made.

27. On 1 April 2020, the Parties were invited to inform the CAS Court Office whether they wanted a hearing to take place or whether they were content for the matter to be determined by the Sole Arbitrator on the papers alone.

28. On 4 April 2020, TTOC indicated its preference for the matter to proceed based solely on the Parties' written submissions and without the need for an oral hearing.

29. On 20 July 2020, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to submit the present matter to a sole arbitrator pursuant to Article R50 of the CAS Code.

30. On 6 August 2020, pursuant to Article R54 of the CAS Code, the CAS Court Office informed the Parties that the Panel appointed to decide the present proceedings was constituted as follows:

    Mr James Drake Q.C., Barrister, London, United Kingdom as Sole Arbitrator.

31. On 10 August 2020, World Athletics was prepared to agree with this matter being determined by the Sole Arbitrator based solely on the Parties' written submissions "*subject to the confirmation that the Appellant accepts the entirety of the evidence given by the DCO for the 19 April 2019 Missed Test in the Unsuccessful Attempt Report, the Witness Statement and in his oral testimony before the Disciplinary Tribunal*". TTOC gave that confirmation on 14 August 2020. (It transpires that there was no DCO witness statement and that this reference was in error.)

32. On 15 September 2020, the CAS Court Office, on behalf of the Sole Arbitrator, issued an Order of Procedure, which was duly signed by the Parties. Amongst other things, by signing the said order the Parties confirmed: (a) "*their agreement that the Sole Arbitrator may decide this matter based on the Parties' written submissions*"; and (b) "*that their right to be heard has been respected*".

33. This matter is therefore to be determined on the papers alone and on the express basis that, paraphrased, the evidence of the DCO as to the events of 19 April 2019 are accepted and unchallenged.

## VI. SUBMISSIONS OF THE PARTIES

### TTOC's Submissions and Requests for Relief

34. TTOC appeals against the decision of the Disciplinary Tribunal imposing upon Ms Ahye a period of ineligibility of two years commencing 19 April 2020. According to TTOC, it is "*in the interest of fairness and the principles of natural justice that the award should be struck out on the basis that it is harsh and oppressive and is inconsistent with established precedents dealing with similar issues for which the Athlete was charged*".

35. By its Appeal Brief, the grounds of appeal are articulated in the following way (here numbered one through five for ease of reference):

a. Ground 1: *That in the interest of fairness and the principles of natural justice the award issued to the Athlete should be struck out on the basis that it is harsh and oppressive and is inconsistent with established precedents dealing with similar issues for which the Athlete was charged.*

b. Ground 2: *That the Tribunal erred in law when it found that the Respondent did discharge its burden of proof at the requisite standard in relation to the actions of the Dope* [sic] *Control Officer (DCO). The Tribunal applied the incorrect Standard of Proof when assessing the reasonableness of the DCO's conduct on 19th April 2019, as well as, in determining whether the Athlete was able to rebut the presumption of negligence. The Tribunal applied too low a test when considering the DCO's action and too high a test when dealing with the Athlete.*

c. Ground 3: *That the Dope* [sic] *Control Officer (DCO) did not do all that was reasonably necessary to locate the Athlete in that he failed to act in accordance with Article 9.2.1 of the Guidelines for Implementing an Effective Testing Programme.*

d. Ground 4: *That there was the perception of bias in the manner in which the Disciplinary Tribunal dealt with the evidence and ultimately its decision against the Athlete.*

e. Ground 5: *That notwithstanding the Disciplinary Tribunal views relative to the 2nd Missed Test on 23rd February, 2019 by implying that the Athlete was not to blame for same, the Tribunal still proceeded to consider that Test in arriving at the award granted to the Athlete.*

36. TTOC seeks the following relief:

*a. "That TTOC's appeal against the award granted to the Athlete be deemed admissible;*

*b. That the award be set aside in full or that the period of ineligibility be reduced in the interest of fairness and the principles of natural justice on the basis that one of the missed Tests is excusable;*

c. *That the Respondent be ordered to pay to the TTOC the costs that it has incurred in lodging this appeal*".

37. TTOC made a number of submissions in support of its appeal. TTOC said nothing in relation to the First Missed Test, but did address the Second and Third Missed Tests.

***Second Missed Test***

38. TTOC accepts, so it is understood, the facts and matters surrounding the Second Missed Test as described in the Notice of Charge. What is now said by TTOC (though never said by the Athlete, whether to the Athletics Integrity Unit or the Disciplinary Tribunal) is that, having formed the view that Ms Ahye was "*not to blame*" for the Second Missed Test then it follows that the Second Missed Test should not be taken into account as a violation, with the result that no ADRV has been committed, or that, alternatively, there is no fault or negligence to be attributed to Ms Ahye in respect of the Second Missed Test.

39. The argument is put in this way (emphasis in original):

"*15(v). That notwithstanding the Disciplinary Tribunal views relative to the 2nd Missed Test on 23rd February, 2019 by implying that the Athlete was not to blame for same, the Tribunal still proceeded to consider that Test in arriving at the award granted to the Athlete.*

...

*59. It is with respect to the Second Missed Test which the Disciplinary Tribunal considered in arriving at its decision against the Athlete that we do have an issue and which conflicts with what the Tribunal said at paragraph 37 of its Decision. The Tribunal said:- "**The second whereabouts failure was in respect of a miss test on 23rd February, 2019. We make no finding against her as regards the evidence (all lack of evidence) as to how that test came to be missed. We are prepared to accept that this happened as a result of some administrative muddle and that the Athlete's explanation to that effect should be treated as true**".*

*60. If that statement means what it says, then clearly the Tribunal was not blaming the Athlete for the Second Missed Test. Why then was that Test considered in deeming that the Athlete committed an ADRV? It is my respectful view that it ought not to have been considered and as such the Athlete would be deemed not to have committed an ADRV.*

*61. In dealing with the Second Missed Test it was quite evident that the Tribunal did not rely on that test in arriving at its decision against the Athlete. At paragraph 70 (ii) the Tribunal wrote:- **"we say nothing about the second of those missed tests other than to note that it was not contested".** Mr. Sullivan QC in the **Bannister case** noted that the two-year sanction will be applicable only where all three Missed Tests are inexcusable.*

*62. The Disciplinary Tribunal's own admission is that the Second Test is excusable, accordingly, the Athlete did not achieve the threshold to commit an anti-doping rule violation. Even if we are to accept that because the Athlete did not contest the Second Missed Test, she would be deemed to have missed that Test, there was enough mitigating circumstances to warrant a one (1) year suspension, rather than two (2) years.*

*63. I was reliably informed by the Athlete that she was unaware that she could have contested the Second Missed Test. She was not provided with such legal advice from her attorney."*

***Third Missed Test***

40. TTOC criticised the Disciplinary Tribunal's determination in respect of the Third Missed Test on a number of bases, summarised as follows:

a. The Anti-Doping Rules should be construed in a way that produces "consistency" and "proportionality" and in a manner that "does not offend against the rules of natural justice": see CAS 2005/A/830.

b. As for the proof required:

i. The burden of proof is on World Athletics to establish the various elements of the ADRV.

ii. The standard of proof is that World Athletics must establish these elements to a comfortable satisfaction "*bearing in mind that this is a serious allegation*": see CAS 1998/208; CAS JO/96/003 and 004; CAS 2004/A/651. CAS case law "*seems to suggest that the degree of comfortable satisfaction ... should be extremely high in order for it to meet the objective criteria required for a decision which would affect the livelihood of a dedicated ... athlete*". This standard of proof "*should approach the level of certainty and not the level of suspicion.*"

c. An athlete accused of an ADRV is subject to "strict liability". This could operate in a way that is harsh and unfair against the athlete.

d. In such circumstances it is important that the rules being enforced are clear: see CAS OG 04/2003.

e. It is necessary for federations such as World Athletics to proffer the objective elements of the doping offence and if the federation succeeds in doing so then the athlete will be presumed to be guilty – but the athlete has the opportunity of rebutting

the presumption by proving that he or she did not act with intent or negligence: see CAS 2002/A/386; CAS 2001/A/317.

f. It is accepted that the Athlete bears the burden of rebutting this presumption of guilt.

g. The standard of proof which the Athlete must meet in discharging this burden is on the balance of probabilities; i.e., "*of persuading the judging body that the occurrence of a specified circumstance is more probable than its non-occurrence*".

h. The Disciplinary Tribunal erred in two ways:

i. One, it applied the wrong (too low) standard to World Athletics' burden: it applied the balance of probabilities instead of the comfortable satisfaction of the tribunal. Had the tribunal applied the correct (higher) standard it would not have concluded that the DCO did what was reasonably expected of him in relation to the Third Missed Test, with the consequence that the tribunal would have concluded that there were not the requisite three Missed Tests inside 12 months.

ii. Two, it applied the wrong (too high) standard of proof to the Athlete's burden in rebutting the presumption of guilt. It should have applied the balance of probabilities; had it done so, it would have concluded that she was not at fault.

41. The principal complaint on the part of TTOC relates to the steps taken by the DCO on 19 April 2019. In its submissions, it asks "*Did the DCO do what was reasonably expected in the circumstances to locate the Athlete?*" and answers that he did not. TTOC contends that, on a fair reading of the WADA Guidelines, the DCO was required to do more than he did and, in particular, take positive steps to speak with the woman seen leaving the apartment complex on the morning in question.

**World Athletics' Submissions and Requests for Relief**

42. By its Answer Brief, World Athletics asks the CAS to rule that (a) the appeal is dismissed; and (b) World Athletics is granted a substantial contribution to its legal and other costs in connection with these proceedings.

43. World Athletics makes the following submissions, once again summarised for the sake of efficiency.

***Second Missed Test***

44. World Athletics did not address in its Answer the submissions made by TTOC in respect of the Second Missed Test.

***Third Missed Test***

45. With respect to the Third Missed Test, the submissions were as follows:

a. It is accepted that (a) the burden of proof is on World Athletics to establish the various elements of the ADRV and (b) the standard of proof is that the World Athletics establish these elements to the comfortable satisfaction of the tribunal.

b. The Disciplinary Tribunal, applying the correct standard, was right to conclude that the specific elements of an ADRV had been proved – and that in particular World Athletics established that the DCO did all that he reasonably could do in the circumstances.

c. The DCO's conduct was not only reasonable, but exemplary, on the basis that he did the following things:

i. He arrived at the location before the beginning of the 60-minute time slot.

ii. He rang the doorbell and knocked on Ms Ahye's door on four occasions with a combined total of 36 knocks and 12 rings.

iii. He called both telephone numbers given in Ms Ahye's whereabouts information.

iv. He made sure he was in a position to see if anyone left Ms Ahye's apartment building or from the immediate vicinity of her address for the duration of the 60-minute time slot.

d. As to the suggestion that the DCO should have spoken to the lady with the dog, he was under no obligation to do so and the DCO's conduct was irreproachable.

e. The Disciplinary Tribunal applied the correct standard – ie the balance of probabilities -- when asking whether the Athlete was at fault or negligent.

f. In applying the correct standard, the Disciplinary Tribunal was correct to decide that the Athlete had not discharged her burden of showing that she acted without fault or negligence.

g. The issue of fault relates not just to one or other of the Missed Tests but for all three whereabouts failures that go to make up the ADRV.

h. Ms Ahye is a highly experienced athlete, and highly experienced (certainly since 2014, the date of her first whereabouts filing) in anti-doping matters and would have been fully aware at all times of her whereabouts obligations.

i. Sanctions should not be modified unless they are manifestly and grossly disproportionate – see eg CAS 2016/A/4558.

## VII. JURISDICTION OF CAS

46. It is common ground between the Parties that the CAS has jurisdiction in respect of this appeal. That jurisdiction derives from the CAS Code and the World Athletics Anti-Doping Rules in the following way.

47. Article R27 of the CAS Code provides as follows:

*"These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings)."*

48. Pursuant to Article R47 of the CAS Code:

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

49. In turn, the World Athletics Anti-Doping Rules provide as follows:

a. Article 1.8 provides that "*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 ...*".

a. Article 13.1 provides that "*Unless specifically stated otherwise, decisions made under these Anti-Doping Rules may be appealed only as set out in this Article 13. Such decisions shall remain in effect while under appeal unless CAS orders otherwise.*"

b. Article 13.2.1 provides, inter alia, that a decision imposing "Consequences" (as defined in the Anti-Doping Rules) may be appealed and Article 13.2.2 provides that "*cases arising involving International-Level Athletes ... may be appealed exclusively to CAS.*"

c. Article 13.2.4 provides that "*In cases under Article 13.2.2, the following parties shall have the right to appeal to CAS: (a) the Athlete or Athlete Support Person who is the subject of the decision being appealed; ... (d) the National Anti-Doping Organisation of the Athlete ... country of residence or where the Athlete ... is a national or licence holder ....*"

d. Article 13.2.3 in any event provides that "*In cases where Article 13.2.2 does not apply, a decision of the Disciplinary Tribunal may be appealed exclusively to CAS*".

50. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the Parties.

51. It follows that CAS has jurisdiction to decide the present appeal.

## VIII. ADMISSIBILITY OF THE APPEAL

52. Article R49 of the CAS Code provides in part as follows:

"*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against....*"

53. Article 13.7.1 of the World Athletics Anti-Doping Rules provides that the "*deadline for filing an appeal to CAS shall be 30 days from the date of receipt of the reasoned decision in question by the appealing party ... Where the appellant is a party other than the IAAF, to be a valid filing under this Article 13.7.1, a copy of the appeal must be filed on the same day with the IAAF. Within 15 days of the deadline for filing the statement of appeal, the appellant shall file his appeal brief with CAS and, within 30 days of receipt of the appeal brief, the respondent shall file his answer with CAS.*"

54. TTOC received the decision of the Disciplinary Tribunal on 13 January 2020 and the TTOC's Statement of Appeal was filed on 21 January 2020, therefore within the deadline provided for under Article 13.7.1 of the World Athletics Anti-Doping Rules.

55. World Athletics accepts the admissibility of this appeal.

56. In the circumstances, this appeal is admissible.

## IX. APPLICABLE LAW

Article R58 of the CAS Code provides as follows: *"R58 ... 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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

57. This is underscored by Article 187 of the Swiss Private International Law Act, which provides that "*the arbitral tribunal shall rule according to the law chosen by the parties*".

58. It follows that the appeal is determined in accordance with the provisions of the World Athletics Anti-Doping Rules as the 'applicable regulations. This too is common ground.

59. It is therefore necessary to set out the salient provisions of the World Athletics Anti-Doping Rules (and Regulations) relating to whereabouts failures and also the relevant provisions of the **ISTI** and the World Anti-Doping Agency's "*Guidelines for Implementing an Effective Testing Program*" dated October 2014 (the "**WADA Guidelines**").

60. It is common ground that Ms Ahye was at all material times in the World Athletics International Registered Testing Pool and, as such was an "International-Level Athlete" for the purposes of the World Athletics Anti-Doping Rules and thus required to provide her whereabouts information (as provided by Article 5.7 of the World Athletics Anti-Doping Rules, Appendix A of the World Athletics Anti-Doping Regulations and ISTI). As noted above, this meant that Ms Ahye was required to do the following things: (a) to make quarterly 'whereabouts filings' that provide accurate and complete information about her whereabouts during the quarter; (b) to specify in the whereabouts filing for each day in the forthcoming quarter one specific 60-minute slot (between 05:00 and 23.00 hours) where she would be available at a specific location for testing; (c) to update that information as necessary so that it remained accurate and complete at all times; and (c) make herself available for testing at such location at such nominated time.

61. It is also common ground that Article 2.4 of the World Athletics Anti-Doping Rules provides that an ADRV is committed upon: "*Any combination of three Missed Tests ..., as defined in the International Standard for Testing and Investigations, within a twelve-month period by an Athlete in a Registered Testing Pool.*"

62. ISTI defines a "Missed Test" as follows: "*A failure by the Athlete to be available for Testing at the location and time specified in the 60-minute time slot identified in his/her Whereabouts Filing for the day in question, in accordance with Article I.4 of the International Standard for Testing and Investigations.*" Article I.4.3 of the ISTI provides the following:

> "*An Athlete may only be declared to have committed a Missed Test where the Results Management Authority can establish each of the following:*
>
> *a) that when the Athlete was given notice that he/she had been designated for inclusion in a Registered Testing Pool, he/she was advised that he/she would be liable for a Missed Test if he/she was unavailable for Testing during the 60-minute time slot specified in his/her Whereabouts Filing at the location specified for that time slot;*
>
> *b) that a DCO attempted to test the Athlete on a given day in the quarter, during the 60-minute time slot specified in the Athlete's Whereabouts Filing for that day, by visiting the location specified for that time slot;*
>
> *c) that during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test;*
>
> *d) that Article I.4.2 does not apply or (if it applies) was complied with; and*
>
> *e) that the Athlete's failure to be available for Testing at the specified location during the specified 60-minute time slot was at least negligent. For these purposes, the Athlete will be presumed to have been negligent upon proof of the matters set out at sub- Articles I.4.3(a) to (d). That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his/her part caused or contributed to his/her failure (i) to be available for Testing at such location during such time slot and (ii) to update his/her most recent Whereabouts Filing to give notice of a different location where he/she would instead be available for Testing during a specified 60-minute time slot on the relevant day.*"

63. The WADA Guidelines provide guidance in respect of how a DCO should carry out his or her responsibilities. Under the heading "*9.2.1 Making a Reasonable Testing Attempt*", this is said:

*"An unsuccessful attempt to test an Athlete will not amount to a Missed Test unless the ADO on whose behalf the test was attempted can demonstrate to the comfortable satisfaction of the hearing panel that (among other things) the DCO made a reasonable attempt to locate the Athlete for Testing during the 60-minute timeslot specified for the day in question in the Athlete's Whereabouts Filing.*

*What constitutes a reasonable attempt to locate an Athlete for Testing during the 60-minute timeslot cannot be fixed in advance, as it will necessarily depend on the particular circumstances of the case in question, and in particular on the nature of the location chosen by the Athlete for that timeslot.*

*The only truly universal guideline is that the DCO should use his/her common sense. He/She should ask him/herself: "Given the nature of the location specified by the Athlete, what do I need to do to ensure that if the Athlete is present, he/she will know that a DCO is here to collect a Sample from him/her?"*

*In this context, the DCO should bear in mind the requirement to avoid insofar as possible giving the Athlete advance notice of Testing that might provide an opportunity for Tampering or evasion or other improper conduct.*

*In certain circumstances, a degree of advance notice may simply be unavoidable. For example, an Athlete may live or train at a location where access is controlled by security personnel who will not permit access to anyone without first speaking to the Athlete or (for example) a team official.*

*This in itself is neither improper nor suspicious, but the DCO should be especially vigilant in such cases of any other circumstances which may be suspicious (such as a long delay between the security guard contacting the Athlete or team official and the DCO being given access to the Athlete). In this case, the DCO should provide a full report of such suspicious circumstances and should consider requiring the Athlete to give a second Sample.*

*The DCO does not necessarily have to be present at the location specified for the 60-minute time-slot from the beginning of the sixty minutes specified in order for the attempt to be reasonable. However, once he/she arrives at the location the DCO should remain at that location for whatever time is left of the 60-minute timeslot,2 and the DCO should ensure that he/she allows sufficient time to make a reasonable attempt to locate the Athlete during that remaining time.*

*For example, if the location specified is a sports center, and the Athlete has said he/she will be in either the gym or the pool or the changing room, then the Athlete may need to check each of those possible places, and so it is likely that more time will be required to make a proper attempt than if the location specified is the Athlete's house.*

*[Comment: The DCO should stay at the specified location for the remainder of the 60-minute timeslot even if he/she receives apparently reliable information that the Athlete will not be at the location during the 60-minute timeslot (e.g. because he/she is out of the country). This is to avoid any subsequent argument that the information received was in fact wrong and the Athlete turned up at the location after the DCO had left.]*

*If the specified location is the Athlete's house or other place of residence, the DCO should ring any entry bell and knock on the door as soon as he/she arrives. If the Athlete does not answer, the DCO may telephone the Athlete to advise him/her of the attempt in the closing five minutes of the 60-minute period. Such a call is not mandatory however, nor should it be used to invite the Athlete for Testing, but rather to potentially further validate that the Athlete is not present.*

*[Comment: If the Athlete merely specifies the sports center, and the number of potential locations within the sports center make it difficult for the DCO to find the Athlete within the 60-minute timeslot, the Athlete risks a Missed Test.]*

*Preferably, the DCO should wait somewhere close by (e.g. in his/her car) in a place where he/she can observe the (main) entrance to the residence. He/she should then knock/ring again a short time later (e.g. 15 minutes), and should keep doing so periodically until the end of the 60 minutes. At that point, he/she should try one last time at the end of the 60 minutes before leaving the location and completing an Unsuccessful Attempt Report.*

*If the DCO is told that the Athlete is not present at the specified location but can be found in an alternative location not far away, then the DCO should record this information (including the name, number and relationship to the Athlete of the person providing the information), but the DCO should not leave the specified location to go to try to find the Athlete, in case the Athlete is trying to get back to the specified location and the DCO misses him/her in transit.*

*Instead, the DCO should remain at the specified location for the remainder of the 60-minute timeslot. Thereafter, he/she is entitled to go to the alternative location (if so instructed by the ADO) to see if the Athlete can be located there for Testing. Even if that Athlete is located for Testing at the alternative location, however, and a Sample is collected, the Athlete is still liable for an apparent Missed Test and so the DCO should also provide an Unsuccessful Attempt Report to the ADO.*

*If the specified location for the 60-minute time-slot is a sports complex, it is the Athlete's responsibility to specify where in the complex he/she can be located. If the Athlete specifies a time when he/she knows he/she might be in one of several places within the location (e.g. the gym, or the treatment room, or the changing room), he/she should name each of them in the Whereabouts Filing, and the DCO should visit each of the places named, in turn.*

*In such circumstances, the Athlete takes the risk that the DCO might miss him/her in transit, in which case the DCO should file an Unsuccessful Attempt Report and the Athlete may have a Missed Test declared against him/her.*

*If the Athlete only specifies the sports complex for his/her 60-minute time-slot, and does not specify where in the sports complex he/she will be during the 60-minute timeslot, the DCO should make reasonable attempts to check each of the locations where the Athlete may be within the complex, but if notwithstanding those attempts the Athlete cannot be found then the DCO should file an Unsuccessful Attempt Report and the Athlete may have a Missed Test declared against him/her.*

*If there is a Public Address (PA) system at the venue, the DCO should consider asking for an announcement to be made, telling the Athlete to report to a particular meeting point, but without announcing the reason for the request. If necessary, that announcement could then be repeated at regular intervals for the remainder of the 60-minute timeslot.*

*Whatever the location specified, it may be appropriate for the DCO to speak to people he/she encounters during the attempt to see if they can assist in locating the Athlete. If so, the DCO should try to get the names and positions (e.g. neighbour, coach, receptionist) of the people with whom he/she speaks, for recording (along with relevant details of the conversations) on the Unsuccessful Attempt Report. The DCO should not identify the purpose of his/her visit, unless necessary for safety or security reasons.*

*The DCO should note any circumstances he/she observes during his/her attempt to test the Athlete that could be relevant.*

*For example, if the attempt is made at the Athlete's home, and no one answers the door, the DCO should note whether or not there are any lights on in the house, or if he/she notices any movement in the house. If there is a car in the driveway, the DCO might note the make/colour/licence plate number, and check whether the engine hood is warm, indicating that the car has been used recently. It is up to the DCO to gather such anti-doping intelligence as may be useful to the ADO. This information should be included in the Unsuccessful Attempt Report.*

*If the DCO locates the Athlete and is able to collect a Sample from him/her, but has suspicions of possible manipulation or Tampering, the DCO may require the Athlete to provide a second Sample (and further Samples if necessary) after the first. An example might be circumstances where it appears that the Athlete knew of the DCO's presence at the specified location early in the hour, but the Athlete did not make himself/herself available for Testing until late in the hour.*

*If the DCO is unable to locate the Athlete during the 60-minute timeslot, he/she should complete and submit an Unsuccessful Attempt Form to the ADO that ordered the mission as soon as possible, and in any event no more than three working days after the attempt.*

*The DCO should provide a detailed account in the Unsuccessful Attempt Report of exactly what he/she did during the 60-minute timeslot to try to find the Athlete. For example, if the attempt was at the Athlete's home, the DCO should note when and how many times he knocked on the door, where he/she waited in between attempts, etc). The DCO should specify exactly where he/she went, for how long, what he/she did, who he/she spoke to about where the Athlete might be (including the names of the people involved, and what was said.*"

64. The sanctions for an ADRV, including a 'Whereabouts Failure', are set forth in Articles 9 and 10 of the World Athletics Anti-Doping Rules. Article 9 provides that an ADRV in connection with an in-competition test will result in automatic disqualification of individual results and forfeiture of titles (etc) and Article 10 provides for "further sanctions". For present purposes, because this is Ms Ahye's first ADRV, the following provisions are to be noted:

a. Article 10.3.2 provides that: "*For an Anti-Doping Rule Violation under Article 2.4 that is the Athlete's first antidoping offence, the period of Ineligibility imposed shall be two years, subject to reduction down to a minimum of one year, depending on the Athlete's degree of Fault. The flexibility between two years and one year of Ineligibility in this Article is not available to Athletes where a pattern of last-minute whereabouts changes or other conduct raises a serious suspicion that the Athlete was trying to avoid being available for Testing.*"

b. Article 10.4 provides that "*If an Athlete ... establishes in an individual case that he/she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.*"

c. Article 10.5.2 provides that "*...if an Athlete ... establishes that he bears No Significant Fault or Negligence, then (subject to further reduction or elimination as provided in Article 10.6) the otherwise applicable period of Ineligibility may be reduced based on the degree of Fault of the Athlete ..., but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. ...*"

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

e. "No Fault or No Negligence": "*The Athlete's ... establishing that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had ... violated an anti-doping rule. ...*"

f. "No Significant Fault or No Significant Negligence": "*The Athlete's ... establishing that his 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. ...*"

65. The World Athletics Anti-Doping Rules also have something to say about the proper interpretation of the rules. Article 20, "Interpretation", provides in relevant part as follows (where "Code" refers to The World Anti-Doping Code):

*"20.1 These Anti-Doping Rules are sport rules governing the conditions under which sport is played. Aimed at enforcing anti-doping principles in a global and harmonized manner, they are distinct in nature from criminal and civil laws, and are not intended to be subject to or limited by any national requirements and legal standards applicable to criminal or civil proceedings. When reviewing the facts and the law of a given case, all courts, arbitral tribunals and other adjudicating bodies should be aware of and respect the distinct nature of these Anti-Doping Rules implementing the Code and the fact that these rules represent the consensus of a broad spectrum of stakeholders around the world as to what is necessary to protect and ensure fair sport.*

*20.2 These Anti-Doping Rules shall be interpreted in a manner that is consistent with the Code. The Code shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of any Signatory or government. The comments annotating various provisions of the Code and the International Standards shall be used to interpret these Anti-Doping Rules.*

*20.3 Subject to Article 20.2 above, these Anti-Doping Rules shall be governed by and construed in accordance with Monegasque law."*

## X. THE SCOPE OF THE REVIEW ON APPEAL

66. Article 57 of the CAS Code provides:

> *"The Panel has 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."*

67. The World Athletics Anti-Doping Rules make similar provision.

a. Article 13.1.1 provides that "*The scope of review on appeal includes all relevant issues to the matter and is expressly not limited to the issues or scope of review before the initial matter.*"

b. Article 13.1.2 provides that "*CAS shall not defer to the Findings being appealed. In making its decision, CAS need not give deference to the discretion exercised by the body whose decision is being appealed.*"

68. As appears to be common ground, by dint of these provisions the scope of this appeal is not restricted to deciding whether the decision under appeal is wrong; instead, this appeal is a *de novo* hearing of the merits of the case.

## XI. THE MERITS OF THE APPEAL

69. The five grounds of appeal are set forth above. Ground 5 relates specifically to the Second Missed Test and Grounds 2 and 3 relate specifically to the Third Missed Test. The remaining grounds are general in nature. They are addressed below in that order.

**The Second Missed Test; Ground 5**

70. As noted above, Ground 5 says: "*That notwithstanding the Disciplinary Tribunal views relative to the 2nd Missed Test on 23rd February, 2019 by implying that the Athlete was not to blame for same, the Tribunal still proceeded to consider that Test in arriving at the award granted to the Athlete.*"

71. According to the submissions advanced in support of this ground, there are two strands to the argument. First, it is said by TTOC that the circumstances surrounding the Second Missed Test were such that it should not be regarded as a Missed Test at all with the consequence that there have not been three Missed Tests so as to amount to an ADRV. Second, it is said that "*there was* [sic] *enough mitigating circumstances to warrant a one year suspension, rather than two years*". TTOC does not make this submission as part of an argument under Article 10 of the World Athletics Anti-Doping Rules, but it is taken to be an argument to the effect that the period of ineligibility should be reduced here either pursuant to Article 10.3.2 of the World Athletics Anti-Doping Rules (as a first offence taking into account the Athlete's degree of Fault) or under Article 10.5.1 of the same rules (that the Athlete bears no Significant Fault or Negligence).

72. It appears therefore that two issues arise for determination under this ground:

a. Does the Second Missed Test amount to a Missed Test at all? On this issue, World Athletics bears the burden.

b. If the Second Missed Test does amount to a Missed Test, when one takes into account Ms Ahye's degree of fault with respect to this Second Missed Test, should the (standard) period of ineligibility of two years imposed in respect of the ADRV (ie for all three Missed Tests) be reduced to one year? TTOC bears the burden on this issue.

73. There was no challenge before the Disciplinary Tribunal to the fact that the Second Missed Tests amounted to a breach of the World Athletics Anti-Doping Rules. It is, as described above, nevertheless now said that the circumstances surrounding the test were such that it should not be regarded as a Missed Test at all with the consequence that there have not been three Missed Tests so as to amount to an ADRV. (This was not an argument put to the Disciplinary Tribunal.)

74. In the Sole Arbitrator's view, this submission is misconceived, conflating as it does the violation of the rules with the opportunity under the rules to avoid or reduce the sanctions should an athlete be able to show that there was no fault or negligence on his or her part.

75. Before the Disciplinary Tribunal, it was accepted by Ms Ahye that the Second Missed Test was a Missed Test in breach of the World Athletics Anti-Doping Rules. There was no question therefore that it was to be brought to account as a Missed Test. What the Disciplinary Tribunal did, in light of the scarcity of evidence in relation to the circumstances surrounding the Second Missed Test, was to arrive at no conclusion in relation to fault. The tribunal said this:

"*The second Whereabouts Failure was in respect of a missed test on 23rd February 2019. We make no finding against her as regards the evidence (or lack of evidence) as to how that test came to be missed. We are prepared to accept that this happened as a result of some administrative muddle and that the Athlete's explanation to that effect should be treated as true.*"

76. There is, however, nothing available in the factual circumstances – or in the remarks of the tribunal -- that lends any support at all to the contention that the Second Missed Test is not to be regarded as a Missed Test for the purposes of the World Athletics Anti-Doping Rules. Ms Ahye gave certain whereabouts information; the DCO called at that address at the allotted time to conduct a test; Ms Ahye was not there but abroad in Trinidad; she therefore missed the test; there was, accordingly, a Missed Test within the definition of that term for the purposes of the World Athletics Anti-Doping Rules.

77. As to fault, the Sole Arbitrator is prepared to go further than the Disciplinary Tribunal was prepared to go. It is the Sole Arbitrator's view that, on the evidence available, Ms Ahye was

indeed at fault (in that she failed to take due care) to ensure that her whereabouts filing was consistent with her whereabouts in relation to the Second Missed Test. Ms Ahye is an experienced international athlete and one who well knew the whereabouts regime, for no other reason than she had, quite recently as it happens, missed a test by dint of a whereabouts failure. The Sole Arbitrator accepts that Ms Ahye well knew what was required – ie, to update her whereabouts filing in advance – and yet she failed to do so.

78. In the circumstances:

a. the submission that Ms Ahye's degree of fault in and around the Second Missed Test provides any basis for the reduction of the period of ineligibility, whether pursuant to Article 10.3.2 or Article 10.5.2 of the World Athletics Anti-Doping Rules. is not accepted; and

b. the TTOC submission that Ms Ahye was not to blame for the Second Missed Test such that it should not be used against her is not accepted.

79. To the contrary, Ms Ahye was to blame for the Second Missed Test, and it is perfectly appropriate that it should be brought to account as one of the three Missed Tests that make up the ADRV in this matter.

80. In this context, the reliance on CAS 2013/A1 is misconceived. In the first place, it is not authority for the proposition, as is suggested by TTOC, that an excusable missed test is not to be brought to account in the tally of missed tests that go to make up an ADRV. Second, it is concerned with the application of the particular rule there at issue to the effect that the sanction for an ADRV of three missed tests shall be two years where all missed tests are "*inexcusable*" and may be lowered to somewhere between one to two years if the position is otherwise. Third, there is no such language anywhere in the World Athletics Anti-Doping Rules or Regulations, or ISTI, or the WADA Guidelines. Fourth, in any event, there is no basis for saying that Ms Ahye should somehow be excused for this missed test; to the contrary, she was at fault for failing to make herself available in accordance with her whereabouts filing.

81. This ground of appeal is dismissed.

**The Third Missed Test; Grounds 2 and 3**

82. This involves Ground 2 and Ground 3:

a. Ground 2: *That the Tribunal erred in law when it found that the Respondent did discharge its burden of proof at the requisite standard in relation to the actions of the Dope* [sic] *Control Officer (DCO). The Tribunal applied the incorrect Standard of Proof when assessing the reasonableness of the DCO's conduct on 19th April 2019, as well as, in determining whether the Athlete was able to rebut the presumption of negligence. The Tribunal applied too low a test when considering the DCO's action and too high a test when dealing with the Athlete.* (Ground 2)

b. Ground 3 is that "*the ... DCO did not do all that was reasonably necessary to locate the Athlete in that he failed to act in accordance with Article 9.2.1 of the Guidelines for Implementing an Effective Testing Programme.*"

83. The following issues thus arise for determination for the Third Missed Test:

a. Has World Athletics established (the burden being on it) the elements of a Missed Test to the required standard of proof?

b. If yes, has TTOC established (the burden being on it), that the Third Missed Test was without the fault or negligence of Ms Ahye to the required standard of proof?

84. The legal principles behind these issues are relatively straightforward. These are distilled from the various authorities relied upon by the Parties (and are set forth in terms in Article 3.1 of the World Athletics Anti-Doping Rules[5]) as follows:

a. The burden of proof is on World Athletics to establish the various elements of an ADRV, namely three Missed Tests (as defined by the rules) within the space of 12 months.

b. World Athletics must establish these elements to the comfortable satisfaction of the tribunal.

c. In the specific context of the Third Missed Test, World Athletics must show that the DCO did "*what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test*".

d. In the event that World Athletics meets its burden, the burden shifts to the athlete of showing that he or she acted without fault or negligence.

e. The standard of proof applicable to this burden is the balance of probabilities.

85. On the application of those principles to the facts at hand, uncontested as they are by TTOC, the Sole Arbitrator finds as follows:

a. On the evidence, World Athletics has indeed established the necessary elements of an ADRV on the part of Ms Ahye, and has done so to the comfortable satisfaction of this tribunal. Ms Ahye incurred Three Missed Tests within a 12-month period and thus committed a breach of Article 2.4 of the World Athletics Anti-Doping Rules.

b. In relation to the Third Missed Test, the Sole Arbitrator entirely accepts the submissions of World Athletics. The Sole Arbitrator is comfortably satisfied that, in the circumstances of the DCO's visit on 19 April 2019, the DCO did what was reasonable in the circumstances (given the nature of the location that had been specified by Ms Ahye) to try to locate Ms Ahye, short of giving her advance notice of the test:

i. He arrived at the location before the beginning of the 60-minute time slot.

ii. He rang the doorbell and knocked on Ms Ahye's door on four occasions with a combined total of 36 knocks and 12 rings.

iii. He called both telephone numbers given in Ms Ahye's whereabouts information.

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[5] Art 3.1 the World Athletics Anti-Doping Rules provides:
*"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. Where these Anti-Doping Rules 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, the standard of proof shall be by a balance of probability."*

iv. He made sure he was in a position to see if anyone left Ms Ahye's apartment building or from the immediate vicinity of her address for the duration of the 60-minute time slot.

v. He left the location only after the expiration of the specified time slot.

86. As to the principal complaint that the DCO should have spoken to the 'lady with the dog', the Sole Arbitrator disagrees. Like the Disciplinary Tribunal, the Sole Arbitrator is of the view that the DCO was under no obligation to speak with her in circumstances where (a) she lived not in the same apartment building as Ms Ahye but in a different one altogether, albeit in the same complex and (b) she was 50-60 yards away from the DCO such that if the DCO did go to speak with her he would have lost sight of the front door of Ms Ahye's apartment building.

87. The WADA Guidelines in this respect are not mandatory (how could they be?) but merely reflect the common sense position that if a DCO encounters someone at the whereabouts address whom the DCO believes may be able to assist in locating the athlete, then it may be appropriate for the DCO to approach that person to that end. The DCO here took the view that the woman would not have been able to assist in locating Ms Ahye – not least because she lived in a different apartment building – and that to leave his position would have meant that he lost sight of Ms Ahye's apartment, obviously something any sensible DCO would be loath to do.

88. In that case, it falls to TTOC to discharge the burden on it (standing in the shoes of Ms Ahye) of showing that Ms Ahye acted without fault or negligence.

89. On this issue, the Sole Arbitrator concludes that TTOC has not discharged its burden for the following reasons:

a. Ms Ahye is a highly experienced athlete, and highly experienced (certainly since 2014, the date of her first whereabouts filing) in anti-doping matters and would have been fully aware at all times of her whereabouts obligations.

b. It is important to note that the issue of fault relates not just to one or other of the Missed Tests but for all three whereabouts failures that go to make up the ADRV.

c. In any event, it is clear that Ms Ahye was indeed at fault in not being available on 19 April 2019.

d. On that date, Ms Ahye was plainly aware of the requirements upon her to meet her whereabouts responsibilities and that, in circumstances where she already had two Missed Tests confirmed against her, the Sole Arbitrators agrees with the Disciplinary Tribunal's observation that she "*should therefore have been on her guard in April 2019 about the possible consequences of missing a third test*".

e. The reasons offered by Ms Ahye for her failure to hear the DCO knocking on the door, or ringing the doorbell, or telephoning her are weak and unpersuasive. If it is accepted that she was experiencing problems with her doorbell, it was incumbent on her to fix the problems or ensure that such problems did not stand in the way of her meeting her whereabouts obligations.

f. But the doorbell was only one of the means by which the DCO sought to raise Ms Ahye – he also knocked (loud and often) on her door and he telephoned her – all to no avail.

g. In those circumstances, the lost opportunity to conduct a test on that date at that time – both specified by Ms Ahye – was squarely the fault of Ms Ahye. She bore the responsibility of ensuring that she was available to be tested and she failed to take

various obvious steps that were available to her to make that happen – such steps include: (a) fix the doorbell; (b) make sure she was in a position to hear a knock on the door; (c) make sure she was in a position to hear her telephone(s) ring.

90. The Sole Arbitrator concludes that, not only has TTOC failed to discharge its burden of showing no fault on the part of the Athlete, it is plain that Ms Ahye was at fault in failing to make herself available for testing at the address and hour nominated by her for that very purpose.

91. These grounds of appeal are therefore dismissed.

**Other Grounds of Appeal**

92. TTOC advanced certain other grounds of appeal of a general nature, unconnected with any particular Missed Test, namely that:

a. Ground 1: *"in the interest of fairness and the principles of natural justice the award issued to the Athlete should be struck out on the basis that it is harsh and oppressive and is inconsistent with established precedents dealing with similar issues for which the Athlete was charged."*; and

b. Ground 4: *there was the perception of bias in the manner in which the Disciplinary Tribunal dealt with the evidence and ultimately its decision against the Athlete."*

93. As to the former, nothing in the papers suggests that there was any unfairness in and about the conduct of the hearing before the Disciplinary Tribunal, nor any breach of natural justice, whatever is intended to be conveyed by that term in these circumstances. The contention appears to be that a period of ineligibility of two years is 'harsh and oppressive' and out of line with the sanctions imposed in other like cases. The Sole Arbitrator disagrees. A period of two years may be regarded by some as severe, but one must miss three Missed Tests in a 12-month period in order to attract that penalty so that, in the Sole Arbitrator's view, it provides a reasonable and proportionate means of enforcing the desirable objectives of the World Athletics Anti-Doping Rules and Regulations. Moreover, each case must be determined according to its own particular facts and circumstances such that it is generally of little assistance to identify other cases with other facts and different penalties. In any event, TTOC has identified no such other case that provides any basis for saying that the imposition of a two-year period of ineligibility (as provided for in the World Athletics Anti-Doping Rules) is somehow 'inconsistent'.

94. As to the latter, there is nothing anywhere in the papers, not even a hint, of any bias of any sort on the part of the Disciplinary Tribunal. This ground is therefore dismissed as hopeless.

95. In the event, these further grounds of appeal are also dismissed.

## XII. CONCLUSION

96. For the reasons set out above, the appeal is dismissed.

97. It is the determination of this tribunal that Ms Ahye has committed three Missed Tests within a 12-month period (commencing 23 June 2018). This amounts to an ADRV under Article 2.4 of the World Athletics Anti-Doping Rules and carries with it a period of ineligibility of two years under Article 10.2.2, subject to a reduction to a minimum of one year, depending on Ms Ahye's degree of fault, pursuant to Article 10.3.2 (as Ms Ahye's first offence) and 10.5.2 (in any event).

98. Having taken into account the nature and circumstances of the Three Missed Tests, and the evidence on each of them proffered by Ms Ahye, the Sole Arbitrator finds that the decision of the Disciplinary Tribunal was correct in applying a two-year period of ineligibility from the date of the Third Missed Test (being 19 April 2019) and sees no reason to grant a reduction of the period of ineligibility. In the Sole Arbitrator's view, there is nothing about the degree of fault on the part of Ms Ahye that commends itself to a reduction of sanction.

99. The Sole Arbitrator also agrees with the decision of the Disciplinary Tribunal that Ms Ahye's results from 19 April 2019 to 30 August 2019 are to be disqualified with all resulting consequences, including the forfeiture of any titles, awards, medals, points and prize and appearance money.

## XIII. COSTS

100. Article R65.2 CAS Code provides: *"Subject to Articles R65.2 para.2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS borne by the CAS. Upon submission of the statement of appeal, the Appellant shall pay a Court Office fee of CHF 1,000 without which the CAS shall not proceed, and the appeal shall be deemed withdrawn."*

101. Article R65.3 of the CAS Code provides: *"Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties."*

102. Since the present appeal is lodged against a decision of an exclusively disciplinary nature rendered by an international federation, no costs are payable to CAS by the parties beyond the Court Office fee of CHF 1,000 paid by TTOC with the filing of his Statement of Appeal, which is in any event retained by CAS.

103. According to Article R65.3 of the CAS Code, the Sole Arbitrator therefore has a broad discretion in respect of the making of any costs award, to be exercised by reference to all the circumstances of the case including the complexity and outcome of the proceedings and the conduct and financial resources of the Parties.

104. The Parties' respective submissions on costs were these:

a. TTOC asked that World Athletics be ordered to pay to TTOC the costs that it has incurred in lodging the appeal.

b. World Athletics asked the CAS to order TTOC to make a substantial contribution to its legal and other costs in connection with these proceedings.

105. As the prevailing party, World Athletics is entitled to the relief that it seeks on costs.

106. The Sole Arbitrator therefore orders that TTOC should pay an amount of CHF 3000 (three thousand Swiss francs) by way of contribution of World Athletics' reasonable legal costs and disbursements in connection with these proceedings.

Tribunal Arbitral du Sport
Court of Arbitration for Sport

## ON THESE GROUNDS

**The Court of Arbitration for Sport rules that:**

1. The appeal filed by the Trinidad and Tobago Olympic Committee against World Athletics with the Court of Arbitration for Sport on 10 February 2020 is dismissed in its entirety.

2. The decision of the Disciplinary Tribunal dated 7 January 2020 is confirmed.

3. The Award is pronounced without costs, except for the Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by the Trinidad and Tobago Olympic Committee, which is retained by the Court of Arbitration for Sport.

4. The Trinidad and Tobago Olympic Committee shall make a contribution of CHF 3000 (three thousand Swiss francs) to the legal costs and other expenses incurred by World Athletics in connection with these proceedings.

5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 24 February 2021

## THE COURT OF ARBITRATION FOR SPORT

James Drake QC
Sole Arbitrator