SR/164/2021

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF WORLD ATHLETICS

Before:

Mr Alan Galbraith QC

BETWEEN:

WORLD ATHLETICS **Anti-Doping Organisation**

and

ALEX LEONARDO QUIÑONEZ **Respondent**

DECISION OF THE DISCIPLINARY TRIBUNAL

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1. INTRODUCTION

1.1 World Athletics is the governing body for the sport of athletics worldwide. World Athletics has delegated implementation of its anti-doping rules to the Athletics Integrity Unit (the "AIU") as per art. 1.2.2 of the World Athletics Anti-Doping Rules. Mr Tony Jackson acts as representative for the AIU in these proceedings. The Respondent, Alex Leonardo Quiñonez (the "Athlete"), is an international-level athlete under Rule 1.4.4 of the Anti-Doping Rules ("ADR"). The Respondent was represented by Borja Oseś and Toni Garcia of Landaberea and Abogados in these proceedings.

2. JURISDICTION

2.1 At all relevant times the Athlete was and is an Athlete in the International Registered Testing Pool as published in the AIU website and entering in, preparing or participating in competitions recognized by World Athletics in terms of art. 1.4.2(f)(i) and 1.4.2(f)(iii). Therefore the ADR applied to the Athlete.

2.2 World Athletics has established a Disciplinary Tribunal to hear alleged anti-doping rule violations and other breaches of the ADR (Rules 1.3 and 8.2 ADR).

2.3 This matter has been referred to the Disciplinary Tribunal in accordance with Rule 8.5.5 of the ADR.

2.4 World Athletics has, pursuant to Rule 4.1 of the World Athletics Disciplinary Tribunal Rules, determined that the Disciplinary Tribunal shall have a secretariat which is independent of World Athletics. Sport Resolutions acts as secretariat to the Disciplinary Tribunal.

3. FACTUAL BACKGROUND

3.1 This matter arises out of a Notice of Charge dated 25 June 2021 by the AIU against the Athlete alleging violation of Rule 2.4 (Whereabouts Failures) for a total of three Whereabouts Failures in the 12-month period beginning 2 June 2020:

a. Missed Test on 2 June 2020

b. Missed Test on 28 September 2020; and

c. Missed Test, alternatively a Filing Failure, on 19 May 2021.

3.2 The issue of the Notice of Charge followed communications from 26 May 2021 between the AIU, the Athlete, his Representative, Mr Suarez, and his counsel,

including an administrative review of the AIU's confirmation on 10 June 2021 of the 19 May 2021 Missed Test or Filing Failure, and the AIU's subsequent decision of 23 June 2021 to record the Missed Test or, alternatively, a Filing Failure.

4. PROCEDURE BEFORE THE DISCIPLINARY TRIBUNAL

4.1 On 25 June 2021 the AIU made an Order provisionally suspending the Athlete under Rule 7.4.2.

4.2 Subsequent correspondence between the AIU and the Athlete's counsel resulted in the Athlete admitting the Anti-Doping Rule Violation under Rule 2.4 as charged but not the Consequences proposed by the AIU.

4.3 By letter of 29 June 2021, the Athlete, through his counsel, sought the agreement of the AIU to a case resolution on terms specified in that letter. That application was declined by the AIU on the same date.

4.4 In declining the application, the AIU proposed that the disputed Consequences of the Anti-Doping Rule Violation be determined by a Sole Arbitrator of the Disciplinary Tribunal on an expedited basis on the parties' written submissions without a hearing. That procedure was agreed by the Athlete's counsel and has been pursued.

4.5 The agreed timetable provided:

(i) The Notice of Charge dated 25 June 2021 (together with its enclosures) to stand as the Integrity Unit brief and exhibits in this matter;

(ii) The Athlete's first letter dated 29 June 2021 (together with one exhibit) to serve as the Athlete's Answer, setting out the Athlete's arguments on the Consequences to be imposed and including all documents and evidence on which the Athlete intends to rely;

(iii) The Integrity Unit to file a reply brief responding to the Athlete's answer brief and producing any rebuttal documents/evidence by no later than 5pm BST on Friday 9 July 2021; and

(iv) The matter to be considered by a Sole Arbitrator based upon the parties' written submission and an Operative Award issued by no later than Wednesday 14 July 2021.

4.6 The reason for expediting the determination was the Athlete's intended participation in the Olympic Games scheduled to commence on 23 July 2021 and the desirability of preserving the Athlete's ability to exercise his right of appeal to the Court of Arbitration for Sport ("CAS") should the decision be unfavourable to him.

4.7 On 2 July I was appointed by the Chair of the Disciplinary Tribunal as Sole Arbitrator.

4.8 As contemplated in the agreed procedure I have received the Notice of Charge and accompanying enclosures, the Athlete's first letter of 29 June 2021 and exhibit, including a translated and certified copy of the exhibit, and the AIU's reply brief and rebuttal documents.

5. LEGAL FRAMEWORK & ANALYSIS

5.1 The charges, which have been admitted as to the violation, were brought under Rule 2.4 of the ADR:

> *2.4 Any combination of three missed tests and/or filing failures, as defined in the International Standard for Results Management, within a 12-month period by an Athlete in a Registered Testing Pool.*

5.2 The Whereabouts requirements of the ADR are found in Rule 5.5:

5.5.1 The Integrity Unit shall identify an International Registered Testing Pool of Athletes who are required to comply with the whereabouts requirements set out in the International Standard for Testing and Investigations, including (a) advising the Integrity Unit of their whereabouts on a quarterly basis; (b) updating that information as necessary so that it remains accurate and complete at all times; and (c) making themselves available for Testing at such whereabouts.

5.5.2 For the purposes of Rule 2.4, failure by an Athlete in the International Registered Testing Pool to comply with the requirements of the International Standard for Testing and Investigations shall be deemed a filing failure or a missed test where the conditions set out in Appendix B of the International Standard for Results Management for declaring a filing failure or missed test are met.

5.5.3 The Integrity Unit will make available through ADAMS a list which identifies those Athletes included in the International Registered Testing Pool either by name or by clearly defined, specific criteria. The Integrity Unit shall coordinate with National Anti-Doping Organizations in respect of the identification of such Athletes and the collection of their whereabouts information. The Integrity Unit shall review and update as necessary the criteria for including Athletes in the International Registered Testing Pool and shall revise the membership of the International Registered Testing Pool from time to time as appropriate in accordance with the set criteria.

5.3 As there is no challenge to the breach it is not necessary to consider the very detailed requirements of the ISTI or the conditions set out in Appendix B of the International Standard for Results Management other than to note:

ISTI Rule 4.8.14.3 An Athlete may choose to delegate the task of making their Whereabouts Filings (and/or any updates thereto) to a third party, such as a coach, a manager or a National Federation, provided that the third party agrees to such delegation. The Anti-Doping Organization collecting the Athlete's Whereabouts Filings may require written notice of any agreed delegation to be filed with it, signed by both the Athlete in question and the third party delegate.

Rule 4.8.14.4 In all cases, however, including in the case of Athletes in Team Sports:

(a) Each Athlete in a Registered Testing Pool remains ultimately responsible at all times for making accurate and complete Whereabouts Filings, whether they make each filing personally or delegates the task to a third party. It shall not be a defence to an allegation of a Filing Failure that the Athlete delegated such responsibility to a third party and that third party failed to comply with the applicable requirements; and

(b) Such Athlete remains personally responsible at all times for ensuring he/she is available for Testing at the whereabouts declared on their Whereabouts Filings. It shall not be a defence to an allegation of a Missed Test that the Athlete delegated responsibility for filing their whereabouts information for the relevant period to a third party and that third party failed to file the correct information or failed to update previously-filed information so as to ensure that the whereabouts information in the Whereabouts Filing for the day in question was current and accurate.

6. POSITION OF THE PARTIES

6.1 The procedural agreement provided the Athlete's submissions of 29 June 2021 in support of an application for a case resolution agreement under Rules 10.8.1 and 10.8.2, have also been accepted as the Athlete's Answer to the charges.

6.2 The substance of that submission seeks a ruling that:

(a) No period of Ineligibility be imposed because of the absence of Fault or Negligence as provided in Rule 10.5.

(b) Alternatively, a significant reduction of the otherwise applicable period of Ineligibility is applied based on the Athlete's degree of Fault as provided in Rule

10.3.2 of the Rules provided that the relevant period is suspended until the end of the 2020 (2021) Summer Olympic Games – and that the results obtained during the suspended period are not disqualified – because of the Athlete's Substantial Assistance under Rule 10.8.1(a)(iv) of the Rules and the principle of proportionality;

(c) Alternatively, a significant reduction of the otherwise applicable period of Ineligibility based on the Athlete's degree of Fault according to Rule 10.3.2 of the Rules and the principle of proportionality.

6.3 The position of the AIU is that:

(a) Rule 10.5 does not apply to a Rule 2.4 violation and accordingly No Fault or Negligence cannot effect a reduction in the Consequences;

(b) Rule 10.8.1(a)(iv) [10.7.1(a)(iv) of the Rules] is inapplicable on the facts;

(c) The mandatory period of Ineligibility of two years should be imposed upon the Athlete based on his level of Fault for the (admitted) Anti-Doping Rule Violation.

6.4 It is convenient to deal immediately with the question of the application of Rule 10.5.

6.5 Rule 10.5 provides:

> *10.5 If an Athlete or other Person establishes in an individual case that they bear No Fault or Negligence for the anti-doping rule violation(s) alleged against them, the otherwise applicable period of Ineligibility will be eliminated.*

6.6 However, I agree with the AIU's submission that the application of Rule 10.5 has to be considered in terms of Rule 10.3. Rule 10.3 is headed "*Ineligibility for Other Anti-*

Doping Violations". It applies to anti-doping rule violations other than as provided in Rule 10.2 which covers violations as to the Presence, Use and Possession of a Prohibited Substance or Prohibited Method.

6.7 Rule 10.3 then provides:

> *10.3 The period of Ineligibility for anti-doping rule violations other than as provided in Rule 10.2 will be as follows, unless Rules 10.6 or 10.7 are applicable:*
>
> *10.3.2 For violations of Rule 2.4, the period of Ineligibility will be two (2) years, subject to reduction down to a minimum of one (1) year, depending on the Athlete's degree of Fault. The flexibility between two (2) years and one (1) year of Ineligibility in this Rule 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.*

6.8 The applicable period of Ineligibility for a Rule 2.4 violation is therefore specifically provided to be according to Rule 10.3.2 unless Rules 10.6 or 10.7 are applicable, i.e. a period of two years which is subject to reduction down to a minimum of one year depending on the Athlete's degree of Fault.

6.9 Rule 10.6 is problematic in its application to Rule 10.3.2 because, in providing for a potential reduction because of No Significant Fault or Negligence, it does not add to the express provisions of Rule 10.3.2 allowing for a reduction of the period of Ineligibility depending on the Athlete's degree of Fault.

6.10 Rule 10.7, referred to in the Athlete's answer as Rule 10.8, provides:

> *10.7.1 Substantial Assistance in discovering or establishing violations*

(a) *Prior to an appellate decision under Rule 13 or the expiration of the time to appeal, the Integrity Unit may suspend a part of the Consequences (other than Disqualification and mandatory Public Disclosure) imposed in an individual case where the Athlete or other Person has provided Substantial Assistance to an Anti-Doping Organisation, criminal authority or professional disciplinary body that results in: (i) the Anti-Doping Organisation discovering or bringing forward an anti-doping rule violation by another Person; or (ii) a criminal or disciplinary body discovering or bringing forward a criminal offence or the breach of professional rules committed by another Person and the information provided by the Person providing Substantial Assistance is made available to the Integrity Unit or other Anti-Doping Organisation with Results Management responsibility; or (iii) WADA initiating a proceeding against a Signatory, WADA-accredited laboratory, or Athlete passport management unit (as defined in the International Standard for Laboratories) for non-compliance with the Code, International Standards or Technical Documents; or (iv) a criminal or disciplinary body bringing forward a criminal offence or the breach of professional or sport rules arising out of a sport integrity violation other than doping (provided that, for this point (iv) to apply, the Integrity Unit must have first obtained WADA's approval). After an appellate decision under Rule 12 or the expiration of time to appeal, the Integrity Unit may only suspend a part of the otherwise applicable Consequences with the approval of WADA.*

6.11 The application of this Rule depends on the facts. In my view the Rule is not applicable in the present case but that will be better explained after the facts have been identified.

6.12 Rule 10.5 is expressly referenced in Rule 10.2:

10.2 The period of Ineligibility for a violation of Rule 2.1, Rule 2.2 or Rule 2.6 will be as follows, subject to potential elimination, reduction or suspension pursuant to Rules 10.5, 10.6 and/or 10.7:

and is in the terms of the Rules only applicable to those identified anti-doping rule violations.

6.13 The reason for the distinction is that negligence, actual or deemed, is an element of the anti-doping rule violation under Rule 2.4 and a No Fault or Negligence plea would be a negation of an element of the violation. Accordingly, the question to be determined is the applicability of Rule 10.3.2 to the facts of the Athlete's case and whether the starting point of two years Ineligibility should be subject to a reduction potentially down to a minimum of one year, depending on the Athlete's degree of Fault.

The Facts

6.14 Obviously determination of a question of Fault is intensely fact specific but always within the context of the purpose of the Rules generally and the specific Rules in issue.

6.15 As I understand it, the essential facts are not in dispute. If they were, determination on the written submissions without more would likely be inappropriate. I did seek the further assistance of the parties in clarifying the state of the entries in ADAMS prior to the events of 19 May 2021.

6.16 The Athlete is a world class sprinter who placed third in the 200 metres at the 2019 World Championships in Doha. At all relevant times he has appointed Mr Alberto Suarez (the "Representative") as his Authorised Athlete Representative in terms of the Athletes' Representatives Rules.

6.17 In that role Mr Suarez acts on the Athlete's behalf in representing him in negotiations with event organizers and, importantly, in making entries into the ADAMS system which records a one-hour period and place where the Athlete will on each day be available for testing.

6.18 The Whereabouts obligation has been recognised in any number of CAS decisions as onerous but at the heart of the anti-doping regime.

6.19 In a recent whereabouts case, *World Athletics v Stevens* (SR/092/2020) the World Athletics Disciplinary Tribunal cited the following from the ITF Panel decision as identifying the importance of the testing regime:

> *"40. While the Whereabouts requirements are undoubtedly onerous, they are necessary in order to facilitate 'No Advance Notice' Out-of-Competition testing, and so to allow tennis players to claim with credibility that they are subject to testing at any time and so the public can have confidence that they are clean. In this context, Gemmel at [26] emphasizes the importance of the 'obligation of the athlete to be present and available at the specified time and location.'*
>
> *41. Before us there was no dispute as to the importance of the Out-of-Competition testing regime. It is important to maintain the integrity of sport. It is important that the world can be confident that sport is drug-free. It is important to other athletes to be confident that their colleagues are not gaining an improper advantage over them by drug use. It is also important to athletes because if sport is riddled with drug use it has the potential to taint all who are elite athletes in the sport. We are all familiar with efforts made by a minority of athletes to evade or avoid doping control and the needs for the sport to take stringent precautions to ensure that does not occur."*

6.20 Unfortunately, on two occasions prior to May 2021, viz 2 June 2020 and 28 September 2020, the Athlete was not at or could not be located at the address entered in the ADAMS system. Mr Suarez, in his explanation letter of 9 June 2021, acknowledged that these failures were the consequence of miscommunications between the Athlete and himself, a lesson which he said had been taken on board. No administrative review was sought on either occasion and therefore, the AIU recorded a Whereabouts Failure (a Missed Test) on both occasions.

6.21 The circumstances of the Missed Test/Filing failure on 19 May 2021 requires consideration in more detail. The Whereabouts information filed in ADAMS identified that the Athlete would be available for testing between 20:00 and 21:00 on 19 May 2021 at

"312 Vista Loop, Davenport, Florida, United States, 33897"

6.22 I assume that entry was made prior to second quarter 2021 commencing on April 2021, and, my interpretation of the limited information I have is that at the time the entry was made, it was anticipated that the Athlete would be in Florida training for a period.

6.23 A Doping Control Officer attended the above address on 19 May 2021 but was unable to locate the Athlete. The Officer attempted to contact the Athlete by phone using the number listed in the Athlete's Whereabouts information but got no reply. The Officer then filed a Missed Test Report.

6.24 Before the AIU had time to act, it received an email from the Athlete's representative, Mr Suarez, confirming that the Athlete was not in Florida, USA, but in Portugal. I set out the email in full:

"*20 May 2021*

Dear Joanna,

I had a tragic mistake, I was 100% sure that the whereabouts of Alex Quiñonez was updated. And now when I'm sleeping at 03.15h in Madrid the phone rings awakening me without time to answer it.

It seemed a strange phone call and I can see that was of Florida. I don't know people in Florida to call me, and my only connection was that Alex was on stage there.

But he is in a stageion Portugal from World Relays of Silesia, amd thinking scared I checked his whereabouts and it's updated because in an incomprehensible error of mine.

Please I assume all the consequences and sanctions, even my licence withdrawals, but was a mistake that Alex is not guilty and he is sure that his whereabouts is updated correctly in Portugal.

I had evidences with the organizers of Diamond League, Nike and more, that I told to them that Alex is in Portugal, never never I wanted that this from happening.

I'm very sorry with all my soul.

I hope to hear from you very soon. Thank you very much.

Best regards, Alberto Suárez" [sic]

6.25 The obvious conclusion is that the telephone number in the Athlete's Whereabouts information was that of Mr Suarez and accordingly the Doping Control Officer's call came in the middle of the night to Mr Suarez in Spain and unsurprisingly was not quickly answered. But as Mr Suarez's email says its source prompted concerns and Mr Suarez's discovery that the Athlete's registered Whereabouts entry was incorrect.

6.26 There then followed the course of correspondence referred to in para. 3.2 above, first between the AIU and Mr Suarez and subsequently between the AIU and the Athlete's legal representatives, Messrs Osés and Garcia.

6.27 Mr Suarez's email to the AIU of 9 June 2021 included the following documents:

1- *Explanation letter*

2- *Passport*

3- *Travel History of Official Website of the Department of Homeland Security of United States*

4- *Expert's Report of WhatsApp conversations with the Whereabouts Information between Alex Quiñonez, Nelson Gutierrez and me*

5- *Letter of Futbol Club Barcelona*

6- *Emails Mr Spencer Barden (DL Gateshead) and me*

7- *Invitation Letter DL Gateshead*

8- *Travel Exemption DL Gateshead*

9- *Email Mr John Nubani (DL Doha) and me*

10- *Email between EHQ Athletics Servicing and me*

11- *Email sent to Nelson Gutierrez with address of UK Consulate in Oporto (Portugal)*

12- *Email sent to Whereabouts*

6.28 Again, I set out in full the explanation letter accompanying that email:

"Dear Sirs,

First of all, thank you very much for your support to a better and pure Athletics. One of the things that the last days torments me,is that the people to think that Alex Quiñonez is not a clean athlete.

Because he is totally innocent and I am the only one to blame.

Since the first day that Yulimar Rojas and Alex Quiñonez were included in World Athletics Registered Testing Pool, I am the responsible of their Whereabouts.

I know that is a great deal of responsability, and their careers depend of my competence, but I trust absolutely in the integrity of them.

In the last months Mr. Alejandro Lozano told me that they should do it, but Alex and Yulimar are absent-minded and always I thought would be best for them.

When Alex had the previous missed test, they were communication errors between us, that we recognizes and we didn't claim. Then we have been very careful with it.

As you will understand it's completely illogical that I place the Wherebouts of Alex in another continent, when he has two missed test and the third is the sanction.

Mr. Nelson Gutierrez (Coach of Alex), planned with me the stages that his group would be to prepare the Olympic Games months ago. And I always informed to differents persons that Alex would arrive to Europe to compete in World Relays of Silesia and then he would be in Portugal until Tokio.

For example I reported his plans to Mr. Spencer Barden (Athlete's Liasion of Diamond League of Gateshead and Doha) because Ecuador is in the Red List of Countries to entry in United Kingdom, and the only way to be able to compete in Gateshead was for athletes to have been in a non 'red list' country for at least 10 days prior to entering the UK.

At the same time I talked with Mr. Vicente Egido (Athletics Director of Futbol Club Barcelona) that Alex was ready to compete with the club in the Semi-finals of Spain Clubs Championships (15th May) and the Final (12th June). Even with Mr. José Luis de Carlos (Manager of Meetings of Royal Spanish Athletics Federation). I offered to Continental Tour Bronze Meeting of Andujar (22th May) that if Alex could not run in Gateshead, he was very near to travel from Portugal. He can testify to that.

Everything it was clear and perfectly arranged until the night from May 19th to 20th.

I was sleeping when the sound of my mobile phone wakes me up at 3.15 am., I see that it was a phone number of United States with area code Florida.

I do not know anybody in Florida and it seemed a strange call, and thinking about it in the last years my only relation with this area of USA is when Alex was on training stages.

And with a bad feeling that I cannot explain it, instead of sleeping again I watched the Athlete Central app, and I wanted to die.

Inexplicably the Whereabouts information of Alex was in the stage of Florida (April) and not in Portugal. Today is imposible to me provide an explanation of this tragic mistake.

I was sure and I am sure that I filled the information in Portugal.

Instantly I corrected the Whereabouts and writed to inform by email to attention of Mrs. Joanna Eriksson, because she was the last Whereabouts and Testing Coordinator that notice me about an issue of Ana Peleteiro on 3th May.

Waiting an answer, in the morning I writed to Mr. Alejandro Lozano to explain what has happened and that I had sent an email at 4.37 a.m.

Meanwhile Alex was sleeping peacefully in Portugal.

From the first moment I had appealed to open a case file with sanction to me, and when we received the notice o an apparent Whereabouts Failure on 26th May, the next day I went to my Member Federation (Royal Spanish Athletics Federation) and asked to Mr. Luis Saladie (Responsible of Athletes Representatives) a life ban of my license, as he can report it to Athletics Integrity Unit and World Athletics.

I love the Athletics with all my heart, and every day I thank God for my wonderful life with my athletes, but I never cannot live with the guilty conscience of ruin the life of an innocent person.

Thank you for your help.

Yours sincerely,

Alberto Suarez

World Athletics Athletes' Representative" [sic]

6.29 Item 4 of the documents attached to Mr Suarez's email included what I understand to be extracts from WhatsApp communications on 3 May, 4 May, 11 May and 13 May 2021, which were subsequently notarised and then translated. I set out the translated transcripts:

Nelson Gutiérrez Equa..[incomplete]	
3 May 2021	
	Good morning, brother ! (12:10)
	Congratulations for the victories! (12:10)
Good morning bro. Thanks (12:24)	

Nelson Gutiérrez Equa .[incomplete]	
(Resent) [image] (21:53)	
A big hug (21:53)	
	Brother…but are you arriving at the hotel today or tomorrow? (22:57)
Tomorrow (22:58)	

	You need to send me the address in Portugal for the whereabouts brothers (14:01)
I'll send it now (15:42)	
(Resent)]image] (21:53)	
A big hug (21:53)	
	Brother…but are you arriving at the hotel today or tomorrow? (22:57)

	OK (emoticon) (22:58)
	I got that (icon) (22:58)
	Ha ha ha ha (22:58)
(Emoticon) (22:58)	
4 May 2021	
(Resent) Post code.3050-223 (15:09)	
Post code of the hotel (15:09)	
13 May 2021	

Alex Quinonez	
4 May 2021	
Hello Alberto, good afternoon, I hope you are well (17:03)	
Alberto, I'm in Portugal (17:03)	
To see if they give me the code to get trainers (emoticon) and clothes to train (17:03)	
	Hello Alex! (12:06)

Alex Quinonez	
	(Ok icon) (17:42)
	One thing (17:42)
	You have the whereabouts at 20:00 h at the hotel (17:43)
	Is that time ok or do you want another slot? (17:43)
Yes, Alberto, that's fine (18:00)	

	The teacher has already told me (21:06)		Perfect
	The code is the same … do you remember the password? (21:07)	11 May 2021 Good morning Alberto, blessings (10:02)	
Ah Alberto it's okay actually, I'm advising you that I'm already here in Portugal and that everything is okay (21:07)		I hope everything's ok (10:02)	
	What I do need to ask for is that they put the money on the page for you (21:07)	The Nike representative hasn't said anything about the clothes (10:02)	
I can't remember the password to be honest			Good morning Alex (10:02)
			They are working on it (10:02)
			The thing is last week they [unfinished sentence]

6.30 The Athlete's submission identifies the 3 May conversations as between the Athlete's coach and Mr Suarez in which Mr Suarez asks for the address of the hotel in Portugal "for the location", to which the coach responded by sending a picture of the Grande Hotel de Luso which contained the address. The coach then confirmed the Athlete's arrival "tomorrow".

6.31 The transcript on 4 May has the Athlete confirming to the Representative his arrival in Portugal, Mr Suarez asking:

"You have the whereabouts at 20:00 h at the hotel. Is that time ok or do you want another slot?"

And the Athlete replying*:*

"Yes, Alberto, that's fine."

6.32 I have also been provided with a printout from ADAMS for the period from 1 May to 30 May. As I understand the printout it shows that Mr Suarez had correctly entered the Athlete's Whereabouts for 1, 2 and 3 May 2021 in Silesia (Poland), where the Athlete was competing in the WA relays, and then correctly on 4, 5 and 6 May 2021 in Portugal. But the entries 7 May-end May 2021 remained as Florida, USA, until corrected on 19 May 2021 when Mr Suarez, as a result of the missed Florida phone call, identified that these were incorrect.

6.33 Mr Suarez was unable to give any specific explanation as to how this obvious discrepancy occurred. Given the accuracy of the filings for 1-3 May and

4-6 May 2021 and the evidence that Mr Suarez knew at least from mid-April of the Athlete's intention to be based and competing in Europe through May and June before going to Tokyo, it is impossible to regard the discrepancy filings for Florida, USA from 7 May 2021 as anything other than an inadvertent error by Mr Suarez when adjusting the existing May entries.

6.34 Mr Suarez's knowledge is clear from his communications with the Gateshead organizer of 16 April 2021 identifying that the Athlete was intending to be in Portugal from 1 May 2021 and the exchange of communications of 22 April 2021 with the Gateshead organizer confirming the Athlete's entry and asking:

"*Will he travel from Spain?*

To which Mr Suarez answered:

"From Spain or Portugal I have to talk with him to planning his stay of May and June".

6.35 Those communications confirm Mr Suarez's statements that there had been early communication about the Athlete competing in Europe in May through June. Other communications by Mr Suarez with event organizers and, for example, on 12 May 2021 with Nike about getting raceday kit and shoes sent to the Athlete at the Grande Hotel de Luso in Portugal, make it clear that Mr Suarez knew that the Athlete, having travelled from the USA to Europe, was intending to stay in Europe and at least from 4 May at the Grand Hotel de Luso.

6.36 The April communications with the Gateshead organizer continued through May, including air bookings for travel to Gateshead from Portugal, on to Doha for the next Diamond League meeting, and back to Portugal. The continued registration of Florida in ADAMS makes no sense at all. The only sensible interpretation is that before the events of May 20 2021, it never crossed Mr Suarez's mind that he had failed to register the Athlete's whereabouts in Portugal as on-going after 6 May 2021. Given what he knew, the continued registration in ADAMS of Florida cannot have been deliberate on Mr Suarez's part.

6.37 These communications show no miscommunication between the Athlete and Mr Suarez or any concealment of the Athlete's actual whereabouts or intentions. Quite the contrary. I cannot draw any adverse inference at all.

6.38 Accordingly, the failure to update the Athlete's Whereabouts filing beyond 6 May 2021 can only be attributed to human error by Mr Suarez.

6.39 As a result of responsibility under the Rules remaining with the Athlete, Mr Suarez's human error has meant that the Athlete has had no choice but to admit to a violation of Rule 2.4. The question now, given the view I have taken as to the non-application

of Rule 10.5, is what level of sanction is appropriate in the circumstances under Rule 10.2.3 for the Athlete's degree of Fault.

Discussion

6.40 Whereas the burden of proving a violation lies on the AIU the burden under Rule10.3.2 of establishing a degree of Fault allowing for reduction in Ineligibility is on the Athlete. The standard of proof is that of balance of probability.

6.41 The definition of Fault recognizes that it is to be assessed "appropriate to a particular situation". That definition identifies that there may be degrees of Fault depending upon the specific circumstances and an individual's personal capability.

> *"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's or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Protected Person, 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 or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person'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 a career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Rule 10.6.1."*

6.42 The Disciplinary Tribunal in *World Athletics v Stevens* commented:

> *"Fault", as we have noted earlier, is defined in the Definitions of the 2019 Rules and in Appendix 1 of the Code as "any breach of duty or lack of care appropriate to a particular situation."*

"Degree of fault" has never been defined, leaving Panels in the unfortunate situation of having to exercise their discretion without any guidance as to what "degree of fault" means. The issue was squarely put to a CAS Panel in Cilic v. International Tennis Federation ("Cilic"), CAS 2013/A/3327. The context, admittedly, was different, but the Panel finds it particularly helpful to refer to the three 'degrees of fault' identified by the CAS Panel in Cilic: "a) Significant degree or Considerable fault; b) Normal degree of fault; c) Light degree of fault". The CAS Panel in Cilic went on:

"71. In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities.

72. The Panel suggests that the objective element should be foremost in determining into which of the three relevant categories a particular case falls.

73. The subjective element can then be used to move a particular athlete up or down within that category.

74. Of course, in exceptional cases, it may be that the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether. That would be the exception to the rule, however."

6.43 In that case the Tribunal was satisfied that the degree of objective Fault was significant. In respect to the third missed test in that case the only way to contact the Athlete was via phone, yet the Athlete did not update her number, which she had changed. Accordingly, there was no way that the DCO was able to contact her for the purpose of the test. However, the Tribunal took into account a significant subjective element in reducing the period of Ineligibility of two years by six months.

6.44 On the present facts no particular subjective element arises. What is therefore required is an objective assessment of the Athlete's degree of Fault for what I am satisfied was an inexplicable human error by Mr Suarez.

6.45 Mr Suarez's inability to give an explanation is unsurprising given the inconsistency between the continued registration of Florida when Mr Suarez had the facts, clearly understood them as the correspondence shows, and had corrected the register through to 6 May 2021. I cannot interpret Mr Suarez's error as in any way caused by a failure of communication by the Athlete or on his behalf. Not only did Mr Suarez know the factual position and intention but common sense says that the Athlete knew that Mr Suarez knew.

6.46 However, that is not the end of the issue. As the AIU submission emphasises, despite the fact that the Athlete has not caused or contributed to Mr Suarez's error, the Athlete remains personally responsible for the Missed Test resulting from the Filing Failure. As it is rather pejoratively put, an Athlete cannot hide behind the failure of his Representative.

6.47 There is no such attempt here. The Athlete accepts the violation, albeit he did not cause the error which resulted in the violation. Given no causative contribution by the Athlete the question of the Athlete's degree of Fault is what, given Mr Suarez's independent mistake, could or should the Athlete have done to avoid human error by Mr Suarez resulting in a failure under the Rules.

6.48 The AIU submission seeks to make something of statements in *Naser* (CAS 2020/A/7526 and 7559), *Stevens* and *Coleman* (CAS 2020/A/7528) that an athlete with two whereabouts failures on their record should take every step within their control to avoid a further whereabouts failure. As a general proposition that must be correct but what steps must still be determined in respect to the particular circumstances. In those three cases there were additional negligent acts by the athletes which contributed to the occurrence of the violation.

6.49 The AIU submissions suggest a late notification by the Athlete in the 4 May 2021 WhatsApp communication and registration by Mr Suarez. That may be arguable but there is nothing to link that to the relevant error, which was the Failure to extend the 4-6 May 2021 registration in Portugal as ongoing through May 2021.

6.50 Instead that submission seems to have led the AIU submission to ignore the factual context and evidence identifying the Athlete as intending to and being in Portugal through that May period, going back to at least mid-April and the coach's communication of 3 May 2021. In short, para. 54 of the AIU's submission sets up a proposition that is inconsistent with the facts and must be rejected.

6.51 The further submission by the AIU is that the Athlete was under a duty to confirm that the updates had been transposed to ADAMS so that it was accurate and complete. It was submitted, by way of example, that the Athlete could and should have (i) requested confirmation from Mr Suarez to that effect (including evidence of the Filing in ADAMS) and (ii) access his Whereabouts Filing in ADAMS himself to ensure that the updates communicated to the Representative had been immediately transferred to his Whereabouts Filing.

6.52 The AIU submission cites an obiter comment in the *Subirats v FINA* decision of CAS (CAS 2011/A/2499) that the Appellant there who had relied on his National Federation to forward his Whereabouts information to FINA "should have made sure that such third party effectively forward the whereabouts information to the anti-doping organisation on time." The CAS Tribunal went on to say that "the Appellant should have ensured that the VSF was acting correctly, for example, by asking the VSF to confirm the fact that the whereabouts information was filed on time."

6.53 That was a case about filing failure, again without any causative contribution of the Appellant to the Federation's failure to register his Whereabouts information. CAS in fact reversed the FINA Doping Panel determination of a violation because of FINA's own breaches of its communication obligations so the CAS decision says nothing about the degree of Fault of an athlete in the Appellant's position. What is worth

noting, however, is that the FINA Doping Panel from which the CAS appeal resulted had imposed only the minimum 12-month period of Ineligibility.

6.54 I am not being critical when I say that the AIU examples are a counsel of perfection in an ideal world. Undoubtedly those practices would be desirable. But if that was to be a universal requirement to avoid the AIU's submission of significant Fault and scant regard then one would hope to at least see it in a Comment if not in the text of the Rule. I do not have evidence before me to assess how realistic it would be as a universal rule.

6.55 Without that evidence I am left to consider those two propositions in the particular circumstances facing this Athlete at the beginning of May through to 20 May 2021.

6.56 As to the first, that the Athlete should have sought confirmation and/or evidence of the filing, puts in issue the Athlete's communications with Mr Suarez on 4 May 2021. I am not sure whether the semantics of "confirmed" or "assumed" is particularly helpful. Rather the facts are, as I have said, that this was not the Appellant sending this information off to a National Federation as in Subirats but part of a continuing course of communications between the Athlete and his coach and Mr Suarez, of which one unambiguous fact was that all three knew and knew each other knew that the Athlete would not be in Florida in May 2021.

6.57 Given the communications, including the 3 May 2021 communications, the obvious and express inference from "You have the whereabouts at 20:00 at the hotel" and the question whether the Athlete wants another slot is that the Athlete has been or is being registered at the hotel for his Whereabouts. Given the communications and shared knowledge that Florida was out of the picture, again the obvious inference must be that Florida was not the registered Whereabouts the next day or following. And while it is hypothetical it is unlikely that any query from the Athlete would have resulted in a sudden realisation by Mr Suarez and anything other than reassurance.

6.58 Obviously, one must accept that if Athletes personally checked ADAMS this would or should likely avoid most if not all violations linked with misfiling errors. It is possible to contemplate particular circumstances creating uncertainty where that might be a required action. I am not certain that in reality many athletes would take that step without a specific concern, even with heightened anxiety to avoid a third failure. And not doing so will, if it contributes to a failure, expose the Athlete to the risk of a two-year period of Ineligibility. In my view the AIU approach that such a failure should result in a two-year sanction would impose akin to a universal obligation which is not transparently identified in the Rules and would leave no room for reflecting other contributing defaults of an athlete, such as were reflected in the Naser case. But I agree that it may be a matter to be considered in assessing the degree of Fault in a particular case.

6.59 However, in the present case with the shared understanding that Florida was out of the picture and the confirmation that his Whereabouts had been or was in the process of registration at the hotel in Portugal, which was the only location in the immediately on-going picture, I cannot see the Athlete's failure to independently check the entry as justifying the imposition of a sanction beyond the minimum provided in Rule 10.3.2.

6.60 I previously indicated in para. 6.11 that a proposition relying on Rule 10.7.1, advanced on behalf of the Athlete, could not apply on the facts. As will be apparent from my description of the facts, it could not be claimed on behalf of the Athlete that his co-operation had included providing information which permitted the AIU to identify an otherwise undisclosed breach of the Rules. In the present instance the role and error by Mr Suarez was immediately identifiable, including by Mr Suarez's own communication of 20 May 2021.

6.61 Finally, because of the non-application of Rule 10.5 and, on the facts, Rule 10.7.1 there is no foundation for suspension of the commencement of the period of Ineligibility. In the present instance, given this determination, the period of Ineligibility will commence on the date of provisional suspension, viz 25 June 2021.

6.62 However, disqualification from titles, prizes, appearance money etc will, pursuant to Rule 10.8, apply from 19 May 2021.

7. RULINGS

7.1. The Disciplinary Tribunal has jurisdiction over the present matter.

7.2. The Athlete has admitted an anti-doping violation of Rule 2.4.

7.3. A period of 12 months Ineligibility is imposed pursuant to Rule 10.2.3 to run from the date of Provisional Suspension, viz 25 June 2021 and end at 23:59 on 24 June 2022.

7.4. The Athlete's results are disqualified for the period between 19 May 2021 and 25 June 2021 including the forfeiture of any titles, prizes, appearance money etc in that period pursuant to Rule 10.8.

7.5. In view of the Athlete's admission of violation and the circumstances of the contest as to degree of Fault no costs order is made.

8. RIGHT OF APPEAL

8.1. This decision may be appealed to the Court of Arbitration for Sport ("CAS"), located at Château de Béthusy, Avenue de Beaumont 2, CH-1012 Lausanne, Switzerland (procedures@tas-cas.org), in accordance with Article 13 ADR and its relevant subsection.

8.2. In accordance with Art. 13.6 2021 ADR, parties shall have 30 days from receipt of this decision to lodge an appeal with the CAS.

Alan Galbraith QC
Sole Arbitrator, Disciplinary Tribunal
London
14 July 2021