



Arbitration CAS 2006/A/1165 Christine Ohuruogu v. UK Athletics Limited (UKA) & International Association of Athletics Federations (IAAF), award of 3 April 2007

Panel: Mr Hans Nater (Switzerland); President; Mr Dirk-Reiner Martens (Germany); Mr Raj Parker (United Kingdom)

Athletics

Athlete's failure to provide accurate whereabouts information for out-of-competition testing

Doping offence

Sanction

- 1. The application of the UKA and IAAF Anti-Doping Rules with respect to out-of-competition testing, specifically IAAF Rules 32.2(d) and 35.17 is confirmed. The meaning of IAAF Rule 35.17 is unambiguous and states that once three failures have been evaluated as three missed tests within 5 years, then the athlete has committed a doping offence. The wording of that rule does not suggest that a missed test cannot be declared as such until the athlete has been notified of any previous missed test(s).**
- 2. With respect to the sanction, the twelve month ban imposed by UKA on an athlete who has missed three tests is both within the range set by the World Anti-Doping Code and in line with the IAAF Rules for this type of offence. The suspension is proportionate and should not be disturbed.**

Christine Ohuruogu (“Ohuruogu”) is a professional athlete who specialises in the 400-metre track event. Ohuruogu is a member of the International Association of Athletics Federations registered testing pool.

UK Athletics Limited (UKA) is the governing body for athletics in the United Kingdom. The UKA is a member of the International Association of Athletics Federations.

The International Association of Athletics Federations (IAAF) is the world governing body for athletics.

Ohuruogu is a successful and high profile athlete. She won a gold medal in the 2006 Commonwealth Games in Melbourne and she has been suggested by many as one of the faces of the London 2012 Olympic Games. She was born in London, and continues to live there, specifically in the East End.

Ohuruogu was selected as one of around 20 UK athletes on the IAAF's registered testing pool. As such, she was obliged to provide up-to-date "*whereabouts information*" so that out-of-competition testing could be conducted. Out-of-competition testing forms an essential part of the regime for the prevention of doping pursuant to the World Anti Doping Code (the "WADA Code").

The facts set out below have been agreed by all the parties to this arbitration. The central issue in the case is whether the athlete failed to provide accurate whereabouts information for out-of-competition testing on three separate occasions and the consequences of such failure.

On or about 28 July 2005, in accordance with UKA protocol, Ohuruogu informed the IAAF that her schedule included training on Wednesdays from 12 noon to 4pm at Mile End Stadium. Between July and October 2005 she notified changes to the schedule. On two occasions she did this by text message and on other occasions by telephone.

On Wednesday 12 October 2005, a doping control officer from UK Sport (UKS) went to Mile End Stadium at 12 noon and waited for one hour. Ohuruogu was not there and a missed test was reported. On 17 October 2005 UKS reported a missed test to the UKA and on the 21 October the UKA wrote to Ohuruogu requesting an explanation for the missed test.

On 28 October 2005, Ohuruogu replied to the UKA accepting responsibility for forgetting to update her schedule. She explained that her training schedule had changed and instead of being at Mile End Stadium site she was at the Olympic Medical Institute (OMI) at Northwick Park.

On 2 November 2005 the UKA Anti-Doping Administrator notified Ohuruogu that she had been evaluated as having missed a test.

By June 2006 Ohuruogu's declared schedule for Wednesdays had changed to the OMI between 10am and 11am. At about 10pm on 27 June 2006, Ohuruogu's schedule changed when her coach suggested that, because of an injury, she should not undertake strength training at the OMI and instead train at the Mile End Stadium. On 28 June 2006, a doping control officer went to the OMI location, but Ohuruogu was not there. A trainer who was there telephoned Ohuruogu and she spoke to the doping control officer. However, she could not get from her home in Stratford to the OMI in Harrow (the other side of London) before the doping control officer had left.

On 6 July 2006, UKS informed the UKA that Ohuruogu had missed a second test. On 13 July the UKA wrote to Ohuruogu, requesting an explanation for the missed test. On the same day, Ohuruogu returned a completed whereabouts form to the IAAF and notified the IAAF of the difficulty of giving specific information as her rehabilitation training was occurring on a week-by-week basis.

On 25 July 2006, a doping control officer went to Mile End Stadium, the declared location for Ohuruogu between 11am and 12 noon. Ohuruogu was not there. The officer waited for one hour and then filed a missed test report.

Ohuruogu had planned to train at Mile End Stadium on that day, but at around 9.30am her coach telephoned her to say that he would have to train her at Crystal Palace Stadium instead because the facilities at Mile End Stadium were not available. Ohuruogu forgot to notify the change of schedule to the athletics authorities.

On 27 July 2006, the UKS informed the UKA that Ohuruogu had missed another test. The next day, the UKA wrote to Ohuruogu requesting an explanation for the missed test. On 31 July 2006 Ohuruogu responded to the UKA with her explanation for the second and third missed tests.

On 3 August 2006, the UKA informed Ohuruogu that she had been recorded as having missed three tests. On 6 August 2006, the Anti-Doping Co-ordinator decided that there was sufficient evidence of an anti-doping rule violation to invoke disciplinary proceedings and Ohuruogu was suspended with immediate effect, pending the result of those proceedings.

The matter was referred to the Disciplinary Committee (DC) of the UKA chaired by Charles Flint QC and, on 15 September 2006, Ohuruogu was found guilty by the DC of an anti-doping rule violation, contrary to IAAF Rule 32.2(d) by virtue of UKA Rule 2.1. As a result, she was declared ineligible for competition for one year from 6 August 2006.

On 5 October 2006, Ohuruogu appealed to the Court of Arbitration for Sport (CAS) against the DC's decision in accordance with Rules 47 and 48 of the Code of Sports Related Arbitration (the "Code"), and IAAF Rules 60.9, 60.11 and 60.25.

On 18 December 2006, the President of the Panel admitted the IAAF as an Intervener to the Appeal.

The hearing was held in London on 11 January 2007 and lasted one day.

LAW

1. Under R.47 of the Code:

"An appeal against the decision of a federation, association or sports related body may be filed with the CAS insofar as the statutes or regulations of the said bodies so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports related body.

An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure or first instance".

2. Under Rule 10.1 of the UKA Anti-Doping Rules and IAAF Rule 60.13, International Level Athletes, such as Ohuruogu, are entitled to appeal the decision of the DC to the CAS. Under the IAAF Rule 60.25, Ohuruogu had 30 days from the date of communication of the written reasons of the decision to be appealed in which to file her Statement of Appeal with CAS. Ohuruogu filed her Statement of Appeal within this time limit.

3. It follows that the CAS has jurisdiction to decide the present dispute.

4. Under R.58 of the Code:

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such 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 and according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

5. In the present matter, there was a dispute between the parties over whether English law or Monegasque law governed the appeal proceedings. However, the parties eventually agreed that there was no material difference between English and Monegasque law on the relevant issues and therefore the appeal proceedings should be decided in accordance with English law principles.

6. The main issues to be resolved by the Panel are:

- i. Liability;
- ii. Sanction; and
- iii. IAAF/UKA’s Anti-Doping Regimes.

7. The relevant IAAF rules are as follows:

Rule 32.2(d):

“Doping is defined as the occurrence of one or more of the following anti-doping rule violations:

(a) to (c) ...

(d) the evaluation of 3 missed out-of-competition tests (as defined in Rule 35.17 below) in any period of 5 years beginning with the date of the first missed test”.

Rule 35.17:

“If an athlete fails on request to provide the IAAF with his whereabouts information, or to provide adequate whereabouts information, or is unable to be located for testing by a doping control officer at the whereabouts retained on file for that athlete, he shall be subject to an evaluation by the IAAF Anti-Doping Administrator for a missed test. If, as a result of such evaluation, the IAAF Anti-Doping Administrator concludes that the athlete has failed in his obligation to provide whereabouts information or adequate whereabouts information, the IAAF Anti-Doping Administrator shall evaluate the failure as a missed test and the athlete shall be so notified in writing. If an athlete is evaluated as having

3 missed tests in any period of 5 years beginning with the date of the first missed test, he shall have committed an anti-doping rule violation in accordance with Rule 32.2(d)”.

8. The Panel has examined the terms of these rules in accordance with the English law rules of construction to establish their proper meaning. Under English law, it is necessary to ascertain the meaning of the document by reference to what meaning would be given to it by a reasonable man having all the background knowledge that would reasonably have been available. The presumption is that the words in documents should be given their natural and ordinary meaning and it is only when such an approach creates an unreasonable result that it is necessary to look to other meanings. English law does not readily accept that people have made linguistic mistakes, particularly in formal documents.
9. The Panel considers that the meaning of rule 35.17 is clear on its face as a matter of language. The language of rule 35.17 simply and unambiguously states that once three failures have been evaluated as three missed tests within 5 years, then the athlete has committed a doping offence:
 - (a) If an athlete:
 - (i) fails on request to provide the IAAF with his whereabouts information; or
 - (ii) fails on request to provide the IAAF with adequate whereabouts information; or
 - (iii) is unable to be located for testing by a doping control officer at the whereabouts retained on the athlete’s file;the athlete shall be subject to an evaluation by the IAAF Anti-Doping Administrator for a missed test.
 - (b) If the IAAF Anti-Doping Administrator concludes as a result of this evaluation that the athlete has failed in his obligation to provide whereabouts information or adequate whereabouts information, the failure shall be evaluated as a missed test.
 - (c) The athlete is notified of the evaluation of a missed test in writing.
 - (d) If there are three missed tests (i.e. three failures by the athlete which have been evaluated as three missed tests) within 5 years, then the athlete has committed a doping offence.
10. The Panel does not consider that the above interpretation creates an unreasonable result, such that the Panel could find it was not intended and therefore should import other words to convey a true meaning/intention. The athlete is given an opportunity to give reasons for his/her failure during the evaluation process. Indeed, Ohuruogu did this in her email of 31 July 2006 when she explained the reasons behind her second and third failures.
11. There is no wording in rule 35.17 that suggests that a missed test cannot be declared as such until the athlete has been notified of any previous missed test(s). To interpret rule 35.17 as meaning that such prior notification is necessary would involve correcting the draftsman’s presumed mistake and adding extra words into the language of the rule. Similarly, if written notification was to be treated as a necessary component of or condition precedent to the evaluation process, the requirement would have to be moved to earlier in the structure of the

second sentence of rule 35.17, in order to show that it was a condition precedent to an evaluation taking place. It is not the Panel's role to rewrite the IAAF's rules and anyway, in the present circumstances, such an approach is not available to the Panel under English law.

12. If the Panel looks beyond the ordinary meaning of the words to the factual matrix of the situation, the above interpretation remains correct. There is consecutive language elsewhere in the IAAF rules (for example, rule 40.6) and if the draftsman had intended to include that meaning in rule 35.17, then it is clear that he knew how to do so. In fact, Professor Ljungqvist's evidence in his witness statement and at the hearing was that the factual background of rule 32.2(d) was that the language chosen was intended to avoid the mischief of tests being sequential and therefore creating a temporary immunity for athletes. That is why there is no sequential language in the rule.
13. The facts as found by the UKA Disciplinary Committee were agreed by all the parties at the CAS hearing and, according to those facts, it is clear that Ohuruogu committed a doping offence under IAAF rule 32.2(d).
14. The WADA Code allows a ban of between three and 24 months for the doping offence committed by Ohuruogu. The WADA Code was drafted in consultation with world sports governing bodies and has been approved by the International Olympic Committee and EU governments. It is therefore rightly regarded as the oracle of the anti-doping movement. The UKA's penalty of a 12-month ban is well within the parameters set by WADA for this type of offence. The Panel also notes that the evidence submitted to it by the IAAF shows that WADA is in the process of revising the WADA Code and the current proposition is that there should be an amendment to impose a minimum sanction of 12 months on athletes who miss three tests.
15. The commentary to para.10.4.3 of the WADA Code states that organisations with longer experience of a whereabouts policy can provide for penalties at the longer end of the specified range. The IAAF is at the forefront of the fight against doping and it chose a penalty that is around halfway in the relevant range.
16. Professor Ljungqvist's evidence (paras 9 to 31 of his statement) was that out-of-competition testing is at the heart of any effective anti-doping programme. To carry out effective testing of this nature, it is vital that athletes produce accurate whereabouts information so that they can be tested by surprise. The IAAF has great experience and is at the forefront of the fight against doping in athletics and its position is that it is important to have an effective penalty against athletes that do not provide adequate whereabouts information, "*pour encourager les autres*". It is not the CAS Panel's role to second-guess the IAAF's decision or policy in this regard.
17. In a previous CAS decision CAS 2006/A/1025 referred to by the parties in their submissions, the CAS Panel identified a lacuna in the WADA Code that would produce an injustice if it was allowed to stand. The CAS Panel in that case stated that in all but the very rare cases, the WADA Code imposes a regime that provides just and proportionate sanctions. The present

case is not one of the very rare cases where an injustice will be done by a lacuna in the WADA Code and therefore the decision in CAS 2006/A/1025 can be distinguished.

18. Therefore, the Panel considers that the one-year fixed ban under IAAF R.40.1(c)(i) is proportionate and should not be disturbed.
19. The Panel expresses no view on the exact compatibility or otherwise of the anti-doping regimes of UK Sport and the IAAF. If there is any disparity in procedure, this is a matter as between the IAAF and its member body the UKA. The arguments as to compatibility are not relevant to the jurisdiction of the UKA to deal with Ohuruogu in this case.
20. It is clear as a matter of English law that the relationship between the UKA and Ohuruogu is contractual in nature. Ohuruogu agreed to be subject to the UKA's new regime when she signed the form that contained those procedures on 25 July 2005 and it is clear in the Panel's view that she committed a doping offence under those procedures.
21. The Panel concludes by noting that the burden on an athlete to provide accurate and up-to-date whereabouts information is no doubt onerous. However, the anti-doping rules are necessarily strict in order to catch athletes that do cheat by using drugs and the rules therefore can sometimes produce outcomes that many may consider unfair. This case should serve as a warning to all athletes that the relevant authorities take the provision of whereabouts information extremely seriously as they are a vital part in the ongoing fight against drugs in the sport.
22. Ohuruogu has been subjected to many anti-doping tests in the past and has not failed any of them. Indeed, on two occasions (16 and 28 July 2006) close to the date of the third missed test (25 July 2006) she tested negative in competition. There is no suggestion that she is guilty of taking drugs in order to enhance her performance or otherwise and, indeed, this case can be viewed in all the circumstances as a busy young athlete being forgetful.

The Court of Arbitration for Sport rules:

1. The appeal filed by Ms Christine Ohuruogu in relation to the decision of the Disciplinary Committee of the UK Athletics Limited is dismissed.
2. Ms Christine Ohuruogu is therefore declared ineligible for competition for one year from 6 August 2006.
3. (...).