CAS 2013/A/3080 Alemitu Bekele Degfa v. Turkish Athletics Federation and International Association of Athletics Federations

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: His Honour James Robert Reid QC, retired judge, West Liss, Hampshire, United Kingdom

Arbitrators: Mr Ulrich Hass, professor, Zurich, Switzerland

Mr Daniel Visoiu, attorney-at-law, Bucharest, Romania

in the arbitration between

ALEMITU BEKELE DEFGA, Istanbul, Turkey

Represented by Professor Antonio Rigozzi, professor and attorney-at-law and Ms Brianna Quinn, attorney-at-law, of Lévy Kaufmann-Kohler, CH-1211, Geneva, Switzerland, and Mr Koray Akalp, attorney-at-law.

Appellant

vs.

TURKISH ATHLETICS FEDERATION, Ankara, Turkey
Represented by Mr Nihat Doker, General Secretary, Ankara, Turkey

First Respondent

and

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS, Monaco Cedex
Represented by Mr Jean-Pierre Morand, attorney-at-law, Mr Huw Roberts, IAAF internal legal counsel, and Mr Thomas Capdevielle, IAAF results manager, MC70087 Monaco.

Second Respondent

I. PARTIES

1. Ms Alemitu Bekele Degfa (the "**Appellant**" or "**Ms Bekele**") is an athlete of Turkish nationality and of Ethiopian origin born on 17 September 1977, and is an international long-distance runner specialising in the 3000m and 5000m events.

2. The Turkish Athletics Federation (the "**First Respondent**" or "**TAF**") is an association incorporated under Turkish law with its headquarters in Ankara, Turkey. It is the national governing body for athletics in Turkey.

3. The International Association of Athletics Federations (the "**Second Respondent**" or "**IAAF**") is the international federation governing the sport of athletics worldwide. It has its registered office in Monaco. The TAF is a member of the IAAF.

II. BACKGROUND FACTS

4. Below is a summary of the main relevant facts and allegations based on the parties' written submissions and adduced evidence. Additional facts and allegations may be set out, where relevant, in connection with the discussion of law and merits that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning

5. In August 2009, the IAAF introduced the concept of the "Athlete Biological Passport" ("**ABP**") to its standard blood testing programme.

6. On 17 August 2009, at the World Championships in Berlin, Ms Bekele competed in the 5000m race finishing in 11th place, following which the IAAF collected an ABP blood sample from her ("**Sample 1**").

7. On 11 March 2010 at the World Indoor Championships in Doha, Ms Bekele competed in the 3000m race finishing in 5th place, the IAAF collected a second ABP blood sample from her ("**Sample 2**").

8. On 29 July 2010, at the European Championships in Barcelona, where Ms Bekele competed in the 5000m finishing in the gold medal position in a European Championship record time of 14:52:20 minutes, the IAAF collected a third ABP blood sample from her ("**Sample 3**").

9. In September 2010, the IAAF received what it describes as a "tip-off" from an anonymous Turkish athlete which suggested, inter alia, that Ms Bekele was engaged in doping practices.

10. As a result of this information and the ABP results from Ms Bekele in 2009 and 2010 (which the IAAF regarded as "highly suspicious") her name was added to the IAAF's "Registered Testing Pool" in October 2010.

11. Following this, three further ABP samples were collected from Ms Bekele: on 10 July 2011 out of competition in St Moritz ("**Sample 4**"); on 29 August 2011 at the IAAF World Championships in Daegu ("**Sample 5**"); and on 27 November 2011 out of competition in Turkey ("**Sample 6**").

12. Her hematological profile comprising the results of the first five of these tests was identified as being abnormal by the IAAF's adaptive model with a probability of more than 99%.

13. Sample 1 showed a haemoglobin level ("**HGB**") of 15.1, and a reticulocyte percentage ("**RET%**") of 0.67; Sample 2 an HGB of 17.1 and an RET% 0.67; Sample 3 an HGB of 17.1 and an RET% of 0.17; Sample 4 an HGB of 13.4 and an RET% of 1.72; and Sample 5 an HGB of 14.1 and an RET% of 1.65. Sample 6 (which was not included in those samples run against the IAAF's adaptive model) showed an HGB of 13.0 and an RET% of 1.56.

14. In addition to the IAAF samples, the Athlete had undergone a number of blood tests of her own in which her HGB (but not her RET%) were measured. These were: 25 September 2009 HGB 12.8; 1 June 2009 HGB 14.2; 3 September 2009 HGB 12.62; and 4 September 2009 HGB 12.0. These did not form any part of her biological passport but were revealed by Ms Bekele in the course of the proceedings.

15. Because of the results from the IAAF tests, an investigation into a potential doping violation was triggered by the IAAF pursuant to the Anti-Doping Rules in Chapter 3 of the IAAF Competition Rules and commenced in accordance with Rule 37.10. Her case was referred to an independent Expert Panel comprising Prof Yorck-Olaf Schumacher, Dr Giuseppe D'Onofrio, and Prof Michel Audran. The Expert Panel concluded that it was highly likely that her blood profile was the result of the use of a prohibited substance or method.

16. Ms Bekele was invited to provide an explanation for her abnormal profile, which she did through her national federation. Initially, on 23 February 2012 she put forward a somewhat skimpy "home made" response. On 1 March 2012, however, she withdrew that explanation and submitted a new, more considered response which in essence explained her elevated HGB by reference to a combination of factors including (1) the inhalation of pure oxygen under hyperbaric conditions; (2) training at altitude and in hot and humid conditions; and (3) various food supplements. This explanation was considered but rejected by the Expert Panel and she was then charged with a breach of Rule 32.2(b) by a letter dated 3 April 2012.

17. On 3 April 2012, a provisional period of ineligibility was imposed on her pursuant to IAAF Competition Rule 38.2. She was formally charged and on 15 June 2012 the TAF Penal Board ("**Penal Board**") conducted a hearing at which they heard Ms Bekele's evidence in person and considered the further explanations for the apparent abnormalities which she gave. These were in summary as follows: (1) vaginal bleeding following the abortion of twins on 21 May 2009; (2) food poisoning and gastrointestinal infection from 2 to 11 September 2009; (3) lung pathology resulting from underwater training with pure oxygen from 8 March 2010 to 25 September 2010; (4) hyperthyroidism on 16 April 2010; and (5) severe malaria from 21 May 2011 to 10 November 2011.

18. As a result of the new medical evidence submitted by Ms Bekele, the Penal Board referred the evidence to an expert medical panel. Having received its report, the Penal Board held that Ms Bekele had violated the anti-doping rules contrary to Rule 32.2.b. It therefore imposed a sanction of four years ineligibility on Ms Bekele commencing on 15 February 2012 pursuant to Rule 40.6(a) on the grounds that there were aggravating circumstances in that she had committed the violation as part of a doping plan or scheme.

III. PROCEDURAL HISTORY

19. By a statement of appeal dated 8 February 2013, Ms Bekele appealed against the underlying decision to the Court of Arbitration for Sport ("**CAS**"), naming the TAF as Respondent pursuant to Article R48 of the Code of Sports-related Arbitration (the "**Code**"). She also appealed at a national level to the national appeal body, the Arbitration Panel of the Turkish Directorate of Youth and Sport. At this stage she

offered a further series of explanations for her apparently abnormal test results. That body decided to refer her medical case to an expert medical committee established by the Anti-Doping Commission of the Turkish National Olympic Committee.

20. In her statement of appeal, Ms Bekele nominated Prof Ulrich Haas as arbitrator.

21. On 22 March 2013, the IAAF having become aware of the appeal to the CAS, asserted the right to intervene as a party pursuant to Articles R41.3 and R54 of the Code.

22. On 12 April 2013, (after having been given various extensions of time) Ms Bekele filed her appeal brief pursuant to Article R51 of the Code. By it she sought both to set aside the decision of the Penal Board and (even if unsuccessful in that regard) to set aside the sanction of a four-year period of ineligibility and to substitute it with a period of two years.

23. The appeal brief raised a number of issues which may be summarised as follows: (1) the possibility of incorrect flagging of abnormality; (2) alleged flaws in the sampling process, the analysis of the samples, and the conclusions which could be drawn from the analysis; and (3) the effects of severe malaria on the values found in some of the samples.

24. On 2 May 2013, shortly after the appeal brief was filed with the CAS, the Turkish national appeal body, having received the report of the expert committee to which it had referred Ms Bekele's medical case, rejected Ms Bekele's appeal and upheld the decision of the Penal Board.

25. On 6 May 2013, the TAF filed its "Statement of Defense" pursuant to Article R55 of the Code

26. On 13 May 2013, Ms Bekele and the TAF were notified of the constitution of the Panel to decide this appeal as follows:

President:	His Honour James Robert Reid QC
Arbitrators:	Mr Ulrich Hass
	Mr Daniel Visoiu

27. Neither party objected to the composition of the Panel.

28. On 3 July 2013, having considered representations by the parties as to whether the IAAF should be joined as a party to the appeal, the Panel allowed the IAAF's

application to be joined as a Respondent. Reference is made to the grounds in that Order.

29. On 24 July 2013, the IAAF filed its Answer to the Appeal pursuant to Article R55 of the Code.

30. On 16 September 2013, in accordance with directions given by the Panel and having been allowed extensions of time, Ms Bekele filed her Reply to the IAAF's Answer.

31. On 11 October 2013, in accordance with directions given by the Panel and having been given an extension of time, the IAAF filed its Rejoinder to Ms Bekele's Reply.

32. By letter dated 9 December 2013, Ms Bekele, by her lawyers, informed the CAS that she was limiting the scope of her appeal to the length of the sanction imposed on her. In doing so she stated that this was not intended to be an admission of guilt to the anti-doping rule violation but that the decision was one taken in the light of her inability to afford further expert evidence intended to be adduced by the IAAF and the fact that if she were to succeed in having the length of the sanction reduced to two years, that sanction would have been served by 3 April 2014.

33. Ms Bekele and the IAAF signed the Order of Procedure on 13 December 2013. The TAF did not sign the Order of Procedure.

IV. CONSTITUTION OF THE PANEL AND THE HEARING

34. An oral hearing took place on Monday 16 December 2013 at the CAS headquarters in Lausanne, Switzerland. The Panel was assisted by Brent J. Nowicki, Legal Counsel to the CAS.

35. Ms Bekele was represented by Prof Rigozzi, Ms Quinn, and Mr Akalp. The TAF did not attend the hearing. The IAAF was represented by Mr Morand, Mr Roberts, and Mr Capdeville. Ms Bekele made a personal statement to the Panel at the conclusion of the hearing and responded to questions put to her by the Panel and the IAAF. On behalf of the IAAF, Prof Schumacher and Prof D'Onofrio gave oral evidence and confirmed their written statements.

36. Prof Schumacher and Prof D'Onofrio confirmed their view that the analysis of Samples 2 and 3 showed a supraphysiological red cell mass (high HGB values) and a suppressed erythropoesis (low RET%). There was no physiological explanation for such phenomenon. Such a pattern could only be achieved through an artificial increase in the

number of circulating red blood cells, for example, through the use of an erythropoietic stimulant, such as a recombinant human EPO (rhEPO) or the application of red cells through blood transfusion. Prof Schumacher noted that both these techniques required repetitive and planned application of drugs (rhEPO) or sophisticated, premeditated reinfusion techniques. These techniques required to be timed carefully to achieve the highest possible impact on performance and to avoid positive testing in conventional urine tests for EPO. The RET% dropped to its lowest about two weeks after the cessation of doping. These samples suggested the employment of a doping plan aimed at the IAAF Indoor World Championships in Doha and the IAAF European Championships in Barcelona. Their initial view had been that Sample 1 suggested that the IAAF World Championships in Berlin had also been targeted. In their oral evidence that suspicion had hardened. They confirmed that none of the potential explanations advanced by Ms Bekele (including her assertion that she had suffered two severe bouts of malaria in May and November 2011 respectively) accounted for the abnormal profile. The results in Samples 2 and 3 indicated a cessation of doping somewhere between one and three weeks before the respective events so as to avoid the danger of detection from a conventional doping test. They were 100% sure the tests did not show a false positive. The results disclosed by Samples 4, 5, and 6 showed a return to normal values, indicating a cessation of the use of Prohibited Substances or Methods.

37. Ms Bekele told the Panel that she had never used any banned substance or method and that she was unable to explain the results. She denied that she had shared a coach with another Turkish athlete charged with doping offences. She was simply a runner and wished to be able to resume her career as soon as possible.

38. At the close of the hearing Ms Bekele and the IAAF expressed that they were satisfied as to how the hearing and proceedings had been conducted, and that their right to be heard had been fully respected.

V. JURISDICTION OF THE CAS AND ADMISSIBILITY

39. The CAS has jurisdiction to decide the present dispute between the parties. This jurisdiction is not disputed by the parties and has been confirmed by the signing of the Order of Procedure. In addition, it is contemplated by Article R47 of the Code that:

> *"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 body 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."

40. By Article 42.3 of the IAAF Competition Rules that:

> *"Appeals Involving International-Level Athletes: in cases involving International-Level Athletes or their Athlete Support Personnel, the first instance decision of the relevant body of the Member shall not be subject to further review or appeal at national level and shall be appealed only to CAS in accordance with the provisions set out below."*

41. It follows, therefore, that the CAS has jurisdiction to hear this appeal.

42. Moreover, the Panel notes that by virtue of IAAF Rule 42.13, Ms Bekele had forty-five (45) days in which to file her statement of appeal, beginning on the date the written reasoning of the underlying decision was provided to her. In this regard, the Panel notes that the reasoned underlying decision was notified to Ms Bekele on 25 December 2012. The filing of her statement of appeal on 8 February 2013 is, therefore, timely and consequently this appeal is admissible.

VI. APPLICABLE LAW

43. By Article R57 of the Code, the Panel has full power to review the facts and the law.

44. Article R58 provides as follows:

> *"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 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

45. By Rule 42.23 of the IAAF Competition Rules in all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitration shall be conducted in English, unless the parties agree otherwise. The relevant IAAF Rules and subsidiarily Monegasque law shall therefore be applied.

VII. THE RELEVANT COMPETITION RULES

46. The following IAAF Competition Rules are most material to this appeal and are set forth below, where relevant, as the framework for this award.

47. By Rule 32.2 of the IAAF Competition Rules:

"2. Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List. The following constitute anti-doping rule violations:

...

(b) Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method.

(i) it is each Athlete's personal duty to ensure that no Prohibited Substance enters his body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.

(ii) the success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used, or Attempted to be Used, for an anti-doping rule violation to be committed."

48. By Rule 33.1 and 2:

"1. The IAAF, the Member or other prosecuting authority shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the IAAF, the Member or other prosecuting authority has established an anti-doping rule violation to the comfortable satisfaction of the relevant hearing panel, bearing in mind the seriousness of the allegation which 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.

2. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Rules 40.4 (Specified Substances) and 40.6 (aggravating circumstances) where the Athlete must satisfy a higher burden of proof."

49. By Rule 40.2:

"The period of Ineligibility imposed for a violation of Rules 32.2(a) (Presence of a Prohibited Substance or its Metabolites or Markers), 32.2(b) (Use or Attempted Use of a Prohibited Substances or Prohibited Method) or 32.2(f) (Possession of Prohibited Substances and Prohibited Methods), unless the conditions for eliminating or reducing the period of Ineligibility as provided in Rules 40.4 and 40.5, or the conditions for increasing the period of Ineligibility as provided in Rule 40.6 are met, shall be as follows: First Violation: Two (2) years' Ineligibility."

50. By Rule 40.6:

"If it is established in an individual case involving an anti-doping rule violation other than violations under Rule 32.2(g) (Trafficking or Attempted Trafficking) and Rule 32.2(h) (Administration or Attempted Administration) that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four (4) years unless the Athlete or other Person can prove to the comfortable satisfaction of the hearing panel that he did not knowingly commit the anti-doping rule violation.

(a) Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the Athlete or other Person used or possessed multiple Prohibited Substances or Prohibited Methods or used or possessed a Prohibited Substance or Prohibited Method on multiple occasions; a normal individual would be likely to enjoy performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility; the Athlete or other Person engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation. For the avoidance of doubt, the examples of aggravating circumstances referred to above are not exclusive and other aggravating factors may also justify the imposition of a longer period of Ineligibility.

(b) An Athlete or other Person can avoid the application of this Rule by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation (which means no later than the date of the deadline given to provide a written explanation in accordance with Rule 37.4(c) and, in all events, before the Athlete competes again)."

VIII. THE PARTIES' SUBMISSIONS

A. Ms Bekele

51. In her appeal brief, as supplemented by her reply, Ms Bekele sought the following relief:

- *Setting aside the Decision of the Turkish Athletics Federation dated 4 December 2012;*
- *Declaring that no anti-doping rule violation by Ms Alemitu Bekele has been established;*
- *In the event that a period of ineligibility is to be imposed on Ms Alemitu Bekele, ordering that such period of ineligibility shall not exceed 2 years;*
- *In the event that a period of ineligibility is to be imposed on Ms Alemitu Bekele, ordering that the total period of provisional suspension served by Ms Alemitu Bekele be credited against the total period of ineligibility to be served;*
- *Condemning the Turkish Athletics Federation and the International Association of Athletics Federations to pay the arbitration costs; and*
- *Ordering the Turkish Athletics Federation and the International Association of Athletics Federations to reimburse Ms Alemitu Bekele's costs incurred in the CAS appeal.*

52. More specifically, Ms Bekele submitted that she did not admit to any doping offence. She had originally appealed against the decision of the Penal Board because the medical

evidence which she had obtained after the decision of the Penal Board demonstrated that abnormal blood profile was the consequence of two severe bouts of malaria coupled with her Ethiopian heritage which would of itself have led to her having a higher HGB level than most women athletes. She had abandoned her appeal against the finding of the Penal Board because she did not have the finance to counter the expert evidence which the IAAF proposed to call at the hearing, in particular in regard to the question of malaria. In these circumstances, she had taken the difficult decision to pursue her appeal only against the four-year ban which had been imposed on her. She accepted that she must serve a two-year ban, but given that a two-year period of ineligibility would expire in April 2014, this was a hardship with which she had to put up because of her financial inability effectively to challenge the evidence sought to be adduced by the IAAF.

53. So far as the IAAF's attempt to assert that there were aggravating circumstances justifying a four-year period of ineligibility, the attempt to base a case of multiple infractions on Sample 1 was a change of position which could not be permitted. A four-year period of ineligibility was the maximum and should not be imposed lightly even if there were aggravating circumstances. In the only CAS decision relied upon by the IAAF (CAS 2012/A/2773 *IAAF and Hellenic Amateur Athletic Association v Kokkinariou*) there had been a doping plan or scheme extending over five of six years. Moreover, that was the decision of a sole arbitrator, not a panel. On the contrary, there were at least five other CAS cases in which there had been a panel of three arbitrators and where only a two-year year ban had been imposed: CAS 2010/A/2178 *Caucchioloi v CONI & UCI;* CAS 2010/A/2308 *Pellizotti v* COM *& UCI;* CAS 2010/A/2174 *De Bonis v.* COM *& UCI;* CAS 2010/A/2235 *UCI v Valjavec & Olympic Committee of Slovenia;* and CAS 2009/A/1912 *Pechstein v International Skating Union.* In particular, it was highlighted that in CAS 2010/A/2235 at para 119, the panel observed:

> *"UCI claims that blood manipulation constitutes an aggravating factor and, consequently, that a minimum three-year ban should be imposed on the Athlete. This submission has no foundation under the UCI ADR which does not under article 293 differentiate between various forms of first offence or suggest that blood manipulation attracts ratione materiae a higher sanction than the presence of a prohibited substance. It is the circumstances of the offence, not the commission of the offence itself, which may aggravate. Here there is nothing before the CAS Panel*

to displace the presumption that 2 years ineligibility for a first offence is appropriate in this case."

54. Since the purpose of the ABP program is to assess whether or not an athlete has committed an anti-doping rule violation on the basis of a longitudinal profile of that athlete, in the majority of ABP cases the relevant authority cannot determine with any precision what type of doping has occurred or when it is alleged to have occurred. Since the purpose of the ABP program is to provide details of the variations in an athlete's biological parameters over the course of the period monitored, so that these parameters can be assessed to "indirectly reveal the effects of doping" multiple values will necessarily be obtained in every ABP case, and the relevant authority and its experts are not able to identify the precise violation that has been committed, concluding that there are aggravating circumstances for multiple violations on the sole basis of the longitudinal variations in an Athlete's ABP is at odds with the concept of aggravating circumstances under Rule 40.6.

55. There was no evidence of deceptive conduct to avoid detection or suggestion of any sophisticated scheme. In this context there was no basis for asserting that there were aggravating circumstances and even if there were it would be disproportionate to impose more than a two-year sanction.

56. The appeal was a hearing *de novo* and the Panel should not have regard to the fact that the Penal Board had considered the case warranted a four-year period of ineligibility.

B. The TAF

57. The TAF's only submission as to the penalty was a written submission that the Penal Board had sanctioned Ms Bekele in accordance with the rules and regulations of the IAAF.

58. The TAF's request for relief was as follows:

1. *To reject the claims of Ms Degfa*
2. *to establish that the costs of the present arbitration procedure shall be borne by Ms Degfa*

C. The IAAF

59. In its answer, the IAAF sought the following relief:

(i) The Appellant's appeal be rejected;

(ii) The decision of the TAF Penal Board dated 4 December 2012 to find the Appellant guilty of an anti-doping rule violation under IAAF Rule 32.2(b) and to impose a sanction of 4 years ineligibility be upheld;

(iii) The period of ineligibility of 4-years in the Appellant's case starts on the date of the CAS decision, with any period of provisional suspension and/or Ineligibility previoulsy served to be credited against the total period of Ineligibility imposed.

(iv) The IAAF be awarded its costs in the appeal (including CAS costs), such costs to be confirmed.

60. More specifically, the IAAF submitted that there were aggravating circumstances which justified the increase of the penalty up to a four-year period of ineligibility. That penalty was appropriate because a similar penalty had been imposed in CAS 2012/A/2773 *IAAF and Hellenic Amateur Athletic Association v Kokkinariou.* In the majority of cases in which athletes had been charged with a doping offence as a result of the analysis of the ABP the athletes had admitted their fault and consequently accepted a two year period of ineligibility. In the 15 cases in which the athlete had not admitted culpability and the offence was found proven, a four-year ban was imposed. This policy was in line with the proposed introduction (to take effect from 2015) of a four-year sanction. The Panel should have regard to the policy of imposing a four-year sanction when an athlete unsuccessfully contested his or her culpability. The Panel should also pay particular regard to the decision of the Penal Board and of the Arbitration Panel of the Turkish Directorate of Youth and Sport. It would be most undesirable if every time an athlete received a four-year sanction he or she could seek to appeal to the CAS in the hope that a different panel might impose a more lenient penalty.

61. In the present case there were significant aggravating circumstances. The evidence established that the anti-doping rule violation was part of an anti-doping plan or scheme. She had carried out the doping over a considerable period of time and must have done so with the assistance of others, in particular her coach. She could not have done what the

scientific evidence established by herself. She had, on the evidence, used or possessed a Prohibited Substance or Prohibited method on multiple occasions. The evidence showed that she had targeted at least two (and probably three) major events. She had engaged in deceptive or obstructing conduct to avoid detection or adjudication of an anti-doping rule violation by her advancing a variety of different and unfounded defences before the Penal Board, the Arbitration Panel of the Turkish Directorate of Youth and Sport and (until the last moment) before the CAS. She had only abandoned her final defence that the readings in her ABP were due to malaria about a week before the hearing in the face of overwhelming scientific evidence that the defence was bogus. A four-year ban was fully justified.

62. The cases referred to on behalf of Ms Bekele were not on point. The rules of different sports differed. While the IAAF Competition Rules incorporated in its rules in Rule 40.6 what was expressed merely as guidance in the WADA Code, in other sports (for example cycling) the rules did not expressly incorporate the WADA guidance as part of their rules.

IX. MERITS OF THE APPEAL

63. The submissions of the parties were considered by the Panel in their totality. This Award, however, only sets out those matters which are necessary to the determination of the appeal.

64. The Panel has full power to review the facts and the law. Thus it is not necessary for Ms Bekele to go so far as to show that the decision of the Penal Board was one which no reasonable tribunal could have reached or that the decision was defective either in taking into account matters which it should not have done or failing to take into account matters which it should have done. The Panel is comforted in its view by CAS jurisprudence.

65. The Panel, however, has paid proper attention and given proper respect to the careful decisions of the Penal Board and the Arbitration Panel of the Turkish Directorate of Youth and Sport.

66. The Panel is comfortably satisfied that Ms Bekele committed anti-doping rule violations ahead of both the IAAF Indoor World Championships in Doha and the IAAF European Championships in Barcelona in 2010. The unrebutted and strong evidence of Prof

Schumacher and Prof D'Onofrio demonstrated clearly the commission of doping offences contrary to the IAAF Competition Rules. The Panel, like Prof Schumacher and Prof D'Onofrio, has suspicions that the results shown by Sample 1 demonstrate a further doping offence, but that suspicion is not enough to comfortably satisfy the Panel as to Ms Bekele's guilt in relation to that sample.

67. The Panel is also comfortably satisfied that there are in this case aggravating circumstances which bring Competition Rule 40.6 into play. Conversely, Ms Bekele has failed to prove to the comfortable satisfaction of the Panel that she did not knowingly commit anti-doping rule violations. The Panel found her assertions that she had never engaged in any doping practice or method entirely unconvincing.

68. The Panel is comfortably satisfied that her conduct in advance of the taking of Samples 2 and 3, involving as it did a course of conduct over a considerable period, amounted to a doping plan or scheme. Whilst this was not a sophisticated conspiracy (such, for example, as that found in CAS 2008/A/1718 to 1724 *IAAF v All Russian Athletic Federation and others*) this was not a case of an athlete taking a banned substance on a single occasion. It was a repetitive and planned application of drugs (rhEPO) or sophisticated, premeditated reinfusion techniques. Likewise, under these circumstances it is difficult to conceive that Ms Bekele acted without the help or assistance of others.

69. Furthermore, the Panel is comfortably satisfied that she used or possessed a Prohibited Substance or Prohibited Method on multiple occasions, in line with Rule 40.6(a) which states, in part: "*Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: .. the Athlete or other Person used or possessed multiple Prohibited Substances or Prohibited Methods or used or possessed a Prohibited Substance or Prohibited Method on multiple occasions . . . .* " The nature of the findings by Prof Schumacher and Prof D'Onofrio make it clear that she must have repeatedly so acted.

70. As to the question whether Ms Bekele has been shown to have engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation, the view of the Panel is that for this factor to be brought into play an athlete must have done more than put the prosecuting authority to proof of its case. In light of the above, the Panel deems that it is not sufficient to establish an aggravating circumstance the mere fact that an athlete has relied on factors which are found not to

be sufficient to explain the anomalies in his or her APB. If there were circumstances which showed to the comfortable satisfaction of the Panel that the threshold of what can be deemed to be a legitimate procedural defence is clearly exceeded, then this factor would be relevant. However, it was not suggested during the appeal that there was any principle of Monegasque law (the relevant law) which rendered it unlawful to take such a defence into account as an aggravating factor.

71. The position in this case was that the Athlete advanced various facts which she suggested could be responsible for the results found on the analysis of the various Samples. Although it was suggested that there were inconsistencies and improbabilities in the Athlete's account of her whereabouts over the summer of 2010 and the bout or bouts of malaria she claimed to have suffered, the subject was not explored in any detail by the IAAF at the hearing. For example, it appeared at one stage that the IAAF might have been going to suggest that the supposed medical records produced on behalf of the athlete were not what they purported to be, but this point was not pursued.

72. The further point which arose was that it could have been suggested that the cessation of the use of a Prohibited Substance or Method somewhere between one and three weeks before the events which the athlete was targeting amounted to deceptive conduct to avoid detection. The same point arose in CAS 2012/A/2773 *IAAF and Hellenic Amateur Athletic Association v Kokkinariou,* on which the IAAF placed great reliance. The Sole Arbitrator did not find it necessary to determine the point in that particular case but observed at para 129:

> *"The Sole Arbitrator notes that most, if not all, doping practices are timed to avoid detection. As a result, an aggravating circumstance is likely to require a further element of deception. However, since IAAF Rule 40.6 is already engaged, this point may be left open in this case."*

The Panel respectfully agrees with the tentative view expressed by the Sole Arbitrator. Even if such conduct amounts to one aggravating circumstance something further is needed before the conduct is such as to justify an increased sanction for another additional aggravating circumstance. An example of such conduct can be found in CAS 2008/A/1718 to 1724 *IAAF v All Russian Athletic Federation and others* in which athletes were shown to have provided specimens which were not their own.

73. In these circumstances, the Panel is not comfortably satisfied that Ms Bekele engaged in deceptive or obstructive conduct in such a manner as to require the imposition of a *per se* increased sanction to be imposed on this ground.

74. The Panel, however, does reiterate its finding that Ms Bekele did demonstrate certain behaviours that lend themselves to the existence of aggravating circumstances. As previously mentioned, her course of conduct over at least a period of several months amounted to a doping plan or scheme, as well as her use or possession of a Prohibited Substance or Method on multiple occasions, thereby justifying the imposition of a period of ineligibility greater than the standard sanction of two-years ineligibility.

75. The question then is what greater period of ineligibility shall be imposed. The words of the Rule are "shall be increased up to a maximum of four (4) years." These words impose a maximum. They do not mean that in every case in which there are aggravating circumstances a period of ineligibility of four years must be imposed.

76. The fact that the standard sanction will in the future be increased to a period of four-years ineligibility is irrelevant to the issues in this case. The case has to be decided on the rules as they stand, not on the rules as they will become in the future.

77. CAS 2012/A/2773 *IAAF and Hellenic Amateur Athletic Association v Kokkinariou*, on which the IAAF placed great reliance, was a case in which neither Respondent filed an Answer and the Sole Arbitrator did not have the advantage of any argument on behalf of the athlete. The Sole Arbitrator found that the athlete used a Prohibited Substance as part of a structured regime between 2006 and 2009 and again in 2011. Further the athlete had used ferretin in concert with rhEPO or another ESA. The use of the additional substance to enhance the effects of a Prohibited Substance demonstrated a considerable degree of forethought and was an additional element of planning in what was already a methodical and drawn out doping scheme. In those circumstances, the Sole Arbitrator found that there was a multiple triggering of Rule 40.6 and that the Ineligibility Period should be extended to four years. That decision reflected a greater culpability than that of Ms Bekele in the present case in which the period over which doping has been established is one year, but that fact does not of itself mean that the sanction in this case should be a lesser one. It is well arguable that the athlete in the *Kokkinariou* case cleared the bar for the imposition of the maximum penalty by a considerable margin.

78. The Panel further notes that the threshold for an athlete to get a reduction from the standard sanction of two years is high, both in relation to the objective facts that have to be submitted and proven, as well as in relation to the degree of fault. Even if the conditions for a reduction or suspension of the period of ineligibility are fulfilled, panels in general are hesitant to allow for a maximum reduction, but rather tend to weight the circumstances speaking in favour of the athlete carefully and with a sense of proportion. Furthermore, the starting point for a reduction is, in principle, the standard sanction and not the lower limit of the sanction range. In the view of the Panel, the same principles should apply if – as it is the case here – an increase of the standard sanction is in question.

79. So far as the cases relied upon by Ms Bekele are concerned, the rules in those cases were not those of the IAAF. But the distinction relied upon by the IAAF (that the examples lifted from the comments in the WADA Code into the IAAF Competition Rules 40.6(a) are not specifically incorporated into the rules, for example, of the ICU) is not a persuasive reason to disregard those cases, in none of which was a four-year enhanced penalty imposed. The substantive part of each rule is the same and comes from a common source, the WADA Code. The examples set out in the WADA Comments and the IAAF Rules are expressly said not to be exclusive. Like all cases on penalty, it is not correct to describe the cases as setting a precedent as to the appropriate level of penalty in other cases. They are merely examples which may offer helpful guidance, and to the extent that they do offer helpful guidance, a panel will have regard to them.

80. The IAAF relied upon the fact that a four-year period of ineligibility had been established as the norm in blood doping cases in athletics. In CAS 2012/A/2773 *IAAF and Hellenic Amateur Athletic Association v Kokkinariou* at para 75, the Sole Arbitrator referred to *Portugese Athletics Federation v Ornelas* in which a four-year period of ineligibility had been imposed for blood doping offences apparently committed over a period of one year. However, as was observed in 2010/A/2235 *UCI v Valjavec & Olympic Committee of Slovenia*, albeit in relation to a different set of rules, the rules do not differentiate between various forms of first offence or suggest that blood manipulation attracts *ratione materiae* a higher sanction than the presence of a prohibited substance. It is the circumstances of the offence, not the commission of the offence itself, which may aggravate.

81. That said, blood doping offences are by their nature repetitive and sophisticated. Aggravating features which involve a doping plan or scheme and a repetitive and sophisticated use or possession of a Prohibited Substance or Method are likely to be regarded as aggravating circumstances which require a substantial increase over the standard sanction. It is also true that it is difficult to conceive that the Appellant acted without the help or assistance of others. The IAAF itself speculated that assistance might have been given to the Appellant by an athlete support personnel. In this respect the Panel refers to the decision in CAS 2008/A/1718 to 1724 *IAAF v All Russian Athletic Federation and others* where it is stated at para 216:

> *"On the other hand the Panel finds, that the circumstances of the case do not warrant to go to the upper limit of the range of the period of ineligibility, ie up to 4 years. The extent of the doping program of which the Athletes were undoubtedly part of has not been completely uncovered. It is hardly conceivable that the Athletes could have acted the way they did without the assistance of athlete support personnel or persons holding certain official functions within the federation. The Panel is of the view that the Appellant may not have used all efforts at its disposal to uncover the full extent of the "doping program". ... In view of these persisting uncertainties the Panel does not find it just and equitable to go to the upper limit of discretion at its disposal concerning the length of the sanctions."*

82. In the present case, the established culpability of the athlete relates only to a single year and to the targeting of two competitions within that year, though by the repeated use of a Prohibited Substance or Method. This is offending on a substantially lesser scale than that of Ms Kokkinariou whose career over five of six years appears to have been built on blood doping. It is also true that although Ms Bekele has been shown to have used a Prohibited Substance or Method repeatedly in targeting two competitions, in the great majority of cases in which an athlete tests positive for a Prohibited Substance, the athlete will not have indulged in a single one-off breach of the rules and in many cases will have been targeting a specific competition or series of competitions.

83. In all these circumstances of the cases, and having taken account of all the matters placed before the Panel, the Panel's view is this is not a case in which the period of ineligibility should be increased to the maximum available. To do so would be to suggest that in all cases of blood doping a four-year period of ineligibility would under the rules as they stand be almost *de rigueur*, when the rules do not make specific provision for a more severe penalty in blood doping cases. Again, each case has to be considered on its own merits and in the particular circumstances of this case, taking

account of the gravity of the aggravating circumstances which have been established. As such, the Panel takes view that the appropriate period of ineligibility in this case is two years and nine months.

X. CONCLUSION

84. The result is that the appeal of Ms Bekele is allowed to the extent that the period of ineligibility which she must serve is increased over the standard sanction to a period of two years and nine months, such period to commence on the date of this decision but credit being given for the periods of ineligibility already served which commenced on 2 April 2012.

XI. COSTS

85. The preparation for, and the hearing of, this appeal were considerably delayed and the costs greatly increased by Ms Bekele initially seeking to appeal not only against the penalty imposed on her but also the finding that she had been guilty of a doping offence. That part of her appeal was abandoned only about a week before the hearing by which time the Second Respondent, the IAAF, had incurred a great part of bulk of their costs of this appeal. The First Respondent, the TAF, did not participate beyond putting in an Answer and its costs were therefore small. The costs were further increased by the unsuccessful opposition by Ms Bekele to the joinder of the IAAF as a Respondent, necessitating a determination of this issue by the Panel.

86. Based on the foregoing, each party shall bear one third of the costs of the arbitration, such costs to be determined by the CAS Court Office in accordance with Article R64.4 of the Code.

87. Moreover, by Article R64.5 of the Code, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses. In this case, Ms Bekele has been the prevailing party to the limited extent that she has succeeded in having the length of her period of ineligibility reduced, but she did not prevail on the larger question of whether she had committed a doping offence or not because she abandoned that part of her appeal at a late stage. The Panel has taken account of the asserted impecuniosity of Ms Bekele and that her legal representatives say they have acted for her pro bono during a position of these proceedings. In all the circumstances, the Panel takes the view that it should not direct any party to contribute to the legal fees and other expenses of any other party.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal of Ms Bekele is allowed in part.

2. The decision of the TAF is varied to the extent that Ms Bekele's period of ineligibility shall be for a period of two years and nine months commencing on the date of this award but giving credit for the period of ineligibility already served from 3 April 2012.

3. Each party shall pay one third of the costs of the arbitration, such costs to be determined by the Court Office of the CAS.

4. Each of the parties shall bear their own legal costs and other expenses incurred in connection with this arbitration.

5. All other claims are dismissed.

Lausanne, 14 March 2014

THE COURT OF ARBITRATION FOR SPORT

His Hon. James Robert Reid QC
President of the Panel

Prof Ulrich Haas
Arbitrator

Mr Daniel Visoiu
Arbitrator