CAS 2006/A/1165 Ohuruogu v/UK Athletics Limited

ARBITRAL AWARD

rendered by

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition

President:	Dr **Hans Nater**, Attorney-at-Law, Zurich, Switzerland
Arbitrators:	Dr **Dirk-Reiner Martens**, Attorney-at-Law, Munich, Germany
	Mr **Raj Parker**, Solicitor, London, England
Ad Hoc Clerk:	Mr **Jan Golaszewski**, Solicitor, London, England

in the arbitration proceeding between

MS CHRISTINE OHURUOGU, London, England
represented by Mr Ian Mill QC, Ms Jane Mulcahy and Russells Solicitors, London, England

- Appellant –

- and -

UK ATHLETICS LIMITED, Birmingham, England
represented by Mr Andrew Hunter and Farrer & Co, London, England

- Respondent –

- and -

THE INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS, Monaco
represented by Mr Mark Gay and DLA Piper UK LLP, London, England

- Intervener –

IN FACT

1. PARTIES CONCERNED

1.1 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.

1.2 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.

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

2. BACKGROUND

2.1 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.

2.2 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 (***WADA Code***).

2.3 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.

First Missed Test

2.4 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.

2.5 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.

2.6 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.

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

Second Missed Test

2.8 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.

2.9 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.

Third Missed Test

2.10 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.

2.11 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.

2.12 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.

2.13 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.

2.14 The matter was referred to the Disciplinary Committee of the UKA (***DC***) 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.

2.15 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 (***Code***), and IAAF Rules 60.9, 60.11 and 60.25.

3. SUMMARY OF THE ARBITRAL PROCEEDINGS

The Parties

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

The Order of Procedure

3.2 On 18 December 2006, the CAS, on behalf of the President of the Panel, issued an Order of Procedure, which was subsequently accepted and countersigned by all parties.

The Hearing

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

3.4 An Amended Appeal Brief was submitted only the day before the hearing and therefore it was dealt with by written submissions from the parties after the hearing.

4. WITNESS EVIDENCE

4.1 The parties submitted various witness statements to the CAS with their pleadings. At the hearing, the Panel heard oral evidence from Ohuruogu and Professor Arne Ljungqvist, the IAAF Senior Vice-President.

LAW

5. PROCEDURAL ISSUES

Jurisdiction

5.1 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.*"

5.2 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.

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

Applicable Law

5.4 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."

5.5 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 PARTIES' SUBMISSIONS

Ohuruogu

6.1 This is a summary of the written and oral submissions made on behalf of Ohuruogu. Ohuruogu challenged the DC's interpretation of Rules 35.17 and 32.2(d) and submitted that these rules are not triggered merely by failure to attend three tests; rather they are triggered by an athlete being notified of three evaluations of a failure to attend a test. This would be fair and reasonable so that athletes are aware of the risk they run of further breaching the Rules.

6.2 Ohuruogu stated that, alternatively, if the "three strike rules" are unclear, they should be construed:

(a) Purposively, in the light of their context;

(b) In favour of the athlete or club and against the body imposing the rules (the *contra proferentem* principle);

(c) Narrowly (since they give rise to penal sanctions);

(d) Consistently; and

(e) In accordance with natural justice and fairness.

6.3 If the Rules are construed in this manner, the penalty imposed would lead to a substantial and obvious breach of the rules of natural justice and fairness. Furthermore, it cannot have been envisaged that a ban would be imposed on someone for a third offence even before the athlete had been notified that she had committed a second offence.

6.4 Similarly, if it is necessary to rely on the *contra proferentem* rule, then the interpretation which favours the athlete is that the three strikes must be distinct and sequentially evaluated and notified in order for a ban to be imposed. Any other interpretation would be inconsistent with not only the principles of legal certainty, but also the UKA's "safety net" procedure, which is alerted after the evaluation of two failures.

6.5 With regard to the sanction itself, Ohuruogu argued that the DC wrongly interpreted the sanction analysing it in the context of the WADA Code, and not in the context of her individual circumstances. Given her circumstances, the penalty was disproportionate. Ohuruogu emphasised that the WADA Code does not demand any particular penalty for this offence. Rather it allows sporting bodies to adopt a period of ineligibility between three months and two years depending on the specifics of the offence. That being the case, the penalty chosen for the specific offence must itself be proportionate. It is not proportionate just because it is within the WADA range.

6.6 Ohuruogu argued that if the DC had considered her circumstances properly, it would have been bound to find that the sanction was disproportionate since the DC itself considered a fair penalty was a ban of three months. This period of time is in line with the penalty for like offences under, amongst others, the Irish Anti-Doping Rules, the British Judo Association Doping Control Rules, and the British Triathlon's Anti-Doping Regulations.

6.7 Lastly, Ohuruogu submitted in her Amended Appeal Brief (which was admitted by the Panel) that the UKA's adoption of the UK Sport procedure on anti-doping tests in 2005 was *ultra vires* as they were different to the IAAF's anti-doping procedures. Therefore, the IAAF's procedures continued to apply and Ohuruogu would not have committed a doping offence under those rules as they are more lenient regarding Ohuruogu's purported doping offence than the UK Sport rules adopted by the UKA.

UKA

6.8 This is a summary of the written and oral submissions made on behalf of the UKA. With regard to the interpretation issue, the UKA contended that the language of IAAF Rule 35.17 is clear and as such the English law rules of construction as set out by the House of Lords in *Investors Compensation Scheme v West Bromwich* [1998] 1 All ER 98 should be applied. An athlete commits a doping offence once three failures have been evaluated as three missed tests. The athlete is notified of the result of each evaluation in writing, but such notification is not a part of the evaluation

process or a condition precedent to evaluating the next failure. It is impossible to construe the rule so that it is triggered by three sequential evaluations as Ohuruogu argues.

6.9 The UKA agreed with the DC that the effect of Ohuruogu's interpretation of IAAF Rule 35.17 would be to provide an athlete with a temporary exemption from making himself available for out-of-competition testing for a short period following an apparent missed test. This would clearly be contrary to IAAF and UKA policy.

6.10 With regard to the sanction issue, the UKA noted that the WADA Code does not require a fixed sanction of twelve months for the offence; it permits sports governing bodies to select a range of sanctions between three and twenty-four months. The UKA argued that IAAF Rule 40.1(c)(i) (which imposes the mandatory suspension of twelve months) is not legally valid for the purposes of this case. The UKA stated that simply because Rule 40.1(c)(i) is not valid, it does not follow that there should be no sanction. The UKA stated that the CAS Panel should apply a proportionate sanction, which would be three-month ban.

6.11 Lastly, regarding Ohuruogu's Amended Appeal Brief argument on the validity of its anti-doping rules, the UKA stated that the repercussions of the CAS declaring that the rules were invalid would be catastrophic as it would mean that all out of competition testing conducted by the UKA since 1 July 2005 would be invalid. Ohuruogu's argument was incorrect as the new UKA procedures were lawfully adopted by agreement between the UKA and Ohuruogu.

IAAF

6.12 This is a summary of the written and oral submissions made on behalf of the IAAF. In respect of the interpretation issue, the IAAF agreed with the stance adopted by the UKA: IAAF Rule 32.2(d) should be construed to mean that three evaluated missed tests are required for a doping offence. There is no sequential language in the rule because, when the new rule was introduced in 2003, the IAAF removed the sequential language in order to stop athletes manipulating the rule by only providing whereabouts information once they had reached "two strikes".

6.13 However, the IAAF disagreed with the UKA or the DC that sanction of a one-year ban is disproportionate. The IAAF argued that the sanction is appropriate and reasonable for the following reasons:

(a) The sanction is within the range prescribed by WADA;

(b) The sanction is the product of the IAAF's considerable expertise in out-of-competition testing;

(c) Serious sanctions are needed to deal with anti-doping in athletics;

(d) The sanction is consistent with the future thinking of WADA; and

(e) The sanction is consistent with the approach of certain other sporting bodies

6.14 Lastly, regarding Ohuruogu's Amended Appeal Brief argument on the validity of the UKA's anti-doping rules, the IAAF stated that there was no lacuna between the IAAF and UK Sport's anti-doping rules. UK Sport's rules were in fact more lenient than the IAAF's rules and, in any event, Ohuruogu would have been guilty of a doping offence under both sets of rules.

7. THE PANEL'S CONCLUSIONS

7.1 The main issues to be resolved by the Panel are:

(a) Liability;

(b) Sanction; and

(c) IAAF/UKA's Anti-Doping Regimes.

Liability

7.2 The relevant IAAF rules adopted by the UKA Anti-Doping Rules, as they apply to this case, 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 [18 consecutive months].*"

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 [18 consecutive months], he shall have committed an anti-doping rule violation in accordance with Rule 32.2(d)."

7.3 The current IAAF Competition Rules (2006-2007) stipulate that an athlete's three missed tests may occur within a five-year period. As Ohuruogu's first missed test occurred prior to 1 November 2005, the 18-month period provided for in Rule 32.2(d) of the 2004-2005 Competition Rules remains in effect. In the present case, Ohuruogu's three missed tests occurred within the period of time stipulated in both the 2004-2005 and 2006-2007 version of the IAAF Competition Rules, and therefore the rule change would in any case have no effect.

7.4 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.

7.5 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 [18 months], 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 [18 months], then the athlete has committed a doping offence.

7.6 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.

7.7 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.

7.8 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.

7.9 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).

Sanction

7.10 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.

7.11 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.

7.12 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.

7.13 In a previous CAS decision, *Puerta v ITF (CAS2006/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 *Puerta* can be distinguished.

7.14 Therefore, the Panel considers that the one-year fixed ban under IAAF R.40.1(c)(i) is proportionate and should not be disturbed.

IAAF/ UKA Anti-Doping Regimes

7.15 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.

7.16 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.

Postscript

7.17 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.

7.18 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.

8. COSTS

8.1 In disciplinary cases of an international nature ruled in appeal, the proceedings shall be free, subject to payment of the CAS Court Office fee, as stated in R.65.1 and 2 of the Code.

8.2 In this matter, taking into account all the relevant criteria set out in R.65.3 of the Code, the Panel considers that it is appropriate for each party to pay its own costs. Consequently, none of the parties is ordered to contribute to the costs of another.

8.3 Accordingly, this award is rendered without costs except for the CAS Court Office fee of CHF 500 already paid by Ohuruogu that shall be retained by the CAS under R.65.2 of the Code.

****

ON THESE GROUNDS

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. This award is rendered without costs except for the Court Office fee of CHF 500 already paid by Ms Christine Ohuruogu and which the CAS shall retain.

4. Each party shall bear its own legal and other costs.

Done in Lausanne, 3 April 2007

THE COURT OF ARBITRATION FOR SPORT

Hans Nater
President of the Panel