

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

Before:

Charles Hollander QC
Janie Soublière
Julien Berenger

BETWEEN:

World Athletics

Anti-Doping Organisation

and

Salwa Eid Naser

Respondent

DECISION OF THE DISCIPLINARY TRIBUNAL

1. Salwa Eid Naser (“the Athlete”) is a Nigerian athlete who represents Bahrain. She is the current 400m world champion, having won the title at the World Championships at Doha in October 2019.
2. In these proceedings the Athletics Integrity Unit (“AIU”) bring two charges against the Athlete based on four alleged Whereabouts Failures. The charges were brought on 4 June 2020 and

THE INDEPENDENT EXPERTS

are both Anti-Doping Rule Violations (ADRVs) in connection with Whereabouts Failures within the meaning of Rule 2.4 of the World Athletics Anti-Doping Rules (WA ADR), specifically for

(i) a Filing Failure concerning an attempt to test the Athlete on 16 March 2019 (effective 1 January 2019), (ii) a Missed Test dated 12 March 2019 and (iii) a Missed Test dated 12 April 2019 (the First ADRV Charge); and

(i) a Missed Test dated 12 March 2019, (ii) a Missed Test dated 12 April 2019 and (iii) a Missed Test dated 24 January 2020 (the Second ADRV Charge).

3. Mr Ross Wenzel appeared for the AIU. Dr Emir Crowne, Mr Matthew Gayle and Ms Kristie Irving appeared for the Athlete.
4. An oral hearing was conducted on 6 October 2020, via videoconference. Mr Enrique Martinez and Mr Femi Ayorinde gave evidence for the AIU. The Athlete gave evidence herself and led evidence from Mr Tahar Righi, Ms Ifeoma Edith Agbapuonwu, Mr Abbas Abudakar and Ms Chinasa Abadom.
5. The Athlete was provisionally suspended as of June 4, 2020, pending the outcome of this hearing.

Jurisdiction

6. There was no dispute as to jurisdiction.
7. The WA ADR apply to all athletes who are members of a Member Federation and to all athletes participating in competitions organised, convened, authorised or recognised by World Athletics. At all material times, the Athlete was a member of the Bahrain Athletics Association (BAA), the World Athletics Member Federation in Bahrain. In addition, in 2019, the Athlete competed in the Arab Championships, Cairo, the Asian Championships, Doha, the IAAF Diamond League events in Shanghai, Rome, Rabat, Lausanne and Zurich and in the IAAF World Championships in Athletics in Doha, Qatar, all competitions organised, convened, authorised and recognised by World Athletics.

8. Rule 1.8 of the WA ADR and both its subsections further establish that the Athlete is an International-Level Athlete for the purposes of this matter.
9. Rule 5.4.1 of the WA ADR also provides that Testing conducted under those rules shall be subject to the provisions of the World Athletics Anti-Doping Regulations in force at the time of Testing:

5.4.1 All Testing conducted by the Integrity Unit and National Federations (and/or by the relevant National Anti-Doping Organisation or third party Testing authority) shall be in substantial conformity with these Anti-Doping Rules and the Anti-Doping Regulations in force at the time of Testing.

10. Article 1.6 of the World Athletics Anti-Doping Regulations also specifies:

The Anti-Doping Rules and these Anti-Doping-Regulations shall apply to all Doping Controls and related activity in respect of which World Athletics and respectively its Members and Area Associations have Testing authority or other competent jurisdiction.

11. Rule 7.2 of the WA ADR confers jurisdiction for results management on the AIU in circumstances including the following:

7.2 The Integrity Unit shall have results management responsibility under these Anti-Doping Rules in the following circumstances:

7.2.1 For potential violations arising in connection with any Testing conducted under these Anti-Doping Rules by the Integrity Unit, including investigations conducted by the Integrity Unit against Athlete Support Personnel, or other Persons potentially involved in such violations.

World Athletics Registered Testing Pool and Athlete Whereabouts Information Regime

12. For the purposes of this matter, the most relevant elements of the well-known regime for elite athletes in relation to provision of whereabouts information may be summarised as follows:

- a. An athlete who is in a Registered Testing Pool (RTP) is required to make quarterly Whereabouts Filings that provide accurate and complete information about the Athlete's whereabouts during the forthcoming quarter, including identifying where he/she will be living, training and competing during that quarter, and to update those Whereabouts Filings where necessary, so that he/she can be located for Testing during that quarter at the times and locations specified in the relevant Whereabouts Filing, as specified in Article I.3. A failure to do so may be declared a Filing Failure¹.
- b. *Inter alia*, a World Athletics Registered Testing Pool ("WARTP") athlete must specify in his/her Whereabouts Filings, for each day in the forthcoming quarter, one specific 60-minute time slot where he/she will be available at a specific location for Testing and a location where they will be staying overnight and available for testing².
- c. Where a change in circumstances means that the information in a Whereabouts Filing is no longer accurate or complete as required by Article I.3.4, the athlete must file an update so that the information on file is again accurate and complete. In particular, the athlete must always update his/her Whereabouts Filing to reflect any change in any day in the quarter in question (a) in the time or location of the 60-minute time slot specified in Article I.3.2; and/or (b) in the place where he/she is staying overnight. The athlete must file the update as soon as possible after the circumstances change, and in any event prior to the 60-minute time slot specified in his/her filing for the day in question³.
- d. The required information must be recorded in ADAMS as the athlete's whereabouts change, ADAMS entries may be changed up to the time he/she has specified for that day in ADAMS.
- e. Where an attempt is made to test an athlete at his/her overnight location (as indicated on his/her whereabouts) and the athlete is not available for Testing, this shall be pursued as an apparent Filing Failure.

¹ Annex I of the ISTI (specifically Article I.1.1 of Annex I)

² See AIU Notice for Whereabouts Filing Q1-Q4 2019

³ Art I.3.5 ISTI

- f. An RTP athlete must specifically be present and available for Testing on any given day during the 60-minute time slot specified for that day in his/her Whereabouts Filing, at the location that the athlete has specified for that time slot in such filing. A failure to comply with this requirement shall be pursued as an apparent Missed Test⁴.
- g. Where an athlete has not been located despite the Doping Control Officer's ("DCO") reasonable efforts, and there are only five minutes left within the 60-minute time slot, then as a last resort the DCO may (but does not have to) telephone the athlete (assuming he/she has provided his/her telephone number in his/her Whereabouts Filing) to see if he/she is at the specified location⁵.

13. A Missed Test will only be confirmed against an athlete if all the requirements of Article I.4.3 of the International Standard for Testing and Investigations (ISTI) are fulfilled. i.e. that the athlete was given notice of inclusion in an RTP and of the consequences for not being available at the time and location indicated therein, that an attempt was made by a DCO to test the athlete during the 60 min time slot at the time and location indicated therein, that during that 60 min time slot the DCO did what was reasonable "in the circumstances" to try to locate the athlete.

14. In relation to Article I.4.3(c) of the ISTI, the WADA ISTI Guidelines for Implementing an Effective Testing Programme (Version 1.0 October 2014) (the "WADA Guidelines") provide guidance on what constitutes a reasonable attempt by a DCO:

"9.2.1 Making a Reasonable Testing Attempt

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

⁴ Art I.4.1 ISTI

⁵ Comment to I.4.3(c) ISTI

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

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

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

The Alleged Whereabouts Failures

15. Rule 2.4 of the WA ADR provides that the following shall constitute an Anti-Doping Rule Violation:

2.4 Whereabouts Failures

Any combination of three missed tests and/or Filing Failures as defined in the International Standard for Testing and Investigations, within a twelve-month period, by an Athlete in a Registered Testing Pool.

16. The AIU charged the Athlete with a Filing Failure in relation to an attempt by a DCO to test her on 16 March 2019 at her overnight location, outside of her 60 minute time slot .The Athlete has not successfully challenged and failed to request an administrative review for this Filing Failure as asserted by the AIU. It is to be treated as effective 1 January 2019. The Panel accepts that the requirements of Article I.3.6 of the ISTI has been met and confirms this Filing Failure against the Athlete.
17. The AIU charged the Athlete with a Missed Test in relation to a failed attempt to test the Athlete in her 60-minute time slot on 12 March 2019. The Athlete has not successfully challenged and failed to request an administrative review of this Missed Test as asserted by the AIU. The Panel accepts that the requirements of Article I.4.3 of the ISTI have been met and confirms this Missed Test against the Athlete.

18. The AIU charged the Athlete with another Missed Test in relation to an attempt to test her in her 60 min slot on 12 April 2019. The Athlete challenged the charge and requested an administrative review of this Missed Test as asserted by the AIU. A Missed Test which she still argues the AIU has not established to the required standard of proof. The Panel considers whether the requirements of Article I.4.3 of the ISTI have been met with regards to this Missed Test below.
19. The Panel notes that although the AIU was within its rights to charge the Athlete with a violation of Rule 2.4 of the WA ADR further to completing its Administrative Review for this alleged Missed Test and concluding that it was in fact a Missed Test, the AIU did not proceed at that time with a formal charge under Rule 2.4 of the WA ADR.
20. The AIU charged the Athlete with a third Missed Test in relation to an attempt to test her in her 60 min time slot on 24 January 2020. The Athlete challenged and provided ample explanations for the same but did not request an administrative review of the Missed Test as asserted by the AIU. The Panel considers whether the requirements of Article I.4.3 of the ISTI have been met with regards to this Missed Test below.
21. Further to asserting this Missed Test, the AIU charged the Athlete with two possible Whereabouts Violations under Rule 2.4 of the WA ADR: the First ADRV Charge and Second ADRV Charge, as explained above.
22. Because the Filing Failure is backdated to 1 January 2019, the AIU conceded at the hearing that it could not succeed in establishing the commission of three Whereabouts Failures in relation to either charge unless they succeeded in establishing the 12 April 2019 Missed Test. This is because, effectively, three Whereabouts Failures would then not have occurred in a 12-month rolling period as is required to establish a violation of Rule 2.4 of the WA ADR.

The Athlete's Whereabouts Submissions

23. Salwa Eid Naser is now 22. She was brought up in Nigeria but has been representing Bahrain since 2014. As an elite athlete, she was entered into the then IAAF RTP in 2016 and has thus been subject to the World Athletics Whereabouts Regime for some years.

24. However, the Athlete has never been able to submit her own Whereabouts Information into ADAMS, let alone successfully log in. She gave evidence that she had tried more than once, and on occasion tried to do so with her then boyfriend, but without success. The BAA assigned Mr Tahar Righi as her Technical Manager, and one of his responsibilities was to enter the relevant information on her behalf. Whilst there is nothing wrong with an athlete using a third person “agent” to enter their Whereabouts Information into ADAMS, it will be apparent that this creates a risk of problems, if for example the agent enters the wrong information or otherwise makes a clerical error, or where there is a misunderstanding or miscommunication between athlete and agent. Alternatively, where the athlete changes location at short notice, a need to contact the agent to promptly amend and update the ADAMS information may prove problematic. The Athlete gave evidence that she had not been entirely happy with Mr Righi’s assistance and had asked the BAA to appoint someone different, but nothing was done of this request.

25. Pursuant to Article I.2.1 ISTI;

Athletes remain fully responsible for complying with the filing requirements, irrespective of whether or not the Anti-Doping Organization has provided them with such support.

26. Pursuant to Article I.6.4 ISTI;

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

27. Thus, an athlete is personally responsible for his/her conduct and to have relied on another person to file his/her whereabouts, even if in good faith, is not a valid defence to a Whereabouts Failure charge.

The January 2020 Missed Test

28. The AIU contend that it has established a Missed Test against the Athlete committed on 24 January 2020. It is convenient to deal with this first.

29. The Athlete's Whereabouts Information designated 06:00-07:00 hrs as the 60-minute period for 24 January 2020 and stated that she would be at "*Transcorp Hilton Hotel, 1, Aguiyi Ironsi Street Maitama, Abuja, Abuja Capital Territory, NIGERIA*". On 23 January 2020, she was due to travel from Abuja to Lagos and the next day on to Bahrain. On 23 January, once she reached the airport she found her flight first delayed then cancelled. She then travelled to Lagos by ground transportation, arriving late in the evening of 23 January. It took some time to find a place to stay, as a number of hotels tried were booked and it was late at night that she checked into the Lagos Continental Hotel. By the time she contacted Mr Righi to ask him to update her Whereabouts Information on ADAMS it was 0225 hrs on 24 January. Mr Righi, who was unwell, was asleep and did not receive the message until the next morning, well after the 6-7am time slot specified in the Athlete's whereabouts in ADAMS. Of course, she was not in Abuja when the DCO sought to test her on the morning of 24 January because her whereabouts were not timely updated by Mr Righi to indicate that she was in fact in Lagos.

30. These events illustrate the problems in providing Whereabouts Information where an athlete relies on the assistance of a third party to enter the information into ADAMS rather than doing it themselves. Given that the Athlete knew she was not going to be where she had said she was going to be in her ADAMS whereabouts, but did not know where she would be until late on the date of 23 January, there was an obvious difficulty: by the time she was able to tell Mr Righi what her location was, it was not surprising he was asleep.

31. However, pursuant to the Rules, the AIU's contention that the 24 January 2020 consisted of a Missed Test cannot be reasonably challenged. The Panel concurs and finds that the requirements of Article I.4.3 of the ISTI have been met and confirms this Missed Test against the Athlete.

The April 2019 Missed Test

32. The AIU contend that it has established a Missed Test against the Athlete on 12 April 2019.
33. The DCO was Mr Enrique Martinez. The address registered in ADAMS at that time for the Athlete, under the reference "Salwa New Apartment" was "Flat 11, Building 964, Road 833, Block 908, Riffa, Bahrain". The time specified was 6-7am. Mr Martinez arrived in advance of 6am and found that Building 964 did not exist. However, he was in possession of a screenshot from a previous visit indicating that the correct building might well be 954. He then proceeded to Building 954, which was a building which had a number of apartments; a number of Bahraini athletes lived there in accommodation provided by the BAA. Indeed, this was the right address as he correctly surmised.
34. It is possible to see a photo on Mr Martinez's contemporaneous report showing two doors close to one another. What happened next would have been comical were the consequences not so serious. The left hand door is a solid wooden door with the number 11 at its side. The right hand door is a double door with a glass pane in each door. At its side is the number 954 and under the number is an intercom. The intercom has a number of buzzers and numbers on each buzzer. Under the number 954 is the number 12 next to the intercom.
35. In fact, as the video produced by the Athlete shows, the numbers 11 and 12 are the numbers of the car parking spaces and are not apartment numbers at all. Building 954 was the right hand door and contained a number of apartments including indeed flat 11. The door which had the number 11 at its side was in fact a storage unit and contained a number of gas canisters which are immediately visible when you look up above the door.
36. The left hand door did not have an intercom or a buzzer. As it bore the number 11, Mr Martinez assumed this was flat 11 and knocked every five minutes until the hour was up. He obtained no response. This was, of course, not surprising, given that this is a technical room.

37. In fact, the intercom for Building 954 did not work and had never worked. Nor does it work today. Mr Martinez did not try that intercom, which he confirmed at his hearing before the panel, it being 6am and he was concerned about waking other people.
38. Mr Martinez said in his witness statement that the right hand door was locked. There was a question whether he actually meant “locked” or “closed”. The Athlete’s evidence was that the door of Building 954 was always open, indeed as a result of the intercom never working. There is no reference in Mr Martinez’s contemporaneous report to the right hand door. We accept the Athlete’s evidence on this point.
39. Mr Martinez then tried to contact the Athlete by telephone, as is permitted in the last 5 minutes of the hour. However, her up-to-date ADAMS entry did not contain a phone number. Mr Righi told us that she had changed her mobile number several times and at that time he did not have a current number to enter into ADAMS. Mr Martinez was provided with a previous number for her by IDTM (the doping control service provider responsible for the testing mission), which he phoned, but it provided a message that the phone was disconnected or out of reach.
40. We also accept the evidence of the Athlete and her then boyfriend Mr Abbas Abudakar, who is also a 400m runner, that they were present in flat 11 throughout the morning in question and at the time in question. The Athlete was asleep, Mr Abbas would have been awake for prayers from 4am.
41. But as a conscientious Doping Control Officer and in accordance with Article 9.2.1 of the WADA guidelines, Mr Martinez wanted to find the Athlete, if at all possible, to successfully complete his testing mission. He appreciated based on the information provided to him that 964 was almost certainly an error for 954. Having looked for and successfully located the correct building, 954, he then proceeded to knock on the wrong door. He should have opened the door to Building 954 and knocked on the door of flat 11 inside the building. Had he done that, he would have successfully located the Athlete at her flat 11, at the time and location indicated on her whereabouts.

42. It would be wrong to be critical of Mr Martinez. The numbering on the doors is extremely confusing. He is an experienced and conscientious DCO. It was obvious that he was anxious and committed to do everything possible to locate and test the Athlete and took his responsibilities very seriously. He seemed to us to be everything a good DCO should be. Indeed, later that day he returned to the same address to see if she was now there (but was unsuccessful for the same reason as before). He then went over and beyond the call of duty to the Bahraini National Stadium to see if she was there and to test her there if she could be found (which she was not), which again seems to us to go well beyond his mission.
43. The Athlete did not help herself in many regards. She could have entered explanatory information on ADAMS, as is suggested in the AIU Whereabouts Notices she receives quarterly, which would have prevented the confusion of numbers and given additional information to assist a DCO. If her up to date mobile number had been registered in ADAMS, she would have received a call from Mr Martinez before the end of the hour, as we accept her and Mr. Abbas' evidence that her phone was on at the time in question. Guidance provided to athletes suggests that athletes provide an up-to-date telephone number on ADAMS, although this is not a rule requirement. The fact that she had already been notified of a Filing Failure and Missed Test recently, should have alerted her to the need to take special care. But part of the underlying problem was her lack of familiarity with ADAMS.
44. For the purpose of considering whether this was a Missed Test pursuant to Article I.4.3 of the ISTI, the fact is that Mr Martinez did realise the correct building number was 954, and, in the circumstances set out above, never went to Flat 11. Having appreciated that 964 was almost certainly an error for 954, Mr. Martinez then, quite simply, knocked on the wrong door. Whereas the Athlete was obviously in fact at her Flat 11, at the time indicated on her whereabouts and quite logically, never heard the knock because Mr. Martinez was not knocking on her door. As a result, in our view, this does not fulfil the requirements of Article I.4.3c of the ISTI and the alleged April 12, 2020, Missed Test cannot be confirmed against the Athlete. Thus, the ADRV has not been established to our comfortable satisfaction as the requirements of Rule 2.4 of the WA ADR have not been met.

Other arguments

45. For completeness, we should mention the Athlete's arguments based on delay. Although an Administrative Review of the April 2019 test was completed in August 2019, the AIU did not bring charges until June 2020. It was argued on behalf of the Athlete that:
- a. Under the World Athletics Rules, no proceedings can be brought by the AIU after a 30-day period as the AIU should be deemed to have decided that no ADRV occurred.
 - b. Alternatively, the same result could be reached by operation of the principle of laches.
 - c. Alternatively, the Panel has a discretion to backdate any period of Ineligibility.
46. In the light of our conclusions on the Missed Tests, these points can be dealt with shortly.
47. Principles of equity in common law jurisdictions such as laches have no possible place in Anti-Doping Rules. The 30-day point has been previously held in more than one case to relate to appeal rights and does not arise here⁶. There is a power to backdate a suspension at the request of the Athlete if thought appropriate by the Panel. In this regard, the Athlete did not rely on any prejudice. On the contrary, the Athlete's greatest success to date was winning the 400m in the World Championships at Doha in October 2019. If a period of Ineligibility was backdated, it would logically go back to September 2019, and involve disqualification of her Doha win which could hardly be in her interests. We would thus not have backdated any suspension had the issue arisen.

Conclusions

48. As the AIU conceded, if the 12 April 2019 test was not to be treated as a Missed Test, the charges fall to be dismissed and that follows from our conclusions.
49. Three missed tests are disastrous for elite athletes and the regime under the rules is very onerous. Of course, the regime is designed to protect honest athletes from others who cheat

⁶ See *World Athletics v Kiprotich* SR/009/2020 at [108]-[109] and anonymised ruling of the Chair of this tribunal dated 27 April 2020.

and that is why it is onerous and rigorously enforced. But it does mean that an athlete needs to take great care to ensure she complies with the requirements and makes it as easy as possible for DCOs to make contact. That involves monitoring the information provided closely and providing up to date telephone numbers. We do not consider in this case the Athlete paid enough attention to these requirements.

50. However, we should also say that having an agent putting the athlete's information on ADAMS for her is bound to lead to problems, even with an agent doing his best to put in the correct information promptly. There are bound to be miscommunications, misunderstandings and errors. This is a regime where the provision of up-to-date and accurate Whereabouts Information is critical and the consequences of providing inaccurate information or error are very grave. Moreover, internet connection in Bahrain and Nigeria is not always reliable, as was apparent from the problems which arose during the oral hearing before the Panel, and this inevitably makes exchanges between athlete and agent more difficult, especially when there is a late or sudden change of plan.

51. The Athlete should have in mind that the January 2020 Missed Test still stands against her. We would very strongly advise her to seek advice regarding her personal use of ADAMS so that in future she is able to enter and update her whereabouts into ADAMS without the need for an agent to assist her, and so she can be master of her own destiny, as it were. We would hope that the BAA will give her the necessary assistance to do this. This was a case very much on the borderline, and we hope the Athlete will learn from the experience and heed the AIU's warnings.

Disposition

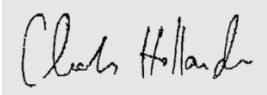
52. The charges are dismissed.

53. Each Party shall bear its own costs.

54. This decision may be appealed exclusively to the Court of Arbitration for Sport pursuant to Article 13 ADR and its subsections.

Publication

55. Pursuant to Rule 14.3.3 WA ADR this decision shall not be Publicly Disclosed without the Athlete's consent.



Charles Hollander QC (Chair)

For the Panel

London

14 October 2020

1 Salisbury Square London EC4Y 8AE resolve@sportresolutions.co.uk 020 7036 1966

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www.sportresolutions.co.uk



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