Arbitration CAS 2020/A/7526 World Athletics (WA) v. Salwa Eid Naser & CAS 2020/A/7559 World Anti-Doping Agency (WADA) v. WA & Salwa Eid Naser, award of 30 June 2021

Panel: Prof. Massimo Coccia (Italy), President; Mr Nicholas Stewart QC (United Kingdom); The Hon. Michael Beloff QC (United Kingdom)

Athletics (track and field)
Doping (whereabouts failure)
Reasonable attempt to locate an athlete for testing during the sixty minutes time slot
Assessment of the DCO recollection of events
Missed test presumed to have been caused by the athlete's negligence unless the presumption is rebutted
Personal responsibility of the athlete in case of delegation of Whereabouts Filings to a third party
CAS scope of review and recharacterization of the charge against the athlete
Second ADRV for sanctioning purpose
Reduction of the ineligibility period
Starting date of the ineligibility period
Disqualification of the athlete's results

1. **According to the International Standard for Testing and Investigation (ISTI) and the WADA Guidelines, an athlete may only be declared to have committed a missed test where the Results Management Authority can establish that during the 60-minute time slot specified in his/her Whereabouts Filing at the location specified for that time slot, the Doping Control Officer (DCO) did what was reasonable in the *"particular circumstances of the case"*, in particular given the *"nature of the location chosen by the Athlete"*, to try to locate the athlete, short of giving the athlete any advance notice of the test. The evaluation of the reasonableness of a DCO's attempt must be made looking objectively at the steps taken by the DCO in the specified location, in light of the information provided by the athlete and in connection with the athlete's duty of diligence in filing Whereabouts Information that is accurate enough to allow DCOs to find them without any particular effort.**

2. **There is no presumption that a DCO's recollection of events is correct unless proven otherwise. Rather, the hearing body must evaluate the probabilities in the particular circumstances of the case in hand.**

3. **Where a missed test has been established, the athlete has the burden to rebut the presumption that his/her negligence caused his/her failure to be available for testing. According to the ISTI, a *"duty"* or *"care"* is expected from an athlete with regard his/her whereabouts obligations which, include (i) a duty to provide and update sufficient and accurate Whereabouts Information for each day on a quarterly basis and (ii) a duty to specify, for each day, a specific location in which, for a sixty-minute timeslot, he/she would be present, available and accessible for unannounced testing.**

Considering that an athlete is ultimately responsible for the Whereabouts Information being updated, the failure to be available and accessible caused by the indication of a wrong address shall be deemed to be due to the athlete's negligence.

4. **Under the ISTI, an athlete who delegates Whereabouts Filings to a third party assumes all risks for any errors committed by the latter.**

5. **Under Article R57 of the CAS Code, a recharacterization of the charge would not exceed the limits of the CAS Scope of review. Furthermore, the principle *jura novit curia* entails that CAS panels can opt for a legal qualification of the conduct that is different from the one envisaged in the charge, as long as the interested parties' right to be heard is respected. In this regard, since WADA has its first and only chance to present its case at the CAS appeal level, it must be allowed to fully exercise its appeal rights, which include a recharacterization of the charge(s), with the sole caveat that this should be based on the same set of facts discussed during the first instance proceedings. This is indeed essential to (i) secure the integrity of the system, (ii) secure a worldwide uniform application of the anti-doping rules and (iii) prevent ADOs and first instance hearing bodies, especially those at national level, to characterize charges in an incorrect way which could favour a given athlete.**

6. **Article 10.7.4(a) WA Anti-Doping Rules (ADR) *"Multiple Violations"* allows to determine under which circumstances an anti-doping rule violation (ADRV) can be treated for sanction purposes as a second ADRV, i.e. the athlete must have received notice of a first alleged ADRV before a second violation can be established. Thus, even if there are two distinct ADRVs, for the purpose of sanction they must be treated as one, if the condition precedent for treating them otherwise is not satisfied.**

7. **An athlete, that has shown an unacceptable degree of nonchalance and a worryingly lackadaisical approach to his/her whereabouts obligations under the ADR in all three Whereabouts Failures, thereby deserves no reduction of the ineligibility period and shall be sanctioned with the standard two-year ineligibility period.**

8. **With regard to the construction of Proviso c of Article 10.10.2 WA ADR providing for the possibility to backdate the starting date of the athlete's suspension, it is a necessary, but not sufficient, condition precedent that there have been substantial delays in any aspects of doping control, including the hearing process, which are not attributable to the athlete. If the condition precedent is satisfied, backdating the period of ineligibility is an available but not a mandatory consequence. Whether and how such discretion is exercised by the adjudicating body depends axiomatically upon the circumstances of the particular case.**

9. **Under Article 10.8 WA ADR, the finding that an athlete has committed an ADRV under Article 2.4 WA ADR entails, as a rule, the disqualification of all the results**

obtained from the date on which the ADRV occurred until the start of any provisional suspension or the date on which the ineligibility period is set to begin, unless *"fairness requires otherwise"*. In this respect, the fact that no doping practices affected the athlete's competitive results obtained after his/her third whereabouts failure, can be taken into account in the athlete's favour.

I. INTRODUCTION

1. These consolidated appeals are brought by, respectively, World Athletics (CAS 2020/A/7526) and the World Anti-Doping Agency (CAS 2020/A/7559) against a decision rendered on 14 October 2020 by the Disciplinary Tribunal (the "DT") established by Sport Resolutions on behalf of World Athletics, which found that Ms Salwa Eid Naser had not committed any Anti-Doping Rule Violation under Article 2.4 ADR, as the DT was not comfortably satisfied that she had committed three Whereabouts Failures within a 12-month period (the "Appealed Decision").

II. PARTIES

2. World Athletics ("WA", formerly known as the International Association of Athletics Federations or "IAAF") is the international governing body of athletics at world level, headquartered in the Principality of Monaco. WA is a signatory to the World-Anti Doping Code ("WADC") and has established the Athletics Integrity Unit ("AIU") to carry responsibility for anti-doping results management.

3. The World Anti-Doping Agency ("WADA") is the international agency governing anti-doping matters, with headquarters in Montreal, Canada.

4. Ms Salwa Eid Naser is a track and field international level athlete born on 23 May 1998 and mostly competing in 200m and 400m races (the "Athlete"). She is a Nigerian-born citizen of the Kingdom of Bahrain, where she lives and trains being registered with the Bahrain Athletics Association ("BAA"). She is the current 400m world champion, having won the title at the World Championships in Doha, Qatar, on 3 October 2019.

III. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced during the course of these proceedings. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in other sections of this award, particularly in connection with the ensuing legal discussion. While 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.

A. Premise

6. In compliance with the applicable WA Anti-Doping Rules ("ADR" – see Section VIII below), which the AIU is responsible for implementing, the Athlete has been included in the WA Registered Testing Pool ("RTP") since 2016.

7. The definition of RTP provided in the ADR requires the AIU to identify a group of *"highest priority"* athletes who, under the relevant Anti-Doping Regulations ("AD Regulations"), have in particular the following obligations as members of said pool of elite athletes (collectively the "Whereabouts Requirements"):

   (i) Provide accurate information as to their whereabouts on a quarterly basis, *"including identifying where* [they] *will be living, training and competing during that quarter"* so that they can be located for testing at those times and locations ("Whereabouts Information" or "Whereabouts Filing");

   (ii) Specify for each day of the forthcoming quarter a 60-minute timeslot in which they have to be available and accessible for testing at a specified location.

8. In order to implement the aforementioned rules, WADA has developed an online application, the Anti-Doping Administration and Management System ("ADAMS"), on which athletes can upload and update their Whereabouts Information. Each International Federation is then provided access to the information entered into ADAMS by the athletes competing in their respective sport.

9. Accordingly, since 2016 the Athlete has been under the permanent obligation to regularly enter and update her Whereabouts Information into ADAMS – information to which the AIU has access on behalf of WA – and to be available and accessible for testing each day at the specified location and 60-minute timeslot.

10. A violation of the Whereabouts Requirements constitutes a "Whereabouts Failure" in the form of a Filing Failure or a Missed Test (as defined in the relevant provisions, see Section VIII para. 110 below). A combination of three Whereabouts Failures within a 12-month period amounts to an Anti-Doping Rule Violation ("ADRV").

11. By notice of charge dated 4 June 2020 (the "Notice of Charge"), the AIU, on behalf of World Athletics, charged the Athlete *"with committing the following Anti-Doping Rule Violations (the 'Charge'):*

2.2.1 A combination of three Missed Tests and/or Filing Failures, as defined in the International Standard for Testing and Investigations, within the twelve-month period beginning on 1 January 2019, specifically for (i) a Filing Failure effective 1 January 2019, (ii) a Missed Test dated 12 March 2019 and (iii) a Missed Test dated 12 April 2019 in accordance with Article 2.4 ADR; and

2.2.2 A combination of three Missed Tests and/or Filing Failures, as defined in the International Standard for Testing and Investigations, within a twelve-month period beginning on 12 March 2019, including (i) a Missed Test on 12 March 2019 (ii) a Missed Test on 12 April 2019 and (iii) a Missed Test on 24 January 2020 in accordance with Article 2.4 ADR".

12. The Notice of Charge accordingly indicted the athlete with two potential violations, which for the sake of convenience will be identified in this award as "First Charge" and "Second Charge". The Notice of Charge also informed the Athlete that the Head of the AIU had exercised its discretion to impose on her a provisional suspension ("Provisional Suspension").

13. The facts surrounding the Whereabouts Failures on which the Notice of Charge was based are summarised below.

B. The relevant Whereabouts Failures

a. The missed test on 12 March 2019 (the "12 March 2019 Missed Test")

14. On 12 March 2019, the Doping Control Officer ("DCO") Mr Enrique González Martinez ("DCO González"), resident in Spain, reached the location provided in the Athlete's Whereabouts Information for that date, in order to conduct an Out-of-Competition test during the specified 60-minute time slot (06:00 – 07:00 am).

15. The address indicated in the Athlete's Whereabouts Information was *"N1 building 871 Rd 1514 Block 915, Boukouara, Bahrain"*. However, on 12 March 2019, the DCO was not able to locate the Athlete at the specified location and timeslot. Therefore, on the same day, the AIU sent an email to the Athlete requesting that she provide her explanation for the apparent Missed Test by 26 March 2019, warning that, absent such explanation, a Missed Test would be recorded against her.

16. The Athlete failed to provide any explanation within the aforementioned deadline and, accordingly, the AIU confirmed the Missed Test against her by email on 28 March 2019.

17. On 11 April 2019, the BAA wrote an email to the AIU enclosing a letter from the Athlete, whereby she contended that she had never received AIU's email of 12 March 2019 and requested to be given a chance to *"explain to you the case"*.

18. On 12 July 2019, the AIU replied via email to the Athlete's request and exceptionally granted her an extension to request an administrative review of the 12 March 2019 Missed Test by 19 July 2019.

19. On 17 July 2019, the BAA sent an email to the AIU enclosing a letter from the Athlete, whereby she provided her explanation for the 12 March 2019 Missed Test, stating in particular as follows: *"i would like to inform you that in that date i was as usually in my flat from 6 to 7 AM … i dont know what was the problem at that date may be i dont listen knocking the door"* [sic]. She added that she had been tested 14 times in that season and that all her results were negative, concluding by stating that *"i am not a cheater and i am against all cheaters in all sports"*.

20. On 6 August 2019, the AIU sent via email to the Athlete its administrative review decision, dated 27 August 2019, which held that the Athlete's explanation was insufficient to exclude that her negligence contributed to the Whereabouts Failure and the AIU thus confirmed the Missed Test.

21. This Whereabouts Failure is uncontested by the Athlete.

b. The Filing Failure in connection with a testing attempt on 16 March 2019 (effective 1 January 2019)

22. On 16 March 2019, Doping Control Personnel ("DCP") attempted to locate the Athlete at the location provided in her Whereabouts Information, outside the 60-minute timeslot.

23. The Athlete's overnight location specified in ADAMS was *"N1 building 871 Rd 1514 Block 915, Boukouara, Bahrain"* ("Address 1"). However, the DCP was not able to locate the Athlete at the specified location.

24. According to the unsuccessful attempt report (the "UA Report") provided by the DCO Mr Viktor Jensen Marup, he: *"knocked on door of address from athlete's WA overnight location (Address 1). Arab-looking man eventually came opened. He did not know about the athlete living there and said he is an athlete and that he moved in Yesterday"*.

25. Thereafter, the DCO rang the bell of the Athlete's mailing address according to ADAMS, namely *Flat: Mezzanine. Building 55 Block 925. Road AlSyaeh Avenue. Riffa/Bukowarah, Ar Rifa, BAHRAIN* ("Address 2"), but still could not locate the Athlete.

26. The DCP then relocated to the Bahrain National Stadium. While there were some athletes training in the stadium, the DCP was not able to locate the Athlete among them.

27. Later on, the DCP phoned the Athlete's technical assistant Mr Tahar Righi, who informed them that the Athlete had left for Dubai the day before and provided to the DCP the Athlete's new address in Bahrain ("Address 3") and the address of the hotel where she was staying in Dubai.

28. The DCP visited Address 3. According to the UA Report: *"Someone yelled from the inside and a man put his head out. He identified as the athlete's brother and said she 'went out'. Did not know to where"*.

29. On the following day, albeit with some difficulty, the DCO was able to locate the Athlete in Dubai and to test her.

30. On 12 April 2019, the AIU sent an email to the Athlete requesting that she provide her explanation for the apparent Filing Failure.

31. On 27 April 2019, the BAA wrote an email to the AIU enclosing a letter from the Athlete, whereby she provided her explanation for the apparent Filing Failure, stating in particular as follows: *"that is not my fault to report this in the system because I don't know how I enter the system even I don't know the username and password the responsibility is of the person in my federation who is in charge to update my whereabouts and when I travel to Dubai I inform him about my hotel address in Dubai and he update this too late because he was seek at that time and forgot to update my whereabouts…i talk to my federation about this case and they told me to change the person who is responsible for updating my whereabouts"* [sic]. She added that she was clean and *"against cheaters"*.

32. On 12 June 2019, the AIU sent an email to the Athlete whereby it confirmed the Filing Failure (the "Quarter 1 2019 Filing Failure") against her on the basis that, in particular, the Athlete was ultimately responsible for filing accurate Whereabouts Information, whether personally or through a third party. The AIU also informed the Athlete that she could request an administrative review of the decision by 26 June 2019.

33. The Athlete did not request any administrative review of the decision and, thus, the Quarter 1 2019 Filing Failure was definitively recorded against her, effective 1 January 2019 (as, pursuant to the relevant rules, the Whereabouts Failure must be attributed to the first day of the relevant quarter in which the Filing Failure occurs).

34. This Whereabouts Failure is uncontested by the Athlete.

c. The missed test on 12 April 2019 (the "12 April 2019 Missed Test")

35. This is the only Whereabouts Failure disputed by the Athlete in these CAS proceedings.

36. On 12 April 2019, DCO González and the chaperone Ms María James ("Chaperone James") attended the location provided in the Athlete's Whereabouts Information during the relevant 60-minute timeslot (between 6:00 and 7:00).

37. The Whereabouts Information on ADAMS specified the following address: *"Primary Residence/ Home address: Flat 11, Building 964, road 833, block 908, Riffa, Bahrain"* (emphasis added).

38. DCO González was unable to locate the Athlete. He sent to the AIU his UA Report and an additional report in which he stated, in essence, the following:

(i) The address inserted in the Athlete's Whereabouts Information, indicating Building 964, is non-existent and thus erroneous, as the last building on road 833 is building no. 954 ("Building 954").

(ii) DCO González *"had an* [sic] *screenshot from previous attempts saying it might really be building 954. This address does exists* [sic] *and there is a number 11 by a door"* (for the sake of convenience, the door with number 11 on its side will be referred to in this award as "Door 11").

(iii) DCO González and Chaperone James remained outside Building 954 for the entire 60-minute timeslot and knocked on Door 11 every five minutes, although they were *"not sure this place is actually an appartment* [sic]*, it looks like a warehouse"*.

(iv) They both tried to speak to three people passing by, *"but they spoke really poor English and were of no help"*.

(v) At 6:55, DCO González tried to contact the Athlete at a phone number he had from previous missions, since *"in the athlete's ADAMS WA there is no phone number"*; however, *"a message in Arab and English was heard after 5 rings saying the phone was disconnected or out of reach"*.

(vi) At 12:00, DCO González and Chaperone James tried again to locate the Athlete at Building 954 but still could not do so;

(vii) At 13:30, DCO González and Chaperone James reached the Bahrain National Stadium, since this was indicated on ADAMS as the Athlete's training venue, although no training was planned for that day; however, security personnel informed them that the venue was closed and nobody was inside at that moment or had been training at all that day.

39. On 24 April 2019, the AIU sent an email to the Athlete requesting that she provide her explanation for the apparent Missed Test on 12 April 2019. The AIU mentioned that, after its preliminary evaluation, *"all requirements relating to a Missed Test under the IAAF Anti-Doping Regulations have been satisfied"*.

40. In the same communication, the AIU warned the Athlete as to a mistake recorded in her ADAMS information, as follows: *"We would like to draw your attention to the fact that there is a clerical error in your ADAMS registered Whereabouts address. You registered as your Home address Building 964 and not 954 as you did in Q1 2019. The last building in Road 833 in Riffa is the building with number 954 and not 964. Please correct as soon as possible the abovementioned clerical error because inaccurate and insufficient Whereabouts Filing could be pursued as a Filing Failure according to the article 3.4 of Appendix A of the Regulations"* (emphasis in the original).

41. On 8 May 2019, the BAA wrote an email to the AIU enclosing a letter from the Athlete, whereby she provided her explanation as to the 12 April 2019 Missed Test, stating in particular

that (i) she was in her flat during the 60-minute timeslot on 12 April 2019, (ii) she acknowledged that *"[a]s you mentioned in your remark there is an error in the building number its 954 not 964"* and (iii) she informed that *"my federation changes the person in charge to update my whereabouts"*.

42. On 12 June 2019, the AIU sent an email to the Athlete informing her that the 12 April 2019 Missed Test was confirmed against her again on the basis that each Athlete in the RTP is ultimately responsible for filing accurate Whereabouts Information, whether personally or through a third party. The AIU also informed the Athlete that she could request an administrative review of the said decision by 26 June 2019.

43. The Athlete did not request any administrative review.

d. The missed test on 24 January 2020 (the "24 January 2020 Missed Test")

44. On 24 January 2020, the DCO Mr Femi Ayorinde ("DCO Ayorinde") attended the location provided in the Athlete's Whereabouts Information in order to test her during the relevant 60-minute timeslot (between 6:00 and 7:00).

45. The Whereabouts Information on ADAMS specified the following address: *"Transcorp Hilton Hotel, 1, Aguiyi Ironsi Street Maitama, Abuja, Abuja Capital Territory, NIGERIA"*.

46. DCO Ayorinde was not able to locate the Athlete. Therefore, on 6 February 2020, the AIU sent an email to the Athlete requesting her explanation for her apparent Missed Test on 24 January 2020.

47. On 19 February 2020, the Athlete replied to the AIU. Preliminarily, she mentioned that she was only able to receive the AIU's communication through the BAA, since the AIU was writing to the wrong email address. She explained that the AIU had sent an email to two different email addresses that were respectively wrong and hacked: *"Please noted* [sic] *that my correct address is salwaeby@icloud.com not salwaeid@icloud.com, and the address salwabobby7@gmail.com I am not using it since a long time because it was hacked"* (in this respect, the Panel notes the following: (i) in the whole correspondence on file related to the four Whereabouts Failures up to that moment, the AIU had always sent its communications to the allegedly erroneous email address salwaeid@icloud.com and to the allegedly hacked email address salwabobby7@gmail.com, along with the BAA's address, which is also the one provided on the Athlete's ADAMS; (ii) the BAA itself once inserted in CC the Athlete's email address that she later claimed to be wrong, i.e. salwaeid@icloud.com; (iii) Ms Naser declares in her will-say statement attached to her Answers that in December 2018 the email accounts salwaeid@icloud.com and salwabobby7@gmail.com were both hacked).

48. The Athlete next provided her explanation as to the 24 January 2020 Missed Test, stating as follows:

(i) On 23 January 2020, in the afternoon, she called her Technical Manager Mr Righi to inform him that she would be travelling to Lagos on the same night, to reach Bahrain on the following day and that she would be providing him with the address of the Hotel in Lagos later on.

(ii) She travelled by car and reached Lagos at night; when she got a *"booking hotel"* she sent the relevant address to Mr Righi; however, Mr Righi did not see her messages since (i) he was asleep, there being a *"difference of 2 hours between Nigeria and Bahrain"* and (ii) he was sick.

(iii) Thereafter, she was *"terrified"* since she had lost her internet connection during the trip to Lagos and thus could not contact anyone. Therefore, when she reached the hotel in Lagos she *"slept directly"*.

(iv) On the following morning, she found a missed call from an unknown number and called it; a DCO replied stating that he had been to the hotel in Abuja; she explained the situation and specified that she was available for testing in Lagos.

(v) When Mr Righi saw the Athlete's messages, he updated her Whereabouts Information indicating the address in Lagos and a new timeslot between 13:00 and 14:00; he suggested that she stay at the hotel in order to be available for testing.

(vi) The Athlete stayed at the hotel in Lagos until 16:00 but nobody came to test her.

49. On 31 March 2020, the AIU sent an email to the Athlete confirming the 24 January 2020 Missed Test against her.

50. On 13 April 2020, the Athlete sent an email to the AIU, requesting an administrative review of the decision and reiterating her explanation for the 24 January 2020 Missed Test, declaring as follows:

"I informed the Technical Manager as usually but he doesn't see my message because there is 2 hours between Bahrain and Nigeria (not the same Zone time) for him it was 2:25 AM and he was sleeping".

51. The Athlete added that she was clean and she intended to be a *"model for the next generation … of a clean athlete"*.

52. On 16 April 2020, Mr Righi sent some further explanations for the Athlete's 24 January Missed Test, pointing out that:

(i) The Athlete sent him a text via WhatsApp on 23 January 2020 at 15:45 Nigerian time, saying *"I'm going to Lagos today"*; however, she had no internet connection and, thus, he received such message only at 2:25 Bahraini time, along with the address of the Continental Hotel in Lagos (*"she saw that she hasn't internet and her message is hold, then she*

calls me to inform me for her trip from Abuja to Lagos then Bahrain, that's why I received (this whatsapp message at 2:25 AM on the day of 24th with another messages: when she got internet)").

(ii) He only saw the messages on the morning of 24 January 2020; he tried to contact the Athlete but she was disconnected (he later found out that she was asleep, after a tiring trip by car from Abuja to Lagos); he then proceeded to update the Athlete's Whereabouts Information and moved the 60-minute timeslot from 6:00-7:00 to 13:00-14:00; the Athlete sent him some further texts later in the afternoon, in which she blamed him for what happened and asked him why he did not update her Whereabouts Information; Mr Righi then called her and explained to her why he did not see her messages; he also told her that he had updated her Whereabouts Information and set a new timeslot from 13:00 to 14:00 and advised that she should remain in the hotel until 16:00.

(iii) The case deserved to be reviewed, since in particular *"it is not intentionally that her whereabouts has not been updated on time"* and the Athlete *"attended the whole anti-doping education program programmed by Bahrain Athletics Association in 2019"* and *"her file is clean; she has never been sanctioned for using prohibited substances*".

53. On 5 May 2020, the AIU communicated its decision of administrative review. It held that the explanations provided by the Athlete and Mr Righi were insufficient, since it is ultimately the Athlete's responsibility to ensure that her Whereabouts Information is correct and accurate. Therefore, the 24 January 2020 Missed Test was upheld. The AIU also specified that at that point the Athlete had a total of four Whereabouts Failures recorded against her, namely:

(a) the Quarter 1 2019 Filing Failure (effective 1 January 2019);

(b) the 12 March 2019 Missed Test;

(c) the 12 April 2019 Missed Test;

(d) the 24 January 2020 Missed Test.

C. Proceedings before the World Athletics Disciplinary Tribunal

54. On 6 October 2020, a hearing took place before the DT.

55. On 14 October 2020, the DT issued the Appealed Decision by which it dismissed both charges against the Athlete and lifted the Provisional Suspension, ruling as follows:

"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".

56. In particular, the DT dismissed the Charge against the Athlete because, although *"[t]his was a case very much on the borderline"*, the unsuccessful attempt of DCO González of 12 April 2019 could not be treated as a Missed Test.

57. The DT referred *inter alia to* the following considerations:

(i) The requirements of Article I.3.6 of the International Standard for Testing and Investigations ("ISTI") were met for the Quarter 1 2019 Filing Failure.

(ii) The requirements of Article I.4.3 ISTI were met for the 12 March 2019 Missed Test and the 24 January 2020 Missed Test.

(iii) As to the alleged Missed Test on 12 April 2019:

- *"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'"*;

- DCO González arrived in advance of the 6:00-7:00 timeslot and realised 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"* and thus proceeded to Building 954, which was *"the right address, as he correctly surmised"*;

- as shown in DCO González's report there are two exterior entry doors outside Building 954: *"The left hand door is a solid wooden door with the number 11 at its side* [i.e. Door 11]. *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* [hereinafter, for the sake of convenience, "Door 12"];

- numbers 11 and 12 next to Door 11 and Door 12 actually refer to car parking spaces;

- Door 12 is the entrance door to Building 954 and allows access to *"a number of apartments including indeed flat 11"*;

- Door 11 leads to a technical room and contains *"a number of gas canisters which are immediately visible when you look up above the door"*; however, DCO González knocked on Door 11 for the entire timeslot since he assumed it led to flat 11;

- DCO González did not try the intercom next to Door 12, as it was 6:00 and he feared he would wake other people up; in any case, the said intercom did not work;

- DCO González contended that he tried Door 12 and the latter was *"locked"*; it is unclear *"whether he actually meant 'locked' or 'closed'"*; however, the DT observed that *"[t]here is no reference in* [DCO González]*'s contemporaneous report to the right hand door"* and accepted that, as stated by the Athlete, Door 12 was always open due to the fact that the intercom did not work;

- Although no phone number was indicated in the Athlete's Whereabouts Information, DCO González tried to contact her at a previous phone number, but it was *"disconnected or out of reach"*;

- the Athlete and her then boyfriend Mr Abbas were both present at flat 11 during the 60-minute timeslot on 12 April 2019;

- DCO González is an *"experienced and conscientious DCO"* who, after being faced with an *"extremely confusing"* numbering on the doors of Building 954, was still committed to find the Athlete; he went back to Building 954 later that day and also reached the Stadium to see if she was training there; he went *"well beyond his mission"* to locate the Athlete;

- The Athlete could have entered more information on ADAMS in order to prevent the DCO's mistake and assist him in locating her, or provide an up-to-date phone number or in any case *"take special care"* due to the fact that she had already been notified of two Whereabouts Failures;

- Notwithstanding the above, DCO González did not make a reasonable attempt to locate the Athlete pursuant to Article I.4.3 ISTI; indeed, after reaching the correct building, he *"quite simply, knocked on the wrong door"* – i.e. Door 11 – while the Athlete *"was obviously in fact at her Flat 11"* – i.e. at a flat reachable by entering Door 12 and climbing the internal staircase.

(iv) In any case, the Athlete's argument on delay is unfounded: the Athlete contends that under the ADR no proceedings can be initiated against an athlete after 30 days from notification of the last Whereabouts Failure, since after that date one should assume that the AIU decided not to bring any charges; however, case law shows that the 30-day time limit relates to *"appeal rights"* only and has no bearing on the case at hand.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

58. On 12 November and 30 November 2020, in accordance with Articles R47 and R48 of the 2020 edition of the Code of Sport-related Arbitration (the "CAS Code"), WA and WADA respectively filed their statements of appeal against the Appealed Decision. Accordingly, the CAS Court Office opened two proceedings, docketed as CAS 2020/A/7526 *World Athletics v.*

Salwa Eid Naser and CAS 2020/A/7559 *World Anti-Doping Agency (WADA) v. World Athletics and Salwa Eid Naser*.

59. On 10 December 2020, in accordance with Article R51 of the CAS Code, WA filed its appeal brief in case CAS 2020/A/7526. In that submission, WA requested that the Athlete be ordered to produce some documents pursuant to Article R44.3 of the CAS Code, to show: (i) the dates of the Athlete's trip to Dubai in March 2019 and when such trip was booked, (ii) that she was booked on a flight from Abuja to Lagos on 23 January 2020; (iii) that she sought to call Mr Righi on WhatsApp on the night of 23 January 2020 after arriving at the Continental Hotel in Lagos; (iv) that Mr Abbas – who testified before the DT as the Athlete's boyfriend – phoned the Athlete on several occasions between 15:00 and 18:00 on 12 April 2019; (v) that the Athlete's mother Ms. Agbapuonwu resided in Bahrain between November 2018 and June 2019; (vi) that the Athlete's sister Ms Abadom had resided in Bahrain since March 2018; (vii) that in April 2019 the Athlete's sister Ms Abadom was residing at flat 11 of building 954 (viii) that Mr Abbas resided, at different times, both in flat 11 and flat 12 of building 954.

60. On 15 December 2020, the CAS Court Office informed the Parties, *inter alia*, that in view of their agreement, the procedures CAS 2020/A/7526 *World Athletics v. Salwa Eid Naser* and CAS 2020/A/7559 *World Anti-Doping Agency (WADA) v. World Athletics and Salwa Eid Naser* had been consolidated.

61. On 24 December 2020, WADA filed its appeal brief in case CAS 2020/A/7559.

62. On 15 and 26 January 2021, in accordance with Article R55 of the CAS Code, the Athlete filed her Answers in CAS 2020/A/7526 and CAS 2020/A/7559. As to WA's procedural request, the Athlete stated her willingness to disclose any relevant and available documents, if so ordered by the Panel.

63. On 2 February 2021, the CAS Court Office notified the Parties that, on behalf of the President of the CAS Appeals Arbitration Division and pursuant to Article R54 of the CAS Code, the Panel appointed to decide the matter would be constituted by Prof. Massimo Coccia as chairman, Mr Nicholas Stewart QC nominated by WA and WADA and the Hon. Michael J. Beloff M.A. QC nominated by the Athlete.

64. On 8 February 2021, the CAS Court Office notified the Parties that Ms Giulia Vigna had been appointed *ad hoc* Clerk.

65. On 22 February 2021, the Panel granted items (i) to (iv) of WA's request for document production (see *supra* para. 59), they being relevant *"in terms of credibility of Ms Naser and of the explanations she gave"*. Items (v) to (viii), on the other hand, were denied since the requested documents were under the control of third parties and, accordingly, the Panel had no authority to compel them to produce anything.

66. On 23 March 2021, the Athlete produced some documents in response to the Panel's order, with an explanation for the non-production of the others, as follows:

(i) As to item (i), pictures of the Athlete's passport showing that she entered the United Arab Emirates on 13 March 2019 and she left on 23 March 2019, to reach Bahrain on the same day;

(ii) As to item (ii), the e-ticket receipt for a flight from Lagos to Bahrain (via Dubai) on 24 January 2020; however, the Athlete did not produce any evidence as to the flight from Abuja to Lagos on 23 January 2020, as she claimed to have been unable to retrieve any documents or information in that respect;

(iii) As to item (iii), the WhatsApp conversation between the Athlete and Mr Righi on 23 and 24 January 2020 which, however, did not show whether the Athlete placed any call to Mr Righi on the night between 23 and 24 January 2020;

(iv) As to item (iv), no document or information was provided to the CAS; the Athlete explained that she could not to get any log of the phone calls placed by Mr Abbas to the Athlete on 12 April 2019.

67. On 25 March 2021, the Athlete returned the signed Order of Procedure. On 29 March 2021, WA and WADA returned the signed Order of Procedure.

68. On 15 April 2021, the CAS Court Office, on behalf of the Panel, sent to the Parties a draft hearing schedule.

69. On 17 April 2021, the Athlete sent to the CAS Court Office an additional piece of evidence, namely an expert report signed by Dr Hurford ("Dr Hurford's Report"), one of the Athlete's witnesses, and requested its admission into evidence, to which WA objected on 19 April 2021.

70. On 19 April 2021, the Athlete's counsel took note of the fact that, as per the draft hearing schedule, she would be the first to provide her witness testimony and, after reiterating that she was Respondent in both proceedings, suggested that *"[a]s a matter of practice, if not fairness, World Athletics and WADA should present their witnesses first (if any). It would then be for Ms. Naser to present her case in response"*.

71. On 20 April 2021, the CAS Court Office sent a letter to the Parties (i) informing them that the Panel had decided to accept Dr Hurford's Report into the casefile, while reserving any determination as to its relevance and (ii) explaining that the Athlete would be the first to give oral evidence at the hearing since *"[u]nder Swiss law (which governs CAS proceedings), Ms Naser is a party, not a witness (she will not be sworn). It is customary at CAS that parties, whether appellants or respondents, who wish to give oral evidence, if any, are examined before experts and witnesses"*: the Panel considered the circumstance that (a) the Athlete would have a right to attend the whole hearing and thus to be present during the witnesses' testimony, (b) WA and WADA would speak first

at the hearing submitting their opening statements and, thus, would present their case before the Athlete's oral evidence, and (c) the Athlete would be given a chance, as customary at the CAS in disciplinary cases, to have a last word and address the Panel at the end of the hearing.

72. On 22 April 2021, following a request in this respect from the Athlete, the Parties were provided with a copy of the arbitral award issued in case CAS 2020/A/7528.

73. On 22 and 23 April 2021, the hearing took place by video-conference.

74. The following people were in attendance at the hearing:

- the Panel, assisted by Ms Giulia Vigna (*ad hoc* clerk) and Ms Delphine Deschenaux-Rochat (CAS Counsel).
- for WA: Mr Tony Jackson (Deputy Head of Case Management at the AIU), Mr Ross Wenzel (Counsel) and Mr Anton Sotir (Counsel);
- for WADA: Mr Cyril Troussard (as WADA representative), Mr Jonathan Taylor QC (Counsel) and Mr Chris Lavey (Counsel);
- for the Athlete: Ms Salwa Eid Naser (Respondent), Dr Emir Crowne (Counsel), Mr Matthew Gayle (Counsel) and Ms Kristie Irving (Counsel).

75. At the outset of the hearing, the Parties confirmed they had no objections to the constitution and composition of the Panel.

76. The Panel heard oral evidence from the following individuals, who were subjected to examination and cross-examination as well as to questions from the arbitrators:

- Ms Salwa Eid Naser (the Athlete), as a party to the proceedings;
- Mr Enrique González Martinez (DCO for the 12 April 2019 Missed Test) as a witness called by WA;
- Dr David P. Hurford (learning disabilities expert) and Mr Abdulraoof Hashem Abdullatif Alsada, owner of Building 954 (the "Landlord"), who was assisted by an interpreter (Ms Amal Khoury), as witnesses called by the Athlete.

77. The Athlete had indicated that she would also adduce evidence from Mr Abbas Abubakar Abbas (Athlete's former boyfriend) and Ms Fatima Mubarak Isa Mubarak (Athlete's teammate). However, at the CAS hearing the Athlete's counsel waived their testimonies. Consequently, the Panel ruled that their witness statements presented before the CAS be withdrawn from the record. The Panel specified that, in any case, it had the power to rely on

the DT case file and to consider the evidentiary value of the references, if any, to said witnesses in the proceedings below.

78. On 23 April 2021, during its closing oral pleadings, WADA used a PowerPoint presentation that had not been previously announced or introduced into the record; however, no objection thereto was raised by the Athlete. It consisted of extracts from case law relied upon by WADA in support of its argument that the Panel should be able to rule upon the 12 April 2019 Missed Test as a filing failure, supplemented by a few very brief comments.

79. At the end of the hearing, upon the Panel's specific question, the Parties acknowledged that the Panel had fully respected their right to be heard and confirmed that they had no objection as to the way in which the hearing had been conducted.

80. As agreed at the hearing, on 26 April 2021, WADA sent an email to the CAS Court Office, attaching (i) the PowerPoint presentation shown during the hearing and (ii) the case law mentioned therein.

81. That PowerPoint presentation raised no new arguments and the jurisprudence cited therein all went to issues already canvassed in the written and oral submissions before the Panel at the hearing. In any event, the Athlete raised no objection to it.

V. PARTIES' SUBMISSIONS

A. World Athletics

82. World Athletics requests the following relief:

"(1) rule that the appeal of World Athletics is admissible;

(2) rule that the decision dated 14 October 2020 rendered by the World Athletics Disciplinary Tribunal in the matter of Salwa Eid Naser is set aside;

(3) declare that Salwa Eid Naser has committed an anti-doping rule violation pursuant to Article 2.4 of the World Athletics Anti-Doping Rules;

(4) impose a period of ineligibility of two (2) years upon Salwa Eid Naser commencing on the date of the CAS award, with a credit for the period of Provisional Suspension served by the Athlete from 4 June 2020 until 14 October 2020;

(5) order the disqualification of any results obtained by the Athlete from 12 April 2019 until the date on which the CAS award enters into force with all resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money pursuant to Rule 10.8 of the World Athletics Anti-Doping Rules;

(6) order the Athlete to bear the arbitration costs (if any); and

(7) award World Athletics a contribution to its legal and other costs".

83. World Athletics' submissions, in essence, may be summarized as follows:

(i) The Athlete's Whereabouts Failures:

(a) The 12 March 2019 Missed Test is uncontested; the Athlete initially explained the Missed Test stating *"I don't know what was the problem at that date may be i don't listen knocking the door"*; however, as testified both before the DT and at the CAS hearing, she had actually moved out of that address and failed to update her Whereabouts Information accordingly.

(b) The Quarter 1 2019 Filing Failure is uncontested; while on 16 March 2019 the DCO attempted to locate the Athlete attending the address provided in ADAMS as well as other locations in Bahrain, she had actually failed to indicate in her Whereabouts Information that she was on holiday in Dubai.

(c) The DT failed to consider in the Appealed Decision that the Whereabouts Failure of 12 April 2019 amounts to a Missed Test and DCO González actually did all that was reasonable (and even more) to locate the Athlete.

(d) As to the 24 January 2020 Missed Test, the Athlete provided an implausible and inconsistent story and, even accepting her recollection of events, she went to bed in Lagos simply accepting that her Whereabouts Information had not been properly updated and, still, she did not even set an alarm for the following morning; overall, the Athlete's failure to be available for testing was caused by her negligence.

(ii) In particular, the Whereabouts Failure of 12 April 2019 constitutes a Missed Test because:

(a) The Athlete was not present and available at the specified location:

- the Athlete had an obligation to be present and available at the location specified in her Whereabouts Information. She was neither present nor available, nor could she be, considering that the indicated location (i.e. building 964) does not exist; that fact is by itself decisive against her;

- had building 964 existed, while the Athlete actually lived at Building 954, DCO González would have knocked on the door of building 964 and that would have undoubtedly constituted a Missed Test. The Athlete should not

be saved only due to the fact that, for whatever reason, she inserted a non-existent address on ADAMS;

- furthermore, in any case, there is no corroborating evidence that she was even present and available at Building 954;

- in any case, it is not sufficient for athletes to be present and available, they shall also be accessible to the DCO; therefore, they should place themselves in a position in which they can hear or see the DCO attending the specified location.

(b) DCO González did what was reasonable in the circumstances to locate the Athlete:

- he actually went above and beyond what was reasonably required of him to try to locate the Athlete;

- he could and should have stopped at the specified location, namely the non-existent building 964;

- however, he found Building 954 and decided to try and locate the Athlete there, without even being sure that it was the correct address;

- he spent the full hour outside of Building 954, knocking on Door 11 (which was logical to believe led to flat 11);

- he inspected the intercom next to Door 12 but found no names or numbers on it and, as it was early in the morning, he felt uncomfortable randomly ringing unknown people;

- he actually tried to open Door 12 and found that it was locked;

- he spoke to persons exiting nearby buildings in order to gather information;

- although no telephone number was provided on ADAMS, he tried to ring the Athlete using a telephone number he had from a previous mission, but found that it was out of service;

- he sought to locate the Athlete later that day, both at building 954 and at the Bahrain National Stadium;

- the only factual controversy is whether or not DCO González tried Door 12 and whether or not it was locked; in this respect, DCO González testified

before the DT that he did try Door 12 and it was *"closed and locked"*. However, the DT rejected such evidence, thereby finding in effect that DCO González lied. Such conclusion is at odds with the relevant CAS case law, according to which the DCO's recollection of events is presumed to be correct, unless very substantial counterevidence can be presented. In the present case, the Athlete has stated that Door 12 is always open and her claim was merely supported by her own words and statements from her mother, her sister and her ex-boyfriend – who were not called to testify before the CAS – and the owner of Building 954 whose testimony, however, was contradictory: this is not enough to rebut the presumption of accuracy of the DCO's version of facts. Furthermore, it would have been illogical, for DCO González, to spend one hour at Building 954 without trying Door 12.

(c) The Athlete's negligence contributed to her failure to be available for testing:

- it is the Athlete's responsibility to keep accurate Whereabouts Information and, as such, she cannot claim that the negligence was that of a third person tasked with updating said information;

- in the present case, the Athlete provided a wrong address and did not enter any information on ADAMS in order to help finding flat 11, nor did she indicate her name on the intercom next to Door 12 or otherwise clarify that flat 11 was accessed through Door 12;

- furthermore, she did not make sure that the intercom worked or provide a mobile phone number to be contacted by the DCO.

(iii) In any event, the 12 April 2019 Whereabouts Failure stems from the Athlete's Filing Failure:

(a) As recognised by the Athlete herself in her first explanation to the AIU, she made a mistake and inserted the wrong address in ADAMS.

(b) In addition to the address being incorrect, the Athlete did not provide sufficient information to enable her to be located, notwithstanding the fact that, as also acknowledged by the DT, the *"numbering on the doors is extremely confusing"* and she actually had provided further details to reach her address with reference to a previous location in Boukouara.

(iv) There is no reason to depart from the standard two-year ineligibility period for a violation of Article 2.4 ADR, considering the clearly significant negligence of the Athlete.

B. WADA

84. WADA requests that the Panel rule as follows:

"6.1.1 WADA's appeal is admissible.

6.1.2 The Appealed Decision is set aside.

6.1.3 The Athlete has committed an anti-doping rule violation in breach of IAAF Anti-Doping Rule Article 2.4, in that she committed three Whereabouts Failures in the twelve-month period between 1 January 2019 and 31 December 2019 (i.e., the Whereabouts Failures on 12 March 2019, 16 March 2019 (backdated to 1 January 2019), and 12 April 2019 (whether backdated to 1 April 2019 or not)).

6.1.4 Alternatively, the Athlete has committed an anti-doping rule violation in breach of World Athletics Anti-Doping Rule 2.4, in that she committed three Whereabouts Failures in the twelve-month period between 12 March 2019 and 11 March 2020 (i.e., the Whereabouts Failures on 12 March 2019, 12 April 2019 (whether backdated to 1 April 2019 or not), and 24 January 2020).

6.1.5 The Athlete's results since 1 or 12 April 2019 (as applicable), or alternatively since 24 January 2020, are disqualified in accordance with Article 10.8 of the IAAF Anti-Doping Rules or of the World Athletics Anti-Doping Rules (as applicable).

6.1.6 The Athlete is Ineligible (as defined in the World Athletics Anti-Doping Rules) for a period of 24 months, in accordance with Article 10.3.2 of the IAAF Anti-Doping Rules or of the World Athletics Anti-Doping Rules (as applicable), but with a credit for the period of provisional suspension served by the Athlete, i.e., from 4 June 2020 to 14 October 2020.

6.1.7 The arbitration costs (if any) shall be borne by the Athlete.

6.1.8 The Athlete is ordered to make a contribution to WADA's legal and other costs".

85. WADA's submissions, in essence, may be summarized as follows:

(i) The whereabouts system is crucial for protecting the integrity of sport; indeed, drug testing can only be effective if unannounced out-of-competition testing can be carried out, which is only possible if athletes are required to file accurate Whereabouts Information; the DT made a mistake that must be corrected in order to restore athletes' confidence and reliance on the system.

(ii) The Panel can and should find that the 12 April 2019 Whereabouts Failure was actually a Filing Failure:

(a) Article I.3.4 ISTI clearly states that athletes are responsible to provide accurate Whereabouts Information, in sufficient detail to enable the relevant anti-doping organisation to locate them for testing; in case the anti-doping organisation

attempts to test an athlete in the relevant 60-minute timeslot and, in that occasion, it finds that the provided Whereabouts Information is inaccurate or insufficient, said situation shall still be pursued as a filing failure.

(b) In the case at hand, the DCO took up the 12 April 2019 mission and found that the Athlete's Whereabouts Information was insufficient to locate her; indeed, she admitted that the indication of building 964 was wrong as the latter actually did not exist; in such situation, the DCO was not required to act as a detective and use clues to find the correct location; had DCO González stopped when finding that there was no building 964 on the relevant road, the AIU would have proceeded to declare a Filing Failure, with no argument being available to the Athlete.

(c) Furthermore, Article I.3.6(d) ISTI provides that in case of filing failures athletes shall be presumed to have acted negligently; such presumption can only be rebutted by showing that no negligent behaviour on the athlete's part contributed to the failure; in the case at hand, the Athlete was clearly negligent and the fact that she had delegated the filing of her Whereabouts Information to a third party is no defence.

(d) Nothing in the rules prevents the CAS Panel from assessing the 12 April 2019 Whereabouts Failure as a Filing Failure; indeed, Article I.5.5 ISTI and Article 8.6 AD Regulations expressly state that hearing panels shall not be bound by determinations made during the results management process; WA is also not bound by that characterisation, as mentioned in case *World Athletics v Wilson Kipsang Kiprotich* (DT decision of 24 June 2020).

(e) The CAS *de novo* power is limited by the scope of the issues that have been decided by the first instance tribunal; the recharacterization of the 12 April 2019 Missed Test as a Filing Failure would not violate said limit, considering that (i) the charged ADRV would still be the same (violation of Article 2.4 ADR), (ii) the Filing Failure is based on the same facts that are relevant to the 12 April 2019 Missed Test and (iii) no new evidence is being introduced to that end.

(f) WADA has a supervisory jurisdiction aimed at ensuring harmonisation and consistent application of the rules; such role can only be exercised at the appeal level and it is crucial to correct mistakes that were made within the relevant Anti-Doping Organisations or International Federations; it would be unreasonable and excessively burdensome for WADA to monitor the correctness of every charge put forward within each Anti-Doping Organisation, rather than intervene at the appeal level.

(g) Recharacterization would not be unfair or prejudicial to the Athlete, as it would not in any way impair her ability to mount a defence against the new charge.

(iii) Alternatively, the 12 April 2019 Whereabouts Failure meets all the requirements of a Missed Test:

(a) The Athlete, when included in the RTP, was warned that she would be liable for a Missed Test in case she was not available for testing at the specified location during the 60-minute timeslot.

(b) DCO González attempted to test the Athlete on 12 April 2019 during the relevant timeslot and did everything that was reasonable in the circumstances to try and locate the Athlete:

- he sought to locate her address, which did not appear on Google Maps, and found the location with the help of a screenshot;
- he sought and did not find any building 964, but still decided to visit building 954 to look for any helpful information;
- he stayed at Building 954 for the full hour, knocking on Door 11, without receiving any answer;
- he tried to open Door 12, but it was *"closed and locked"*;
- he inspected the intercom next to Door 12 but there was no name or number on it; he did not try the intercom as he (reasonably) feared he would wake someone (other than the Athlete) up; in any case, it would have been useless since, as stated by the Athlete, such intercom never worked;
- he spoke to people coming out of nearby buildings in order to gather information, but they spoke poor English;
- although the Athlete did not insert any mobile phone number on ADAMS, he tried to contact her at a number he had from a previous mission, but found that it was disconnected;
- he went back to Building 954 later on the same day and also tried to locate the Athlete at the Bahrain National Stadium, but with no success.

(c) Pursuant to Article I.4.2 ISTI, the Athlete had been notified of her previous Missed Test, on the very same day.

(d) The Athlete's failure was negligent, and she has no element to rebut such presumption; the fact that her negligence contributed to the Missed Test is evident; for instance, she did not provide any information as to the fact that flat

no. 11 was behind Door 12, nor did she put her name on the intercom or provide a mobile phone number to help the DCO to locate her.

(e) The DT based its decision on the only finding that DCO González did not try to open Door 12; namely, the DT rejected DCO González's evidence in this respect and accepted the Athlete's submission that Door 12 was *"always open"*, thereby ruling that DCO González did not make every reasonable attempt to locate the Athlete; such conclusion is flawed since:

- at the DT hearing, DCO González made absolutely clear that he did try to open Door 12 but it was closed and locked: *"I pushed the door. I got the handle, tried to open, not only once but two, three times, and I couldn't open that. So that was my logical conclusion, it was closed and locked"*;

- the relevant jurisprudence shows that reasonableness shall be evaluated considering *inter alia* the quality of the information provided by the athletes since, as a rule, they shall make themselves available and accessible; in the present case, the Athlete provided inaccurate information (a non-existent address and no further specifications) and thus clearly did not make herself available; therefore, she cannot argue that the DCO should have overcome such inaccuracy and still be able to locate the Athlete and, accordingly, one cannot say that the DCO acted unreasonably, even assuming (*quod non*) that he did not try Door 12;

- the CAS Panel is not bound by the DT's factual findings. The Panel can and should accept DCO González's evidence that he tried Door 12 and could not open it;

- CAS jurisprudence has shown that DCO's evidence is presumed to be correct, unless the athlete can prove that the DCO, in the circumstances of that particular case, had a motive to fabricate facts; in the present case, there is no such motive, as the DT itself recognised that DCO González is an experienced DCO and took very seriously his commitment to find the Athlete;

- accepting that DCO González did try Door 12 is also the most logical conclusion considering the (undisputed) circumstances in this case, namely (i) that he stayed for a full hour in front of Door 11 and had doubts about the possibility that such door led to an apartment, (ii) Door 12 is close to Door 11 and better resembles the entrance to a building and thus it would have been irrational for the DCO not to check it, (iii) the DT accepted that he did examine the intercom next to Door 12 and even took a picture of it

and thus, once again, it would have been irrational for him not to try the door that was only inches away from the intercom;

- the Athlete did not provide "substantial counter-evidence" to rebut DCO González's version of the events; indeed (i) while it is true that at first the question arose as to whether DCO González meant that Door 12 was "closed" or "locked", in his testimony before the DT the latter was very clear in his answer, stating that *"the door obviously was closed, and for me, you know, if I translate from my, my mother tongue, it's like the door was closed. It was locked. And that's it. You know, I was ... what I mean by locked that it couldn't be opened just pushing. You know, just I tried to push and the door was, was closed and locked"*; (ii) the conclusion that Door 12 was *"always open"* due to the intercom not working came from the Athlete, who had a strong personal interest in the outcome of the case, along with the other persons supporting such argument, namely her boyfriend and her sister; furthermore, such conclusion does not entail that there could not be something that prevented Door 12 from being opened on 12 April 2019 from 6:00 to 7:00; (iii) the fact that DCO González did not mention Door 12 in his contemporaneous report is irrelevant; indeed, there are no specific guidelines as to what should be mentioned in such reports and, in any case, DCO González did not mention trying the intercom in the contemporaneous report, but still the DT accepted his evidence on such point.

(f) There is no basis for reducing the two-year standard period of ineligibility for violations of Article 2.4 ADR, considering the Athlete's degree of negligence in the present case.

(g) Unless the Athlete is able to show that fairness requires otherwise, all her results from the date on which the ADRV occurred shall be disqualified, thus either from the 1 or 12 April 2019 ("First Charge") or from 24 January 2020 ("Second Charge").

C. Salwa Eid Naser

86. The Athlete stated, in both her Answers, that she seeks:

"a. an elimination of any proposed period of Ineligibility; or

b. any other period of Ineligibility this Panel may deem fit (including the commencement of any period of Ineligibility and/or disqualification of results, considering the significant prosecution delays at bar and/or overall fairness of the situation); and

c. a contribution to her legal costs, together with any other order, remedy or award this Panel deems just".

87. The Athlete's submissions, in essence, may be summarized as follows:

(i) When the Athlete received the Notice of Charge, providing for her immediate provisional suspension, she was not afforded the opportunity for a provisional hearing; this is contrary to Rule 7.10.2 of the WA Anti-Doping Rules entered into force on 1 April 2020, according to which there can be no provisional suspension unless the athlete is given the opportunity for a provisional hearing; while some matters of the present case operate under a previous version of the relevant provisions, the Notice of Charge was notified to the Athlete on 4 June 2020 and, thus, the Athlete should have been afforded a provisional hearing; such breach of the Athlete's natural justice rights has the consequence that any proposed sanction shall be eliminated or at least reduced.

(ii) WA failed to institute timely proceedings against the Athlete after the 12 April 2019 Missed Test, *i.e.* the third Whereabouts Failure recorded against her in a 12-month period; indeed, under Article 8.5 AD Regulations, when three Whereabouts Failures are recorded against the athlete, WA shall bring proceedings against him/her within 30 days; however, although the investigations for the third Whereabouts Failure were concluded on 26 June 2019, WA only instituted said proceedings almost a year later *i.e.* on 4 June 2020; such delay is fatal to WA's decision to pursue charges against the Athlete.

(iii) There were unexplained delays in the proceedings that led to the AIU charging the Athlete for an ADRV; therefore, after the conclusion of the investigations for the third Whereabouts Failure, the Athlete continued to compete, without knowing that an ADRV would be asserted against her; WA then waited for a fourth Whereabouts Failure in January 2020 then to allege two ADRVs, nearly a year later; this delay was prejudicial to the Athlete and to the merits of the case, considering that, for instance, memories fade over time. This factor should be relied upon to either eliminate or reduce any proposed period of ineligibility; indeed, as per the concept of "estoppel by representation", followed in CAS case law, if the conduct of one party has induced the other party to believe something, the former cannot change its behaviour to the detriment of the latter; said concept is also applicable in case of silence or inaction, if the "representor" had a duty to make a disclosure towards the "representee".

(iv) The 24 January Missed Test is no longer contested.

(v) There was no Whereabouts Failure with reference to the testing attempt on 12 April 2019:

(a) It could not be established to the comfortable satisfaction of the DT.

(b) The Athlete was present at the specified location during the relevant timeslot.

(c) The DCO did not make a reasonable attempt; in this respect, video evidence relied upon by the Athlete – i.e., a smartphone video showing the Athlete reaching

Building 954, opening both Door 11 and Door 12 and showing what is inside (the "Video") – corroborates the finding that Door 12 is always left open; moreover, the same DCO attempted to test the Athlete in August 2019, realized that Door 12 was the entrance to the building, opened it and found the Athlete at flat 11.

(vi) The Panel cannot recharacterize the Whereabouts Failures that were presented before the DT; indeed, although it is true that Article R57 of the CAS Code enables the Panel to review the matter *de novo*, said review is limited to the issues that arose from the Appealed Decision; accordingly, any recharacterization would be beyond the Panel's scope of review and belated, considering that it was not raised until these proceedings, although WA had been in charge of the entire process from start to finish up till then

(vii) In any case, the fact that the Athlete suffers from both an attentional disorder and dyslexia should be taken into account when establishing her culpability and degree of fault; in this respect, dyslexia is a factor that contributed to the Athlete giving the wrong building number to Mr Righi and thus to the clerical error on ADAMS as to her location on 12 April 2019.

VI. JURISDICTION

88. Article R47 of the CAS Code provides as follows:

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

89. According to Article 13 ADR (see Section VIII below), *"Unless specifically stated otherwise, decisions made under these Anti-Doping Rules may be appealed only as set out in this Article 13".*

90. Article 13.2.1 ADR provides a non-exhaustive list of decisions concerning ADRVs, which "*may be appealed under these Anti-Doping Rule"*; such list includes *inter alia "a decision that no Anti-Doping Rule Violation has been committed".*

91. Article 13.2.2 ADR specifies that *"[i]n cases arising involving International-Level Athletes … a decision may be appealed exclusively to CAS".*

92. Article 1.8 ADR provides the following definition of "International-Level Athlete":

"Within the overall pool of Athletes set out above who are bound by and required to comply with these Anti-Doping Rules, each of the following Athletes shall be considered to be an International-Level Athlete ('International-Level Athlete') for the purposes of these Anti-Doping Rules and therefore the specific provisions in these Anti-Doping Rules applicable to International-Level Athletes shall apply to such Athletes:

(a) An Athlete who is in the International Registered Testing Pool; …".

93. The Athlete has been part of the RTP since 2016 (see *supra* at para. 6) and thus falls within said definition.

94. Article 13.2.4 ADR so provides:

"In cases under Article 13.2.2, the following parties shall have the right to appeal to CAS: … (c) the IAAF; … (f) WADA".

95. The Parties do not dispute the jurisdiction of the CAS and confirmed it by signing the Order of Procedure.

96. It follows that the CAS has jurisdiction to decide the dispute in both appeals.

VII. ADMISSIBILITY

97. Article R49 of the CAS Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document".

98. According to Article 13.7 ADR:

"13.7.1 The deadline for filing an appeal to CAS shall be 30 days from the date of receipt of the reasoned decision in question by the appealing party (and where the IAAF is the prospective appellant in a proceeding other than before the Disciplinary Tribunal, 30 days from the date of receipt of the full reasoned decision and the complete file relating to the decision in English or French). Where the appellant is a party other than the IAAF, to be a valid filing under this Article 13.7.1, a copy of the appeal must be filed on the same day with the IAAF. Within 15 days of the deadline for filing the statement of appeal, the appellant shall file his appeal brief with CAS and, within 30 days of receipt of the appeal brief, the respondent shall file his answer with CAS.

13.7.2 Notwithstanding Article 13.7.1, the filing deadline for an appeal by WADA shall be the later of:

(a) 21 days after the last day on which any other party in the case could have appealed; and

(b) 21 days after WADA's receipt of the complete file relating to the decision".

99. The Appealed Decision was notified to WA on 14 October 2020 and WA lodged its appeal (docketed as CAS 2020/A/7526) on 12 November 2020, i.e. within the 30 days allotted under Article 13.7.1 ADR.

100. WADA, along with the Bahrain NADO, was notified of the Appealed Decision on 19 October 2020 and received a copy of the case file from WA on 12 November 2020.

101. Under Article 13.7.2 ADR, the deadline for WADA's appeal was the latest of (a) 21 days after 18 November 2020, which was the deadline for the Bahrain NADO to appeal against the Appealed Decision (thus 9 December 2020) or (b) 21 days after WADA's receipt of the case file (thus 3 December 2020). WADA lodged its appeal (docketed as CAS 2020/A/7559) on 30 November 2020, i.e. within the relevant time limit under Article 13.7.2 ADR.

102. Both appeals complied with the requirements of Article R48 of the CAS Code. It follows that WA's and WADA's appeals are both admissible.

VIII. APPLICABLE LAW

103. Article R58 of the CAS Code provides as follows:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

104. The Appellants contend that two different versions of Anti-Doping Rules apply to the present case, depending on whether the Panel relies on the First Charge or on the Second Charge. Notably, considering that the IAAF Anti-Doping Rules entered into force on 1 January 2019, while the World Athletics Anti-Doping Rules were enacted on 1 November 2019, the Appellants rely on the date of the third Whereabouts Failure for the First Charge (i.e. 12 April 2019) and on the date of the 24 January 2020 Missed Test for the Second Charge, and argue that the IAAF Anti-Doping Rules are applicable to the Whereabouts Failures that form part of the First Charge, while the World Athletics Anti-Doping Rules apply to the 24 January 2020 Missed Test, which forms part of the Second Charge.

105. The Panel notes that the IAAF and World Athletics Anti-Doping Rules (and the respective Anti-Doping Regulations) are all but identical in language and are equivalent in substance. Therefore, considering that, for the reasons elaborated below (see paras. 184-197 *infra*), the Panel will rely primarily on the First Charge, throughout this Award reference will be made to the IAAF Anti-Doping Rules ("ADR") and the IAAF Anti-Doping Regulations ("AD Regulations").

106. Pursuant to Article 13.9 ADR:

> *"13.9.4 In all CAS appeals involving the IAAF, the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Anti-Doping Rules and Regulations). In the case of conflict between the CAS rules currently in force and the IAAF Constitution, Rules and Regulations, the IAAF Constitution, Rules and Regulations shall take precedence.*

13.9.5 In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the appeal shall be conducted in English, unless the parties agree otherwise".

107. Article 20.2 ADR provides that *"These Anti-Doping Rules shall be interpreted in a manner that is consistent with the Code* [the WADC]. *The Code shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of any Signatory or government. The comments annotating various provisions of the Code and the International Standards shall be used to interpret these Anti-Doping Rules".*

108. By way of introduction, the Panel notes that the WADC is the regulatory document on which the World Anti-Doping Program is based. As provided in the WADC and mentioned in several CAS awards (see e.g. CAS 2020/A/7528 at para. 96 and CAS A2/2014 at para. 18), the World Anti-Doping Program is formed of three levels, following a top-down hierarchical order:

(i) The WADC, whose provisions *"are mandatory in substance and must be followed as applicable by each Anti-Doping Organization and Athlete or other Person"* but do not replace the rules that shall be adopted by each anti-doping organisation; in this respect, WA, as a signatory to the WADC, has adopted the ADR, whose provisions are in part identical to the WADC and whose application is mandatory;

(ii) The International Standards, which contain *"much of the technical detail necessary for implementing the Code"* and are *"mandatory for compliance with the Code"*; in the case at hand, the Panel will rely on the "International Standard for Testing and Investigations" ("ISTI");

(iii) The Models of Best Practice and Guidelines, which *"provide solutions in different areas of anti-doping"* and, albeit not mandatory, provide relevant guiding canons to all involved in anti-doping controls; in the present case, reference will be made to the "Guidelines for Implementing an Effective Testing Program", October 2014 edition ("WADA Guidelines").

109. By reason of those provisions, pursuant to Article R58 of the CAS Code, the Panel must adjudicate the present dispute taking into consideration the ADR and the AD Regulations, the ISTI and the WADA Guidelines; subsidiarily, Monegasque law will be applicable.

110. That said, the provisions that are relevant to the present dispute provide as follows:

(i) The ADR:

(a) Article 2 defines the conducts that constitute an Anti-Doping Rule Violation: *"Doping is defined as the occurrence of one or more of the following (each 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".

(b) Article 5.7 deals with the Athlete Whereabouts Information, providing as follows in its relevant parts:

"5.7.1 […] *Each Athlete in the International Registered Testing Pool shall do the following, in each case in accordance with Appendix A of the Anti-Doping Regulations: (a) advise the Integrity Unit of his whereabouts on a quarterly basis; (b) update that information as necessary so that it remains accurate and complete at all times; and (c) make himself available for Testing at such whereabouts*;

5.7.2 For purposes of Article 2.4, an Athlete's failure to comply with the requirements of Appendix A of the Anti-Doping Regulations shall be deemed a Filing Failure or a Missed Test (as defined in the International Standard for Testing and Investigations) where the conditions set forth in the International Standard for Testing and Investigations for declaring a Filing Failure or Missed Test are met" (the provisions of Appendix A to the AD Regulations are substantially identical to those of Annex I to the ISTI; for the sake of convenience, in the present Award reference is made to the provisions of the ISTI);

(c) Article 10 lists the sanctions applicable to all Anti-Doping Rules Violations and its relevant parts state the following:

"10.3 Ineligibility for Other Anti-Doping Rule Violations

The period of Ineligibility imposed for Anti-Doping Rule Violations under provisions other than Articles 2.1, 2.2 and 2.6 shall be as follows […]

10.3.2 For an Anti-Doping Rule Violation under Article 2.4 that is the Athlete's first antidoping offence, the period of Ineligibility imposed shall be two years, subject to reduction down to a minimum of one year, depending on the Athlete's degree of Fault. The flexibility between two years and one year of Ineligibility in this Article is not available to Athletes where a pattern of last-minute whereabouts changes or other conduct raises a serious suspicion that the Athlete was trying to avoid being available for Testing. […]

10.8 Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation

In addition to the automatic Disqualification, pursuant to Article 9, of the results in the Competition that produced the Adverse Analytical Finding (if any), all other competitive results of the Athlete obtained from the date the Sample in question was collected (whether In-Competition or Out-of-Competition) or other Anti-Doping Rule Violation occurred through to the start of any Provisional Suspension or Ineligibility period shall be Disqualified (with all of

the resulting consequences, including forfeiture of any medals, titles, ranking points and prize and appearance money), unless the Disciplinary Tribunal determines that fairness requires otherwise. […]

10.10 Commencement of Ineligibility and other Consequences

Any Consequences imposed under this Programme shall come into force and effect on the date that the decision imposing the Consequences is issued, save that: …

10.10.2 The period of Ineligibility shall start on the date that the decision is issued provided that:

(a) any period of Provisional Suspension served by the Athlete or other Person (whether imposed in accordance with Article 7.10 or voluntarily accepted by the Athlete or other Person in accordance with Article 7.10.6) shall be credited against the total period of Ineligibility to be served. To get credit for any period of voluntary Provisional Suspension, however, the Athlete or other Person must have given written notice at the beginning of such period to the Integrity Unit, in a form acceptable to the Integrity Unit (and the Integrity Unit shall provide a copy of that notice promptly to every other Person entitled to receive notice of a potential Anti-Doping Rule Violation by that Athlete or other Person under Article 14.1.2) and must have respected the Provisional Suspension in full. No credit against a period of Ineligibility shall be given for any time period before the effective date of the Provisional Suspension or voluntary Provisional Suspension, regardless of the Athlete or other Person's status during such period. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility that may ultimately be imposed on appeal; …

(c) where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the period of Ineligibility may be deemed to have started at an earlier date, commencing as early as the date the Anti-Doping Rule Violation last occurred (e.g., under Article 2.1, the date of Sample collection). All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified".

(d) For the purpose of establishing the Athlete's level of fault, the ADR define "Fault" as follows:

"*Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact*

that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2".

(ii) The ISTI:

(a) Article 3 ISTI provides the definitions of "Missed Test" and "Filing Failure" for the purpose of establishing a 2.4 ADRV:

"Filing Failure: A failure by the Athlete (or by a third party to whom the Athlete has delegated the task) to make an accurate and complete Whereabouts Filing that enables the Athlete to be located for Testing at the times and locations set out in the Whereabouts Filing or to update that Whereabouts Filing where necessary to ensure that it remains accurate and complete, all in accordance with Article I.3 of the International Standard for Testing and Investigations.

Missed Test: A failure by the Athlete to be available for Testing at the location and time specified in the 60-minute time slot identified in his/her Whereabouts Filing for the day in question, in accordance with Article I.4 of the International Standard for Testing and Investigations".

(b) Annex I to the ISTI deals with the *"Code Article 2.4: Whereabouts Requirements"*; notably:

– Article I.1 ISTI introduces the obligations to be fulfilled by the athletes as to whereabouts requirements and explains when Whereabouts Failures amount to an ADRV:

"I.1.1 An Athlete who is in a Registered Testing Pool is required:

a) 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 Failure; and

b) to 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, as specified in Article I.4. This does not limit in any way the Athlete's Code Article 5.2 obligation to submit to Testing at any time and place upon request by an Anti-Doping Organization with Testing Authority over him/her. Nor does it limit his/her obligation to provide the information specified in Article I.3 as to his/her whereabouts outside that 60-minute time slot. However, if the Athlete is not available for Testing at such location during the 60-minute time slot specified for that day in his/her Whereabouts Filing, that failure may be declared a Missed Test.

I.1.2 Three Whereabouts Failures by an Athlete within any 12-month period amount to an anti-doping rule violation under Code Article 2.4. The Whereabouts Failures may be any combination of Filing Failures and/or Missed Tests declared in accordance with Article I.5 and adding up to three in total".

I.1.3 The 12-month period referred to in Code Article 2.4 starts to run on the date that an Athlete commits the first Whereabouts Failure being relied upon in support of the allegation of a violation of Code Article 2.4. If two more Whereabouts Failures occur during the ensuing 12-month period, then a Code Article 2.4 antidoping rule violation is committed, irrespective of any Samples successfully collected from the Athlete during that 12-month period. However, if an Athlete who has committed one Whereabouts Failure does not go on to commit a further two Whereabouts Failures within 12 months of the first, at the end of that 12-month period the first Whereabouts Failure "expires" for purposes of Code Article 2.4, and a new 12-month period begins to run from the date of his/her next Whereabouts Failure.

[Comment to I.1.3: For purposes of determining whether a Whereabouts Failure has occurred within the 12-month period referred to in Code Article 2.4, (a) a Filing Failure will be deemed to have occurred on the first day of the quarter for which the Athlete fails to make a (sufficient) filing; and (b) a Missed Test will be deemed to have occurred on the date that the Sample collection was unsuccessfully attempted.]".

– Article I.3.6 provides the requirements for a Filing Failure to be established against an athlete:

"I.3.6 An Athlete may only be declared to have committed a Filing Failure where the Results Management Authority establishes each of the following:

a) that the Athlete was duly notified (i) that he/she had been designated for inclusion in a Registered Testing Pool; (ii) of the consequent requirement to make Whereabouts Filings; and (iii) of the Consequences of any Failure to Comply with that requirement;

b) that the Athlete failed to comply with that requirement by the applicable deadline;

c) in the case of a second or third Filing Failure in the same quarter) that he/she was given notice, in accordance with Article I.5.2(d), of the previous Filing Failure, and (if that Filing Failure revealed deficiencies in the Whereabouts Filing that would lead to further Filing Failures if not rectified) was advised in the notice that in order to avoid a further Filing Failure he/she must file the required Whereabouts Filing (or update) by the deadline specified in the notice (which must be no less than 24 hours after receipt of the notice and no later than the end of the month in which the notice is received) and yet failed to rectify that Filing Failure by the deadline specified in the notice; and

d) that the Athlete's Failure to Comply was at least negligent. For these purposes, the Athlete will be presumed to have committed the failure negligently upon proof that he/she was notified of the requirements yet failed to comply with them. That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his/her part caused or contributed to the failure".

– Article I.4.3 lists the requirements to be met in order to record a Missed Test against the Athlete:

"I.4.3 An Athlete may only be declared to have committed a Missed Test where the Results Management Authority can establish each of the following:

a) that when the Athlete was given notice that he/she had been designated for inclusion in a Registered Testing Pool, he/she was advised that he/she would be liable for a Missed Test if he/she was unavailable for Testing during the 60-minute time slot specified in his/her Whereabouts Filing at the location specified for that time slot;

b) that a DCO attempted to test the Athlete on a given day in the quarter, during the 60-minute time slot specified in the Athlete's Whereabouts Filing for that day, by visiting the location specified for that time slot;

c) that during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test;

[Comment to I.4.3(c): Once the DCO has arrived at the location specified for the 60-minute time slot, if the Athlete cannot be located immediately then the DCO should remain at that location for whatever time is left of the 60- minute time slot and during that remaining time he/she should do what is reasonable in the circumstances to try to locate the Athlete. See WADA's Guidelines for Implementing an Effective Testing Program for guidance in determining what is reasonable in such circumstances …]

d) that Article I.4.2 does not apply or (if it applies) was complied with; and

e) that the Athlete's failure to be available for Testing at the specified location during the specified 60-minute time slot was at least negligent. For these purposes, the Athlete will be presumed to have been negligent upon proof of the matters set out at sub- Articles I.4.3(a) to (d). That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his/her part caused or contributed to his/her failure (i) to be available for Testing at such location during such time slot and (ii) to update his/her most recent Whereabouts Filing to give notice of a different location where he/she would instead be available for Testing during a specified 60- minute time slot on the relevant day".

(iii) the WADA Guidelines:

(a) Article 9.2.1 WADA Guidelines expands on the concept of "reasonableness" of a DCO testing attempt as referred to under Article I.4.3.(c) ISTI and provides the following:

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.

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?' …

If the specified location is the Athlete's house or other place of residence, the DCO should ring any entry bell and knock on the door as soon as he/she arrives. If the Athlete does not answer, the DCO may telephone the Athlete to advise him/her of the attempt in the closing five minutes of the 60-minute period. Such a call is not mandatory however, nor should it be used to invite the Athlete for Testing, but rather to potentially further validate that the Athlete is not present…

Preferably, the DCO should wait somewhere close by (e.g. in his/her car) in a place where he/she can observe the (main) entrance to the residence. He/she should then knock/ring again a short time later (e.g. 15 minutes), and should keep doing so periodically until the end of the 60 minutes. At that point, he/she should try one last time at the end of the 60 minutes before leaving the location and completing an Unsuccessful Attempt Report …".

IX. MERITS

111. Both WA and WADA request that the Panel set aside the Appealed Decision, arguing that the 12 April 2019 Missed Test should be confirmed and that thus the Athlete violated Article 2.4 ADR based either on the First Charge or on the Second Charge. As to the consequences for such violation, the Appellants contend that the Athlete shall be sanctioned with (i) the standard two-year period of ineligibility, which does not deserve reductions based on the Athlete's degree of fault and (ii) disqualification of her results since the date of the third Whereabouts Failure, 12 April 2019 (or, as requested by WADA, since 1 April 2019, based on a Filing Failure effective on that date).

112. The Athlete, on the other hand, seeks full confirmation of the Appealed Decision, contending that on 12 April 2019 there was no Whereabouts Failure. Leaving aside the recharacterization as a Failing Failure (considered in paras. 168-183 *infra*), this alleged Whereabouts Failure is crucial to both the First Charge and the Second Charge as, without it, the Athlete would not incur three such failures within a twelve-month period and she could not be charged with any ADRV. Alternatively, should the Panel find that she did perpetrate an ADRV, the Athlete requests (i) that any imposed period of ineligibility be reduced, taking into account the circumstances of the case at hand, including the delays in the proceedings that led to the Notice of Charge and the Athlete's dyslexia and ADHD, and (ii) that her results be disqualified

only from 4 October 2019 (*i.e.* the day after she won the 400m at the World Championships in Doha).

113. The Panel will first deal with the point raised by the Athlete in paragraph 87(i) *supra*. The Athlete is correct that the WA ADR in force at the date of the Notice of Charge included at 7.10.2 the following proviso:

> *"Provided, however, that a Provisional Suspension may not be imposed unless the Athlete or other Person is given an opportunity for a Provisional Hearing either (at the election of the Integrity Unit) before imposition of the Provisional Suspension or on a timely basis after imposition of the Provisional Suspension".*

114. As there is no evidence that the Athlete ever asked for a Provisional Hearing or received any indication that it would be denied if requested, the Panel doubts that there was any failure to comply with the proviso at all. But even if, *quod non*, any such failure occurred, it would not advantage the Athlete in the context of these proceedings or provide a reason for elimination or reduction of any sanction. It might (if established) provide a basis for challenging the validity of the Provisional Suspension, but that is not a challenge which the Athlete makes before this Panel (or would rationally make, given that she is now entitled to credit for the period of Provisional Suspension already served). In any event, as established by consistent CAS case law, the *de novo* character of this appeal cures any such alleged procedural irregularity (see e.g. CAS 2009/A/1880-1881 at para. 146, CAS 2009/A/1545 at para. 78, CAS 2008/A/1594 at para. 109). This Athlete's submission thus fails.

115. Then, in view of the Parties' requests, the Panel must determine whether the Athlete violated Article 2.4 ADR and, if so, what are the appropriate consequences.

A. The Athlete's ADRV

116. Under Article 2.4 ADR, a "Whereabouts Failure" is defined as *"[a]ny combination of three Missed Tests and/or Filing Failure Failures, as defined in the International Standard for Testing and Investigations, within a twelve-month period by an Athlete in a Registered Testing Pool".*

117. As mentioned above (see para. 11), the AIU has accused the Athlete of the following Whereabouts Failures:

(i) a Missed Test on 12 March 2019;

(ii) a Filing Failure on 16 March 2019 (effective 1 January 2019);

(iii) a Missed Test on 12 April 2019 which, according to WADA, could and should also be characterised as a Filing Failure (and, in such case, the latter would be effective 1 April 2019);

(iv) a Missed Test on 24 January 2020.

118. The Athlete does not contest the Whereabouts Failures under (a), (b) and (d) but, as mentioned, does by contrast argue, in line with the Appealed Decision's finding, that there was no Whereabouts Failure on 12 April 2019, in the sense that no Missed Test ever occurred and that no Filing Failure accusation is admissible at this stage.

119. Given that said Whereabouts Failures did not all occur within a twelve-month period, the Panel is of the view that the Athlete can be charged based on either of two different combinations of failures, namely:

(i) the Filing Failure effective 1 January 2019, the Missed Test on 12 March 2019 and the alleged Whereabouts Failure on 12 April 2019 (which was referred to as the "First Charge"); or

(ii) the Missed Test on 12 March 2019, the alleged Whereabouts Failure on 12 April 2019 and the Missed Test on 24 January 2020 (which was referred to as the "Second Charge").

120. The 12 March 2019 and 12 April 2019 Whereabouts Failures are common to both the First Charge and the Second Charge. It is common ground between the Parties that, if the Panel were to find that there was no Whereabouts Failure on 12 April 2019 (in the form of either a Missed test or a Filing Failure), both the First Charge and the Second Charge would need to be dismissed.

121. In light of the above and considering the Parties' submissions, the Panel must address three main issues:

(i) whether the Athlete has committed a Missed Test on 12 April 2019;

(ii) whether, despite the content of the Notice of Charge, the 12 April 2019 Whereabouts Failure could be recharacterized as a Filing Failure and the consequences thereof;

(iii) whether the Athlete is guilty of either or both of the First and Second Charges.

a. The unsuccessful testing attempt on 12 April 2019 constitutes a Missed Test

122. As already mentioned (*supra* at para. 110), under Article I.4 ISTI a Missed Test may only be confirmed if the relevant results management authority (the AIU in the present case) can establish all the requirements listed under Article I.4.3 ISTI, namely:

(i) That, when placed in the RTP, the Athlete was informed that her unavailability for testing during the 60-minute timeslot and at the specified location would constitute a Missed Test.

(ii) That a DCO attempted to test the Athlete during the 60-minute timeslot at the specified location.

(iii) That during the 60-minute timeslot the DCO did what was reasonable in the circumstances to try to locate the Athlete.

(iv) That Article I.4.2 ISTI which specifies that, in case an unsuccessful attempt has been made to test an athlete, subsequent unsuccessful attempts may be counted as a Missed Test or a Filing Failure only if the athlete in question had previously been notified of the original unsuccessful attempt, is either not applicable or, if applicable, was respected.

(v) That the Athlete's failure to be available for testing was at least negligent. It is worth noting that, if the AIU is able to prove that the requirements (i) to (iv) are met, the Athlete will be presumed to have been negligent, and such presumption will only be rebutted if the Athlete is able to establish that no negligence on her part caused her failure to (a) be available and accessible for testing at the specified location during the relevant timeslot and (b) update her Whereabouts Information to reflect her actual location during the relevant timeslot.

123. The Athlete did not specifically contest items (i), (ii) and (iv) above. Therefore, also on the basis of the evidence of file, the Panel deems that those requirements are met and will focus on items (iii) and (v) above and, in particular, on the following issues:

(a) Whether DCO González made a reasonable attempt to locate the Athlete at the specified location on 12 April 2019;

(b) Whether the Athlete's failure to be available for testing was negligent.

(a) The reasonableness of the attempt made by DCO González on 12 April 2019

124. The requirement under Article I.4.3(c) ISTI – *"that during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test"* – was debated at length among the Parties, as this is the element on which the DT based its decision to acquit the Athlete. In short, the Appellants contend that DCO González did what was reasonable in the circumstances and even went beyond its duties to locate the Athlete. The Athlete, on the other hand, backs the Appealed Decision's finding that DCO González did not act reasonably in the circumstances, and insists that she was present and available at the location and DCO González could not find her as he unreasonably selected the wrong door and did not even try to open the correct Door 12 although it was unlocked.

125. According to Article 9.2.1 of the WADA Guidelines, *"[w]hat 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"* (emphasis added).

126. Several CAS precedents underscore that the *"particular circumstances of the case"* must be assessed beginning from the quality of the information provided by the Athlete (see e.g. CAS A1/2013, para 28, and CAS A4/2013, para. 15). As to the *"nature of the location chosen by the Athlete"*, the Panel is of the opinion that athletes should put themselves in the shoes of a DCO and be diligent at foreseeing and removing beforehand any possible difficulties that a DCO might encounter at the specific location chosen by the athlete (e.g., if the location were a hotel room, the hotel concierge should be alerted).

127. In the Panel's view, the whole system hinges on the premise that athletes have the duty to be diligent at filing Whereabouts Information that is accurate enough to allow DCOs to find them without any particular effort. In this respect, Article I.3.4 ISTI is unequivocal: *"It is the Athlete's responsibility to ensure that he/she provides all of the information required in a Whereabouts Filing* ***accurately and in sufficient detail to enable any Anti-Doping Organization wishing to do so to locate the Athlete for Testing*** *on any given day in the quarter at the times and locations specified by the Athlete in his/her Whereabouts Filing for that day, including but not limited to during the 60-minute time slot specified for that day in the Whereabouts Filing. More specifically, the Athlete must provide* ***sufficient information to enable the DCO to find the location, to gain access to the location, and to find the Athlete at the location****"* (emphasis added).

128. With that in mind, the Panel is of the opinion that the evaluation of the reasonableness of a DCO's attempt must be made looking objectively at the steps taken by the DCO in the specific location chosen by the athlete, in light of the information provided by the athlete and in connection with said athlete's duty of diligence in foreseeing and reducing potential difficulties. In this respect, the personal situation of the concerned athlete and/or the actual presence and availability at the specified location is irrelevant (see CAS A2/2014 at para. 59: *"The reasonableness of the actions of the DCO were to be assessed objectively, without reference to the particular situation of Mr […].* ***Any consideration of the particular situation of Mr […] was only relevant to whether he can establish that he was not negligent in being unavailable for testing****"* (emphasis added).

129. In the Appealed Decision, the DT acknowledged that, considering the circumstances of the case and the overall situation at the specified location, DCO González acted conscientiously and went beyond what was expected of him. Nonetheless (and surprisingly, in the Panel's view), the DT found that DCO González made one mistake that by itself made his unsuccessful attempt to locate the Athlete unreasonable, namely that although he understood that Building 954 was the correct building (instead of the indicated Building 964), he did not at first select the correct entrance door (i.e. Door 12), he spent the time-slot knocking on the wrong door (i.e. Door 11) and he did not attempt to go through the unlocked Door 12. On that ground alone, the DT determined that it was not proven to its comfortable satisfaction that DCO González acted reasonably in the circumstances.

130. The Panel does not concur with the DTs determination in this regard; it is of the firm opinion that DCO González actually did all that could be reasonably required of him to locate the Athlete at the specified location. The sequence of events is quite clear and essentially

undisputed, with the only exception related to the attempt at opening Door 12 (a passage which will be dealt with in detail *infra* at paras. 133-147).

131. First, DCO González went to the address indicated in the Athlete's whereabouts filing for the quarter commencing on 1 April 2019, where the Athlete stated that, on 12 April 2019, she would be available for testing from 06:00 to 07:00 at *"Salwa New apartment"* located at *"Flat 11 Building 964, Road 833, Block 908, West Riffa, Riffa, Ar Rifa, Bahrain"*. Once on location, DCO González found out that there was no Building 964 on Road 833; in other words, the Athlete had provided an address that could not enable a DCO to locate her in the 60-minute time-slot she had specified for 12 April 2019. The Panel is of the view that it could have been reasonable enough for DCO González to simply abort the mission there and then, once he did not find Building 964 on Road 833. Strictly speaking, everything DCO González did, after he left the spot where Building 964 was supposed to be, was beyond the call of duty and before he even arrived at Building 954 he had already met the requirements of Article I.4.3(c) ISTI. Accordingly, the Panel could allow this appeal on that basis alone. However, as explained below, the Panel reaches the same result on this appeal after it has fully examined the reasonableness of the DCO's actions after he arrived at the correct Building 954.

132. Having ascertained that there was no Building 964, to try to find the Athlete, DCO González resorted to another source of information outside of the Athlete's whereabouts filing (i.e., a map screenshot from a previous testing attempt showing the approximate location, with no numbering, provided to him by the anti-doping testing company IDTM) and decided to look at Building 954 within the same Road 833. The numbering situation of Building 954 was, as recognised by the DT itself, *"extremely confusing"* as on the wall there were two numbers, 11 and 12, close to two doors respectively on the left and on the right – already defined in this award as Door 11 and Door 12 (see *supra* at paras. 38 and 57) – and an intercom showing no names or flat numbers close to Door 12 (an intercom that, according to the Athlete and the landlord, had not been working for a long time). DCO González knocked throughout the whole hour on Door 11 with no answer. There was no indication on Building 954 that could have helped DCO González to realise (a) that flat 11 could be found by entering the building through Door 12 and climbing the internal staircase, and (b) that numbers 11 and 12 were not associated with flats 11 and 12 but, in fact, with parking spaces. Although it is true, as acknowledged by DCO González, that Door 11 did not resemble an entrance door to an apartment, there was no indication that Door 11 led to a self-contained technical room with no possible access from there to other doors of the building that could lead to flat 11. In the absence of any phone number in the Athlete's whereabouts filing, DCO González also tried to call the Athlete using a phone number (provided to him by IDTM) taken from the Athlete's previous whereabouts filings, but either the phone was off or the line was disconnected.

133. As to the disputed attempt to open Door 12, the Panel observes that DCO González clearly testified, both before the DT and at the CAS Hearing, that he did try to open Door 12 during the 60-minute timeslot. However, he found that it was closed, specifying that he was prevented from opening it since it was locked or somehow stuck.

134. The Panel is aware of CAS jurisprudence to the effect that a DCO's recollection of events is presumed to be correct, unless substantial counter-evidence can be presented to rebut it (see CAS 2019/A/6302, para. 68 and CAS 2016/A/4700, para. 57). However, it prefers the reasoning in CAS 2020/A/7528, at para 141: *"it is a matter for the Panel to form a view on the evidence and to weigh it according to its context and circumstances"*). In other words, there is no such presumption but, rather, the hearing body must evaluate the probabilities in the particular circumstances of the case in hand, to which the Panel now turns

135. On the one hand, in the Panel's view, it is crucial to bear in mind that, similarly to the DCO in case CAS 2015/A/4163, DCO González *"had no reason at all to seek to provide material, which could be relied upon to inculpate the Appellant for evading a test; on the contrary his concern was to fulfil his own mission to test the Appellant"*. DCO González was highly experienced. He had travelled from his home in Spain (some distance from Madrid) to the Madrid airport and, then, by flight from Madrid via Istanbul to Bahrain, which he was visiting for the first time. The Panel considers it highly unlikely that he – given his other steps beyond call of duty – would somehow have overlooked Door 12 and would subsequently lie about it.

136. On the other hand, the Athlete did not present any convincing evidence, on the balance of probabilities, to contradict DCO González's recollection or to somehow show that he had a motive, financial or other, to lie or be biased against the Athlete.

137. The assault on the recollection of DCO González that on 12 April 2019 he had tried to open Door 12 as well as knocking vainly on Door 11 was not entirely coherent. It was suggested that it should have been apparent to him that Door 11 would not lead to a residential flat because from the exterior window gas cylinders were clearly visible. But the Panel cannot accept that the DCO himself believed that by knocking repeatedly on Door 11 he was indulging in an exercise of futility. He must clearly have thought, as he in fact testified before this Panel, that there was at least a chance that Door 11 led indirectly, if not directly, to residential quarters. And if he lacked entire confidence that this was so, that would have made it more, not less, likely that he would try the adjacent Door 12.

138. The Athlete's other submission, pressed in writing, was that DCO González made no reference in his April report, but only his August 2019 report, to having tried Door 12 and that his reference in the latter to such effort arose from a wish to "improve" his testimony, i.e. to lie so as to avoid the risk of having his employment as a DCO with its concomitant financial advantages terminated by his employers for falling short of his responsibilities. As to this the Panel, with the added benefit of sight and sound of DCO González, would acquit him of such deliberate misrepresentation. In his April report he had no need to refer to Door 12 at all when the Whereabouts Filing identified *"Flat 11"* (albeit at a different address) as the relevant location. In his August report, when he had gained access through Door 12 on the occasion of a subsequent successful out-of-competition control, it was natural to point up the contrast with what happened on the former date.

139. It is noteworthy that the applicable rules provide no compulsory requirement as to the content of the DCO's contemporaneous report or the credibility of the events that are not mentioned therein. Conversely, it is acceptable for a DCO not to indicate each and every circumstance in his or her contemporaneous report and to expand his or her account at a later stage (see e.g. CAS 2018/A/5885-5936, para. 186).

140. Moreover, it is far-fetched to suppose that the DCO would risk his job by giving false evidence just on this unsuccessful attempt at finding the Athlete, especially given that he had already gone well beyond his strict responsibilities by visiting Building 954 at all.

141. The Athlete also sought to make something of the absence of the Bahrain chaperone Ms James (already defined as "Chaperone James"). WA conceded that there was no evidence beyond "party say-so" that the AIU had made effort to locate her. The Panel is unpersuaded that she would ordinarily have had anything useful to say on the issue of whether DCO González did try Door 12. Chaperone James's role was to chaperone a female athlete as and when a test could be administered. It was not her role to check on availability of the athlete or the steps taken by the DCO to locate her. Her absence from the roster of witnesses does not seem significant; certainly, it casts no doubt on the accuracy of DCO González recollection. In any event, the absence of Chaperone James goes both ways as she, being a Bahrain resident, could well have been located and called to testify by the Athlete with the support of the Bahrain Athletics Association.

142. As to whether Door 12 was locked on 12 April 2019, as the DCO asserts, the evidence to the contrary was provided (i) by some video clips (shot on behalf of the Athlete at a much later date and for the purposes of the disciplinary proceedings) where the Athlete is seen entering Building 954 through Door 12 without using a key, and (ii) by the building landlord, who said that the lock had been inoperative for several years before that and that Door 12 could be opened by simply pushing it, with no need to use a key. The Athlete's case, therefore, merely rested on the assumption, based on that evidence, that, as Door 12 was always open and had always been open for the past 7-8 years, it must have been open on 12 April 2019.

143. As to the video clips, their evidentiary value on this matter is nil, in the sense that they cannot prove that, on 12 April 2019, Door 12 was unlocked and could be opened by simply pushing, both because much time had passed from that date and because the Athlete (or someone on her behalf) could too easily keep the Door unlocked just for the purposes of the video shooting.

144. As to the Building 954 landlord, he agreed in his testimony that he knew who Ms Naser was; indeed, she is a jewel in the crown of Bahraini athletics. In the Panel's view, the landlord's close links with the BAA, from whom he derived "significant" rental income, as he acknowledged at the hearing answering a question from WA's counsel, meant that he was not a wholly impartial witness. He clearly had the financial interest of pleasing an important tenant such as the BAA (to which he leased the whole Building 954) and, thus, a personal interest in backing the Athlete's version that Door 12 could be opened by simply pushing it. The Panel

could not but observe that his witness statement, albeit translated from Arabic (his native language) into English and in a text which he claimed not to have seen, nonetheless made express reference to 12 April 2019. The Panel infers that he must accordingly have become aware of the materiality of that date and what turned on it. Overall, the Panel formed the clear impression that, both in signing his witness statement and in his oral evidence at the hearing, the landlord was saying what he had been told to say and was giving his evidence at the hearing without caring in the slightest whether any of it was true. In the Panel's eyes, this was particularly evident on the several occasions, during his cross-examination, that he did not answer the question posed to him and, rather, kept repeating the same mantra about the intercom and the door to the building.

145. In fact, while at the CAS hearing the landlord repeatedly and persistently stated that, around 7-8 years ago, the intercom next to Door 12 and the lock of Door 12 stopped working and consequently, since that moment, *"they removed the lock* [of Door 12] *and it's just you push and you're in and the door will close by itself, so it's easy for get in and get out"*, the Panel could observe from the photographs taken both by DCO González and on behalf of Ms Naser that (i) there was certainly the external part of a lock in place, i.e. it had not been removed, and (ii) there was a leaflet or piece of advertisement that was left in the crack of the door. If the door had always been open for the past seven or eight years, it would be unlikely, albeit not impossible, for a postman or a person delivering advertising material to reach Building 954 and place something in the crack of Door 12 rather than push the door and leave the material inside.

146. Additionally, there is no evidence on file to show that anybody other than DCO González tried to open Door 12 on 12 April 2019. Indeed, the Athlete claimed she was inside flat 11, while the landlord himself stated that he did not remember visiting Building 954 on that day (which was a public holiday in Bahrain). The Athlete's own word, in so far as consistent with that of the landlord as to the fact that Door 12 had been for some while unlocked, is of course merely the declaration of the accused party. She chose to call no other witnesses to support her on this point.

147. Apart from the relative weight of the evidence and arguments on the issue of whether DCO González actually tried Door 12, the conclusion that he did so is also the most logical, considering that (i) he spent the whole hour outside Building 954; (ii) he suspected that Door 11, given its appearance, was not a direct door to an apartment; (iii) he inspected the intercom close to Door 12. Therefore, the Panel finds to its comfortable satisfaction that DCO González's account of events on this point is correct and that the Athlete's own evidence that the door was always unlocked was untruthful.

148. In light of the above, the Panel finds that DCO González did what was reasonable (and more) in the circumstances to locate the Athlete on 12 April 2019 in compliance with Article I.4.3.c) ISTI.

(b) The Athlete's negligence contributed to her failure to be available for testing on 12 April 2019

149. As to Article I.4.3.e) ISTI, considering that all the requirements from (i) to (iv) listed *supra* at para. 122 were met, the Athlete has the burden of rebutting the presumption that her negligence caused her failure to (i) be available at the specified location and (ii) update her Whereabouts Information to indicate the different location where she would be available for testing instead.

150. The Athlete contends that she was present and available at Building 954, flat 11, during the relevant timeslot and, accordingly, there was no negligence on her part. On the other hand, the Appellants contend that the assessment of her availability shall be made based on the location specified in her Whereabouts Information (i.e. building 964) and, that, in any case, she negligently failed to make herself available at Building 954.

151. The Panel notes that, under Article I.4.1 ISTI, the Athlete has an obligation to 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**"* and Article I.3.2 ISTI further specifies in this respect that *"the Whereabouts Filing must also include, for each day during the following quarter, one specific 60-minute time slot between 5 a.m. and 11 p.m. each day where the Athlete will be **available and accessible for Testing at a specific location**"* (emphasis added).

152. In light of the clear wording of said rules, the Panel accepts WA and WADA's argument that the Athlete's availability – or failure thereof – is to be evaluated based on the location provided in her Whereabouts Information.

153. Accordingly, considering that the Athlete indicated a non-existent building (i.e. building 964 instead of 954), the Panel finds that the Athlete was not available and accessible (let alone present) at the "specified location". For the same reason, it follows that the Athlete failed to update her Whereabouts Information to give notice of her actual location, namely Building 954.

154. The Athlete's failure to be available and accessible was patently caused by her negligent behaviour, considering that she is ultimately responsible for the Whereabouts Information being updated on ADAMS.

155. The DT referred to the road number being wrongly recorded in Adams as 964, when it was in fact 954, as a "clerical error". In the Panel's view it was a critical one, whose importance was accordingly understated by the DT. Such a mistake should not be treated lightly, otherwise it would be all too easy for a deceitful athlete to repeatedly dodge out-of-competition controls or the consequences of a Whereabouts Failure by similar "clerical errors".

156. There is sparse evidence as to the source of the error. It is clear that the ADAMS entry was made by Mr Righi (working for the BAA) on the basis of information provided by Ms Naser.

The Panel accepts, in point of fact, that the Athlete had delegated the responsibility for the ADAMS entry to Mr Righi and had not acquainted herself with the mechanics of making the same. However, in point of law, Article I.6.4 ISTI is unambiguous in providing that athletes are personally responsible for any whereabouts data uploaded in ADAMS on their behalf; in fact, according to letter (b) of this ISTI provision, each *"Athlete remains personally responsible at all times for ensuring he/she is available for Testing at the whereabouts declared on his/her Whereabouts Filings. It shall not be a defence to an allegation of a Missed Test that the Athlete delegated responsibility for filing his/her whereabouts information for the relevant period to a third party and that third party failed to file the correct information or failed to update previously-filed information so as to ensure that the whereabouts information in the Whereabouts Filing for the day in question was current and accurate".*

157. Mr Righi was not called as a witness before this Panel. The transcript of his testimony at the hearing before the DT shows that he accepted both that he made the entry and that there was a mistake. But he did not explain how the mistake came about. As Mr Righi works for the BAA, i.e. the same entity that rented Building 954, it should have been well known to him that 954 (and not 964) was the correct building number to be inserted in ADAMS. But even assuming that Mr Righi had been given inaccurate information by the Athlete or that he had been given accurate information but recorded it inaccurately, it would not avail her. By delegating all Whereabouts Filings to a third party such as Mr Righi, the Athlete had been using Mr Righi as a proxy and, therefore, assumed all risks for any errors committed by him, quite apart from her primary personal duty to ensure the accuracy of her Whereabouts Information.

158. It was suggested by the Athlete's counsel that, if the Athlete gave inaccurate information to Mr Righi, she might have genuinely believed that the information she gave was correct, but, because of her dyslexia, mistook a 5 for a 6. In this respect, the Athlete relied on the expert testimony of Dr Hurford in an attempt to show that her medical condition (dyslexia) contributed to her failure to provide to Mr Righi the correct address to be updated on ADAMS. Dr Hurford testified at the hearing that persons with dyslexia may be more inclined to transpose letters and/or numbers

159. The Panel is prepared to accept the expert testimony of Dr Hurford. However, the Panel finds it irrelevant, because the Athlete was not able to prove any causal link, by that or any other evidence, between her condition and the fact that Mr Righi eventually uploaded the wrong address on ADAMS.

160. That said, even considering, as the DT did, that DCO González was still under a duty to take all further reasonable steps after he had reached Building 954, the Panel is of the view that the Athlete would still be unable to rebut the presumption that she was not available to and accessible by DCO González and that the said failure was caused by her negligence.

161. First of all, the Panel observes that the Athlete's counsel ultimately decided at the hearing not to present the testimony of Mr Abbas, i.e. her former boyfriend who had supposedly stayed overnight with her at flat 11 in Building 954 and, therefore, provided no corroboration of her

assertion to have been actually sleeping in flat 11 during the timeslot between 6:00 and 7:00 am on 12 April 2019.

162. Then, in any event, according to the well-established jurisprudence of the CAS on this point, even if an athlete is in fact present at the location, that athlete still needs to show that she was available and accessible. For example: *"Athletes that place themselves in a position whereby they cannot either hear or see a DCO who attends a specified location during the time they have nominated for testing defeat the purpose of the rules and cannot be considered to have made themselves 'available'"* (CAS A2/2014, para. 92).

163. In the case at hand, the Athlete negligently failed to make herself available and accessible, considering that:

(i) there was no name or flat number on the intercom, which did not even work, while the Athlete had in all the circumstances more than sufficient opportunity to insert the number of her flat and to make sure that the intercom was fixed;

(ii) she did not provide her phone number on ADAMS, although the AIU's notice to the Athlete at the beginning of each quarter in 2019 explicitly required it: *"you must provide us … a* ***telephone number*** *where you can be contacted"* (emphasis in the original);

(iii) she did not insert on ADAMS any additional information to show how to find her location, despite having done so with her previous address in Boukouara (*"Directions – drive west from airport on main highway. Eventually there is a large IKEA sign on the left. Continue 4Km and take the turning off to head south –ie to the left on the highway. From there continue to a roundabout with what looks like a mosque in the middle. Go straight on. Them in the middle of the road, is a 5 metre high picture of what looks like Bin Ladin (but is probably the king). Turn left here. Right at the next lights. Next look for the Muscle Factory on the right. Turn left at the light there and the building is on the next corner on the left. Google map provided on 7 Dec but impossible to save in ADAMS"*).

164. Her behaviour was undeniably negligent and cannot be excused, not least because (i) she admitted to having received specific anti-doping training and (ii) had already been notified of two other recent Whereabouts Failures and, thus, should have been even more cautious in dealing with her whereabouts obligations (cf. DT Decision of 9 July 2020, *World Athletics v Deajah Stevens*, para. 71).

165. All in all, the Panel has formed the clear view that, even giving her the benefit of the doubt as to her good faith, the Athlete has adopted a repeatedly irresponsible approach to her whereabouts obligations and has not considered them as one of the fundamental tenets of the whole fight against doping.

166. In light of the above, the Panel holds that the Athlete did not come close to rebutting, on a balance of probability standard, the presumption that her negligence caused her failure to be

available and accessible at the specified location during the relevant timeslot on 12 April 2019. On the contrary, overall, the evidence reinforces that presumption.

167. Consequently, the Panel is comfortably satisfied that the 12 April 2019 Whereabouts Failure meets all the requirements of a Missed Test under Article I.4.6 ISTI. The DT considered the case to be borderline but on the right side. The Panel considers the case to be significantly beyond the boundary but on the wrong side.

b. The 12 April 2019 Missed Test could be recharacterized as a Filing Failure

168. While it was established, as indicated above, to the comfortable satisfaction of the Panel, that the Athlete had committed a Missed Test on 12 April 2019, the Panel wishes to consider, as it was invited to do by WADA, whether additionally the Charge could also have been upheld, and can now be upheld by this Panel, by treating the 12 April 2019 Whereabouts Failure as a Filing Failure. (In passing, WA alluded to this possibility too in its appeal brief but did not submit any request for relief to that effect; accordingly, the Panel considers this issue only in relation to WADA's request).

169. In fact, WADA contends that all the requirements for a Filing Failure were met with reference to the said Whereabouts Failure. Furthermore, in essence, it argues that a recharacterization of that charge is (i) within the scope of the issues decided in first instance by the DT, (ii) crucial to the enforcement of WADA's supervisory jurisdiction and (iii) not prejudicial to the Athlete's defence.

170. The Panel accepts WADA's contention that the 12 April 2019 Whereabouts Failure indeed presents the features of a Filing Failure pursuant to Article I.3.6 ISTI (see para. 110(ii) above), given that:

(i) the Athlete had been notified of the relevant requirements to present and update her Whereabouts Information and of the consequences of a failure to comply with said obligation;

(ii) the Athlete did not properly update her Whereabouts Information with reference to Quarter 2 of 2019 (which began on 1 April 2019) since, as she admitted, she inserted the address of a non-existent building (i.e. building 964); in this respect, the Panel notes that the comment to Article I.3.6.b) ISTI specifies the following: *"An Athlete fails to comply with the requirement to make Whereabouts Filings…where he/she includes information in the original filing or the update that is inaccurate (e.g.,* ***an address that does not exist****)"* (emphasis added);

(iii) The Athlete had been given notice of the Quarter 1 2019 Filing Failure, as she received the AIU's notice of the apparent Failure on the same day;

(iv) There is no element to rebut the presumption that the Athlete's negligence caused or contributed to said Failure; indeed, her only explanation in this respect is that Mr Righi wrongly updated her Whereabouts Information; however, she is ultimately responsible for such mistake under Article I.6.4(a) 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"*).

171. While none of the above was ever controverted by the Athlete, or indeed could have been given the undisputed facts, the Panel must first determine whether to allow a recharacterization of the charge in the manner contended for is permissible at all.

172. In fact, the Panel is aware that, while it has the power, under Article R57 of the CAS Code, to adjudicate the case *de novo*, reviewing *"the facts and the law"*, such review shall be limited to the objective and subjective scope of the decision being appealed against and to the issues analysed therein (see e.g. CAS 2015/A/4059, CAS 2009/A/1879 and CAS 2007/A/1396 & 1402).

173. However, the majority of the Panel is of the view that a recharacterization of the charge would not exceed the limits of its scope of review. Indeed, a recharacterization, if based on the same set of facts – in the case at hand, even on the same basic evidence – remains well within the boundaries of the objective scope of the first instance decision. To hold otherwise manifestly elevates form above substance.

174. Furthermore, the principle *jura novit curia* (undoubtedly applicable to arbitrations seated in Switzerland; see Swiss Federal Tribunal, Judgments nos. 4P 260/2000 of 2 March 2001; 4A_554/2014 of 15 April 2015, 4A 430/2020 of 10 February 2021) entails that the Panel can opt for a legal qualification of the conduct that is different from the one envisaged in the charge, as long as the interested parties are provided with the opportunity to provide comments and evidence on said new qualification (see below para. 181).

175. The Panel acknowledges that previous CAS panels have dismissed a request to amend the charge at the appeal level because the new charge had not been previously raised by the prosecuting anti-doping organization before the first instance hearing body. For instance, this occurred in CAS 2007/A/1426, upon the subordinate request from the athlete to recharacterize his conduct as a minor type of violation (see paras. 60-62 of that award), and in TAS 2007/A/1433, where the national anti-doping organization in charge of prosecuting the ADRV tried to introduce a new charge at CAS appeal level.

176. The Panel is of the view that the present case and, in general, cases in which WADA is involved for the first time at the CAS stage, are fundamentally different from those mentioned above and, considered WADA's role, the latter has the power to recharacterize on appeal before the CAS a charge that was brought by another anti-doping organization at first instance level.

177. Indeed, the Panel notes that WADA, as clearly enshrined in the WADC, has a crucial supervisory jurisdiction over the implementation of the WADC at worldwide level in order to (i) ensure harmonisation and consistent application of the World Anti-Doping Program across the various countries and the different sports and, crucially, (ii) correct mistakes that were made at first instance level.

178. Such function, however, can only be exercised at the appeal stage: indeed, it would be *de facto* impossible for WADA to check each and every charge brought at first instance level by all anti-doping organisations against the evidence and facts of each single case. It is more reasonable (and already demanding) for WADA to supervise the decisions rendered in first instance and, if needed, to cure any misapplication of the rules or, as in the present case, put forward an appropriate recharacterization of a charge.

179. Therefore, unlike in the CAS precedents mentioned at paras. 175, WADA has its first and only chance to present its case at the CAS appeal level. It must, therefore, to enable it to fulfil its vital functions, be allowed to fully exercise its appeal rights, which include a recharacterization of the charge(s), with the sole caveat that this should be based on the same set of facts discussed during the first instance proceedings, thus not exceeding the scope of those proceedings below.

180. The Panel is of the view that this is indeed essential to secure the integrity of the system and prevent that ADOs and first instance hearing bodies, especially those at national level, characterize charges in an incorrect way which could favour a given athlete. A worldwide uniform application of the anti-doping rules is the *raison d'être* of the establishment of WADA some twenty-plus years ago and of the ensuing adoption of the WADC.

181. The Panel is of the opinion that the only reason that could prevent WADA from recharacterizing a charge (and the Panel from entertaining the said argument) would be that such recharacterization could in some way prejudice the rights of the charged individual. Indeed, fairness demands that a person charged with a new ADRV be given a chance to properly mount a defence against it. Inevitably, such potential prejudice must be evaluated on a case-by-case basis, in order to ensure that such person's right to be heard and to present his or her case is fully respected.

182. The Panel holds that in the present dispute there would be no violation of the Athlete's rights, considering that the recharacterization of the 12 April 2019 Missed Test as a Filing Failure would be based on the same set of facts, on which the Athlete had a full chance to present her case. Moreover, in the case at hand the legal recharacterization of the charge would not even require an amendment of the ADRV for which the Athlete was indicted, which would remain a violation under Article 2.4 ADR.

183. In light of the foregoing, the Panel majority finds that WADA has the right to recharacterize the charge against an athlete at appeal level, provided that it does not exceed the scope of the first instance decision and that the athlete's defence is not prejudiced. This finding could

potentially impact only on the starting date for any disqualification (given that Missed Tests take place on the exact date of the failed control while Filing Failures automatically take place on the first day of the relevant quarter), although in the light of the Panel's overall findings it does not actually make any difference at all to the outcome of this case.

c. The Athlete has committed an ADRV based on the First Charge

184. As mentioned above (para.120), the 12 April 2019 Whereabouts Failure is common to both the First Charge and the Second Charge.

185. In this respect, it is worth noting that the AIU, in its Notice of Charge (see para. 11 above) decided that the Athlete had committed *"**Anti-Doping Rule Violations**"* based on both the First Charge and the Second Charge, as follows:

"2.2.1 A combination of three Missed Tests and/or Filing Failures, as defined in the International Standard for Testing and Investigations, within the twelve-month period beginning on 1 January 2019, specifically for (i) a Filing Failure effective 1 January 2019, (ii) a Missed Test dated 12 March 2019 and (iii) a Missed Test dated 12 April 2019 in accordance with Article 2.4 ADR; and

2.2.2 A combination of three Missed Tests and/or Filing Failures, as defined in the International Standard for Testing and Investigations, within a twelve-month period beginning on 12 March 2019, including (i) a Missed Test on 12 March 2019 (ii) a Missed Test on 12 April 2019 and (iii) a Missed Test on 24 January 2020 in accordance with Article 2.4 ADR" (emphasis added).

186. On their part, WA considers that the Athlete has committed two ADRVs pursuant to Rule 2.4 ADR, while WADA puts them as alternative breaches, with the First Charge apparently relied on for preference and the Second Charge as an alternative.

187. In light of the above, the Panel needs to determine whether (i) the First Charge and the Second Charge should be treated as two separate ADRVs under Article 2.4 ADR or whether (ii) the Athlete only committed one ADRV under Article 2.4 ADR and, in such case, whether the ADRV is based on the First Charge or on the Second Charge.

188. The Panel notes that, according to Article 7.6 ADR, the Athlete must be charged with an ADRV each time three Whereabouts Failures are recorded against her within a 12-month period, so that the prosecuting authority is satisfied that an ADVR has been committed under Article 2.4 ADR.

189. The present case is unusual since, although three Whereabouts Failures had already been established in August 2019, per se amounting to a first ADRV, the AIU waited to charge the Athlete with violating Article 2.4 ADR until 4 June 2020. At that point in time, she had committed a further Whereabouts Failure, i.e. the 24 January 2020 Missed Test, which fell outside the first 12-month period (beginning on 1 January 2019) and would complete a second

ADRV under Article 2.4 ADR based on a different 12-month period (beginning on 12 March 2019).

190. However, the Panel is of the opinion that this peculiarity does not have as its consequence that the Athlete can be sanctioned for two different ADRVs under Article 2.4 ADR.

191. In this respect, the Panel observes that the ADR do not provide any definition of a "second" ADRV. However, the Panel notes that Article 10.7 ADR (*"Multiple Violations"*) allows to determine under which circumstances an ADRV can be treated for sanction purposes as a second ADRV, as follows:

> Article 10.7.4(a): *"**For purposes of imposing sanctions** under Article 10.7, an Anti-Doping Rule Violation will only be considered a second Anti-Doping Rule Violation if the Integrity Unit can establish that the Athlete or other Person committed the second Anti-Doping Rule Violation after the Athlete or other Person received notice, or after the Integrity Unit made a reasonable attempt to give notice, of the first alleged Anti-Doping Rule Violation. If the Integrity Unit cannot establish this, the Anti-Doping Rule Violations shall be considered together as one single Anti-Doping Rule Violation for sanctioning purposes, and the sanction imposed shall be based on the Anti-Doping Rule Violation that carries the more severe sanction"* (emphasis added).

192. In keeping with said provision and the last sentence thereof, the Panel considers that, even if there were two distinct ADRVs, for the purpose of sanction they must be anyway treated as one, the condition precedent for treating them otherwise not being on the facts of this case satisfied.

193. Without prejudice to the foregoing, the Panel notes additionally that the relevant Anti-Doping Organisation must charge an athlete with one ADRV under Article 2.4 ADR each time it can establish that he or she committed three Whereabouts Failures within a 12-month period. The relevant starting time of a 12-month period is automatically related to a "first" Whereabouts Failure. In fact, Article I.1.3 ISTI specifies as follows: *"If two more Whereabouts Failures occur during the ensuing 12-month period, then a Code Article 2.4 antidoping rule violation is committed"*.

194. The Panel observes in this context that, pursuant to Article I.1.3 ISTI, *"if an Athlete who has committed one Whereabouts Failure does not go on to commit a further two Whereabouts Failures within 12 months of the first, at the end of that 12-month period the first Whereabouts Failure "expires" for purposes of Code Article 2.4, and a new 12-month period begins to run from the date of his/her next Whereabouts Failure"*. This means in the Panel's view the following:

- in case an athlete only commits *one Whereabouts Failure* within the related 12-month period, that single Whereabouts Failure necessarily becomes irrelevant when the 12-month period expires and no new 12-month period will start until that athlete happens to commit a new Whereabouts Failure, if any;

- in case an athlete only commits *two Whereabouts Failures* within a 12-month period, the first Whereabouts Failure necessarily becomes irrelevant when the 12-month period expires and a new 12-month period will start as of the date of the second Whereabouts Failure;

- in case an athlete commits *three Whereabouts Failures* within a 12-month period, the athlete is automatically considered to have committed an ADRV on the date of the third Whereabouts Failure, with the consequence that any subsequent Whereabouts Failure must necessarily be considered a fresh "first" Whereabouts Failure triggering the start of a whole new 12-month period.

195. In light of the above, the Panel seriously doubts that, once three Whereabouts Failures occur within a 12-month period, thereby completing the requirements for an ADRV, the same Whereabouts Failures (or part of them) can be relied upon to establish a further ADRV under a different 12-month period. It appears strongly arguable that such an interpretation would violate the principle of *ne bis in idem*, as (a portion of) the same conduct by an athlete would be prosecuted more than once.

196. In particular, the Panel would strongly doubt that, in the present case, the Athlete could be charged twice for committing the 12 March 2019 and 12 April 2019 Whereabouts Failures (a first violation combining them with the 1 January 2019 incident and a second violation combining them with the 24 January 2020 incident). However, as the point does not affect the result of these appeals and was not addressed in the written or oral submissions, this Panel will leave this important question to be decided if and when it arises in a future case.

197. Neither Appellant has contended that the Athlete should be sanctioned for two separate ADRVs. The key point is that even if (contrary to the strong doubts expressed in paras 195-196 above) the Panel could find the Athlete guilty of two separate ADRVs, under 10.7.4 ADR they must anyways be considered as only a single ADRV for sanctioning purposes.

198. As expressly stated in Article 10.7.4 ADR, the sanction imposed shall be based on the Anti-Doping Rule Violation that carries the more severe sanction. The First Charge and the Second Charge would each carry, as a starting point, a suspension of two years from the date of the Panel's award and disqualification of results since the date of the ADRV. However, conviction on the First Charge clearly carries the more severe sanction, as the disqualification of results on the Second Charge could only go back to 24 January 2020 whereas on the First Charge it could be to 12 April 2019 (or even, in the view of the Panel majority, 1 April 2019); and even after the exercise of the Panel's discretion under Article 10.8 ADR, as will be seen *infra* at paras. 243-250, the Athlete's results are disqualified from 25 November 2019.

199. This, however, does not mean that the Second Charge is irrelevant, in the sense that (as will be seen below) the fact that the Athlete committed four Whereabouts Failures, which gave rise to two charges, must be taken into account in evaluating the Athlete's overall conduct and in evaluating the possibility to backdate the start of the ineligibility period.

B. The consequences to be imposed on the Athlete

200. On the basis that, by 10.7.4 ADR, the Athlete is to be sanctioned for a single ADRV under Article 2.4 ADRV, the Panel must determine which consequences should be imposed on her under the applicable ADR provisions.

201. To that end, the Panel must deal with the following issues:

(i) The length of the ineligibility period to be imposed on the Athlete;

(ii) The starting date of said ineligibility period;

(iii) The disqualification of the Athlete's results.

a. The length of the ineligibility period

202. Article 10.3.2 ADR provides as follows: *"for an Anti-Doping Rule Violation under Article 2.4 that is the Athlete's first anti-doping offence, the period of Ineligibility imposed shall be two years, subject to reduction down to a minimum of one year, depending on the Athlete's degree of Fault. The flexibility between two years and one year of Ineligibility in this Article is not available to Athletes where a pattern of last-minute whereabouts changes or other conduct raises a serious suspicion that the Athlete was trying to avoid being available for Testing".*

203. As mentioned above (see para. 110), the ADR provide a definition of Fault, according to which *"Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration … include, for example, the Athlete's or other Person's experience … the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour".*

204. In this respect, the Appellants contend that the Athlete must be sanctioned with a two-year ineligibility period, since she bears the highest degree of fault. On the other hand, the Athlete, relying on the criteria developed in CAS 2020/A/7528, contends that her level of fault is at the lowest end of the spectrum and thus, an ineligibility period between 12 and 16 months should be imposed.

205. By way of introduction, the Panel notes that there is no evidence in the present case to prove that the Athlete was trying to avoid being available for testing or to mask some doping practices. Therefore, the Panel would, in principle, be afforded discretion and "flexibility" to reduce the standard period of ineligibility.

206. Moreover, given that the ADRV is composed of the three different Whereabouts Failures that form part of the First Charge, the Panel will have to assess the Athlete's degree of Fault taking into account the circumstances pertaining to all of them.

207. Such evaluation must be made keeping in mind the *"duty"* or *"care"* that she was expected to have with reference to her whereabouts obligations which, as explained above, include (i) a duty to provide and update sufficient and accurate Whereabouts Information for each day on a quarterly basis and (ii) a duty to specify, for each day, a specific location in which, for a sixty-minute timeslot, she would be present, available and accessible for unannounced testing.

208. The Panel is of the view (already noted in paragraphs 164-165 *supra*) that the Athlete, in all three Whereabouts Failures, has shown an unacceptable degree of nonchalance and a worryingly lackadaisical approach to her whereabouts obligations under the ADR, thereby deserving no reduction of her ineligibility period. In fact, in essence:

(a) <u>As to the 12 March 2019 Missed Test</u>:

(a) she first stated that did not hear the DCO knocking at her door, which *per se* is not an acceptable explanation for her failure to be available for testing; however, even worse, it turned out that she actually had moved out of said address and failed to update her Whereabouts Information accordingly;

(b) the DCO tried to call her at the telephone number indicated on ADAMS, but it was *"switched off"*;

(c) she was unaware that the address had not been updated and blamed said circumstance on Mr Righi; her explanation was rendered on the assumption that the DCO had attempted to test her at her new address; when she found out that the address was wrong, she did not take any measure to change the person in charge of her Whereabouts Information or to take on herself that obligation;

(d) she even adduced that she did not see any of the AIU's communications on the Missed Test until 2020 and that Mr Righi wrote on her behalf her explanations.

(b) <u>As to the Quarter 1 2019 Filing Failure</u>:

(a) she was not at the specified address because she was on holiday in Dubai and her Whereabouts Information, once again, had not been updated accordingly;

(b) the DCO tried to contact the Athlete at both telephone numbers indicated on ADAMS, but the calls *"did not go through"*, since one was *"currently switched off"* and the other went directly to voicemail, as the number was incorrect;

(c) she blamed the circumstance on Mr Righi and claimed that she had communicated her destination to him, although she contradicted herself multiple times when she

tried to explain when and how said information was given to him; notably, she could not provide her WhatsApp conversation with Mr Righi since her phone *"got damaged in Dubai"* and she could not find a way to recover her archive; when specifically asked whether Mr Righi had evidence of said conversation, she candidly replied *"I didn't ask him"*;

(d) in her explanations to the AIU, she claimed that she did not have the credentials to access her profile on ADAMS and thus, quite simply, *"this is not* [her] *fault"*;

(e) when the DCO reached her apartment in Bahrain, he found a man claiming to be the Athlete's brother; however, the Athlete specified that her brother is *"still a boy"* and thus she was unable to tell who the person that answered her door was.

(c) As to the 12 April 2019 Missed Test (see above at paras. 122-167):

(a) she indicated a non-existent building on ADAMS and, once again, blamed the occurrence on Mr Righi;

(b) she did not insert in ADAMS any additional information to help the DCO understand how to find flat 11 (which was, counterintuitively, behind Door 12);

(c) she did not ensure the proper functioning of the intercom, nor did she put a name, flat number or other indication that her flat was upstairs to Door 12;

(d) she did not provide a telephone number;

(e) she did not in any way take care that she could be located, even though she was aware that two Whereabouts Failures had already been established against her.

209. The situation would not be any different vis-à-vis her degree of fault in discharge of her whereabouts duties if the Panel were to consider the Second Charge and, therefore, the events concerning the 24 January 2020 Missed Test, since:

(i) on 23 January 2020, she was supposed to take a flight from Abuja to Lagos, which was delayed or cancelled – she did not provide any evidence such as, e.g., tickets or other information as to said flight – and, therefore, she allegedly decided to travel to Lagos using ground transportation;

(ii) she claimed to have placed a call to Mr Righi on WhatsApp from the airport, to communicate her trip to Lagos, since her Whereabouts Information for 24 January 2020 indicated a hotel in Abuja; however, she has no proof of said call;

(iii) she claimed that her trip from Abuja to Lagos lasted around six hours but, according to Google Maps (as raised by the Appellants), it takes almost twelve hours by car;

(iv) she allegedly had no internet connection during her trip and, for that reason, she could not communicate her new address to Mr Righi until she arrived, around midnight, at the Continental Hotel in Lagos;

(v) due to the two-hour difference between Nigeria and Bahrain, Mr Righi only received the Athlete's WhatsApp message with the address of her hotel at 2:25 am, while he was asleep;

(vi) despite the fact that Mr Righi did not reply to the Athlete's messages – she claims to have also placed several calls on WhatsApp to Mr Righi but has no proof of them – and despite knowing that she had selected the 6:00-7:00 am timeslot for the following day, she *"slept directly"* and only woke up after said timeslot had already elapsed;

(vii) in her explanation to the AIU, she pointed out that the AIU had been sending its correspondence to the Athlete using two email addresses, one of them being wrong and the other one *"not using it since a long time because it was hacked"*.

210. The Athlete's account of the above incidents tells a story of a "series of unfortunate events" which not only is unconvincing, but also clearly shows her patent disregard of, and cavalier approach to, her whereabouts obligations.

211. The Panel is of the view that such a reckless approach cannot be tolerated or in any way justified. Indeed, the whereabouts regime is a fundamental means to detect doping practices in sport, as it enables the location of athletes for unannounced out-of-competition testing, which are crucial in the fight against doping (cf. CAS A2/2014, para. 21).

212. WADA emphasised that the provision of accurate whereabouts information, coupled with presence at the location during the time therein indicated, benefits clean athletes who could rely upon their compliance with those requirements to defend themselves against any suspicion of substantive doping offences. The Panel would also note that athletes who do not so comply inevitably expose themselves to such suspicion even if, as in the case of this Athlete, there is no evidence that they are – in the vernacular – "doping cheats", which it is clearly in their own interests to avoid.

213. Therefore, while the Panel recognizes that said system may impose substantial demands upon athletes in terms of sacrifice of freedom or privacy, it is the price they all pay to reap the benefits of participation in what should be a drug-free sport. All athletes must thus be held accountable when they fail, for whatever reason, to abide by their whereabouts obligations, in order to maintain the system's credibility and integrity .and to protect clean athletes. In fact, in a similar vein, a CAS panel has previously held that *"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"* (CAS 2006/A/1165, para. 21).

214. The Panel agrees with that approach. The Athlete is an international-level athlete and current world champion who, as stated in her explanations to the AIU, *"is against cheaters"* and *"have always defended the principles of a Doping-free sport"*. Exactly because she alleges to be against doping cheats, her negligence is too blatant and cannot be excused.

215. In light of the foregoing, the Panel determines that the Athlete shall be sanctioned with the standard two-year ineligibility period.

b. The starting date of the ineligibility period

216. Article 10.10.2, Proviso c, of the ADR states as follows:

"10.10.2 The period of Ineligibility shall start on the date that the decision is issued provided that: […]

c. where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the period of Ineligibility may be deemed to have started at an earlier date, commencing as early as the date the Anti-Doping Rule Violation last occurred (e.g., under Rule 2.1, the date of Sample collection). All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified".

217. WA and WADA both opposed any backdating under Proviso c and, therefore, asked for the starting date of the Athlete's suspension to be the default position, namely the date of the Panel's award.

218. The Athlete's written Answer referred in only general terms to the backdating of her suspension. However, in oral submissions at the hearing her counsel explicitly asked that, if any period of ineligibility were imposed, it should be backdated to immediately after she had competed at the October 2019 World Championships in Doha, so that she may retain her gold medal won in the women's 400 metres.

219. With regard to the construction of Proviso c, the Panel is of the following view:

(i) It is a necessary, but not sufficient, condition precedent for backdating thereunder that there have been, in a case such as the present, substantial delays in any aspects of doping control, including the hearing process, which are not attributable to the Athlete.

(ii) "Delay" in this context carries no pejorative overtones but is simply a proxy for the passage of time.

(iii) "Substantial" is a quantitative concept, equivalent in this context to more than would normally be expected in the case under consideration.

(iv) Any substantial delay not attributable to the Athlete can be taken into account, whether or not it results from factors which are both explicable and reasonable.

(v) If the condition precedent is satisfied, backdating of the period of ineligibility is an available but not a mandatory consequence; this follows not only from the use of the permissive word "may" to govern "be deemed" but from the contrast with the language of mandatory provisions such as Proviso a in Rule 10.10.2: *"any period of Provisional Suspension … shall be credited"*).

(vi) Whether and how such discretion is exercised by the adjudicating body depends axiomatically upon the circumstances of the particular case; it is at this point that any justification advanced by WA as to the delay being explicable and reasonable may be taken into account (see CAS 2015/A/4059, paras. 167-171; CAS 2018/A/5581, paras. 93-94 and *World Athletics v Deajah Stevens*, DT Decision of 9 July 2020, para. 84).

220. A perceptible purpose of Proviso c is to incentivise WA to take a case against an athlete forward with expedition, so that the athlete will not be left in a state of unnecessary suspense as to his or her fate or, more importantly, through no fault of his or hers to have a return to competition unnecessarily postponed, a particularly serious matter in the light of the relatively short period of many sporting careers. As was said in CAS 2009/A/1759-1778, para 95: *"The athlete has a right to an expeditious hearing and timely completion of the adjudicative process"*. Discretionary backdating of the period of ineligibility can compensate for any undue delays in the disciplinary process for which WA, not the Athlete or other person, bears responsibility.

221. It follows from the foregoing that the Panel must ask itself the following questions:

(i) How long has been the period of any delays in the disciplinary process? (a question of fact);

(ii) Is any of that period attributable to the Athlete? (a question of fact);

(iii) After deducting any period found in answer to question (ii), are the overall delays substantial? (a question of appreciation);

(iv) If the answer to question (iii) is Yes (thereby triggering the Panel's discretion under Proviso c), should the Panel, having regard to all relevant circumstances, exercise its power to backdate? (a question of judgment).

222. It is in the Panel's view useful, in the unusual circumstances of the present case, to answer questions (i) to (iii) in relation to each of the First Charge and the Second Charge separately and to consider the Second Charge first (the fact that the Panel is basing its sanction decision on the First Charge is, in fact, irrelevant when addressing those questions, given that WA started disciplinary proceedings for both those charges).

223. In relation to the Second Charge, the Panel finds no evidence of any substantial delay which could trigger the application of Proviso c. The ADRV under the Second Charge was completed only on 24 January 2020 and the Notice of Charge was issued on 4 June 2020.

During that period, the Athlete was invited to give (and did give) her explanation for the 24 January 2020 Missed Test; and in April 2020 she (on 13 April) and Mr Righi on her behalf (on 16 April) exercised her right to request an Administrative Review of the AIU decision to confirm her 24 January 2020 Missed Test. The possibility that WA might have acted more rapidly does not mean that the delay was substantial, as at that point it did proceed within a normal time frame (see CAS 2018/A/5581, paras 93- 94).

224. The Panel has specifically considered how to deal with the period of just over 7 months between the DT's 14 October 2020 decision to dismiss any Charge (which required consideration of the events of 12 April 2019 in both the First Charge and the Second Charge) and the reversal of that decision on this appeal to CAS. In its view, albeit appeals to CAS are not unusual, they are not an element of the overall doping control process which falls within the "normal time frame" (cf. para. 223 above, CAS 2018/A/5581, para 93). Accordingly, the 7-month period in this case could be in some circumstances considered as a period of "substantial delay". However, the Panel finds that that 7-month period must not be considered as a substantial delay for the purposes of Proviso c because it was attributable to the Athlete, whose success before the DT was achieved by that body's rejection of DCO González' evidence, which this Panel instead accepted, and the correlated acceptance of her evidence, which this Panel has found to be untruthful, as explained above at paras 135 *et seq*.

225. Accordingly, in relation to the Second Charge there would be no basis at all for a finding of substantial delay either before or after the Notice of Charge.

226. In relation to the First Charge, the delay is of a different order. The ADRV under the First Charge, consisting of 3 Whereabouts Failures, was completed on 12 April 2019. Communications between the AIU and the Athlete from April to August 2019 relating to both the 12 March and 12 April 2019 Missed Tests and the Quarter 1 2019 Filing Failure, as recorded in the Notice of Charge, were not abnormal given, *inter alia*, that 3 months after she had missed a deadline to give her explanation for the 12 March 2019 Missed Test, the Athlete herself requested and was granted, exceptionally and to her benefit, an extension of the deadline to explain it. The culmination of those communications was a letter dated 27 August 2019 from the AIU to the Athlete, notifying her that, after an administrative review, her 12 March 2019 Missed Test had been upheld by the AIU.

227. That letter concluded with the words:

"According to our records, you have now a total of three confirmed Whereabouts Failures recorded against you in a period of twelve (12) months:

- *the Missed Test on 12 March 2019 that is the subject of this letter;*
- *a Filing Failure effective 16 March 2019; and*
- *a Missed Test on 12 April 2019.*

You can expect to receive further correspondence from the AIU in relation to these Whereabouts Failures ***in due course****"* (emphasis added).

228. There is, however, no evidence of any further communication between the AIU and the Athlete concerning those three Whereabouts Failures until 5 May 2020, when the AIU wrote to the Athlete to confirm the 24 January 2020 Missed Test. That letter specifically advised her that she had four confirmed Whereabouts Failures, being the same four relied upon in support of the First and Second Charges in the Notice of Charge issued just under a month later.

229. In the Panel's view, the First Charge based on the first three Whereabouts Failures could and should have been charged at the latest by the end of 2019. The delay between the end of August 2019 and the end of the year was, albeit narrowly, within the bounds of normality. The further delay after the end of 2019 until the Notice of Charge on 4 June 2020 was by contrast substantial. Such delay amounted to five months (i.e., end of 2019 to 4 June 2020), thereby leading to a total delay of almost ten months.

230. There was no evidence adduced by WA before the Panel to justify that period of substantial delay or to seek to attribute it to the Athlete. Before the DT, as appears from the transcript of the hearing, counsel for WA sought, over justified objection from the Athlete's counsel, himself to explain that there was a continuing and sensitive investigation into the Athlete and the BAA. That somewhat opaque statement was not, for whatever reason, repeated, still less substantiated before the Panel. While the Panel can understand that once the 24 January 2020 Missed Test came to the attention of the AIU, the AIU did not then proceed to notify the First Charge until it had completed enquiries and a review concerning that later Missed Test, WA did not seek to excuse the delay in notifying the First Charge. The Panel is therefore constrained to find that in relation to that charge the period from the beginning of 2020 to the Notice of Charge on 4 June 2020 was a period of *"substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or any other Person"*.

231. The Panel now turns to the issue of whether, and, if so, how it should exercise its discretion, the condition precedent for such exercise being established, bearing in mind, as it has already noted in the preceding paragraph, that before this Panel WA has not sought to justify the substantial delay in relation to the First Charge.

232. The Panel recognises that in most cases it will be fair to backdate a period of ineligibility broadly in line with any established period of substantial delays not attributable to the Athlete or any other Person. However, in this case there are unusual and significant considerations which have led the majority of this Panel to refuse any backdating under Proviso c and therefore to hold that the period of ineligibility must start in accordance with Rule 10.10.2 on the date of issue of the Panel's decision.

233. Key to this Panel majority's decision is a careful examination of all the facts and circumstances which it has found proven in connection with all four of the Athlete's Whereabouts Failures, namely:

(i) all four Whereabouts Failures have been established, albeit the decision on sanction is based on the First Charge only;

(ii) while there is an overlap between the First Charge and the Second Charge, which have two of their three elements in common (the 12 March 2019 and 12 April 2019 Missed Tests), each has a third (i.e. not common) element.

234. The Panel majority observes that, if the Athlete had committed only the last three of the four Whereabouts Failures (but not the Filing Failure effective 1 January 2019), the First Charge could not have been brought and she would have been faced with only the Second Charge. The inevitable result would have been a period of ineligibility starting on the date of issue of the operative part of the Panel's award, there being no possible basis for any other decision. While credit would still have been given for the period of Provisional Suspension, this is a matter free standing of the appropriate starting date with which the Panel is at this juncture concerned.

235. In short, the only reason backdating has even fallen for consideration as an issue on this appeal is because the Athlete has not committed only three Whereabouts Failures, but has committed four, starting with the Quarter 1 2019 Filing Failure which is the first element of the First Charge.

236. Although, by virtue of Article 10.7.4(a) ADR, the Panel's decision on sanction is based on the First Charge, the Panel must examine all aspects of the Athlete's conduct for the purposes of considering whether or not to apply Proviso c discretion to backdate the start of the period of ineligibility. The Panel cannot look at the First Charge in isolation but must take into account all the facts relating to all four Whereabouts Failures.

237. Indeed, if the Panel majority were to accept the Athlete's request for backdating, she would be better off as a result of her commission of four Whereabouts Failures than if she had committed only three (i.e. excluding the 1 January 2019 Filing Failure). The Panel majority recoils from such a perverse conclusion. This unusual feature of the Athlete's case by itself leads the Panel, by majority, to order that the period of ineligibility starts on the date of the issue of this Award.

238. There is another feature of the Athlete's case which, in so far as necessary, fortifies this Panel majority's determination. The language of the AIU letter of 27 August 2019, quoted in para 227 above, would have left the Athlete in no doubt that, far from being exculpated for her first three Whereabouts Failures which grounded the First Charge, those charges were inevitable. That does not by itself assist WA in a case where *"in due course"* became elongated to approximately nine months. But the letter powerfully reminded the Athletes of her duties and of the risks attendant upon her failure to fulfil them. Yet, despite that warning she missed a further test, i.e. on 24 January 2020, which she was ultimately compelled to recognize as a Whereabouts Failure. This reckless disregard of her duties as an international athlete does not make her a worthy candidate for the exercise of a favourable discretion.

239. It is therefore unnecessary for the Panel to consider whether, if it had considered backdating to be appropriate, it would have chosen the date proposed by the Athlete (i.e. just after her gold medal race in the World Championships in Doha) rather than the earliest available date envisaged under Proviso c, being 12 April 2019 when she committed her third Whereabouts Failure, thereby completing the First Charge ADRV (or 1 April 2019 if by reference to the Filing Failure effective on 1 April 2019). Backdating to 12 (or 1) April 2019 would have automatically disqualified her Doha gold medal, with the Panel having no power to reinstate that result under Article 10.8 ADR.

240. Backdating is contemplated as an exercise to favour the Athlete and it is for the Athlete to choose whether to seek its engagement. But, without further argument, the Panel leaves open but would not necessarily accept that it could properly take into account as a relevant factor in the exercise of discretion under Proviso c the impact of backdating on particular competitive results (cf. under the definition of Fault in the ADR *"for example, the fact that an Athlete would lose the opportunity to 'earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2"*).

241. In light of the above, the majority of the Panel finds that the two-year period of ineligibility imposed on the Athlete shall start on the date on which this Award is released.

242. Of course, the period of provisional suspension already served by the Athlete between 4 June 2020 and 14 October 2020 must be credited against said two-year period of ineligibility.

c. The disqualification of the Athlete's results

243. Under Article 10.8 ADR (see para. 110 above), the finding that the Athlete has committed an ADRV under Article 2.4 ADR entails, as a rule, the disqualification of all the results obtained from the date on which the ADRV occurred – therefore, based on the First Charge, as from 12 April 2019 (or from 1 April 2019 if based on the Filing Failure effective on that date) – until the start of any Provisional Suspension or the date on which the ineligibility period is set to begin, unless this Panel finds that *"fairness requires otherwise"*.

244. CAS panels have previously analysed the concept of "fairness" for this purpose, specifying that it is a broad concept covering several situations that could be taken into account in the Athlete's favour, including (i) delays in the hearing process (see e.g. CAS 2010/A/2216, para. 17), (ii) the *"severity of the athlete's ADRV"* and (iii) the *"impact of the ADRV on the subsequent results"* (see CAS 2013/A/3274, paras. 84-89).

245. As to item (iii), in a previous whereabouts case, CAS took into account the fact that no doping practices affected the athlete's competitive results obtained after his third Whereabouts Failure, which therefore were fairly earned and deserved to be saved from disqualification (see CAS 2011/A/2671, para. 84: *"the Panel finds it important to emphasize the circumstance that, as conceded*

by the UCI at the hearing, the First Respondent's competitive results after 28 April 2011 had not been affected by any doping practice, and were fairly obtained by Rasmussen").

246. In the present case, the Athlete has presented before the DT and this Panel evidence (not contested by either WA or WADA) of anti-doping controls that she underwent in the period between 28 January and 24 November 2019.

247. Notably, the list of anti-doping controls appended to Mr Righi's written witness statement in the proceedings below shows that, between 12 April 2019 and 24 November 2019, the Athlete was tested nineteen times, including both blood and urine testing, and her samples always returned negative.

248. In the Panel's view, this is sufficient evidence to enable the Panel to be comfortably satisfied that, in that period, the Athlete was clean and her competitive results were not won through doping practices. No contradictory evidence was presented by either WA or WADA.

249. In light of the foregoing, the Panel finds that in the present case fairness requires that the Athlete's competitive results between 1 April 2019 and 24 November 2019 be not disqualified. Accordingly, the relevant disqualification period shall be set to run from 25 November 2019 until the date of notification of this Award.

250. This decision has the obvious and significant effect that the Athlete remains the current 400m world champion, because her gold medal result in Doha on 3 October 2019 will stand. However, the Panel does stress that, while it accepts that her Doha win was a "clean" result, this should not be taken as any wider acceptance of the Athlete's approach to the WADA anti-doping program as applied to her sport of athletics. The Panel's task was never to pronounce whether or not the Athlete is or was a "doping cheat", but only to decide whether she has been in breach of the IAAF/WA anti-doping rules as charged and to impose a suitable sanction in accordance with the rules. The Panel has found that she was in breach, and that throughout 2019 and into January 2020 her whole approach to the whereabouts requirements was seriously and inexcusably irresponsible; further, she attempted to escape the consequences of her actions by giving evidence which this Panel has found to be untruthful. Such an approach from a top-level athlete is seriously undermining of the whole anti-doping program and is sanctioned accordingly. The Panel recognizes that the Athlete will naturally be distressed to miss participation in the forthcoming Olympic Games in Tokyo, but the fault for this blow to her career is no-one's but hers.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by World Athletics on 12 November 2020 against Ms Salwa Eid Naser with respect to the decision issued by the World Athletics Disciplinary Tribunal on 14 October 2020 is partially upheld.

2. The appeal filed by the World Anti-Doping Agency on 30 November 2020 against World Athletics and Ms Salwa Eid Naser with respect to the decision issued by the World Athletics Disciplinary Tribunal on 14 October 2020 is partially upheld.

3. The decision rendered by the World Athletics Disciplinary Tribunal on 14 October 2020 in the matter of Ms Salwa Eid Naser is set aside.

4. Ms Salwa Eid Naser is sanctioned with a period of ineligibility of two years, commencing on the date of notification of this award, with credit given for the period of provisional suspension already served between 4 June 2020 and 14 October 2020.

5. All competitive results obtained by Ms Salwa Eid Naser from 25 November 2019 through to the date of notification of this award shall be disqualified, with all of the resulting consequences, including forfeiture of any medals, titles, ranking points and prize and appearance money.

6. (…).

7. (…).

8. All other or further motions or prayers for relief are dismissed.