**CAS 2009/A/1805 IAAF v. RFEA & Josephine Onyia**
**CAS 2009/A/1847 IAAF v. RFEA & Josephine Onyia**

ARBITRAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Judge James Robert Reid QC, West Liss, England

Arbitrators: Prof. Richard H. McLaren, Barrister London, Canada

Prof. Fernando Pombo, Madrid, Spain

in the arbitrations between

**INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (IAAF), Monaco**

-Appellant-

and

**REAL FEDERACION ESPANOLA DE ATLETISMO (RFEA), Madrid, Spain**

- First Respondent-

and

**JOSEPHINE ONYIA, c/o RFEA, Madrid, Spain**

- Second Respondent-

**The Parties**

1. The International Association of Athletics Federations ("IAAF") is the international federation governing the sport of athletics worldwide. It has its seat in Monaco.

2. The Real Federacion Espanola de Atletismo ("RFEA") is the national governing body of the sport of athletics in Spain and the relevant member of the IAAF for Spain. It has its seat in Madrid, Spain.

3. Ms Josephine Onyia ("the Athlete") is a Spanish athlete affiliated to RFEA. She is an international level athlete specialising in hurdling.

4. These arbitrations concern the Athlete's eligibility for competition in athletics.

**Basic facts**

5. On 2 September 2008, the Athlete took part and finished third in the 100m hurdles at the IAAF Golden League meeting "Athletissima" held in Lausanne, Switzerland. She subsequently provided a urine sample with code 121544.

6. Sample 121544 ("the Lausanne sample") was analysed at the World Anti-Doping Agency ("WADA")-accredited laboratory in Lausanne. The analysis revealed the presence of 4-Methyl-2-hexanamine (hereafter "methylhexaneamine"), a tuaminoheptane analogue. The Lausanne laboratory reported the finding to the IAAF as an adverse analytical finding on 2 October 2008.

7. On 13 September 2008, the Athlete took part in the VTB Bank World Athletic Final held in Stuttgart, Germany. She finished first in the 100m hurdles and was submitted to doping control. She provided a urine sample with code 2310007 (the "Stuttgart sample").

8. The Stuttgart sample was analysed at the WADA-accredited laboratory in Cologne (Germany) and was found to contain the prohibited substance clenbuterol, a substance included in the WADA Prohibited List "S 1.2 Other Anabolic Agents." The laboratory had detected between 0.02ng/ml and 0.1ng/ml of the substance.

9. The Cologne laboratory notified the IAAF of the adverse analytical finding arising from the Stuttgart event on 26 September 2008.

10. On 29 September 2008, the Athlete sent a brief statement to RFEA in relation to the Stuttgart sample stating that she had never taken any anabolic substance and requesting that her B sample be opened. The statement was received by the IAAF on 30 September 2008.

11. The Athlete was then provisionally suspended from all competitions in athletics by the IAAF Anti-Doping Administrator in accordance with Rule 38.2 of the IAAF Competition Rules (edition 2008) (the "IAAF Rules").

12. The adverse analytical findings were notified to RFEA on 6 October 2008.

13. The B sample analysis of the Stuttgart sample was performed on 22 October 2008 at the Cologne Laboratory and confirmed the presence of the prohibited substance clenbuterol.

14. On 27 October 2008, the IAAF received an e-mail from the Athlete in relation to the Lausanne analysis in which she requested the analysis of her B sample and stated she had never in her life heard of the stimulant allegedly found.

15. The analysis of the B sample of the Lausanne sample was performed on 10 November 2008 at the Lausanne Laboratory and confirmed the presence of methylhexaneamine.

16. In accordance with IAAF Rules, the two cases duly proceeded before the RFEA Committee.

17. The RFEA Committee submitted a series of questions to the Lausanne laboratory in relation to the analyses of the Lausanne samples. They were duly answered.

18. By a decision dated 21 January 2009, the RFEA Committee concluded that there was no violation of the Anti-Doping Rules in the Athlete's case in respect of the Stuttgart sample and that her provisional suspension should be lifted accordingly. The Spanish version of the Commission's decision was sent to the IAAF on 3 February 2009. The English version of the decision was sent to the IAAF on 12 February 2009.

19. By a decision of 12 March 2009, the RFEA Committee concluded that there was no violation of the Anti-Doping Rules in the Athlete's case in respect of the Lausanne sample. The Spanish version of the Committee's decision was sent to the IAAF on 20 March 2009 followed by the English version of the decision which was sent to the IAAF on 14 April 2009.

20. In accordance with IAAF Rules, the two decisions were referred to the IAAF Doping Review Board upon receipt of the English versions. In each case, the Doping Review

Board determined that the decisions should be appealed to CAS and a statement of appeal in each case was filed with CAS accordingly. The Athlete was again suspended pending the outcome of the appeals to CAS pursuant to IAAF Rule 60.23 with effect from 4 March 2009.

**The Constitution of the Panel and the Hearing**

21. On 17 April 2009, the CAS Court Office informed the parties that the Panel to hear the appeal in CAS 1805 had been constituted as follows: Judge James Robert Reid QC, President of the Panel, Prof. Richard H. McLaren and Prof. Fernando Pombo, arbitrators.

22. By letters dated 20, 21 and 27 May 2009, the First Respondent, Second Respondent and Appellant respectively, agreed that the two matters, CAS 1805 and CAS 1847 may be consolidated.

23. On 5 June 2009, the CAS Court Office informed the parties that the same Panel had been appointed to hear the appeal in CAS 1847. The parties did not raise any objection as to the constitution and/or composition of the Panel.

24. By letters dated 29 June, 30 June and 23 July 2009, the First Respondent, the Appellant and the Second Respondent respectively, indicated their preference for the Panel to decide this matter based solely on the parties' written submissions, without the need for a hearing.

25. Pursuant to Article R57 of the Code of Sports-related Arbitration (the "Code"), the Panel has deemed itself to be sufficiently well informed and has decided not to hold a hearing.

26. The Panel held deliberations in this matter by conference call.

**Jurisdiction of the CAS**

27. Article R47 of the Code provides as follows:

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

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

28. IAAF Rule 60 provides for appeal to the CAS in the following terms:

> "Appeals
>
> 9. All decisions subject to appeal under these Rules, whether doping or non-doping related, may be appealed to CAS in accordance with the provisions set out below. All such decisions shall remain in effect while under appeal, unless determined otherwise (see Rules 60.23-24 below).
>
> 10. The following are examples of decisions that may be subject to appeal under these Rules: …
>
> (c) Where a Member has taken a decision that an athlete, athlete support personnel or other person has not committed an anti-doping rule violation…
>
> 21. In all references to CAS under Rule 60.10(c), the respondents shall be the relevant Member and the athlete."

29. The jurisdiction of the CAS is not disputed by any party and was re-confirmed by the parties' signing the Procedural Order.

30. It follows that the CAS has jurisdiction to hear this dispute.

**Applicable Law**

31. Article R58 of the Code provides as follows:

> "The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

32. The applicable regulations to the present dispute are the IAAF Rules, which provide at Rule 60.29 that "In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitrations shall be conducted in English, unless the parties

agree otherwise". Accordingly, the Panel shall apply the IAAF Rules primarily and Monegasque law subsidiarily.

**Admissibility**

33. IAAF Rule 60.25 provides that "...the appellant shall have 30 days from the date of communication of the written reasons of the decision to be appealed (in English or French where the IAAF is the prospective appellant) in which to file his statement of appeal with CAS".

34. The Decision in CAS 2009/A/1805 IAAF v. RFEA & Josephine Onyia was issued by the RFEA on 21 January 2009 and the English version of the 1805 Decision was notified to the Appellant on 12 February 2009. The Statement of Appeal was filed on 13 March 2009. It follows that the appeal was filed in due time and is admissible.

35. The Decision in CAS 2009/A/1847 IAAF v. RFEA & Josephine Onyia was issued by the RFEA on 12 March 2009 and the English version of the 1847 Decision was notified to the Appellant on 14 April 2009. The Statement of Appeal was filed on 12 May 2009. It follows that the appeal was filed in due time and is admissible.

**Merits of the Appeal**

**A. The IAAF Rules**

36. The definition of "doping" under the IAAF's rules is to be found at rule 32.2 (a):

> "2. Doping is defined as the occurrence of one or more of the following anti-doping rule violations:
>
> (a) the presence of a prohibited substance or its metabolites or markers in an athlete's body tissues or fluids ...
>
> (i) it is each athlete's personal duty to ensure that no prohibited substance enters his body tissues or fluids. Athletes are warned that they are responsible for any prohibited substance found to be present in their bodies.
>
> It is not necessary that intent, fault, negligence or knowing use on an athlete's part be demonstrated in order to establish an anti-doping rule violation under Rule 32.2(a).
>
> (ii) except those prohibited substances for which a reporting threshold is specifically identified in the Prohibited List, the detected presence of any

quantity of a prohibited substance in an athlete's sample shall constitute an anti-doping rule violation. "

37. The rules as to the burden and standard of proof of doping are contained in IAAF Rule 33.1 and 33.2 which provide:

"1. The IAAF, the Member or other prosecuting authority, shall have the burden of establishing that an Anti-Doping Rule violation has occurred under these Anti-Doping Rules.

2. The standard of proof shall be whether the IAAF, the Member or other prosecuting authority has established an anti-doping rule violation to the comfortable satisfaction of the relevant hearing body, bearing in mind the seriousness of the allegation which is made. The standard of proof is greater than a mere balance of probability but less than proof beyond a reasonable doubt."

38. Under IAAF Rule 33.4:

"Facts related to anti-doping rule violations may be established by any reliable means. The following standards of proof shall be applicable in doping cases:

(a) WADA-accredited laboratories are presumed to have conducted sample analyses and custodial procedures in accordance with the International Standards for Laboratories. The athlete may rebut this presumption by establishing that a departure from the International Standard for Laboratories has occurred, in which case the IAAF, the Member or other prosecuting authority shall have the burden of establishing that such departure did not undermine the validity of the adverse analytical finding…."

39. Under IAAF Rule 40.1:

"If any person commits an anti-doping rule violation under these Anti-Doping Rules, he shall be subject to the following sanctions:

(a) for a violation under Rules 32.2(a), (b) or (f) (prohibited substances and prohibited methods), except where the prohibited substance is a specified substance in a case under Rule 40.5 below, or Rule 32.2(i) (competing whilst suspended or ineligible):

(i) first violation: for a minimum period of two years' ineligibility…."

40. Under IAAF rule 40.2:

> "If, in a case involving an anti-doping rule violation under:
>
> (a) Rule 32.2(a) (presence of a prohibited substance); …
>
> the relevant tribunal of the Member decides… that there are exceptional circumstances in the case such that the athlete or other person bears no fault or negligence for the violation, the otherwise applicable period of ineligibility under Rule 40.1 (a) shall be eliminated. When a prohibited substance is detected in an athlete's sample in violation of Rule 32.2(a) (presence of a prohibited substance), the athlete must establish how the prohibited substance entered his system in order to have his period of ineligibility eliminated…."

41. Under IAAF rule 40.3:

> "If, in a case involving an anti-doping rule violation under:
>
> (a) Rule 32.2(a) (presence of a prohibited substance);…
>
> the relevant tribunal of the Member decides … that there are exceptional circumstances such that the athlete or other person bears no significant fault or no significant negligence for the violation, the period of ineligibility may be reduced but the reduced period may not be less than half the minimum period of ineligibility otherwise applicable."

42. Under IAAF rule 40.5:

> "The Prohibited List may identify a limited number of specified substances which are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents. Where the athlete can establish that the use of such a specified substance was not intended to enhance performance, the period of ineligibility otherwise applicable in Rule 40.1 (a) shall be replaced by: (i) first violation: minimum - a public warning (and disqualification from the event and subsequent events in which he competed in the competition - see Rule 39 above) and no ineligibility from future competitions; maximum - one year's

ineligibility. (ii) second violation: for a period of two years' ineligibility. (iii) third violation: ineligibility for life."

43. Under IAAF rule 40.6:

> "For the purposes of imposing sanctions under Rules 40.1(a)-(c) above and Rule 40.5, a second or further anti-doping rule violation may only be considered if the IAAF, the Member or other prosecuting authority can establish that the athlete or other person subject to these Anti-Doping Rules committed the second or further anti-doping rule violation after he received notice, or after the Member made a reasonable attempt to give notice, of the first or previous violation. If the IAAF, Member or other prosecuting authority cannot establish this fact, the relevant anti-doping rule violations shall be considered as a single violation and the sanction imposed shall be based on the violation that carries with it the more severe sanction."

**B. The RFEA Decisions**

44. In its decision of 21 January 2009, the RFEA held that the Athlete did not commit any anti-doping rule violation in respect of the Stuttgart sample in the following terms:

> "TO DECLARE that there was no violation of the Anti-Doping Rules and to DISMISS this proceeding against Ms JOSEPHINE ONYIA since there are no rational signs that suggest the existence of punishable doping conduct in sport, thus exonerating her of any punishable conduct and cancelling the provisional suspension of her licence that was imposed in the past."

45. In substance, the RFEA Committee considered that there were four reasons why the Athlete should be exonerated:

> (i) The presence of clenbuterol below the Minimum Required Performance Limit ("MRPL") as set out in WADA Technical Document TD2004MRPL should not be considered as an adverse analytical finding;
>
> (ii) The Cologne laboratory did not comply with the WADA International Standard for laboratories in reporting the results of the Athlete's A and B analyses as adverse analytical findings;
>
> (iii) The presence of clenbuterol could be attributable to the ingestion of contaminated meat; and

(iv) In any event, Ms Onyia did not commit any punishable intentional doping conduct.

46. In its decision of 12 March 2009, the RFEA Committee held that the Athlete did not commit any anti-doping rule violation in respect of the Lausanne sample in the following terms:

"TO DECLARE that there was no violation of the Anti-Doping Rules and to DISMISS this proceeding against Ms JOSEPHINE ONYIA since there are no rational signs that suggest the existence of punishable doping conduct in sport, thus exonerating her of any punishable conduct and cancelling the provisional suspension of her licence that was imposed in the past. "

47. In substance, the RFEA Committee considered that the Athlete did not commit an anti-doping rule violation on the grounds that (1) the substance Methylhexaneamine reported by the Lausanne laboratory could not be considered as a prohibited substance under the 2008 World Anti Doping Authority Prohibited List and that even if Methylhexaneamine was to be considered as a prohibited substance, it should be classified as a "Specified Substance" which was susceptible to unintentional anti-doping rule violations; (2) it was unlikely she would have committed a doping offence given the probability of her being obliged to undergo a doping test; (3) the absence of improvement in her sporting performance; (4) the fact that no stimulants were found in her urine in subsequent tests on 13 and 15 September; and (5) the failure on the part of the Lausanne laboratory to quantify the substance that was found.

**C. The IAAF's arguments**

48. IAAF Rule 34.4 provides that WADA's determination of the prohibited substances and prohibited methods that will be included on the Prohibited List is to be final and shall not be subject to a legal challenge by any athlete or other person.

49. In relation to the Stuttgart sample: the laboratory was obliged to analyse samples and report results in conformity with the International Standard for Laboratories. The presence of clenbuterol was established by the WADA accredited laboratory in Cologne in both A and B samples and duly reported to the IAAF. The Cologne Laboratory produced a full documentation package containing the internal chain of custody, the list of the laboratory staff involved in the analysis and the detailed description of the analytical process. The analyses were conducted in accordance with the International Standard for Laboratories and that they established the presence of clenbuterol in Ms Onyia's A and B sample, in

accordance with the identification criteria set out in the International Standard for Laboratories and the relevant WADA Technical Document.

50. Not all substances in the Prohibited List detected in an athlete's sample necessarily lead to the reporting of an adverse analytical finding. A limited number of substances ("threshold substances") on the Prohibited List can only be reported as an adverse analytical finding when they are found at concentrations exceeding a defined threshold. Clenbuterol is not one of them: see WADA Technical Document TD2004MRPL which contains a table identifying the threshold substances. As a non-threshold substance, the detection of any amount must be reported by laboratories as an adverse analytical finding and considered by the testing authority as a potential anti-doping rule violation. In reporting the presence of clenbuterol in the Athlete's case as an adverse analytical finding, the Cologne laboratory has acted in strict compliance with the WADA International Standard for Laboratories.

51. If the presence of a prohibited substance at a low concentration should not be reported because not all laboratories have the capability to detect it, this would considerably impair the progress of science in the detection of prohibited substances and the efforts made by some laboratories to improve their analytical performances through new equipment, methodology or human resources. Considering the presence of clenbuterol in Ms Onyia's samples as an anti-doping rule violation would not contravene the principles of fairness and equality promoted by the WADA Code. The WADA Code does not apply to the present case and even if it did, the reporting of clenbuterol as an adverse analytical finding in this case is not contrary to the principles of fairness and equality in sport. The minimum required performance level (MRPL) is defined by the International Standard for Laboratories in the following terms: "Minimum Required Performance Level (MRPL): concentration of a Prohibited Substance or metabolite of a Prohibited Substance or Marker of a Prohibited substance or method that a doping Laboratory is expected to reliably detect and confirm in the routine daily operation of the laboratory." See technical document "Minimum Required Performance Levels for Detection of Prohibited Substances."

52. It was not WADA's intention that all 35 WADA-accredited laboratories should perform only at the minimum acceptable level. TD2004MRPL provides:

> "It is recognized that some laboratories will be able to identify a wider range of or lower concentrations of prohibited Substances than other Laboratories. While such individual capabilities are encouraged in order to improve the overall system, it is also recognized that there are Minimum

> Required Performance Limit (MRPL) at which all Laboratories must be able to operate. "

53. Advanced detection tools were necessary in the case of the Athlete as clenbuterol is usually rapidly excreted from the body and that the Athlete's urine sample was extremely diluted.

54. Under the regime of strict liability set out in IAAF Rules, the prosecuting authority does not have to prove intentional doping conduct on the athlete's part for the anti-doping rule violation to be established. The prosecuting authorities only have to demonstrate the objective element of the infraction. The RFEA Committee in its decision of 21 January 2009 clearly erred in taking the view that intentional doping conduct on the Athlete's part had to be proved before she could be declared guilty of a doping offence under IAAF Rules.

55. In order for the Athlete to be able to argue exceptional circumstances pursuant to either IAAF Rule 40.2 or 40.3, she first has to establish how the prohibited substance entered her system. According to IAAF Rule 33.3, the burden of proof on the Athlete in this respect is a balance of probabilities. The Athlete has not been able to meet this burden: she was not able to establish the origin of the finding of clenbuterol in her Stuttgart sample. In the absence of an explanation as to how the prohibited substance was found in the athlete's body, the athlete cannot successfully claim exceptional circumstances in her case. The mere assertion that the low concentration of clenbuterol found may have been caused by the ingestion of contaminated meat is inadequate.

56. As to the Lausanne samples: while the substance found in Ms Onyia's sample (methylhexaneamine) is not expressly identified in the WADA Prohibited List, a substance does not necessarily need to be expressly listed in the WADA Prohibited List to be considered a prohibited substance in sport. It is clear from the relevant section in the Prohibited List that not only are the stimulants specifically listed under Section 6 prohibited, but so are all related substances with a similar chemical structure or similar biological effect(s). The relevant question therefore is whether methylhexaneamine can be considered as being related to one of the stimulants listed under Section 6 either by virtue of having a similar chemical structure, or similar biological effects. Methylhexaneamine not only has a very similar chemical structure to tuaminoheptane but it has also similar biological effects to tuaminoheptane as well as ephedrine and amphetamine, other stimulants.

57. Methylhexaneamine has a similar chemical structure to tuaminoheptane. The RFEA Committee's interpretation of the term "similar" is erroneous. The Committee suggests that methylhexaneamine cannot be considered as a prohibited substance because it does not have the same chemical structure as tuaminoheptane: "similar" does not mean "identical". Dr. Rabin's report demonstrates that methylhexaneamine has indeed a very similar chemical structure to tuaminoheptane and the same molecular weight (155.22) and molecular formula ($C_7H_{17}N$).

58. The Committee's decision with respect to the issue of specified substances reveals that, in their opinion, if an athlete can demonstrate that the athlete did not use a specified substance with the intention of enhancing performances, he or she should not be declared as having committed a doping rule violation.

59. Specified substances are defined as being particularly susceptible to unintentional anti-doping violations because of their general availability in medicinal products and because they are less likely to be successfully abused as doping agents. But the fact that tuaminoheptane is categorised as a specified substance is not a valid reason to consider that the Athlete did not commit an anti-doping rule violation. At the stage of establishing whether or not an athlete committed an anti-doping rule violation, the question of the intention is irrelevant. The IAAF Rules establish a regime of strict liability. The prosecuting authority does not have to prove intent on the athlete's part.

60. Regardless of intention, the mere presence of a prohibited substance (including specified substances) constitutes an anti-doping rule violation on the athlete's part. The issue of the athlete's intention is only relevant at the stage of determining the sanction corresponding to the doping offence. Under IAAF rule 40.5, findings of specified substances, because of the specific nature of these substances, may lead to the application of a lower sanction. It is only to determine whether this regime can apply that the athlete's intention will be taken into consideration. In this case, since the Athlete did not provide any explanation as to how the substance came to be in her body, there could be no mitigation.

**D. The arguments of the RFEA and the Athlete**

61. The RFEA has applied penalties where it has had to in scrupulous compliance with the existing legislation. In these two cases, however, it considered that there were reasonable doubts, and that the elementary principles of equality and presumption of innocence were being violated. It made no criticism of either of the laboratories involved. In each of the cases it had concluded that the athlete was unlikely to be

deliberately using prohibited substances because of the number of competitions in which she competed in the period and her results achieved during that period. Since she was in the first three in each of the five meetings at which she competed over the period 29 August to 13 September, it was more than likely that she would be tested.

62. In relation to the Cologne tests:

(1) it was unethical that the penalising of an athlete should depend on the place where the doping analysis was performed; and

(2) it could not be stated, with any degree of certainty, that the clenbuterol present in urine did not come from contaminated meat. The scientific uncertainties are too great.

63. As to (1): The MRPLs are technical documents that require laboratories to report the presence of prohibited substances above certain thresholds, but in certain cases (e.g. clenbuterol) they do not limit the requirement to those thresholds. Thus laboratories can (and are obliged to) report the presence of prohibited substances. However, different accredited laboratories have different capabilities. The Cologne laboratory did its duty, but the results reported by the laboratory were beyond the capabilities of most accredited laboratories. Most laboratories can detect clenbuterol down to 1 ng/ml on a scientific basis, i.e. in a way that is not dependent on the technician who prepared the sample or on his/her professional qualifications, but of the 35 laboratories accredited at present, only Athens, Beijing and Dresden are capable of matching Cologne's analysis. Thus if the Athlete's sample had been analysed in Barcelona, Lausanne, Madrid or any of the other 35 accredited laboratories (excepting Koln, Athens, Dresden and Beijing), no clenbuterol would have been detected in the Athlete's urine since those laboratories report adverse analytical findings at amounts of 1 ng/ml or greater. Detecting such small amounts (50 times less than the amount detected by most accredited labs and 100 times less than the threshold established by the MRPL) depends on at least two other factors which are not purely scientific: (a) the preparation of the sample before analysis and (b) the training of the technical personnel performing the analysis.

64. The existence of different detection standards at different accredited laboratories violates the principle of equality. Penalties should not be imposed on the basis of results that could not be reproduced in all other accredited laboratories. Unless the detection of the prohibited substance can be reproduced 100% of the time, regardless of the accredited laboratory in which the analysis is performed and by whom, no

penalty should be imposed on the basis of the result. The existing inequality clashes with the principle of equality and represents discrimination, with very serious sporting and economic consequences for the athlete and the Federation.

65. As to (2): Clenbuterol is the only product which has been proven to be used for fraudulent fattening of cattle. That use has led to cases of intoxication when large amounts were administered, and the presence and contamination of meat for human consumption has been shown occasionally to lead to public health problems. It is impossible to detect its presence in food for fraudulent reasons using conventional analysis methods. It is the only substance in the category of stimulants B2 which is listed as an anabolic agent (it is not explicitly included under anabolic agents, and it is mentioned in passing under B2 agonists), and it is also the only substance used to fatten cattle fraudulently.

66. Since the Athlete had competed in different locations, changing country practically on a daily basis, it was not possible to establish that there was meat contamination, as this is not a case of intoxication (other hotel guests would have fallen ill) but, rather, contamination with amounts that are small but sufficient to be detected in urine using the methods applied to detect doping substances, but nonetheless at a concentration that is too small to have any clinical effects.

67. While the IAAF rules provide that an athlete bears sole responsibility for any prohibited substances that may be found in his or her bodily fluids, that was not the original spirit of the law. The original idea was that an athlete could not claim that they had been induced or obliged to take a prohibited substance against their will.

68. The Athlete could not demonstrate exceptional circumstances since she was unaware of the presence of clenbuterol in her organism. She could not claim illness or any other mitigating circumstance since she could not know if the substance detected in her urine came from contaminated meat.

69. The Athlete could not be accused of concealment as she disclosed all the nutritional products that she was taking. The fact that the amount of clenbuterol discovered was extremely small meant that food contamination could not be ruled out. Little is known of its metabolism in fraudulently fattened animals, and even less is known about how it is metabolised in humans. This means that two people who ingest the same amount need not eliminate it in the same way, or in the same time, or in the same amounts.

70. The Athlete normally has very low urine densities in both in-competition and out-of-competition tests (i.e. without advance warning), so it would be malicious to insinuate

that the small concentration of clenbuterol detected in her urine might be due to deliberate dilution, since no other substances were found in her urine.

71. Since the Athlete is necessarily unable to establish the origin of the prohibited substance, the presumption of innocence takes precedence over the presumption of guilt that should prevail in any legal case.

72. In relation to the Lausanne sample, the identification method had to be validated and subject to oversight, and it must be reproducible. The laboratory did not provide the necessary information and, from the documentation which it did provide, the presence of a specific compound was not sufficiently proven since the "standard" substance used to identify the substance found in the urine could not be identified exactly using mass spectrometry. A standard sample from Sigma-Aldrich with the exact formula C7H18N+ was introduced into the analyser, but the laboratory decided that the substance that it introduced was C7H17N. It was legitimate to ask the Laboratory how it identified a substance, particularly when it is the first time that the substance has been identified at that Laboratory. This was done by means of an undated publication with no indication of the journal where it was published. The Laboratory's response to questions put to it as to the identification of the substances and the validation of the substance identification method is unsatisfactory. Although an athlete can be required to know or at least check that a substance is on the Prohibited List, he or she cannot be expected to be aware of the chemical literature on similar substances with stimulating effects, of which there are thousands, as noted by Dr Rabin in his report.

73. Even though the Laboratory is not required to quantify a substance, the information was crucial since stimulants are dose-dependent. A detection threshold is established for ephedrine, the stimulant par excellence, implicitly signifying that there is no stimulant effect below that threshold. An athlete is entitled to demand confirmation and proof of the presence of a substance in his or her urine, the process used for identification, and the scientific guarantees supporting the procedure.

74. It was doubtful that the Athlete tried to commit fraud. She ranked in the top three in several competitions in a short period of time, where she ran the risk of being subjected to a doping test. No stimulants were found in the tests performed on 13 September and 15 September, analysed by different laboratories.

75. WADA gives no explanation as to why it treats different stimulants differently. Prohibited List Stimulants do not have the same effects on the central nervous system, and some act only locally, as in the case of tuaminoheptane found in the sample,

whereas others affect the central nervous system or the cardiovascular system. The chemical structure determines the pharmacological functions.

76. It is not reasonable to require any human, be they an athlete or otherwise, to have detailed knowledge of the labelling, composition and analogues of a chemical substance; apparently "innocent" products such as nasal sprays for treating congestion that are readily available to the general public can lead to an adverse analytical finding in a doping test; there is evidently a need to focus on substances with actual doping effects. Only those substances which have been proven to affect performance should be listed as prohibited substances, and the amounts and degrees of impact should be quantified.

77. The WADA Code no longer requires therapeutic use exemptions for substances that are applied nasally or topically. Tuaminoheptane is a compound that is widely used in the European market for treating nasal congestion and is sold without a prescription.

**E. Application of the Principles to this Case: the Stuttgart sample.**

78. The WADA-accredited laboratory in Cologne was obligated to analyse samples and report results in conformity with the International Standard for Laboratories. The presence of clenbuterol was established in both A and B samples and duly reported to the IAAF.

79. Clenbuterol is a prohibited substance under the WADA 2008 Prohibited List. By IAAF Rule 34, the IAAF Anti-Doping Rules incorporate the Prohibited List published and revised by WADA. Clenbuterol is a Beta-2 agonist with anabolic properties, classified as an anabolic agent under the WADA 2008 Prohibited List (SI Anabolic Agents) and is a substance prohibited at all times (both in-competition and out-of-competition).

80. Clenbuterol is not a “specified substance”. The List clearly provides that all beta-2 agonists are specified substances except salbutamol above 1000ng/ml and clenbuterol. While a limited number of substances contained in the Prohibited List can only be reported as an adverse analytical finding when they are found at concentrations exceeding a defined threshold, clenbuterol is not a “threshold substance”. It falls in the category of non-threshold substances, the detection of any amount of which must be reported by laboratories as an adverse analytical finding, and considered by the testing authority as a potential anti-doping rule violation.

81. The reporting of clenbuterol as an adverse analytical finding in this case was not contrary to the principles of fairness and equality in sport. The definition and TD2004MRPL make it clear that the MRPLs are the minimum levels of detection that all

accredited laboratories are required to be able to reach routinely in the detection of particular substances. For clenbuterol, the minimum required performance level is 2 ng/ml. This means that, as a condition of their accreditation, all WADA-accredited laboratories must be able to report the presence of clenbuterol in urine at a concentration of 2ng/ml. It does not mean that if a laboratory can, and does, detect clenbuterol at a lower level it should not report it. The WADA Technical Document clearly specifies that the MRPL is not a threshold or a limit of detection and that adverse analytical findings may result from concentrations below the MRPL. The WADA Technical Document contains the following passage: "In order to ensure that all Doping Control Laboratories can report the presence of Prohibited Substances, their Metabolite(s) or their Marker(s) in a uniform way, a minimum routine detection capability for testing methods has been established. It is recognized that some laboratories will be able to identify a wider range or lower concentrations of Prohibited Substances than other Laboratories. While such individual capabilities are encouraged in order to improve the overall system, it is also recognized that there are Minimum Required Performance Limit (MRPL) at which all Laboratories must be able to operate."

82. The argument that an athlete should be allowed to escape the consequences of having a prohibited substance in his or her body because only a few of the accredited laboratories could have detected it at the levels at which it was present is akin to arguing that a thief should be let off because if he had not been chased by the quickest policeman in the force he would have escaped. WADA-accredited laboratories are simply required to report as adverse analytical findings, the presence of any prohibited substance or methods in an athlete's sample within the range of their detection capability (which admittedly varies from one laboratory to another). This is supported by the decision in Jerson Anes Ribeiro v UEFA TAS 2005/A/958: see paras 70 to 72. To hold otherwise would be to align all 35 WADA-accredited laboratories with the least capable one.

83. Under the regime of strict liability set out in IAAF Rules, the prosecuting authority does not have to prove intentional doping conduct on the athlete's part for the anti-doping rule violation to be established. The RFEA Committee in its decision of 21 January 2009 erred in taking the view that intentional doping conduct on the Athlete's part had to be proved before she could be declared guilty of a doping offence under IAAF Rules. The rules expressly provide to the contrary.

84. It is not open to the RFEA and the Athlete to argue that a presumption of innocence should apply. The rules expressly provide that it is not necessary that intent, fault, negligence or knowing use on an athlete's part be demonstrated in order to establish an anti-doping rule violation under Rule 32.2(a). The prosecuting authorities only have to demonstrate the objective element of the infraction, and therefore do not have to prove intent on the athlete's part for the anti-doping rule violation to be established.

85. The prosecuting authority does not have to demonstrate that the quantity established would have enhanced the performance of the athlete. The amount discovered on testing is only a snapshot and gives no indication as to whether at some earlier stage the amount in the athlete's body would have been sufficient to affect performance. The fact that on other occasions in close proximity in time to the two occasions on which prohibited substances were found in her samples, the Athlete had tested negative does not assist her.

86. In order for the Athlete to be able to argue exceptional circumstances pursuant to either IAAF Rule 40.2 or 40.3, she first has to establish how the prohibited substance entered her system. Under IAAF Rule 33.3, the burden of proof on the Athlete in this respect is a balance of probabilities. The Athlete has not been able to meet this burden.

87. The mere assertion that the low concentration of clenbuterol found could potentially have been caused by the ingestion of contaminated meat is inadequate. Without any scientific or factual evidence to back up the claim that in this instance the source of the clenbuterol was contaminated meat eaten by the Athlete, she was unable to discharge the onus on her on the balance of probabilities and it was not open to the RFEA to hold her blameless.

88. The decision of the RFEA Committee showed that the Athlete was not able to establish the origin of the finding of clenbuterol in her Stuttgart samples. There is no provision in the rules which enables an athlete to escape from the burden of proof in this regard merely by asserting that he or she has eaten in many different places and is therefore unable to determine where the clenbuterol entered his or her body.

89. In the absence of an explanation as to how the prohibited substance was found in the Athlete's body, the Athlete cannot successfully claim exceptional circumstances in her case. Having failed to meet the first requirement of either Rule 40.2 or 40.3, she cannot avail herself on either of the provisions which enable the fixed sanction imposed by Rule 40.1 (a) (ii) to be eliminated or reduced.

**F Application of the Principles to this Case: the Lausanne sample**

90. The substance found in the Athlete's sample (methylhexaneamine) is not expressly identified in the WADA Prohibited List. A substance does not need to be expressly listed in the WADA Prohibited List to be considered a prohibited substance in sport. The relevant section in the Prohibited List provides that not only are the stimulants specifically listed under Section 6 prohibited but so are all related substances with a similar chemical structure or similar biological effect(s).

91. The List is an open list. It would be impractical to cite all stimulants because of the large numbers of compounds available on the market. Further, an open list allows the inclusion of those designer drugs created only for doping purposes.

92. Methylhexaneamine is related to one of the stimulants listed under Section 6 by virtue of having a similar chemical structure or similar biological effects. Methylhexaneamine not only has a very similar chemical structure to tuaminoheptane but it has also similar biological effects to it.

93. It is immaterial that it has similar biological effects to ephedrine and amphetamine, other very different stimulants, and the Appellant could gain no support for its case from referring to them.

94. The RFEA Committee's interpretation of the term "similar" is erroneous. Methylhexaneamine does not have an identical chemical structure to tuaminoheptane but that does not mean it is not similar. Dr. Rabin's report demonstrated that methylhexaneamine has the same molecular formula ($C_7H_{17}N$) as tuaminoheptane, and the same molecular weight (115.22). It has also a very similar chemical structure. No contrary evidence was adduced by the RFEA or the Athlete.

95. It is immaterial that the laboratory had to order a standard of the substance 4-methyl-2-hexanamine from Sigma-Aldrich in order to be able to confirm its presence in the sample, and similarly it is immaterial that the laboratory had not found this particular substance on any previous occasion. By IAAF Rule 33.4 WADA-accredited Laboratories are presumed to have conducted sample analyses and custodial procedures in accordance with the International Standards for Laboratories. The athlete may rebut this presumption by establishing that a departure from the International Standard for Laboratories has occurred. There was no attempt to do this by the RFEA or the Athlete and there has been, and can be, no suggestion that the laboratory's analysis was flawed or inaccurate.

96. The list of "Specified Substances" includes tuaminoheptane, but does not include methylhexaneamine, the similar substance found in the Athlete's samples. The substance is therefore a Prohibited Substance and not a Specified Substance.

97. Even if it were a Specified Substance, this would be of no avail to the Athlete. The fact that a substance is a Specified Substance does not eliminate the doping offence, but may result in a reduced sanction, provided that the athlete can establish that the use of such a Specified Substance was not intended to enhance sporting performance. Since the Athlete did not give any evidence as to the circumstances under which the substance came to be in her body, she was unable to assert that its use was not intended to enhance her sporting performance.

98. It is immaterial that the laboratory did not measure the amount of methylhexaneamine found since the substance is not a threshold substance. Furthermore, in order to establish a doping violation, it was not necessary to establish that the amount of the substance found could have affected the Athlete's performance.

**Conclusion**

99. In each case the Athlete was shown, to the requisite standard of proof (i.e. to a standard greater than a mere balance of probability), to have a prohibited substance in her samples. In each case therefore she has been shown to have committed an anti-doping rule violation. In neither case was she able to impugn the analysis or provide evidence to show, on the balance of probabilities, how the Prohibited Substance had come to be in her samples. She was therefore not in a position to assert that she bore no, or no significant, fault or negligence for the violations. The appeals by the IAAF will therefore be allowed.

100. A number of the points taken by the RFEA were essentially complaints about the contents of the IAAF rules as they stand or about the contents of the WADA code. Their remedy is not to seek to interpret the rules in ways which are inadmissible but to persuade those organisations that their rules should be amended.

101. The IAAF did not attempt, and would not have been able, to establish that the Athlete committed the second anti-doping rule violation after the Athlete had received notice, or after a reasonable attempt had been made to give her notice, of the first violation. Accordingly, by virtue of IAAF Rule 40.6, the two anti-doping rule violations are to be considered as a single violation. In each case, the sanction for the violation would be the same, namely a minimum period of two years' ineligibility. The sanction imposed will

therefore be based on a minimum two years' ineligibility, and is determined as a period of two years' ineligibility.

102. Pursuant to IAAF Rule 40.9, the period of ineligibility shall commence on the date of the hearing decision or – as in this case – if the hearing is waived, on the date the ineligibility is accepted or otherwise imposed. The Athlete's period of ineligibility shall commence on 22 September 2009. However, since the Athlete has already served periods of provisional suspension for a total of 316 days from 30 September 2008 to 21 January 2009 and again from 4 March 2009 to 21 September 2009, such periods shall be credited against the total period of ineligibility to be served.

103. Pursuant to IAAF Rule 39.1, the Athlete is disqualified from the first event in question, namely 100m hurdles at the IAAF Golden League meeting "Athletissima" held in Lausanne on 2 September 2008, and from all subsequent events until the commencement date of the period of ineligibility with all resulting consequences, including the forfeiture of all titles, awards, medals, points and prize and appearance money.

104. (...)

**ON THESE GROUNDS**

The Court of Arbitration for Sport rules that:

1. The appeals of the International Association of Athletics Federations are allowed.
2. Ms Josephine Onyia is declared ineligible for all competition in respect of the two anti-doping rule violations for a period of two years, commencing on 22 September 2009. However, credit is given for the periods of ineligibility already served because of the provisional suspensions totaling 316 days from 30 September 2008 to 21 January 2009 and from 4 March 2009 to 21 September 2009,
3. Ms Josephine Onyia is disqualified from the 100m hurdles at the IAAF Golden League meeting "Athletissima" held in Lausanne on 2 September 2008 and from all subsequent events until the commencement date of the period of ineligibility with all resulting consequences, including the forfeiture of all titles, awards, medals, points and prize and appearance money.
4. (…)

Lausanne, 22 September 2009

**THE COURT OF ARBITRATION FOR SPORT**

Judge James Robert Reid QC
President of the Panel

Prof. Richard H. McLaren
Arbitrator

Prof. Fernando Pombo
Arbitrator