Arbitration CAS 2021/A/8459 World Anti-Doping Agency (WADA) v. Polish Anti-Doping Agency (POLADA) & Jakub Krzewina, award of 17 October 2022

Panel: Ms Annett Rombach (Germany), Sole Arbitrator

Athletics (track and field)
Doping (whereabouts failure)
Athletes' presumption of negligence and their standard of care
Initial notification of inclusion in a RTP
Burden of proof in respect of the requirement of "reasonable causation"
Principle of reliance / misleading information in a notification
Notification of an incorrect number of failures as a sanction mitigating factor

1. **Athletes included in a Registered Testing Pool (RTP) have an obligation to provide, and keep updated, their whereabouts information, in order to be located for out-of-competition testing. Out-of-competition testing is at the heart of any effective anti-doping programme. To carry out effective testing of this nature, it is vital that athletes produce accurate and timely whereabouts information, so that they can be tested by surprise. Pursuant to Article I.4.2.e) of the WADA International Standard for Testing and Investigations 2020 (ISTI), athletes have the burden of rebutting the presumption that their negligence caused their failure to (i) be available at the specified location and (ii) update their whereabouts information to indicate the different location where they would be available for testing instead. While the standard of negligence implies that there is no strict liability in this context, mistakes done by athletes in respect of their whereabouts obligations should not be treated lightly, as otherwise it would be all too easy for a deceitful athlete to dodge out-of-competition controls. Therefore, an athlete must demonstrate that they applied due care in fulfilling their respective responsibilities, and that any failure to update their whereabouts information in the ADAMS system happened without any attributable fault on their part. An athlete bears a personal duty of care in ensuring compliance with anti-doping obligations. The standard of care for top athletes is very high in light of their experience, expected knowledge of anti-doping rules, and public impact they have on their particular sport. It follows that a top athlete must always personally take very rigorous measures to discharge these obligations.**

2. **Pursuant to Article I.2.1 2020 ISTI, a notification is only required in respect of the <u>initial</u> inclusion of an athlete into the RTP, but not for any voluntary reminder or update sent by the results management authority to the athlete at a later stage. Once an athlete has been included into the RTP, he or she continues to be subject to the requirements of the relevant NADO's regulations, unless and until he or she receives a written notice by the Anti-Doping Organization that he or she is no longer designated for inclusion in the RTP, or upon retirement. The official comment to Article I.2.1 ISTI makes it clear**

that, while Anti-Doping Organizations should be proactive in helping athletes avoid Filing Failures (including through systematic reminders about Whereabouts Filings and applicable deadlines), *"athletes remain fully responsible for complying with their filing requirements, irrespective of whether or not the Anti-Doping Organization has provided them with such support"*.

3. **According to Article 3.2.3(iv) of the POLADA Anti-Doping Regulations (ADR), the primary burden is on the athlete to demonstrate that an alleged departure from the WADA International Standard for Results Management 2021 (ISRM) *"could reasonably have caused"* the Filing Failure in question. Only if the athlete successfully demonstrates such reasonable causation, the burden of proof shifts to POLADA, which then has to prove that the departure did not cause the Whereabouts Failure. It is clear from the burden of proof scheme enshrined in Article 3.2.3(iv) of the POLADA ADR that without any offer of evidence by an athlete that the alleged departure from the International Standards (including ISRM and ISTI) could reasonably have caused the Whereabouts Failure, the assumed departure from these International Standards must be deemed irrelevant, *i.e.* does not invalidate the Whereabouts Failure. Pursuant to the relevant provision of the POLADA ADR, it is required that there is not only an abstract possibility of causation, but that an athlete demonstrates that in his or her specific case, the mistake reasonably caused an Anti-Doping Rule Violation (ADRV).**

4. **Under the principle of reliance, athletes must be principally allowed to rely on official information they receive from a NADO, and these organizations have a duty of care to make sure that they do not deliver potentially misleading information to athletes that are subject to strict anti-doping responsibilities. For any athlete, it is highly relevant to be correctly informed of the number of Whereabouts Failures committed within a 12-month period, because the number of Whereabouts Failures is a decisive factor for establishing an ADRV under Article 2.4 of the POLADA ADR. For an athlete to be informed of his or her second Whereabouts Failure within 12 months, this is a distinct "red flag" that any other such failure will result in an ADRV under Article 2.4 of the POLADA ADR. Conversely, notification of the first failure constitutes no more than a "yellow flag", indicating to the athlete that two more Whereabouts Failures are required to complete an ADRV under Article 2.4 of the POLADA ADR. When the relevant results management authority raises the "yellow flag" instead of the "red flag", this could, in theory, result in a material error in an athlete and influence the level of care this athlete exercises in fulfilling his whereabouts responsibilities, or the athlete's decision of whether or not to challenge the Whereabouts Failure in judicial proceedings. In other words, an athlete's ability to take informed decisions may suffer materially.**

5. **The notification of an incorrect number of failures is a procedural irregularity which may, potentially, affect an athlete's decisions with respect to a challenge or the degree of (enhanced) care to be applied in the management of anti-doping responsibilities. Even if an athlete is unable to prove that such irregularity reasonably caused the ADRV, it is appropriate to take this fact into consideration as a mitigating factor in the determination of the applicable sanction.**

I. THE PARTIES

1. The World Anti-Doping Agency ("WADA" or the "Appellant") is a private law foundation constituted under Swiss law in 1999 to promote and coordinate at international level the fight against doping in sport on the basis of the World Anti-Doping Code (the "WADC" or the "Code"). WADA has its registered seat in Lausanne, Switzerland, and its headquarters in Montreal, Canada.

2. The Polish Anti-Doping Agency ("POLADA" or the "First Respondent") is the National Anti-Doping organisation ("NADO") for the country of Poland, recognized as such by WADA. Its registered seat is in Warsaw, Poland.

3. Mr. Jakub Krzewina (the "Athlete" or the "Second Respondent") is a Polish track and field athlete specializing in the 400m and 4x400m disciplines. Mr. Krzewina was and is an athlete in the Registered Testing Pool ("RTP") of POLADA since 2016.

4. POLADA and Mr. Krzewina are collectively referred to as the "Respondents". The Appellant and the Respondents are collectively referred to as the "Parties".

II. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, she refers in this Award only to the submissions and evidence she considers necessary to explain her reasoning.

6. The present dispute concerns an alleged anti-doping rule violation ("ADRV") of the Athlete under Article 2.4 of the First Respondent's Anti-Doping Rules (the "POLADA ADR"), which addresses so-called whereabouts failures. A whereabouts failure ("Whereabouts Failure") is defined in Article 2.4 of the 2021 POLADA ADR as *"[a]ny combination of three missed tests and/or filing failures, as defined in the International Standard for Results Management, within a twelve-month period by an Athlete in a Registered Testing Pool"*[1]. The Athlete is charged with two missed tests and one filing failure within 12 months, as described in more detail below.

7. According to the WADA International Standard for Testing and Investigations 2020 ("ISTI") and the WADA International Standard for Results Management 2021 ("ISRM") [2], a filing failure ("Filing Failure") is defined as follows:

"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

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1 The 2020 POLADA ADR provides as follows: *"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".*

2 To the extent relevant in these proceedings, ISTI and ISRM contain materially similar provisions.

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, […]".

8. The 2020 ISTI and 2021 ISRM define a missed test ("Missed Test") as follows:

"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, […]".

9. On 31 May 2016, POLADA sent a letter to the Athlete, reminding him of his testing pool obligations in relation to his whereabouts information under WADA's Anti-Doping Administration Management System ("ADAMS"). In relevant part, the letter reads as follows (unchallenged English translation provided by the Appellant):

"We ask you to reliably and systematically fill in your data in the ADAMS system from the moment you receive the letter until further notice. At the same time we would like to remind you that failure to provide the above information is tantamount to a violation of anti-doping rules. If within 12 months there are 3 violations related to the lack of timely submission of data or 3 violations resulting from the submission of false data the competitor will be subject to a penalty from 1 to 2 years of disqualification. […]

Athlete is required to provide quarterly accurate information about his place of stay in the next quarter. He/she must provide his/her place of residence, training and competition locations for that quarter so that he/she can be found and tested during that period. Failure to comply with this requirement constitutes a failure to comply with the obligation to provide information on place and time of residence, and thus constitutes a violation of Article 2.4 of the 2015 version of the World Anti-Doping Code. […]

In accordance with Article 2.4 of the World Anti-Doping Code, an Athlete, if he/she prevents an unannounced doping control on three occasions within a period of twelve months, whether as a result of failure to keep his/her whereabouts up-to-date or of leaving the place of the test, regardless of which Anti-Doping Organization has reported the incident".

A. The First Missed Test

10. On 4 September 2020, the Athlete was unavailable for a doping test at the residence address registered in ADAMS (the "First Missed Test"). Pursuant to the Unsuccessful Attempt Report prepared by the Doping Control Officer ("DCO") on the same day, the door had been opened by the Athlete's fiancée, who informed the DCO that the Athlete was in the hospital to undergo surgery. As per a subsequent telephone conversation between the DCO and the Athlete, it was confirmed that the Athlete was in the hospital and had forgotten to change his residence data in the ADAMS system.

11. On the same day, POLADA delivered a notification to the Athlete, informing him in writing that the DCO *"did not find you at your place of residence reported in the ADAMS system…"*. The Athlete was also invited to submit an explanation within seven days. The Athlete did not provide any explanation.

12. On 14 September 2020, POLADA sent the Athlete a *"final notification"*, which notified the

Athlete of the First Missed Test (*"[t]his is your first anti-doping violation"*), and explained that three violations relating to the duty to report whereabouts information within a 12-month period will be subject to a suspension from one to two years under the applicable doping regulations of the Appellant and the First Respondent.

B. The Filing Failure

13. On 16 December 2020, POLADA sent an e-mail to the Athlete, informing him (in the body text of the e-mail) that the final deadline for making his Whereabouts Filing for the first quarter of 2021 ("Q1/2021") was 20 December 2020. Attached to this e-mail was a letter with further information. The letter mentioned that the deadline for the Whereabouts Filing for Q1/2021 was 15 December 2020 (*i.e.* it diverted from the information provided in the body text of the e-mail).

14. On 8 January 2021, POLADA notified the Athlete of his failure to make his Q1/2021 Whereabouts Filing, and informed him that he had committed a Filing Failure. The Athlete was invited to provide an explanation within seven days. The notification contained, *inter alia*, the following information (unchallenged English translation provided by the Appellant):

"If you have not yet entered information about your whereabouts, you should immediately complete it in the ADAMS system.

[…]

If, in the end, a filing failure is recorded, it will be the FIRST error regarding the place of residence registered against you by POLADA within the twelve-month period referred to in Article 5.9.2 of POLADA".

15. On 13 January 2021, the Athlete made his Whereabouts Filing in ADAMS.

16. On 8 February 2021, POLADA sent the Athlete a *"final notification"*, which notified the Athlete of the Q1/2021 Filing Failure. The letter contained the following information (English translation provided by the Appellant):

"You must submit your appeal in writing to POLADA no later than 15.02.2021.

If you do not finally lodge an appeal a FILING FAILURE will be recorded with a date of 25/12/2020 and this will be the FIRST FILING FAILURE recorded by POLADA within the twelve month period referred to in Article 2.4 of the POLADA Anti-Doping Rules.

It is emphasized that other Anti-Doping Organizations (ADOs) may have recorded your residence entry errors. If so, you should have been notified accordingly. Please note that a Failing to Enter Residence Data (FF-filing failure) reported by other ADOs is also recognised by POLADA provided that it was made in accordance with the applicable requirements set out in the International Standard for Testing and Investigations".

C. The Second Missed Test

17. On 30 March 2021, the Athlete was unavailable for a doping test at the residence address registered in ADAMS (the "Second Missed Test"). Pursuant to the Unsuccessful Attempt Report prepared by the DCO on the same day, a woman answered the intercom and explained that the Athlete was in Karpacz at a training camp. As per a subsequent telephone conversation between the DCO and the Athlete, it was confirmed that the Athlete was at the training camp and had forgotten to change his residence data in the ADAMS system.

18. On 6 April 2021, POLADA delivered a notification to the Athlete, informing him in writing of the Second Missed Test. The Athlete was invited to submit an explanation within seven days. Moreover, the Athlete was informed that if a Missed Test were recorded, it would be his third Whereabouts Failure in twelve months:

"If a final missed test (MT) is recorded, the THIRD error recorded against you by POLADA within the twelve-month period referred to in Article 5.9.2 of POLADA will be recorded".

19. On 8 April 2021, the Athlete submitted his explanations to POLADA with regard to the Second Missed Test. The explanation read as follows (unchallenged English translation provided by the Appellant):

"During the preparations for the European Indoor Athletics Championships in Torun I fell ill with COVID-19 (6.03.2021r.) which resulted in the inability to participate in these very important for me competitions. I spent the next 2 weeks in isolation, after which I planned a gradual return to sport. Unfortunately, health problems did not allow for precise planning of my activity.

On March 23rd I went to a PZLA training camp in Karpacz, where I was supposed to stay until March 27th (entered in the Adams system). After consultation with the doctor (Dr. Jaroslaw Krzywanski) and coach (Marek Rozej) we decided to extend the training camp to 30.03. Despite the gradual improvement of my physical fitness I had some mental health problems in the form of sleep disorders, deterioration of concentration, association and mood which were caused both by the COVID-19 and lost sports competitions.

I made the changes to the Adams system through an app on my phone, which I was already having problems with while logging in.

After successfully logging in, I began changing my residency data from my home in Poznań to a training camp in Karpacz. While making changes the application crashed twice and I had to log in again.

After checking whether the data were saved correctly, I logged out of the application.

On 30.03 after a phone call from my wife with information about the visit of the inspector, I immediately logged into the application (attachment 1) with the belief that my stay data for that day are stored as Karpacz. My mistake of wrongly entered dates can be explained by the fact that in the application, in the calendar, the first day of the week is entered as Sunday (see attachment 2).

When I talked to the coach about extending the training camp, I did not use dates but only the fact that it was extended until Tuesday. Due to the fact that the calendar starts from Sunday I entered my stay data from

Karpacz on Monday, 29.03; written as the second day of the week, thinking that it is Tuesday and everything is correct.

Today, in retrospect, I know that my actions during that period were significantly disturbed after the COVID-19 and my association processes were not functioning properly. In addition, the antidepressants I was given may have affected my decisions and actions. It certainly had an impact on the mistakes I made.

As a representative of Poland I was repeatedly subjected to doping control and there was never any doubt about the results of my tests. The last doping control conducted at my home on 29.01.2021 also gave a negative result and therefore I do not believe that I have the slightest reason to deliberately avoid doping controls and the situation that occurred on 30.03.2021 was an unintentional mistake".

20. On 14 April 2021, POLADA sent the Athlete a *"final notification"*, which informed him of the Second Missed Test. He was also notified about his right to file a complaint against the decision by no later than 21 April 2021. The letter further informed the Athlete as follows:

"If you ultimately fail to appeal the MISSED TEST (MT) ERROR will be noted with the date 30.03.2021 and this will be the THIRD error regarding the place of stay registered by POLADA within the twelve-month period referred to in Article 2.4 POLADA Anti-Doping Rules".

D. The Proceedings before the POLADA Disciplinary Panels

21. On 19 April 2021, the Athlete filed a complaint against the Second Missed Test, in which he reiterated that his failure to update his whereabouts information in the ADAMS system was an unintentional mistake. The complaint was dismissed by the POLADA Disciplinary Panel as *"manifestly unfounded"* on 22 April 2022. The grounds of this decision read – in its relevant parts – as follows:

"[T]he athlete's explanation regarding the mistake due to the fact that the calendar in the application shows Sunday as the first day of the week cannot be regarded as credible in the light of the unsuccessful control attempt report, from which it follows that the athlete admitted that he forgot to change the data in the system.

Also, the COVID-19 issues described by the contestant in no way relieve the contestant of his obligation to provide accurate and up-to-date information about his whereabouts. Moreover, the adoption and acceptance of such a line of defence could, in today's reality, give rise to abuse and potentially condone such actions".

22. On 23 April 2021, POLADA charged the Athlete with an ADRV for having committed three Whereabouts Failures within a 12-month period pursuant to Article 2.4 POLADA ADR ("Notice of Charge"). In the Notice of Charge, the Athlete was also provisionally suspended.

23. On 28 April 2021, upon request by the Athlete, a preliminary hearing was held by the POLADA Disciplinary Panel of the First Instance ("First Instance Panel"). The Athlete gave detailed evidence at the hearing. At the end of the preliminary hearing, the First Instance Panel informed the Athlete and POLADA of the necessity to obtain further evidence, including oral witness testimony. The First Instance Panel rejected the Athlete's request for annulment of the provisional suspension. The hearing before the First Instance Panel continued on 18 May 2021.

24. On 24 May 2021, the First Instance Panel provided the operative award of its decision, dismissing the ADRV charge brought against the Athlete. The First Instance Panel separately notified the substantive reasoning for its decision on 14 July 2021.

25. On 30 July 2021, POLADA appealed the Decision to the POLADA Disciplinary Panel at Second Instance ("Second Instance Panel").

26. On 26 August 2021, the Second Instance Panel handed down the operative part of its decision which reads as follows:

"1. The appeal is dismissed in its entirety".

27. On 12 October 2021, the reasoning of the decision was provided in Polish (together the "Appealed Decision"). The English copy of the Appealed Decision was provided on 25 October 2021. The Second Instance Panel held as follows:

"1.10. According to Article 3.2.3. of the POLADA ADR (formerly 3.2.4. ADR 2020), departures from any other International Standard or other anti-doping rule or policy set forth in the Code or Anti-Doping Organization rules shall not invalidate (…) other evidence of an anti-doping rule violation, and shall not constitute a defence to an anti-doping rule violation. If, however, the athlete or other person establishes that a departure from one of the specific International Standard provisions listed below could reasonably have caused an anti-doping rule violation based on (…) whereabouts failure, then the Anti-Doping Organization shall have the burden to establish that such departure did not cause (…) the whereabouts failure.

1.11. In the opinion of the Second Instance Panel, POLADA failed to prove that the incorrect instruction to the athlete on 8 January 2021 and 8 February 2021 regarding the number of the whereabouts failures the athlete had on his record as at the date of the notice (paragraph 5 of the appeal; paragraph 46 of the preparatory letter of 12 May 2020) had not led to an anti-doping rule violation. The extract from the athlete's testimony of 28 April 2021 referred to by the appealing party, which cannot be interpreted in isolation from the content of the notices of 8 January 2021 and 8 February 2021, cannot be regarded as such evidence (paragraphs 55 - 58). POLADA erroneously informed the athlete twice about the number of the whereabouts failures found, due to which it indisputably contributed to the athlete's anti-doping rule violation. The number of the errors committed and inadvertent but undoubted misinformation of the athlete by POLADA, even in light of the athlete's negligence in the case, cannot burden the athlete. In accordance with the comment to ISRM Article B.2.1: All that is required is to give the Athlete notice of the first Filing Failure and an opportunity to avoid a subsequent one, before a subsequent Filing Failure may be pursued against them. In particular, it is not necessary to complete the Results Management process with respect to the first Filing Failure before pursuing a second Filing Failure against the Athlete. POLADA did not comply with the above requirement and, through its own errors, led to a situation in which the athlete failed to avoid further failures or to subject them to the appropriate appeals procedure. The Athlete is not without fault in the present case and the burden for each of the failures found, laid down in Article 2.4 of the POLADA ADR, falls on the athlete, however taken together they do not provide the basis for imputing to him a violation of Article 2.4 of the POLADA ADR.

1.12. In this case, attention should be drawn in particular to POLADA's explanations given to a member of the Second Instance Panel at the hearing on 26 August 2021. In response to question of the member of the Second Instance Panel whether the ISRM provision has a guarantee nature, POLADA gave a positive answer.

However, POLADA erroneously assumed that the role of the First Instance Panel as well as the Second Instance Panel in this case is, despite POLADA's formal errors (paragraph 43), to establish the athlete's awareness of the violation under Article 2.4 of the POLADA ADR. The Second Instance Panel is of the opinion that the athlete was aware of the violations under Article 2.4 of the ADR, but this does not change the consequences of the erroneous instructions. The athlete, trusting POLADA and the instructions, took certain steps or failed to do so (no complaint). The POLADA's role was to instruct the athlete in accordance with rule B.2.1 of the ISRM on the number of failures found so that the athlete could make a fully informed decision to, inter alia, lodge a complaint about the failure found, as laid down in Article 2.4. of the POLADA ADR. Therefore, erroneous failures must also be regarded as limitations of the athlete's right to a court. Since WADA has adopted an assumption of a specific continuous act with regard to this failure and has given the athletes a certain guarantee of their rights, the Second Instance Panel cannot violate it in the name of the fight against doping. Responsibility for anti-doping rules is strict responsibility. It is not only the athlete who bears responsibility for due compliance with the POLADA ADR. In the opinion of the Second Instance Panel, POLADA bears no less responsibility for compliance with the POLADA ADR. As professionalism is required from athletes, the same standard should be expected from POLADA.

1.13. Finally, POLADA's statement from the aforementioned hearing on 26 August 2021 should be recalled: "The rule (B.2.1 of the ISRM – Panel's note) is obviously intended to protect the athlete so that he knows how many of these single failures he has already committed, in order to ensure that there are not three of them in a 12-month period (...)". For these reasons, the Second Instance Panel considered the appeal unfounded, and to the extent that the present charge constituted "obvious" grounds for dismissing the appeal, the remaining charges were disregarded by the Second Instance Panel (it did not assess their merits)".

28. On 27 October 2021, WADA requested the case file which was, ultimately, received on 28 October 2021.

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

29. On 17 November 2021, the Appellant filed its Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the Appealed Decision, pursuant to Articles R47 *et seq.* of the Code of Sports-related Arbitration (the "CAS Code") (the "Appeal"). The Appellant requested the appointment of a Sole Arbitrator in accordance with Articles R48 and R50 para. 1 of the CAS Code.

30. On 19 November 2021, the CAS Court Office informed the Parties about the Appeal, requested the Appellant to file its Appeal Brief in accordance with Article R51 of the CAS Code and noted the Appellant's choice to proceed with its appeal in the English language. In addition, the Respondents were invited to inform the CAS Court Office whether they agree to the appointment of a Sole Arbitrator.

31. On 26 November 2021, the Second Respondent informed the CAS Court Office that he did not agree with the appointment of a Sole Arbitrator and requested that the Appeal be decided by a three-member panel. Furthermore, the Second Respondent requested to continue the proceedings in the Polish language.

32. On 29 November 2021, the Appellant filed its Appeal Brief in accordance with Article R51 of

the CAS Code. In its Appeal Brief, the Appellant expressed its interest to hold a hearing.

33. On 30 November 2021, the CAS Court Office acknowledged receipt of the Appeal Brief and invited the Respondents to submit their Answer within twenty (20) days, pursuant to Article R55 of the CAS Code. Furthermore, the CAS Court Office informed the Parties that because of the Parties' respective disagreement, the President of the CAS Appeals Arbitration Division, or her Deputy, would decide (1) on the number of arbitrators, in accordance with Article R50 para. 1 of the CAS Code and (2) on the language of the proceedings, in accordance with Article R29 of the CAS Code.

34. On 3 December 2021, the Appellant provided its position on the procedural issues and, *inter alia*, expressed its opposition to conduct the proceedings in the Polish language.

35. On the same date, both Respondents separately informed the CAS Court Office that they reject to pay their respective shares of the advance on costs. The First Respondent also opposed the Appellant's proposal of a Sole Arbitrator.

36. On 6 December 2021, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to submit the present case to a Sole Arbitrator.

37. On 13 December 2021, the Second Respondent requested the CAS Court Office to suspend the time limit for the filing of his Answer until payment of the advance on costs by the Appellant.

38. On 14 December 2021, the CAS Court Office informed the Parties that, pursuant to Article R55 para. 3 of the CAS Code, the initial time limit for the Second Respondent to file his Answer was set aside and that a new time limit would be fixed upon the Appellant's payment of the advance of costs.

39. On 20 December 2021, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided that the language of the proceedings shall be English.

40. On 22 December 2021, pursuant to Article R54 para. 1 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:

    Sole Arbitrator: Ms. Annett Rombach, Attorney-at-law, Frankfurt am Main, Germany.

41. Moreover, the CAS Court Office informed the Parties that the Appellant had paid the total of the advance of costs and invited the Second Respondent to submit his Answer within twenty (20) days, pursuant to Article R55 of the Code. Furthermore, the CAS Court Office noted that it had not received any communication from the First Respondent. It informed the latter that the Sole Arbitrator may nevertheless proceed with the arbitration and deliver an award, if the First Respondent failed to submit its Answer in accordance with Article R55 para. 2 of the CAS Code.

42. On 11 January 2022, the Second Respondent filed his Answer in accordance with Article R55 of the CAS Code. He requested a hearing.

43. On 14 February 2022, after consultation with the Parties, the CAS Court Office informed the Parties that a hearing would be held on 11 March 2022 via videoconference.

44. On 28 February 2022, the CAS Court Office, on behalf of the Sole Arbitrator, transmitted the Order of Procedure to the Parties which was duly signed and returned by the Parties within the prescribed time limit.

45. On 11 March 2022, a hearing via video-conference was held. At the outset of the hearing, all Parties confirmed that they had no objection to the constitution and composition of the arbitral tribunal.

46. In addition to the Sole Arbitrator and Mr. Björn Hessert, Counsel to the CAS, the following persons attended the video hearing:

For the Appellant:	Mr. Adam Taylor, Counsel; Mr. Ross Wenzel, WADA General Counsel;
For the First Respondent:	Mr. Michael Rynkowski, POLADA Director;
For the Second Respondent:	Mr. Jakub Krzewina, Athlete; Mr. Lukasz Klimczyk, Counsel;
	Ms. Magdalena Moron, interpreter;
	Dr. Jaroslaw Krzywanski, witness; Dr. Malgorzata Szewczyk-Nowak, witness.

47. The hearing began at 8:30 am and ended at 12:40 pm without any technical interruption or difficulty. The Parties were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Sole Arbitrator. The witnesses were questioned by the Parties and the Sole Arbitrator. After the Parties' final and closing submissions, the hearing was closed and the Sole Arbitrator reserved her detailed decision for this written award.

48. At the end of the hearing, the Parties expressly confirmed that they had no objections in relation to their respective rights to be heard and that they had been treated equally in these arbitration proceedings.

IV. THE POSITIONS OF THE PARTIES

49. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Parties. The Sole Arbitrator confirms, however, that she has carefully considered all the submissions made by the Parties, whether or not there is specific reference to them in the following summary.

A. The Appellant's Position

50. The Appellant submits the following in substance:

- The Athlete committed three Whereabouts Failures within a twelve-month period, through a combination of apathy, delay and error. Therefore, his behaviour constitutes an ADRV.

- With regard to the First Missed Test:

  - The relevant criteria for a Missed Test under ISTI/ISRM (Art. I.4.3 (a) - (e) 2020 ISTI/Art. B.2.4 (a) - (e) 2021 ISRM) are met.

  - There is a presumption of negligence on the Athlete's part (Art. I.4.3 (e) 2020 ISTI/Art. B.2.4 (e) 2021 ISRM), and he was in fact negligent because he knew two days beforehand that he was going to be in the hospital for an operation, and yet he failed to update his Whereabouts information in the ADAMS system. Both the First and Second Instance Panel found the Athlete to have been at fault (*i.e.* negligent) in respect of the First Missed Test.

- With regard to the Filing Failure:

  - The relevant criteria for a Filing Failure under ISTI/ISRM (Art. I.3.6 (a) - (d) 2020 ISTI/Art. B.2.1 (a) - (d) 2021 ISRM) are met.

  - In May 2016, the Athlete was duly notified about his continuing/renewed obligation to make Whereabouts Filings as part of the Polish whereabouts program or testing pool system, and that a period of ineligibility would result from three Whereabouts Failures in twelve months.

  - The Athlete did not provide his Q1/2021 Whereabouts Filing by the applicable deadline, namely by 1 January 2021. He only provided his Whereabouts Filings on 13 January 2021. For thirteen days, he was unavailable for testing by POLADA.

  - Art. I.3.6 (c) 2020 ISTI /Art. B.2.1 (c) 2021 ISRM has no relevance in the present case. It specifically refers to the situation when the Filing Failure under consideration is a second or third Filing Failure in the same quarter. In the present case, there is only one Filing Failure under consideration, and it was the first of its kind, as the other two Whereabouts Failures were Missed Tests. Therefore, the notice requirements within this provision are irrelevant.

  - It can be deducted from Art. I.3.6 (d) 2020 ISTI /Art. B.2.1 (d) 2021 ISRM that there is a presumption of negligence arising solely out of the Athlete's notification of his Whereabouts obligation in May 2016 and his failure to comply with his respective duties. The Athlete was in fact negligent because he failed to consider his obligation to file Whereabouts information at all until after the deadline had passed (including by failing to check or read the reminder e-mail sent to him by POLADA).

- The Appealed Decision contains several errors with regard to the Filing Failure. The Appealed Decision relied predominantly on a number of minor inconsistencies by POLADA in its correspondence with the Athlete which were not in any way causative of the Filing Failure. The Appealed Decision also failed to correctly understand or interpret the relevant provisions of the ISTI/ISRM and their interaction with the burdens of proof in the POLADA ADR.
- The Second Instance Panel wrongfully interpreted the burden of proof mechanism contained in Art. 3.2.3 POLADA ADR.
- Art. B.2.1. (c) 2021 ISRM, on which the Appealed Decision mainly relies, is inapplicable in the present case. The Second Instance Panel completely misinterpreted the effect of these provisions. The present case was not the case of a second or third Filing Failure.
- POLADA had no burden of proof under Art. 3.2.3 POLADA ADR until the Athlete's initial proof that a departure from ISTI/ISRM could reasonably have caused the Whereabouts Failure. The Athlete did not meet his respective burden of proof.
- In any event, POLADA clearly met its presumed burden of proof to establish that the alleged departure did not cause the Whereabouts Failure.
- With regard to the two different deadlines mentioned by POLADA in its correspondence of 16 December 2020, regarding the Athlete's Q1/2021 filing, the Athlete himself gave clear evidence that he did not read that correspondence. Its content could, therefore, not have any causative effect on his Filing Failure. In any event, the Athlete missed both deadlines, and both deadlines expired before the first day of the new quarter (*i.e.* before 1 January 2021) for which the Athlete should have made his Whereabouts Filing.

- With regard to the Second Missed Test:
  - The relevant criteria for a Missed Test under Art. B.2.4 (a) - (e) of the 2021 ISRM are met.
  - The Athlete received a testing pool notification letter in 2016. A DCO unsuccessfully attempted to test him on 30 March 2021. There is a presumption of negligence on the Athlete's part, and he was in fact negligent because he made a basic and avoidable error in updating his Whereabouts information in the ADAMS system. Despite being an experienced athlete, he did not realize that the calendar week in ADAMS started on Sunday rather than Monday and therefore did not update enough dates for the full time that he was at the training camp. Both the First and Second Instance Panels found the Athlete to have been at fault (*i.e.* negligent) in respect of the Second Missed Test.
- The Athlete committed the First Missed Test, the Filing Failure and the Second Missed Test within a 12-month period. He is, therefore, guilty of an ADRV pursuant to Art. 2.4

POLADA ADR.

- In accordance with Article 10.3.2 of the POLADA ADR, the Appellant requests a Period of Ineligibility of between one and two years, but towards the upper end of the bracket, as in particular: (a) the Athlete had time before his hospital stay in which he could have updated his Whereabouts information; (b) the Athlete was entirely disinterested in his obligations for the Second Whereabouts Failure and failed to do anything or even think about doing anything until the deadline had (long) passed; and (c) the ADAMS system is straightforward to use and the Athlete had been using it since 2016 (and apparently earlier).

51. The Appellant requests the following relief:

"1. The Appeal of WADA is admissible.

2. The dispositive decision of 26 August 2021 and the linked 'justification' of 12 October 2021 rendered by the POLADA Disciplinary Panel of the Second Instance in the matter of Jakub Krzewina are set aside.

3. Jakub Krzewina is found to have committed an anti-doping rule violation pursuant to Article 2.4 of the POLADA ADR 2020 and/or the POLADA ADR 2021.

4. Jakub Krzewina is sanctioned with a period of ineligibility of between one and two years starting on the date on which the CAS Appeals Division award enters into force. Any period of provisional suspension effectively served by Jakub Krzewina before the entry into force of the CAS Appeals Division award shall be credited against the total period of ineligibility to be served.

5. All competitive results obtained by Jakub Krzewina from and including 30 March 2021 until the date on which the CAS Appeals Division award enters into force are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

6. The Respondents are ordered, jointly and severally, to bear the arbitration costs of these proceedings.

7. The Respondents are ordered to make a substantial contribution to WADA's legal and other costs in connection with these proceedings".

B. The First Respondent's Position

52. The First Respondent did not file an Answer. However, in its letter dated 3 December 2021, the First Respondent submitted that it considered the Second Respondent guilty of an ADRV under Article 2.4 of the POLADA ADR, and that the Appeal is legitimate, justified and necessary.

C. The Second Respondent's Position

53. The Second Respondent submits the following in substance:

- The First and the Second Instance Panel correctly found that the Athlete did not violate Article 2.4 of the POLADA ADR. Both Panels concluded that POLADA had failed to meet its results management obligations under the applicable rules.

- Because professionalism and extreme care is required from athletes in respect of compliance with the anti-doping rules, the same level of professionalism and care (and even greater, as it is the anti-doping organisation that establishes the rules) should be expected from anti-doping organisations like POLADA.

- The rigorous requirements regarding written notification of athletes' duties and potential Whereabouts Failures, as well as the possible negative consequences for the anti-doping organisations when breaching those requirements, are supported by the judicial practice of CAS (see e.g. CAS 2009/A/1832).

- With regard to the First Missed Test:

    - The Athlete was under stress because of his upcoming surgery, which impacted his mental and physical health. It was because of this stress that he inadvertently forgot to update his Whereabouts information in the ADAMS system and thereby caused the First Missed Test. The Athlete was not negligent, because he was confronted with urgent health- and life-saving procedures in extraordinary circumstances (*i.e.* the COVID-19 pandemic and increased sanitary restrictions).

    - Even if the Athlete had properly updated his Whereabouts information, it would have been impossible for the DCO to take a sample from him on 4 September 2020. At that time, third parties were banned from entering any medical facility (including the hospital in which the Athlete was treated) because of the COVID-19 pandemic. The Athlete's failure to properly update his Whereabouts information in the ADAMS system was, therefore, not causative for the DCO's inability to take a sample from the Athlete on 4 September 2020.

- With regard to the Filing Failure:

    - A Filing Failure cannot be assumed whenever a (notification) requirement of ISTI/ISRM has not been fulfilled.

    - The First and Second Instance Panels correctly concluded that the Athlete had not been properly notified of his status as a member of the RTP and his respective obligations. In the past, POLADA had always notified the Athlete about his obligations to provide quarterly whereabouts information via regular mail and e-mail. The notification regarding the year 2021 was only transmitted via e-mail. A mere e-mail notification is insufficient, as confirmed by Art. I.3.1 a) 2020 ISTI/ Art. 2.1 a) 20021 ISRM, pursuant to which the Athlete has to provide his *"complete mailing address where correspondence may be sent* […] *for formal notice purposes"*. As a result of the improper notification, the Athlete cannot be declared to have committed a Filing Failure in the sense of Art. I.3.6 b) 2020 ISTI/Art. B.2.1 b) 2021 ISRM.

    - Moreover, the Athlete was erroneously advised by POLADA of (i) the time limit

for filing his Whereabouts information, and (ii) of the number of Whereabouts Failures recorded for him at the time of the notification.

- In POLADA's follow-up notices of 8 January 2021 and 8 February 2021, the Athlete was erroneously informed that the Filing Failure was the FIRST Whereabouts Failure recorded for him. The notification of 8 February 2021 refers to the Athlete's first Whereabouts Failure, not his first Filing Failure. In this respect, the Appellant provided a wrong translation of the original Polish version of the letter. The erroneous information on the number of Whereabouts Failures effectively misled the Athlete. His opposite statement at the First Instance Panel's hearing in April/May 2021 was caused by the fact that he may have misunderstood the questions because of his psychiatric treatment and due to the lack of presence of a professional attorney.
- POLADA also violated Art. I.5.2 d) 2020 ISTI/ Art. B.3.2 d) 2021 ISRM, pursuant to which it should have notified the Athlete within fourteen (14) days of the Whereabouts Failure. While the Filing Failure occurred on 16/21 December 2020 (*i.e.* after the expiry of the time limits set by POLADA for the transmission of the information), the first notice in respect of the Filing Failure was sent to the Athlete only on 8 January 2021.
- Contrary to what the Appellant asserts, the cases CAS 2011/A/2671 and CAS 2017/A/5112 are not applicable to the present case, for various reasons.

- With regard to the Second Missed Test:
  - The Athlete indeed updated his whereabouts for 30 March 2021. These changes were, however, not saved in the ADAMS system either because of technical reasons, or because of the antidepressants taken by the Athlete at the time, combined with his poor health after a COVID-19 infection. It is illogical to assume that the Athlete would have updated his details for only two days (28 and 29 March 2021), but not for the third day (30 March) of the same training camp. The Athlete's poor health in March 2021 confirms that any potential errors were not the result of his negligence.
- Any potential Period of Ineligibility under Article 10.3.2 of the POLADA ADR should be set to the lowest possible limit (*i.e.* 12 months), for the following reasons:
  - The Athlete had a diagnosed depression, which affected his ability to properly perform his anti-doping-related duties;
  - Despite the Athlete's longstanding sporting experience, he never received a considerable education in the field of anti-doping rules. Under CAS jurisprudence (e.g. CAS 2012/A/2822) the lack of knowledge of anti-doping rules and related obligations constitutes a mitigating factor in assessing the Athlete's fault;
  - The Athlete is generally careful and has never been reckless in respect of his anti-doping obligations. None of his numerous samples ever revealed the presence of a

prohibited substance. The present case would be his first ADRV in a long sporting career.

- The requested disqualification of the Athlete's competitive results would be unfair, as the potential ADRV did not have any impact on the sporting results achieved by the Athlete during the period in which he was eligible to participate in sports competitions (see also CAS 2013/A/3274; CAS 2007/A/1362 & 1363).

54. The Second Respondent requests the following relief:

*"**In principal***

81. The Athlete hereby respectfully requests that the CAS to rules [sic] *that:*

1) the appeal of WADA is dismissed;

2) the dispositive decision of 26 August 2021 and the linked 'justification' of 12 October 2021 rendered by the POLADA Disciplinary Panel of the Second Instance in the matter of Mr. Jakub Krzewina is confirmed;

3) the arbitration costs are borne entirely by WADA;

4) the Athlete is granted a significant contribution to its legal and other costs in connection with these proceedings.

In alternative

82. Solely out of an abundance of caution, in the event that CAS considers that the appeal submitted by WADA merits to be upheld and the decision rendered by the Second Instance Disciplinary Panel of POLADA is set aside, the Athlete hereby respectfully requests:

1) to impose the lowest possible penalty of 12 months period of ineligibility with credit for the period of temporary suspension from 23 April 2021 to 24 May 2021;

2) not to disqualify any competitive results obtained by Mr. Jakub Krzewina from and including 30 March 2021 until the date on which the CAS award enters into force;

3) not to charge the Athlete with any arbitration costs of these proceedings (including WADA costs);

4) order POLADA to pay all the arbitration costs of these proceedings (including WADA costs)".

V. JURISDICTION

55. Article R47 para. 1 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the 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".

56. The 2021 POLADA ADR, which is applicable to the procedural aspects of the present appeal, provides for the jurisdiction of the CAS on WADA's challenge of the Appealed Decision. In relevant part, Art. 13 of the 2021 POLADA ADR provides as follows:

"13.1 Decisions Subject to Appeal

Decisions made under the Code or these Anti-Doping Rules may be appealed as set forth below in Articles 13.2 through 13.7 or as otherwise provided in these Anti-Doping Rules, the Code or the International Standards. […]

13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, Provisional Suspensions, Implementation of Decisions and Authority

A decision that an anti-doping rule violation was committed, a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation, or a decision that no anti-doping rule violation was committed; […] *may be appealed exclusively as provided in this Article 13.2.*

[…]

13.2.2 Appeals Involving Other Athletes or Other Persons

In cases where Article 13.2.1 is not applicable, the decision may be appealed to the Second Instance Disciplinary Panel. The appeal process shall be carried out in accordance with the International Standard for Results Management.

13.2.3.2 Appeals Involving Other Athletes or Other Persons

In cases under Article 13.2.2, the following parties shall have the right to appeal: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) POLADA and (if different) the National Anti-Doping Organization of the Person's country of residence or countries where the Person is a national or license holder; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; Polish Sport Federation and (f) WADA.

***For cases under Article 13.2.2, WADA**, the International Olympic Committee, the International Paralympic Committee, and the relevant International Federation **shall also have the right to appeal to CAS with respect to the decision of the Second Instance Disciplinary Panel**"* [emphasis added].

57. The Appealed Decision is a decision rendered by the *"Second Instance Disciplinary Panel"* within the meaning of Article 13.2.3.2, against which a CAS appeal is admissible. The Sole Arbitrator, consequently, has jurisdiction to decide on the Appeal filed against the Appealed Decision.

58. The Parties further confirmed that CAS has jurisdiction by execution of the Order of Procedure.

VI. ADMISSIBILITY

59. Article 13.6.2 of the 2021 POLADA ADR provides as follows:

> *"The time to file an appeal to the Second Instance Disciplinary Panel shall be twenty-one (21) days from the date of receipt of the decision by the appealing party. The above notwithstanding, the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings having led to the decision subject to appeal:*
>
> *(a) Within fifteen (15) days from notice of the decision, such party/ies shall have the right to request a copy of the full case file pertaining to the decision from the Anti-Doping Organization that had Results Management authority;*
>
> *(b) If such a request is made within the fifteen (15) day period, then the party making such request shall have twenty-one (21) days from receipt of the file to file an appeal to the National Anti-Doping Appeal Panel.*
>
> *The above notwithstanding,* ***the filing deadline for an appeal filed by WADA shall be the later of:***
>
> *(a) Twenty-one (21) days after the last day on which any other party having a right to appeal could have appealed, or*
>
> *(b)* ***Twenty-one (21) days after WADA's receipt of the complete file relating to the decision****"* [emphasis added].

60. WADA received the case file from POLADA on 28 October 2021. Therefore, the 21-day time limit to file the Appeal expired on 18 November 2021. WADA's Statement of Appeal submitted on 17 November 2021 was, therefore, filed in time.

61. The Statement of Appeal also complied with the requirements of Article R48 of the CAS Code. Furthermore, the admissibility of the Appeal is not challenged by any Party.

62. The Appeal are therefore admissible.

VII. APPLICABLE LAW

63. For appeal proceedings, Article R58 of the CAS Code provides the following:

> *"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".*

64. The *"applicable regulations"* for the purposes of Article R58 of the Code are those contained in the POLADA ADR because the Appeal is directed against a decision issued by the Second Instance Panel of POLADA, which was passed applying the POLADA ADR. Subsidiarily, Polish law applies in case of a lacuna in the POLADA ADR, as the POLADA is domiciled in Poland.

65. In terms of its applicability *rationae temporis*, the Sole Arbitrator finds that both the 2020 and the 2021 POLADA ADR apply, because the Athlete's three Whereabouts Failures occurred in 2020 (the First Missed Test) and in 2021 (the Filing Failure and the Second Missed Test). As per Article 2.4 of the 2020 POLADA ADR, the ISTI applies as to the question of whether the Athlete committed three Whereabouts Failures. Under Article 2.4 of the 2021 POLADA ADR, this same issue is governed by the ISRM. Because the wording of the relevant provisions in the 2020 ISTI and the 2021 ISRM are materially identical, the Sole Arbitrator, in her analysis below, principally refers to both standards.

VIII. SCOPE OF REVIEW

66. According to Article R57 para. 1 of the CAS Code,

> *"the Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance…".*

67. The unlimited scope of review is also confirmed by Article 13.1.1 of the 2021 POLADA ADR which provides – in its pertinent parts – as follows:

> *"The scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker".*

68. Against this background, the Sole Arbitrator finds that her power to review the facts and the law of the present case is not limited.

IX. MERITS

69. Considering all Parties' submissions, the main issues to be resolved by the Sole Arbitrator are the following:

A. Did the Athlete commit the ADRV contemplated by Article 2.4 of the POLADA ADR, *i.e.* did he commit three Whereabouts Failures within a period of 12 months?

B. In case the first question is answered in the affirmative, what is the appropriate sanction to be imposed on the Athlete?

A. Did the Athlete Commit an ADRV?

70. At the outset, the Sole Arbitrator reiterates that Article 2.4 of the 2020 POLADA ADR provides as follows:

"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".

71. In addition, Article 2.4 of the 2021 POLADA ADR states as follows:

"Any combination of three (3) missed tests and/or filing failures, as defined in the International Standard for Results Management, within a twelve-month period by an Athlete in a Registered testing Pool".

72. Accordingly, under Article 2.4 of the POLADA ADR, any combination of three Missed Tests and/or Filing Failures within twelve months constitutes an ADRV. Such provision matches the obligation of the athletes, included in the RTP, to provide, and keep updated, his/her whereabouts information, in order to be located for out-of-competition testing. Out-of-competition testing is at the heart of any effective anti-doping programme. To carry out effective testing of this nature, it is vital that athletes produce accurate and timely whereabouts information, so that they can be tested by surprise (see, e.g., CAS 2011/A/2671). The question in this case, as already mentioned, is whether the Athlete committed within a period of twelve months three Missed Tests and/or Filing Failures, which, under the applicable rules, could be considered to be violations of his whereabouts obligations.

73. POLADA recorded three such violations for the Athlete within twelve months, namely:

- the First Missed Test (which allegedly occurred on 4 September 2020);
- the Filing Failure (which allegedly occurred in December 2020 / January 2021); and
- the Second Missed Test (which allegedly occurred on 30 March 2021).

74. These alleged Whereabouts Failures occurred within the required period of twelve months. The central question is whether the Athlete indeed committed each of the First Missed Test, the Filing Failure, and the Second Missed Test. For WADA to succeed with its Appeal, it is required to prove that each of the three Whereabouts Failures on which its case rests can be sustained. If the Athlete succeeds with any of his challenges against any of the three Whereabouts Failures (all of which are indeed disputed by him, for a variety of reasons), he cannot be sanctioned under Article 2.4 of the POLADA ADR.

75. The Sole Arbitrator will address each of the three Whereabout Failures, in turn, below.

1. The First Missed Test

76. The Sole Arbitrator reiterates that the 2020 ISTI and 2021 ISRM are defining the term "Missed Test" as follows:

"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 [their] Whereabouts Filing for the day in question, […]".

77. Pursuant to Article I.4.3 2020 ISTI / Article B.2.4 2021 ISRM, a Missed Test may only be confirmed if the relevant results management authority (here: POLADA) can establish all of

the following requirements:

(i) That, when placed in the RTP, the Athlete was informed that his 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. If WADA 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 his part caused his failure to (a) be available and accessible for testing at the specified location during the relevant timeslot and (b) update his Whereabouts information to reflect his actual location during the relevant timeslot.

78. The Athlete did not contest items (i) – (iv) above. Therefore, and based on the evidence on file, the Sole Arbitrator deems that those requirements are met and will focus on item (v), *i.e.* on the issue of negligence.

79. Pursuant to Article I.4.2.e) ISTI, considering that all other requirements mentioned above at para. 77 were met, the Athlete has the burden of rebutting the presumption that his negligence caused his failure to (i) be available at the specified location and (ii) update his whereabouts information to indicate the different location where he would be available for testing instead. While the standard of negligence implies that there is no strict liability in this context, mistakes done by Athletes in respect of their whereabouts obligations should not be treated lightly, as otherwise it would be all too easy for a deceitful athlete to dodge out-of-competition controls (see CAS 2020/A/7526 & 7559). Therefore, the Athlete must demonstrate that he applied due care in fulfilling his respective responsibilities, and that any failure to update his whereabouts information in the ADAMS system happened without any attributable fault on his part. An athlete bears a personal duty of care in ensuring compliance with anti-doping obligations. The standard of care for top athletes is very high in light of their experience, expected knowledge of anti-doping rules, and public impact they have on their particular sport. It follows that a top athlete must always personally take very rigorous measures to discharge these obligations (see CAS 2017/A/5015 & 5110).

80. The Athlete essentially repeats the arguments raised before the First and Second Instance Panels, *i.e.* that the surgery he underwent in the hospital prevented him from updating his whereabouts. More specifically, the Athlete submits that he had initially hoped for his release from the hospital still on the date of the surgery (3 September 2021), but that it only turned out after the surgery that he had to stay in the hospital for another night, and that the post-operation

stress made him forget to update his whereabouts, specifically in light of the fact that he was already undergoing psychiatric treatment at the time due to mental health issues.

81. The Sole Arbitrator finds that the Athlete's explanation is not sufficient to effectively rebut the presumption of negligence, in light of the high requirements for such a rebuttal (as described above), and in light of the personal experience he had in using the ADAMS system as an Athlete who had been included in the RTP since 2016. The Athlete does not allege any reasons which made it impossible *objectively* to update his information once the surgery was completed, *i.e.* still on the day before the DCO attempted to locate him. Rather, he purports that he was *subjectively* unable to fulfil his duties, due to the stress associated with the surgery and his alleged mental problems. However, because the surgery was not an emergency treatment, the Athlete would have been well-prepared to ensure a proper management of his whereabouts duties in advance of the operation. Specifically, he could have, and in fact should have, take the necessary precautions for an update of his information after the surgery. In this respect, the Athlete submits nothing but his alleged post-operation stress as an excuse why he forgot the required update. The Athlete, however, is an experienced and successful professional who has been using the ADAMS system for many years, and who should have been used to the fact that whereabouts information sometimes has to be updated on short notice.

82. Furthermore, the Athlete has failed to submit any relevant, let alone compelling, evidence demonstrating that he was mentally unable to fulfil his whereabouts duties in September 2020. No contemporaneous medical records or expert evidence have been submitted by the Athlete to the CAS file. The two expert witnesses who testified at the hearing upon the Second Respondent's request did not or could not corroborate the assumption that a mental disease prevented the Athlete from fulfilling his anti-doping responsibilities. Dr. Krzywanski, the head of the medical team of the Polish Athletics federation, is not himself a psychiatrist. During the hearing, he explained that he refers a patient to a specialized psychiatrist if he discovers any relevant mental issues in an athlete. While Dr. Krzywanski was regularly seeing the Athlete in the relevant time period of the First Missed Test, he testified that he did not diagnose any mental health problem at the time that would have required psychiatric intervention. Dr. Krzywanski further stated that (from an *ex-post* perspective) the Athlete may have shown symptoms of a beginning depression, but could not further elaborate on this thought. In the absence of any further corroborating evidence, this testimony is far too vague to relieve the Athlete of his burden to rebut that the presumed failure to update his whereabouts happened without negligence. The second expert witness, Ms. Szwewczyk-Nowak, a psychotherapist, only started to treat the Athlete long after September 2020, in spring 2021. Hence, her testimony is *per se* irrelevant in respect of the First Missed Test.

83. Finally, the Sole Arbitrator notes that it is entirely irrelevant whether the DCO would have been able to test the Athlete in the hospital or not. Not only has the Athlete failed to prove that the DCO would not have gotten access to the hospital due to existing COVID-19 restrictions. More importantly, it is not a requirement for a Whereabouts Failure under the applicable 2020 ISTI / 2021 ISRM standards that the Athlete would have been available for testing at his actual location (the one he failed to disclose). For a Missed Test, it is only relevant that the Athlete could not be found at the place recorded in the ADAMS system within the 60-minute time slot that he was supposed to be available there for testing. The Athlete's absence from that place

caused the First Missed Test and not his presence at another place, *i.e.* the hospital, that is potentially inconvenient or even inaccessible for testing.

84. As a result, the Sole Arbitrator finds that the Athlete failed to rebut the presumption of negligence, and that all requirements for a Missed Test were fulfilled. The Athlete was unavailable for a doping test at the residence address registered in the ADAMS system on 4 September 2020. Therefore, POLADA's record of the First Missed Test was lawful.

2. The Filing Failure

85. Next, the Sole Arbitrator has to review the alleged Filing Failure, which appears to be the Whereabouts Failure that the Athlete contests most vigorously.

86. At the outset, the Sole Arbitrator reiterates that the term "Filing Failure" is defined in the 2020 ISTI and 2021 ISRM as follows:

"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, […]".

87. In addition, Article 3.2.3(iv) of the 2021 POLADA ADR reads as follows:

"Departures from any other International Standard or any anti-doping rule or policy set forth in the Code or these Anti-Doping Rules shall not invalidate analytical results or other evidence of any anti-doping rule violation; provided, however, if the Athlete or other Person establishes that a departure from one of the specific International Standard provisions listed below could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding or whereabouts failure, the POLADA shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the whereabouts failure:

[…]

(iv) a departure from the International Standard for Results Management related to the requirement to provide notice to the Athlete of the B Sample opening which could reasonably have caused an anti-doping violation based on a whereabouts failure, in which case POLADA shall have the burden to establish that such departure did not cause the whereabouts failure".

88. Furthermore, the Sole Arbitrator notes that it is undisputed that the Athlete made his Q1/2021 Whereabouts Filing only on 13 January 2021, *i.e.* 13 days after the beginning of the relevant quarter. It is, therefore, uncontested that there was no Whereabouts information at all recorded for the Athlete for a total of 13 days in Q1/2021, and that it was impossible for the anti-doping authorities to locate and test the Athlete during that time period. Therefore, by delaying his Q1/2021 Whereabouts Filing by at least 13 days, the Athlete principally violated his filing obligations.

89. The Athlete, however, contends that the Filing Failure in question must be invalidated because

POLADA is responsible for multiple departures from the ISTI / ISRM. In particular, the Athlete alleges the following four violations of ISTI / ISRM:

- POLADA's failure to properly notify him via registered mail about his status as a member of the RTP and his respective obligations (the information was only transmitted via e-mail) ("Issue 1");
- POLADA's communication of diverging deadlines in respect of his Q1/2021 Whereabouts Filing in the e-mail of 16 December 2020 ("Issue 2");
- POLADA's failure to notify him within 14 days of the alleged Filing Failure ("Issue 3");
- POLADA's erroneous information provided on 8 January 2021 and 8 February 2021, respectively, that the Filing Failure was his FIRST Whereabouts Failure, where indeed it was his second such failure ("Issue 4");

90. The Athlete further submits that these departures were causative of his Art. 2.4 ADRV, because he was misinformed and, in fact, misled by POLADA.

91. Pursuant to Articles I.3.6 2020 ISTI and B.2.1 2021 ISRM, a Filing Failure may only be confirmed if the relevant results management authority (here: POLADA) establishes each of the following requirements:

(i) That the Athlete was duly notified (1) that he had been designated for inclusion in a RTP; (2) of the consequent requirement to make Whereabouts Filings; and (3) of the consequences of any failure to comply with that requirement;

(ii) That the Athlete failed to comply with that requirement by the applicable deadline;

(iii) Only in case of a second or third Filing Failure in the same quarter, that the Athlete was given notice of the previous Filing Failure;

(iv) 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 was notified of the requirements yet failed to comply with them. That presumption may only be rebutted by the Athlete establishing that no negligent behavior on his/her part caused or contributed to the failure.

92. In addressing whether the Athlete's Filing Failure must be invalidated under these standards, the Sole Arbitrator has to conduct a two-step-analysis for each of the four alleged departures (see ¶ 89 above). First, she has to assess whether a relevant departure from the ISTI / ISRM rules can be confirmed. Second, if a relevant departure can be confirmed, she has to assess whether the Athlete established that the departure could reasonably have caused a Whereabouts Failure, and that POLADA and WADA failed to establish that such departure did not cause such failure (see Article 3.2.3(iv) of the POLADA ADR mentioned above). The Arbitrator will address these two questions for each of the four issues, in turn, below.

a. Issue 1: Failure of proper notification

93. Issue 1 relates to the allegation that the Athlete was not formally notified (via registered mail)

about his continuous inclusion in the RTP. The Athlete contends that a formal notice was required to inform him about his RTP status and his continuing Whereabouts Filing obligations, and that a simple e-mail was insufficient to comply with this requirement. Insofar, the Athlete relies on Article I.3.1.a) 2020 ISTI, which provides that an athlete's Whereabouts Filing must contain, *inter alia*, *"a complete mailing address where correspondence may be sent … for formal notice purposes"*. The Athlete infers from his obligation to provide a mailing address that POLADA's message of 16 December 2020 should have been served to that address via registered mail.

94. The Sole Arbitrator finds that this argument is without merit. The contents of POLADA's e-mail (and attached letter) dated 16 December 2020 are not subject to a formal notice requirement under either the POLADA ADR or the ISTI / ISRM. Pursuant to Article I.2.1 2020 ISTI, a notification is only required in respect of the initial inclusion of an athlete into the RTP, but not for any voluntary reminder or update sent by the results management authority to the athlete at a later stage. Once an athlete has been included into the RTP, he or she continues to be subject to the requirements of Article 5.5 of the POLADA ADR, unless and until he or she receives a written notice by the Anti-Doping Organization that he or she is no longer designated for inclusion in the RTP, or upon retirement (see Article I.2.4 2020 ISTI, see also CAS 2009/A/1832). It is undisputed between the Parties that the Athlete was properly notified about his initial inclusion into the RTP in 2016, and that POLADA was, therefore, in full compliance with Article I.2.1 2020 ISTI when it made the initial notification. POLADA did not, however, have any obligation to send any subsequent information or reminders to the Athlete about his status in the RTP (which was to continue indefinitely but for the options for an exclusion mentioned in Article I.2.4 2020 ISTI). POLADA's transmission of annual messages to the Athlete about his RTP status and related obligations occurred on a voluntary basis. The official comment to Article I.2.1 ISTI makes it clear that, while Anti-Doping Organizations should be proactive in helping athletes avoid Filing Failures (including through systematic reminders about Whereabouts Filings and applicable deadlines), *"athletes remain fully responsible for complying with their filing requirements, irrespective of whether or not the Anti-Doping Organization has provided them with such support"*.

95. In addition, the Athlete's reliance on Art. I.3.1 a) 2020 ISTI is also ill-founded because the purpose of this provision is to ensure a smooth notification in case a formal notice is required. It does not relate to the Athlete's inclusion in an RTP.

96. As a result, POLADA did not depart from the ISTI or ISRM when it notified the Athlete of his RTP status and relating obligations via e-mail. In the absence of any relevant departure from the applicable international standards, the second question of whether such departure could have reasonably caused the ADRV is moot. By corollary, Issue 1 does not invalidate the Filing Failure.

b. Issue 2: Disparity in the time limits communicated by POLADA

97. Issue 2 concerns the Athlete's argument that POLADA, in its e-mail dated 16 December 2020, mentioned two different time limits for the Athlete to make his Whereabouts Filing for Q1/2021 (20 December and 15 December). From a formal point of view, POLADA's message is, indeed, contradictory. It is doubtful, however, whether the disparity of the communicated

time limits in POLADA's e-mail of 16 December 2020 constitutes a "departure" from the ISTI / ISRM, because this mistake is not mentioned in Article I.3.6 ISTI and B.2.1 ISRM (see, on the issue of the exhaustive nature of the requirements for a Filing Failure mentioned in the International Standards, CAS 2011/A/2671, para 71).

98. Pursuant to Article 3.2.3(iv) of the 2021 POLADA ADR, departures from the ISTI or ISRM (which both qualify as "other International Standards" in the sense of that provision) shall not invalidate an ADRV, provided, however, that:

"if the Athlete […] establishes that a departure from one of the specific International Standard Provisions listed below could reasonably have caused an anti-doping rule violation based on a […] whereabouts failure, then POLADA shall have the burden to establish that such departure did not cause the […] whereabouts failure […]".

99. According to Article 3.2.3(iv) of the POLADA ADR, the primary burden is on the Athlete to demonstrate that an alleged departure from the ISRM "*could reasonably have caused*" the Filing Failure in question. Only if the Athlete successfully demonstrates such reasonable causation, the burden of proof shifts to POLADA, which then has to prove that the departure did not cause the Whereabouts Failure. It is clear from the burden of proof scheme enshrined in Article 3.2.3(iv) of the POLADA ADR that without any offer of evidence by the Athlete that the alleged departure from the International Standards (including ISRM and ISTI) could reasonably have caused the Whereabouts Failure, the assumed departure from these International Standards must be deemed irrelevant, *i.e.* does not invalidate the Whereabouts Failure.

100. Under this scheme, even if one was to assume (*ad arguendo*) that POLADA's mistake constitutes a "departure" from the ISTI / ISRM – such mistake would remain irrelevant, because the Athlete failed to establish that the assumed departure could reasonably have caused his Filing Failure with regard to his Q1/2021 Whereabouts Filing obligation. In fact, the evidence put before the Sole Arbitrator demonstrates quite the opposite. It clearly shows that the diverging deadlines in POLADA's e-mail had no causative effect whatsoever on the Athlete's failure to timely make his Q1/2021 Whereabouts Filing. In particular:

- The mistake was minor (slight disparity of five days as to the date by which POLADA was requesting that the filing be made);
- The Athlete missed both deadlines. Any confusion the different deadlines could have potentially evoked in the Athlete is limited to whether the Filing should have been made on 15 December or on 20 December at the latest. Therefore, the mistake could only have gained relevance, if any, if the Athlete had made his Whereabouts Filing after the 15th and before the 21st of December. Instead, the Athlete made his Whereabouts Filing more than three weeks later, *i.e.* on 13 January 2021 and, thus, 13 days after the beginning of the Q1/2021 for which the filing was due. The official comment on Article I.1.3 2020 ISTI clarifies, which is also reflected in Article B.1.3 of the 2021 ISRM, that a Filing Failure will in any event be deemed to have occurred on the first day of the quarter for which the athlete fails to make a filing;

- As per his own testimony before the First Instance Panel, the Athlete *"did not read the e-mail I received 17th December"* (Meeting Minutes of 28 April 2021, para. 45). If he did not read the e-mail, he could not have been misled by it. The Athlete did not contest his own testimony given in the disciplinary proceedings before CAS, where he chose not to provide any testimony or party statement.

101. As a result, the minor inconsistency in POLADA's e-mail of 16 December 2020 had clearly no causative effect on the Athlete's failure to timely provide his Whereabouts Filing for Q1/2021. Hence, Issue 2 does not invalidate the Filing Failure.

c. Issue 3: Failure to notify the Athlete within 14 days of the alleged Filing Failure

102. Issue 3 relates to POLADA's alleged failure to notify the Athlete within 14 days of the Filing Failure. In this respect, the Athlete relies on Article I.5.2.d) 2020 ISTI and Article B.3.2.d) 2021 ISRM to argue that the Filing Failure was completed by the latest on 21 December 2020 (*i.e.* one day after the later date mentioned in POLADA's e-mail of 16 December 2020), but that POLADA's notification was only sent on 8 January 2021, *i.e.* 19 days after the requirements of the Filing Failure were met.

103. Article B.3.2.d) 2021 ISRM reads as follows[3]:

"When a Whereabouts Failure appears to have occurred, Results Management shall proceed as follows:

[…]

d) If the Results Management Authority concludes that all of the relevant requirements […] *have been met, it should notify the Athlete within fourteen (14) days of the date of the apparent Whereabouts Failure. […]".*

104. The Sole Arbitrator finds that, in concurrence with the detailed analysis undertaken on this issue by the CAS panel in CAS 2011/A/2671, POLADA's non-compliance with Article B.3.2.d) 2021 ISRM does not invalidate the Filing Failure, for the following reasons:

105. First, the time limit for notifying the Athlete of a Filing Failure does not form part of the mandatory elements the results management authority is required to establish under the wording of Article I.3.6 of the 2020 ISTI and B.2.1 of the 2021 ISRM (quoted above at para. 91) in order to record a Filing Failure. Rather, Article B.3.2.d) 2021 ISRM only addresses the procedural steps to be followed after the identification of a potential Filing Failure. There is no rule in the 2021 ISRM which provides that the requirements for the recording of a Filing Failure are deemed to not be fulfilled if the time limit for notification was missed. Therefore, no weight is given to a deviation from the 14-day rule contained in Article B.3.2.d) 2021 ISRM. By the same token, if the Athlete requests a review of the Whereabouts Failure upon notification, the subject in charge of it shall only consider (again) whether *"all of the requirements for recording a Whereabouts Failure have been met"* (see Article B.3.2.e) 2021 ISRM). These requirements are laid

[3] Article I.5.2.d) 2020 ISTI has virtually the same wording.

down in Article B.2.1 2021 ISRM and do not mention the obligation to adhere to the time limit for notification (see also CAS 2011/A/2671, para. 71). Therefore, the Sole Arbitrator finds no basis in the wording of Article B.3.2.d) 2021 ISRM for the assumption that a deviation from the 14-day time limit mentioned in para. d) of that provision affects the possibility that a Filing Failure be recorded as such.

106. Second, the purpose of the notification requirement in Article B.3.2.d) 2021 ISRM does not call for the invalidation of the Filing Failure in case the 14-day time limit is exceeded. The CAS panel, in a case which related to a Missed Test, described the *rationale* of that provision as follows (CAS 2011/A/2671, para 72):

"Its function, indeed, appears that of offering the athlete the opportunity to give explanations – before a missed test is recorded – with respect to the fact that an antidoping officer had failed to meet him/her for unannounced testing, and therefore persuade the responsible anti-doping organization that there has been no missed test. In that context, the notice to the athlete plays an important role. Article 11.6.3 IST describes the results management process in the case of an apparent missed test; in such 'administrative' process, the fundamental rights of the athlete must be respected: the athlete must be informed and be given the opportunity to state his/her case and persuade the responsible anti-doping organization that the apparent missed test must not be registered as such. Said role, however, defines also the consequences of the failure by the responsible anti-doping organization to respect the 14-day rule mentioned at Article 11.6.3(b) IST. In fact, the purpose of the notice of the attempted test can be considered satisfied even though the notice has been given after the 14-day deadline had passed, in the event the athlete has had the actual possibility to give explanations – before a missed test is recorded – with respect to the fact that an anti-doping officer had failed to meet him/her for unannounced testing, and indeed has exercised the right to state his/her case. In that situation, no breach of the athlete's right to be heard is committed".

107. The Sole Arbitrator finds the CAS panel's logic convincing. This logic does not only apply to Missed Tests, but quite equally to Filing Failures.

108. In the present case, it is undisputed that POLADA provided the Athlete with the opportunity to provide an explanation on the Filing Failure with its correspondence of 8 January 2021, and then (when the Athlete had not responded) again on 8 February 2021. Hence, the Athlete had sufficient opportunities to explain the alleged failure, which means that his right to be heard was respected. The delay of a few days in delivering the initial notification did not result in any limitation of the Athlete's basic procedural rights.

109. Third and last, the Athlete has failed to demonstrate that the delayed notification could have reasonably caused his Filing Failure within the meaning of Article 3.2.3(iv) of the 2021 POLADA ADR. The factual basis of the Filing Failure (*i.e.* the Athlete's failure to submit his Q1/2021 whereabouts information by 21 December 2020 at the latest) is obviously not affected by events pertaining to the subsequent administration process. The fact that a Filing Failure was notified within or outside of the 14-day time window does not change the fact that the Athlete did not provide his whereabouts in due time.

110. As a result of the above, Issue 3 does not invalidate the Filing Failure.

d. Issue 4: Erroneous information on the number of Whereabouts Failures

111. Issue 4 relates to the information provided to the Athlete by POLADA in the notification letters dated 8 January 2021 and 8 February 2021 (quoted above at paras. 14, 16). Both letters refer to the Filing Failure (denominated in the original language of the letters as *"Blad Wprowadzenia Danych Pobytowych (FF – filing failure)"*). In both letters, the Athlete was wrongfully informed that the Filing Failure was his first Whereabouts Failure, where – indeed – it was his second such failure.

112. The Sole Arbitrator wishes to clarify that the English translation of the Polish original of at least the second letter (dated 8 February 2021) submitted by the Appellant is inaccurate in respect of one rather important detail. Whereas the English translation of that letter provides that the Athlete was informed that the Filing Failure was his *"first Filing Failure"* (page 2 of the letter of 8 February 2021), the Polish original uses the language *"pierwszy blad dotyczacy miejsca pobytu zarejestrowany"*, which translates, more accurately, as *"the first error concerning the place of the registered residence"*, or the first Whereabouts Failure. When referring to the Filing Failure, the two letters consistently use the language *"Blad Wprowadzenia Danych Pobytowych (FF – filing failure)"*, whereas in the context of the information provided on the number of failures, the letters use the language *"blad dotyczacy miejsca pobytu zarejestrowany"* without reference to the English term *"FF – filing failure"* that is used otherwise in those same letters to identify the Filing Failure. As a result, the Arbitrator rejects the Appellant's proposition that the letters informed the Athlete of the number of "Filing Failures". She accepts the Second Respondent's proposition that the original text did not refer to the number of "Filing Failures" but, more generally, to the number of "Whereabouts Failures".

113. This is important with respect to the material accuracy of the information provided in the letters. Had the Appellant informed the Athlete that the Filing Failure was his *"first Filing Failure"* within the reference period of 12 months, this information would have been correct, because the Athlete's previous failure was not a Filing Failure, but a Missed Test. However, this is not what the letters said. The letters identified the failure as the Athlete's *"first Whereabouts Failure"* by using language that is distinctly different from the language used to reference the Filing Failure. The Sole Arbitrator is satisfied that a reasonable third party would have understood the information to describe the Athlete's *"first Whereabouts Failure"* rather than his *"first Filing Failure"*. However, the Filing Failure was not the Athlete's first Whereabouts Failure, but his second within a 12-months period, because there was already the First Missed Test recorded for the Athlete discussed above. As a result, the information on the number of Whereabouts Failures in the two letters dated 8 January 2021 and 8 February 2021 was wrong.

114. The Second Respondent argues that POLADA's erroneous information on the number of Whereabouts Failures constitutes a departure from Article B.2.1.c) 2021 ISRM, with the result that the Appellant has failed to establish the requirements for the Filing Failure. The Appellant argues that Article B.2.1.c) 2021 ISRM only applies to cases of a second or third Filing Failure, not to a second or third Whereabouts Failure.

115. The Sole Arbitrator, however, finds it unnecessary to settle the issue of whether the erroneous notification constitutes a departure from Article B.2.1.c) 2021 ISRM or not. It is a matter of

fact that POLADA provided the Athlete with wrong, and potentially misleading, information regarding the number of his Whereabouts Failures. It is immaterial whether or not POLADA had a duty to inform the Athlete of the number of Whereabouts Failures when it notified him of the Filing Failure. If the respective organization chooses to provide information, such information must be true and correct. Under the principle of reliance, Athletes must be principally allowed to rely on official information they receive from a NADO, and these organizations have a duty of care to make sure that they do not deliver potentially misleading information to athletes that are subject to strict anti-doping responsibilities. For any athlete, it is highly relevant to be correctly informed of the number of Whereabouts Failures committed within a 12-month period, because the number of Whereabouts Failures is a decisive factor for establishing an ADRV under Article 2.4 of the POLADA ADR. For an athlete to be informed of his or her *second* Whereabouts Failure within 12 months, this is a distinct "red flag" that any other such failure will result in an ADRV under Article 2.4 of the POLADA ADR. Conversely, notification of the *first* failure constitutes no more than a "yellow flag", indicating to the athlete that two more Whereabouts Failures are required to complete an ADRV under Article 2.4 of the POLADA ADR. When the relevant results management authority raises the "yellow flag" instead of the "red flag", this could, in theory, result in a material error in an athlete and influence the level of care this athlete exercises in fulfilling his whereabouts responsibilities, or the athlete's decision of whether or not to challenge the Whereabouts Failure in judicial proceedings. In other words, an athlete's ability to take informed decisions may suffer materially.

116. However, for the misinformation to invalidate the Filing Failure, it is still required, under Article 3.2.3(iv) of the POLADA ADR, that the Athlete *"establishes that a departure from* [ISTI] *could reasonably have caused an anti-doping rule violation based on a* […] *whereabouts failure"*. As explained in detail above at para. 99, the burden of proof scheme introduced in that provision places the primary burden of proof on the athlete to demonstrate reasonable causation. Only if the athlete overcomes this burden, the secondary burden of proof is on POLADA to show that the departure did not cause the ADRV in question. This is a fair system. Athletes who are in conflict with anti-doping rules shall not benefit from formal mistakes that have no impact on their committing of an ADRV. In order to fulfil their burden of proof in respect of the requirement of *"reasonable causation"*, the Sole Arbitrator finds that an abstract possibility of the departure to result in an ADRV is not sufficient. Insofar, the Sole Arbitrator disagrees with the Appealed Decision, which had found that the Athlete's (self-conceded) awareness of the erroneous information was immaterial, and that the misinformation alone, because of its abstract potential to cause confusion in an athlete, was sufficient to consider the Athlete's initial burden of proof to be met. The Second Instance Panel practically relieved the Athlete entirely of his burden of proof to demonstrate that the erroneous instruction caused the ADRV. Contrary to the Second Instance Panel's view, it is required under Article 3.2.3(iv) of the POLADA ADR that there is not only an abstract possibility of causation, but that an athlete demonstrates that in his or her specific case, the mistake reasonably caused the ADRV. This is, for example, not the case when it is clear that the athlete did not rely on the erroneous information, because he or she was aware of the true situation.

117. In the present case, the Sole Arbitrator has to analyse the following question: has the Athlete established that POLADA's mistake to inform him – erroneously – of his first Whereabouts Failure, when it should have informed him – correctly – of his second Whereabouts Failure,

caused the Whereabouts Failure and, ultimately, the ADRV of which he is accused?

118. In answering this question, the Sole Arbitrator wishes to highlight that the ADRV of Article 2.4 of the POLADA ADR is comprised of three separate failures, which have to be committed cumulatively within a period of 12 months. With respect to the first two failures – the First Missed Test and the Filing Failure – the Sole Arbitrator can exclude the possibility that POLADA's mistake had any impact on the completion of those failures whatsoever, because they were completely fulfilled *before* POLADA released the erroneous information. The Athlete could neither have undone the First Missed Test nor the Filing Failure in a hypothetical situation in which POLADA had provided him with accurate information about the number of Whereabouts Failures. In the Appealed Decision, it is argued that the wrong information impacted the Athlete's freedom of decision as to whether he should or should not appeal the Filing Failure. While it is correct that, in theory, the strategic considerations an athlete undertakes to determine whether or not to appeal a Whereabouts Failure may be impacted by the number of such failures, this issue plays no practical role in the present case. Since the Filing Failure was lawful (see, in this respect, the analysis above on Issues 1 -3), an appeal would have been meritless had the information on the number of Whereabouts Failures been correct. Hence, the procedural rights of the Athlete remained unaffected by the erroneous instruction when any potential remedy against the Filing Failure would, in any event, have been unsuccessful.

119. Therefore, the test whether the misinformation could have *"reasonably caused"* the ADRV rests on the analysis whether the Athlete would have avoided the third failure, which is the Second Missed Test, that occurred after receipt of the wrong information, in case of a correct notification of the number of Whereabouts Failures. The Arbitrator notes that the Athlete has not proffered any evidence in respect of his allegation of *"reasonable causation"*. In fact, the Athlete has not given oral testimony in the present CAS proceeding. During the First Instance Proceeding, he gave clear and unequivocal testimony that he was aware that the Filing Failure had been his second Whereabouts Failure, and that his coach, therefore, wanted *"to keep an eye on him"*. The Appealed Decision wrongfully failed to give any weight to this testimony because, without any explanation, it skipped the first step of the burden of proof scheme described in Article 3.2.3(iv) of the 2021 POLADA ADR, that is, whether the Athlete met his initial burden of proof to establish that the information error could have reasonably caused the ADRV.

120. The Sole Arbitrator finds that the Athlete's testimony given during the hearing before the First Instance Panel demonstrates precisely the opposite, namely that the erroneous information on the number of Whereabouts Failures had no impact on the Athlete whatsoever, because he was, on his own account, positively aware of the true number of Whereabouts Failures. The Athlete's generic attempt to argue, during the hearing before the Second Instance Panel, that his testimony should not be credited because he may have misunderstood the question under the influence of depression and a recent COVID-19 infection, is unconvincing and must be rejected. During the hearing before the First Instance Panel, the Athlete was expressly advised that he may consult an attorney, but the Athlete confirmed that he had *"prepared as much as possible"* for the hearing to present his position there personally. Therefore, the assumption that he may have misunderstood a question on one of the key issues of the hearing is not credible. But even if his subsequent testimony was to be credited, the mere withdrawal of his initial

testimony is no proof that the misinformation "reasonably caused" the Second Missed Test (*i.e.* the third Whereabouts Failure). The Athlete has not demonstrated that he would have avoided the Second Missed Test, for example through the exercise of enhanced care in entering his whereabouts, had he been aware that the Filing Failure was not his first, but indeed, his second Whereabouts Failure. In this respect, the Sole Arbitrator highlights that no evidence has been presented for a causative link between the Athlete's Second Missed Test and the wrongful information. Most importantly, the Athlete chose not to testify in the hearing before the CAS.

121. Under these circumstances, the Sole Arbitrator finds that the Athlete failed to discharge his burden of proof to demonstrate that the erroneous information could have reasonably caused the ADRV.

122. As a result, Issue 4 does also not invalidate the Filing Failure.

123. Therefore, since none of the above-mentioned Issues 1 to 4 invalidated the Filing Failure, POLADA's record of the Filing Failure was lawful and must be sustained.

3. The Second Missed Test

124. As demonstrated above at para. 76, a Missed Test may only be confirmed if all of the requirements of Article B.2.4 2021 ISRM are met. It is undisputed between the Parties that the Athlete was unavailable for testing on 30 March 2021 at the place that was registered for him in the ADAMS system, and that the Athlete was in a training camp at a different location. As with the First Missed Test, the Athlete's defense centers whether the Athlete's failure to properly update his whereabouts happened negligently.

125. Pursuant to Article I.4.3 ISTI / Article B.2.4 ISRM, the Athlete has the burden of rebutting the presumption that his negligence caused his failure to (i) be available at the specified location and (ii) update his whereabouts information to indicate the different location where he would be available for testing instead (see above at para. 79).

126. Under the high standards explained in detail above (para. 79), the Sole Arbitrator finds that the Athlete's explanations for his failure are insufficient to demonstrate that the Second Missed Test happened without negligence. The Athlete, alleged, but did not prove, certain technical problems in the ADAMS App installed on his cell phone. He further explained that as a result of some inadvertent error, he only updated his details for the first two days of the training camp (28 and 29 March 2021), but not for the third day (30 March), because he had failed to match the exact days of the week with the respective calendar dates. At that time, he had just recovered from a very recent COVID-19 infection and was, principally, in a poor state of health. Even if these explanations were sufficiently established, which the Sole Arbitrator finds they are not, they would not meet the high standards required to rebut the presumption of negligence under Article B.2.4.e) ISRM. The Athlete, who had been using the ADAMS App for many years, is (or should be) very experienced in using the system, and he should also know that in case if difficulties to log on the App, or to properly save Whereabouts information, further attempts need to be made until the entry is successful. There is no proof on record that it was objectively impossible to update the information in a proper manner. The Athlete's alleged subjective

inability to fulfil this task – due to a recent COVID-19 infection and alleged depression – do not explain his failure either. These allegations have remained vague and were not corroborated by relevant evidence. As explained above for the First Missed Test, the testimony of expert witnesses Dr. Krzywanski and Ms. Szwewczyk-Nowak is not suitable to prove the Athlete's case.

127. In conclusion, the Arbitrator finds that the Athlete failed to rebut the presumption of negligence, and that all requirements for a Missed Test were fulfilled. Therefore, POLADA's record of the Second Missed Test can be sustained.

128. With the First Test, the Filing Failure and the Second Test being confirmed, and with all three Whereabouts Failures having occurred within 12 months, the Sole Arbitrator finds that, as a result, the Athlete committed the ADRV under Article 2.4 of the POLADA ADR.

B. What Is the Appropriate Sanction to be Imposed on the Athlete?

129. The second question that the Sole Arbitrator has to answer concerns the consequences of the ADRV committed by the Athlete: while the Appellant requests a period of Ineligibility between one and two years, *"but towards the upper end of the bracket"*, together with the ensuing disqualification of results and other consequences, the Second Respondent alleges that only the minimum sanction of one year shall apply, and that his results since 30 March 2021 shall not be disqualified.

130. The first point, therefore, concerns ineligibility. The period of Ineligibility which, under Article 10.3.2 of the POLADA ADR, could be imposed on the Athlete for the ADRV contemplated by Article 2.4 of the POLADA ADR ranges from one to two years, depending on the Athlete's degree of fault. The provision reads as follows:

"For violations of Article 2.4, the period of Ineligibility shall be two (2) years, subject to reduction down to a minimum of one (1) year, depending on the Athlete's degree of Fault. The flexibility between two (2) years and one (1) 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".

131. The Sole Arbitrator finds that the exception of *"suspicious conduct"*, which excludes the possibility of a reduction of the sanction *per se*, is not appropriate to be applied in the present case, and this is also not requested by the Appellant. To the contrary, the Appellant expressly acknowledges that the facts of the present case do not automatically require the imposition of the standard two-year sanction. The dispute between the Parties is about the degree of negligence reflected in the three Whereabouts Failures for which the Athlete bears responsibility. While the Appellant argues that this case is similar to that of CAS 2020/A/7526, which identified in the athlete a *"patent disregard of, and cavalier approach to, her whereabouts obligations"*, the Second Respondent purports that the Athlete is principally careful in respect of his anti-doping responsibilities, has never committed an ADRV, and has been impacted by his physical and psychological state of mind in the relevant time period. Furthermore, the Athlete argues that he never received comprehensive anti-doping education, a fact which was remained uncontested during the proceedings.

132. As a starting point, the Sole Arbitrator concurs with recent CAS jurisprudence (see CAS 2020/A/7526 & 7559) that because the ADRV is composed of three separate and distinct Whereabouts Failures, she will have to assess the Athlete's degree of fault taking into account the circumstances pertaining to all of them.

133. On this basis, the Sole Arbitrator finds that a period of fifteen (15) months is the appropriate measure of ineligibility for the Second Respondent, proportional to his degree of fault.

134. On the one hand, the Sole Arbitrator notes that the behavior of the Athlete shows a disregard of his whereabouts obligations, commanding a sanction that is higher than the minimum stipulated by Article 10.3.2 of the POLADA ADR: the missed tests for which he is responsible were in fact not due to unexpected occurrences, but to circumstances (planned surgery, planned training camp) which had been scheduled in advance, and therefore had left him with sufficient time to keep his whereabouts information updated; the Filing Failure concerning Q1/2021 was the result of the Athlete's carelessness.

135. On the other hand, the Sole Arbitrator remarks that there is no suggestion (let alone evidence) that the Athlete committed the Whereabouts Failures, for which he is held responsible, in order to hide from testing and undergo a doping practice (on this aspect see CAS 2011/A/2671). In the case of the Missed Tests, the Athlete could be reached by telephone, and his respective location could be immediately traced. Furthermore, in his long career, the Athlete has never been a cheater, and has never been suspect to a violation of his anti-doping responsibilities, despite not having received a comprehensive education on his respective duties. Moreover, the Sole Arbitrator accepts that, while the Athlete's difficult personal situation during the relevant time period does not relieve him of his anti-doping responsibilities (and does not exclude negligence *per se*), it may have contributed to the mistakes and oversights made by the Athlete without that the Athlete had any intention to cheat. Finally, the Sole Arbitrator finds that POLADA's mistakes in the communication of the Athlete's Filing Failure cannot be left unnoticed. As explained above, the notification of an incorrect number of failures is a procedural irregularity which may, potentially, affect an athlete's decisions with respect to a challenge or the degree of (enhanced) care to be applied in the management of anti-doping responsibilities. Even though the Athlete, in the present case, was unable to prove that such irregularity reasonably caused the ADRV, the Sole Arbitrator finds that it is appropriate to take this fact into consideration as a mitigating factor in the determination of the sanction.

136. A sanction of fifteen months therefore appears to be proportionate. Pursuant to Article 10.13 of the POLADA ADR, the period of Ineligibility shall start on the date of this CAS Award. According to Article 10.13.2.1 of the POLADA ADR, the Second Respondent shall receive credit for the period of the provisional suspension (imposed on him by POLADA on 23 April 2021) served by him until the Decision of the First Instance Panel (which found that there is no ADRV).

137. The second point concerns disqualification. WADA requests that the Athlete's results be disqualified as from 30 March 2021 (the date of the Second Missed Test), based on Article 10.10 of the POLADA ADR, which reads as follows:

"In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes".

138. In this case, the Sole Arbitrator finds that fairness requires that no disqualification be imposed on the Second Respondent with respect to the results obtained as from 30 March 2021, date of the third whereabouts failure, until present. There is no allegation, let alone any evidence, that the Second Respondent's competitive results after 30 March 2021 had been affected by any doping practice or that the Athlete was not clean. It is not disputed that these results were fairly obtained by the Athlete. Therefore, the Sole Arbitrator sees no reason to disqualify them (see also CAS 2011/A/2671; CAS 2020/A/7526 & 7559).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the World Anti-Doping Agency on 17 November 2021 against the Anti-Doping Agency of Poland and Mr. Jakub Krzewina with respect to the decision rendered on 26 August 2021 and notified with grounds on 12 October 2021 by the Second Instance Panel of POLADA is partially upheld.

2. The decision rendered on 26 August 2021 and notified with grounds on 12 October 2021 by the Second Instance Panel of POLADA is set aside.

3. Mr. Jakub Krzewina is found to have committed an anti-doping rule violation pursuant to Article 2.4 of the POLADA ADR.

4. Mr. Jakub Krzewina is sanctioned with a period of ineligibility of fifteen (15) months, commencing on the date of the notification of this award, with credit given for the period of provisional suspension already served between 23 April 2021 and 24 May 2021.

5. (…).

6. (…).

7. All other motions or prayers for relief are dismissed.