SPORT RESOLUTIONS (UK)

SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/NADP/551/2016

NATIONAL ANTI-DOPING PANEL

Before:

Christopher Quinlan QC

Dr Barry O'Driscoll

Dr Kitrina Douglas

BETWEEN:

UK Anti-Doping ***National Anti-Doping Organisation***

-and-

Robin Townsend ***Respondent***

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE CYCLING TIME TRIALS ANTI-DOPING RULES

FINAL DECISION OF THE ANTI-DOPING TRIBUNAL

A. INTRODUCTION

1. This is the final decision of the Anti-Doping Tribunal ('the Tribunal') convened pursuant to Article 5.1 of the National Anti-Doping Panel Procedural Rules to hear and

determine a charge brought against Robin Townsend ('the Respondent') for a violation of Rule 2.1 of the Cycling Time Trials Anti-Doping Rules ('ADR').

2. Robin Townsend was born on 20 October 1969 and is 46 years of age. Cycling Time Trials ('CTT') is the National Governing Body for cycling time trials in England and Wales. The Respondent is licensed by CTT as a time trial cyclist and by virtue of Article 1.2.1 ADR bound thereby. By virtue of the ADRs UKAD has responsibility for results management of Cycling Time Trials anti-doping rule violations.

3. The Tribunal held a hearing on 26 September 2016 in London. The hearing was attended by:

- Tony Jackson, presenting case for UKAD
- Sarah Innes, UKAD
- Louis Muncey, UKAD
- Professor David Cowan, Director, Drug Control Centre, King's College Laboratory, London, witness
- Mr Paul Ouseley, UKAD Results Manager, witness
- Mr Alan Brailsford, observer

4. The Respondent elected not to attend, either in person or by telephone.

5. This document constitutes our final reasoned decision, reached after due consideration of the evidence, submissions and Arbitral Awards placed before us.

B. BACKGROUND

(1) The First Charge

6. ADR Article 2.1 makes it a doping offence to provide a sample that shows "*the presence of a Prohibited Substance or its Metabolites or Markers*" unless the athlete establishes that the presence is consistent with a Therapeutic Use Exemption ('TUE').

7. On 5 September 2015, a UKAD Doping Control Officer ('DCO') collected an In-Competition urine sample from the Respondent at the Burton & District Cycling Alliance 100 miles event ('the Event'). The Respondent competed for Team Swift and finished ninth, with a time of 03:40:23. The sample was taken from him at 17.26 at Etwall, Derbyshire. The sample was spilt into two separate bottles, reference numbers A/B1114697 respectively.

8. The A Sample returned an Adverse Analytical Finding ('AAF') for modafinil and modafinil acid, a metabolite of modafinil. Modafinil is classified as a Non-Specified Stimulant under S6.a of the 2015 WADA Prohibited List and is prohibited only In-Competition.

9. The Respondent was charged with an anti-doping rule violation ('ADRV') offence by letter dated 8 October 2015 ('the First Charge'). The letter set out the details of the alleged doping offence with which he is charged (contrary to ADR Article 2.1), a summary of the facts and the evidence relied upon by UKAD. The letter also imposed a provisional suspension with immediate effect.

10. The letter further informed the Respondent that he should reply to the letter indicating whether he wished to admit or deny the offence; whether he wished the B Sample to be analysed; to apply to have the provisional suspension lifted; and to make submissions in relation to sanction.

11. In a written response to the charge the Respondent accepted the results of the laboratory analysis of his sample and accepted the ADRV. He denied ingesting intentionally the Prohibited Substance and that its presence in his sample was the result of fault or negligence on his part. The "only possible explanation" he could provide was that his sample was "spiked at the event".

12. The Respondent did not have a Therapeutic Use Exemption ('TUE') to justify the presence of modafinil in the sample.

13. On 1 December 2015 the Tribunal (constituted as the present) held a hearing in Leeds. In its written decision dated 22 December 2015 the Tribunal found:

    13.1. The ADRV had been established.

13.2. Imposed a period of ineligibility of four years commencing on 8 October 2015.

14. By virtue of that ADRV the Respondent was automatically disqualified from the Event on 5 September with all resulting consequences.

(2) The Second Charge

15. In summary, these proceedings arise out of a retesting of the A Sample taken from the Respondent on 5 September 2015, namely A1114697 ('the A Sample') and B1114697 ('the B Sample') as they became.

16. Both samples were transported to the Drug Control Centre, Kings College London ('the Laboratory') which is a WADA-accredited laboratory. The Laboratory analysed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories.

17. Analysis of the A Sample returned an AAF for the Prohibited Substances modafinil and its metabolite modafinil acid. This result was reported to UKAD and the A and B Samples were returned to the Laboratory's freezer for long term storage.

18. On 8 December 2015, UKAD requested that the Laboratory reanalyse the A Sample for erythropoiesis stimulating agents. Until that point UKAD had not asked for such tests to be undertaken and so they had not. That explains why erythropoietin was not detected during first analysis.

19. The Laboratory analysed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories. Analysis of the A Sample returned an AAF for recombinant erythropoietin ('EPO').

20. EPO is classified under S2 Peptide Hormones, Growth Factors, Related Substances and Mimetics of the 2015 WADA Prohibited List and is prohibited in and out of competition.

21. In accordance with WADA's Technical Document TD2014EPO, the Laboratory's conclusion was sent to an independent expert, Dr Christian Reichel, at the WADA-

accredited laboratory in Austria for review. Dr Reichel confirmed that the data for the A Sample confirmed the presence of exogenous EPO.

22. The Respondent does not have a TUE justifying the presence of EPO in his sample.

23. UKAD charged Mr Townsend with a second violation of Article 2.1 by way of a letter dated 2 February 2016 (the 'Second Charge').

24. The matter was referred to the National Anti-Doping Panel for resolution on 7 March 2016.

(3) History of Proceedings

25. It is a long and lamentable history. Since the matter proceeded in the Respondent's absence it is necessary to summarise the history. It is a summary and the full circumstances are known to the parties and the NADP secretariat, should it ever be necessary to examine them.

26. The Respondent filed a response to the Second Charge on 18 February 2016 by email (the 'First Response'). Therein he denied the charge that EPO was present in his sample. He also waived his right to have the B Sample analysed. He stated that he had no idea how EPO *'may or may not be'* in his urine. He also stated that he was *'unhappy that [his] samples were stored for five days'*, unrefrigerated, before being sent to the Laboratory.

27. On 30 March 2016, Graham Arthur (UKAD Director of Legal) forwarded to Kevin Carpenter (Captivate Legal and Sports Solutions, then acting for the Respondent) an email first sent by Paul Ouseley (UKAD Results Manager) to the Respondent on 1 February 2016, in which he responded to the issues raised by the Respondent in the First Response.

28. On the 1 April 2016 the Chairman conducted a telephone directions hearing at which Kevin Carpenter represented the Respondent. By consent, he directed, *inter alia,* that the hearing would take place in Leeds or Sheffield on 1 July 2016 and:

28.1. By 16.00 on 15 April 2016 the Respondent shall serve upon the NADP Case Manager, Jenefer Lincoln, written preliminary questions of UKAD in relation to these three topics: (a) the notice of charge being sent to the incorrect address (b) storage of the Respondent's sample by the DCO and (c) an alleged or potential conflict of interest on the DCO's part.

28.2. *By 16.00 on 29 April 2016 UKAD to shall serve upon the NADP Case Manager, Jenefer Lincoln, its written answers to the preliminary questions referred to in* [the preceding paragraph].

29. Those questions (the 'Preliminary Interrogatories') were served and answered.

30. On 2 June 2016, Kevin Carpenter filed a further response to the Notice of Charge on behalf of Mr Townsend (the 'Second Response') together with enclosures.

31. The Second Response provided that Mr Townsend *'strongly'* maintained his denial of the Second Charge. It provided that Mr Townsend *'cannot state vehemently enough that he has never taken EPO and has absolutely no idea how such a prohibited substance could have been present in the Sample.*

32. In the Second Response, the Respondent stated that he was challenging the external chain of custody and the integrity of the Samples. He alleged that there had been departures from the ISTI that had "*affected the integrity of the Sample and the external chain of custody and made the adverse analytical finding (AAF) unsound*".

33. On 23 June 2016, UKAD filed its evidence and submissions in reply to the Second Response submitted. The same day, the Respondent applied to the NADP for the substantive hearing to be adjourned. By email sent on 24 June 2016 the Chairman confirmed that he was not persuaded as to the merits of that application.

34. By email dated 27 June 2016, Kevin Carpenter stated that he had no instructions from the Respondent as to whether he would be willing and/or able to attend the hearing on 1 July 2016 in person or by telephone. Mr Carpenter also submitted a further application for disclosure of documents by UKAD.

35. At a directions hearing on 29 June 2016, the Chairman directed that the hearing on 1 July 2016 be vacated and made further directions in order to determine the

application for disclosure made by Mr Carpenter on 27 June 2016. UKAD had disclosed redacted sections of its Doping Control Handbook. The Respondent sought disclosure of the reacted portions and further sections.

36. The parties were content for the Chairman to consider the relevant passage and rule on the application. UKAD supplied him with all the sections (not redacted) sought by the Respondent. He read them and considered the application. Concluding there was nothing in those sections which might undermine UKAD's case or might assist the Respondent's case, he refused to order disclosure, a decision communicated to the parties by email sent on 5 July 2016.

37. The Chairman directed that a hearing date be set for determination of the Second Charge and directed the parties to provide their availability to the NADP by 16.00 on 20 July 2016. The Respondent asked for a hearing in late September or October 2016. Accordingly, the substantive hearing was fixed for 26 September 2016 to begin at 10.30 at the offices of Sport Resolutions, London.

38. On 29 June 2016 the Chairman also directed that by 17.00 on 8 July 2016 the Respondent must inform Ms Lincoln of the NADP and UKAD whether he is able and intends to pursue the obtaining of expert evidence. He did not do so.

39. A further directions hearing was convened on 5 September 2015. During this hearing the Respondent said he had retained an expert scientist but refused to name him or the laboratory at which he said he worked. The Chairman directed, *inter alia,* that the Respondent must submit any scientist's report and any written submissions upon which he wished to rely by 16:00 on 16 September 2016.

40. By email timed at 16.56 on 15 September 2016 the Respondent's partner sent an email. It said as follows:

I confirm that Rob was admitted to Northern General Hospital on 11 September 2016 and diagnosed as suffering from chronic Siatatica. Please see attached discharge sheet. (copy of the discharge sheet). As a result, and as is to be expected, Rob has been unfit and unable to dedicate his full energy to this matter. Therefore, for him to file submissions, given the extenuating circumstances, is extremely harsh, and will deny him the right to presenting his defence fairly and fully. Rob has proper grounds

for defending the charge brought by UKAD, and for this matter to be dealt with proportionately, Rob must be given every chance of defending himself therefore, from this it directly flows that filing submissions by tomorrow will not achieve this.

In relation to allowing Rob to adduce expert evidence, again this is a necessity for Rob to be able to properly deal with the charge brought by UKAD. Although Rob has already set out the grounds of his defence, UKAD have simply attempted to place the burden of proving his innocence on him despite knowing the grounds of the defence and that UKAD has breached International Starting for Testing and Investigations. Allowing Rob to adduce expert evidence will, without doubt support his defence, and seriously undermine the charge being advanced by UKAD. It is admitted that the request to adduce expert evidence is late, but that is also due to UKAD's lack of co-operation especially in relation to disclosure sought by Rob. Rob's defence is clear, and he should be given the opportunity of testing UKAD's case as best as he can given the limited resources available to him. An expert has agreed to provide evidence which will undermine the results on which UKAD are bringing the charge, and have potentially serious repercussions which could compromise the results of the first test for which Rob has been sanctioned. Furthermore, there will be no prejudice caused to UKAD, conversely, if Rob is not allowed expert evidence it will seriously prejudice his defence. The role of the NADP is to give athletes a fair process by which they can prove their innocence, by not allowing the expert evidence, the NADP would be denying Rob of this.

In light of the above, it is requested that the hearing listed on 26 September 2016 be adjourned. It is envisaged (subject to Rob's health) that Rob would be in a position to file his submissions, together with the expert evidence by no later than 28 October, and for the hearing to be listed on the first available date after this.

I would therefore be grateful if you could please confirm your agreement to the above urgently. Unfortunately, unless agreed, Rob will have little option but to revert to the civil courts, and the Department of Media, Sports and Culture to intervene to allow him to present his very valid defence without any limitations of the arbitration process.

41. Attached to that email was a photograph of part of a letter purporting to come from the said hospital. The chairman responded that evening by email thus:

Mr Townsend's partner makes an application, on his behalf, to extend the time for service of his written submissions and expert evidence and to vacate the hearing of 26 September The sole basis for the application is that she says he has "chronic Siatatica. Please see attached discharge sheet. (copy of the discharge sheet). As a result, and as is to be expected, Rob has been unfit and unable to dedicate his full energy to this matter".

Sent with the email by which the application was made was a photograph of the top part of a letter from Sheffield Teaching Hospitals. I have not been shown the rest of the letter. It reveals that he was admitted at 11.51 on 11/9/16 and discharged at 11.00 on 12/9. That part of the letter which I have seen says nothing about why he was admitted, his condition or fitness.

This case has a long history. I have repeatedly acceded to applications to adjourn it so Mr Townsend can prepare.

On the basis of what I have seen

1. I am not satisfied as to what his present condition and fitness is.

2. I note it is not said he cannot prepare only that he is "unfit" and cannot "dedicate his full energy" to such task. I am not satisfied that he cannot prepare, and be ready, for the hearing on 26/9/16.

3. I do not know how this impacts, if it does, on the ability of his expert to prepare for the 26/9/16

In the circumstances I am not satisfied there is good reason to adjourn this case from 26/9/16 and accordingly I refuse the application.

42. The following morning his partner (by email at 10.58) stated, *inter alia, "Rob cannot sit up or type the submissions, or walk".* She included a list of the medications he was taking, photographs of boxes of the same and as well as a full photograph of the hospital discharge letter.

43. Later that same day the Respondent filed a number of documents in support of his case, including detailed written submissions and a further 18 attachments over two emails. At page 8 of those submissions he stated:

I have agreed to a hearing on paper, I may be able to ring in by telephone, I have informed the Panel that I have chronic sciatica, slipped disk L4/L5 this caused me to be admitted to hospital in the early hours of Sunday morning the 11 September 2016, it is impossible for me to complete the submissions, and damaging my back has compromised this even more, please note to attend a hearing in person or even sit for very long is impossible, at this time as I am on prescribed medication.

44. In response, on the 19 September 2016 the Chairman directed as follows:

At present this hearing will proceed on 26 September. UKAD are to attend with witnesses, I will wish to question in light of the issues raised by Mr Townsend.

If Mr Townsend wishes to make another application for an adjournment he needs:

1. *To submit medical evidence which establishes that he is unfit to attend in person or by telephone*

2. *He must submit any expert evidence he wishes to rely on by noon on 23 September or indicate that he is not relying on such or provide an explanation direct from Professor Bayer* [the expert he said he had retained to assist him] *as to why it is not ready.*

45. The Respondent did not file medial evidence in response nor anything from Professor Bayer. Instead in an email timed at 11.02 on 23 September 2016 he said:

Their [sic] will be no one else attending the hearing by telephone, I cannot see any reason for myself to attend by telephone I have forwarded my submissions my understanding is, we are doing this by paper I don't believe I have anything further to add. I believe it is now up to the chairman to decide whether he believes it is ok for Ukad / Professor Cowan / Kings College not to follow the rules set by Wada / ISTI, These to protect an athlete from wrong doing by such organisations i.e. Ukad Please note when I sign to enter a event with CTT , I have agreed to by bound by the WADA code, this is a contract between all parties, UKAD broke the contract, by breaking the

ISTI Rules, everyone involved must adhere to these rules, or the contract is broken, as such I do not have to accept any sanction from UKAD.

I expect the two charges brought against me by Ukad to be dropped, I have no issue going forwards into a legal court.

46. At the start of the hearing on 26 September 2016 the Chairman called the Respondent. He did not answer the call so he left a message informing him that the hearing was about to start and he was free to join at any time. The Respondent did not make contact during the hearing or thereafter.

47. The Tribunal proceeded with the hearing on 26 September. It did so because:

47.1. The Respondent had been given every reasonable opportunity to attend an oral hearing, should he wish to do so.

47.2. The Respondent stated that he wished the matter to proceed on the papers, without an oral hearing.

47.3. He has said he would not attend an oral hearing in person or by telephone. He had not provided any medical evidence to support the contention (originally made) that he was unfit to do so.

47.4. As for the provision of expert scientific evidence, the Respondent had been given every reasonable opportunity since first charged in February 2016 to do so. He had not. The Tribunal has not drawn any inference (adverse to him or otherwise from that) for the absence of such.

47.5. The time had come for this stale matter to be resolved.

48. The Chairman directed that an oral hearing take place. He did so to enable the Tribunal to hear and to test (which it did, including by reference to the Respondent's case) the evidence relied upon by UKAD in seeking to discharge its burden to prove the alleged ADRV.

49. For the avoidance of doubt, in considering whether UKAD proved the ADRV the Tribunal ignored the fact and circumstances of the First Charge.

C. ANTI-DOPING RULE VIOLATION (2)

(1) Respondent's case

50. The Respondent denied the charge. He denied knowingly injecting or otherwise using EPO. He argued departures from the ISTI, which could explain the AAF for EPO.

51. In his written submissions, the Respondent argues that UKAD has breached the ISTI in that:

51.1. The Samples were not transported as soon as practicable after the completion of the Sample Collection Session.

51.2. The Samples were not transported in a manner which minimised the potential for sample degradation due to factors such as time delays and extreme temperature variations; and

51.3. The Samples arrived at the Laboratory at 10:19am and did not arrive at 10:45am as indicated in the documentation, such that the Chain of Custody was broken and the Samples were not transported in a manner that protected their integrity, identity and security.

52. To support these arguments, Mr Townsend has submitted a number of documents upon which he seeks to rely, including the WADA ISTI Urine Sample Collection Guidelines (version 6.0, October 2014).

53. In addition to his submission we have also had and considered the detailed Second Response dated 31 May 2016.

(2) UKAD's case

54. UKAD's case, simply stated, was that there had been no departure from the ISTI. Absent that the ADRV was proved.

55. In any event, even if, contrary to its submission, the Tribunal concluded that there had been departure/s from the ISTI, such did and could not explain the EPO in the Respondent's A Sample.

56. Accordingly, absent any grounds for eliminating or reducing the otherwise appropriate period of Ineligibility, the applicable sanction was four years Ineligibly concurrent with his present term.

(3) Determination

(a) Law

International Standards

57. The World Anti-Doping Code 2015 ('WADC') establishes International Standard and rules regulating anti-doping and enforcement that are binding on UKAD as a Signatory to the Code.

58. Under the heading *Purpose, Scope and Organization of the World Anti-Doping Program and the Code*, and under the sub-heading *International Standards* appears the following:

The purpose of the International Standards is harmonization among Anti-Doping Organizations responsible for specific technical and operational parts of anti-doping programs. Adherence to the International Standards is mandatory for compliance with the Code.

59. Article 5.5 of the WADC requires:

5.5 Testing Requirements

All Testing shall be conducted in conformity with the International Standard for Testing and Investigations ['ISTI']*.*

60. UKAD is therefore required to ensure that all testing is undertaken in accordance with the ISTI and to adhere to the standards set out therein in order to maintain its compliance with the Code.

61. The relevant ISTI came into effect on 1 January 2015. Their first purpose is to plan for intelligent and effective testing, and to maintain the integrity and identity of the samples collected, from the point the athlete is notified of the test to the point the samples are transported and delivered to the laboratory for analysis. They establish mandatory standards for test distribution planning (including collection and use of athlete whereabouts information), notification of athletes, preparing for and conducting sample collection, security/post-test administration of samples and documentation, and transport of samples to laboratories for analysis.

62. Section 9.0 of the ISTI is entitled *Transport of Samples and Documentation* and provides:

9.1 Objective

a) To ensure that Samples and related documentation arrive at the laboratory that will be conducting the analysis in proper condition to do the necessary analysis.

b) To ensure the Sample Collection Session documentation is sent by the DCO to the Testing Authority in a secure and timely manner.

63. Section 9.0 of the ISTI also sets out the requirements for transport and storage of samples and documentation, including:

9.2.1 Transport starts when the Samples and related documentation leave the Doping Control Station and ends with the confirmed receipt of the Samples and Sample Collection Session documentation at their intended destinations.

9.3.1 The Sample Collection Authority shall authorize a transport system that ensures Samples and documentation are transported in a manner that protects their integrity, identity and security.

9.3.2 Samples shall always be transported to the Laboratory that will be analyzing the Samples using the Sample Collection Authority's authorized transport method, as

soon as practicable after the completion of the Sample Collection Session. Samples shall be transported in a manner which minimizes the potential for Sample degradation due to factors such as time delays and extreme temperature variations.

[Comment to 9.3.2: Anti-Doping Organizations should discuss transportation requirements for particular missions (e.g., where the Sample has been collected in less than hygienic conditions, or where delays may occur in transporting the Samples to the Laboratory) with the laboratory that will be analyzing the Samples, to establish what is necessary in the particular circumstances of such mission (e.g., refrigeration or freezing of the Samples).]

64. WADA also produces a number of operational Guidelines that are designed to expand upon the International Standards to promote good practice. The Tribunal has read and considered the relevant passages thereof.

65. Drawing on the ISTI and WADA Guidelines, UKAD has produced a Doping Control Handbook ('DCH') which it supplies to Doping Control Officers ('DCOs'). It explains in detail the processes and procedures to be followed in relation to the sample collection process. The relevant parts were disclosed to the Respondent.

66. Section 7.2.1 of the DCH deals with the storage of urine samples. Reflecting *inter alia* Article 9.0 of the ISTI it states:

7.2.1 Storage of Urine Samples

All completed samples must be stored in a secure location until they are transferred to the courier for transport to the laboratory. The location should be one that protects the integrity, identity and security of the samples prior to their collection by the courier, delivery to the courier depot or direct deliver to the laboratory.

DCOs should arrange for the samples to be collected by the courier as soon as practicable post sample collection.

The storage arrangements and monitoring of the secure storage of samples must be recorded on the DCO Report Form. This should detail the location of the samples, the security arrangements for that location and who had access to the samples. If the location/storage arrangements for the samples ae changed at any time before

collection for transportation to the laboratory, this should also be noted on the DCO Report Form, for instance when moving samples from venue to home address. However, it is not necessary, for example, to document each and every sample being moved from the processing room to the fridge.

It is best practice to avoid storing samples for extended periods of time in excessive heat such as a conservatory of the boot of a car. If DCOs do have access to a spare fridge then ideally the samples should be stored there. If a fridge is not available then samples should be stored somewhere cool and out of direct sunlight.

Regulatory Scheme and approach to International Standards

67. By ADR Article 8.3.1 the burden is upon UKAD to establish that the Respondent has committed an ADRV. UKAD must establish the alleged ADRV to the comfortable satisfaction of the Tribunal.

68. ADR Article 2.1.2 sets out that proof of the following will be sufficient:

Proof of any of the following to the standard required by Article 8.3.1 is sufficient to establish an Anti-Doping Rule Violation under Article 2.1:

(a) Presence of a Prohibited Substance or any of its Metabolites or Markers in the Athlete's A Sample, where the Athlete waives his/her right to have his/her B Sample analysed and so the B Sample is not analysed;

69. ADR Article 2.1.3 provides that:

Except in the case of those substances for which a quantitative threshold is specifically identified in the Prohibited List or other International Standard, the presence of any quantity of a Prohibited Substance or any of its Metabolites or Markers in an Athlete's Sample shall constitute an Anti-Doping Rule Violation, unless the Athlete establishes that such presence is consistent with a TUE granted in accordance with Article 4.

70. The Laboratory confirmed the presence of recombinant EPO in the A Sample on 25 January 2016.

71. In the First Response, the Respondent waived his right to have the B Sample analysed.

72. The Respondent does not have a valid TUE to justify the presence of EPO in the A Sample.

73. ADR Article 8.3.3 provides that the facts may be established by any reliable means.

74. ADR Article 8.3.5 provides:

WADA-accredited laboratories, and other laboratories approved by WADA, shall be presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Athlete or other Person charged with the commission of an Anti-Doping Rule Violation may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred that could reasonably have caused the Adverse Analytical Finding (or the factual basis for any other Anti-Doping Rule Violation with which the Athlete or other Person is charged). If he/she does so, then UKAD shall have the burden of establishing that such departure did not cause the Adverse Analytical Finding (or the factual basis for such other Anti-Doping Rule Violation).

75. Deconstructing ADR Article 8.3.5 into its consistent parts it means:

75.1. There is a presumption that WADA-accredited laboratories have conducted sample analysis and custodial procedures in accordance with the ISL.

75.2. However, the player or other person may rebut this presumption by establishing:

75.2.1. There was a departure from the ISL, which

75.2.2. Could reasonably have caused the AAF.

75.3. If the player or other person rebuts that presumption, then UKAD shall have the burden to establish that such departure did not cause the AAF.

76. The shift in the burden of proof under ADR Article 8.3.5 is a quid pro quo for the imposition of strict liability for violations of anti-doping regulations. In *USADA v Jenkins*, the American Arbitration Association Panel stated (para 136):

In view of the grave implication for athletes...who are held strictly to account for any transgression of applicable anti-doping rules, testing laboratories must also be held strictly to account for any non-compliance with those same rules...The strict liability regime which underpins the anti-doping system requires strict compliance with the anti-doping rules by everyone involved in the administration of the anti-doping system in order to preserve the integrity of fair and competitive sport.

77. In *Devyatovskiy and Tsikhan v International Olympic Committee*, that CAS Panel stated:

Doping is an offence which requires the application of strict rules. If an athlete is to be sanctioned solely on the basis of the provable presence of a prohibited substance in his body, it is his or her fundamental right to know that the Respondent, as the Testing Authority, including the WADA-accredited laboratory working with it, has strictly observed the mandatory safeguards.

Strict application of the rules is the quid pro quo for the imposition of a regime of strict liability for doping offenses. This fundamental rule which has formed the anchor for CAS rulings for more than two decades of anti-doping arbitrations was laid down eloquently in USA Shooting & Q./ International Shooting Union already in 1995:

'The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule appliers must begin by being strict with themselves."[1]

78. The CAS Panel in *Veronica Campbell Brown v JAAA & IAAF* (CAS/2014/A/3487)[2] observed that there is "*considerable force*" in the proposition that, in order to justify imposing a regime of strict liability against athletes for breaches of anti-doping regulations, testing bodies should be held to an equivalent standard of strict compliance with mandatory international standards for laboratories and for testing. This is particularly important in view of the main purpose of the ISL, namely "*to*

[1] §6.10-6.11

[2] Award dated 10 April 2014

ensure laboratory production of valid test results and evidentiary data and to achieve uniform and harmonized results and reporting from all Laboratories".

79. ADR Article 8.3.2 (derived from WADC Article 3.2) does not impose absolute standards from which any deviation will result in an annulment of the process or of proceedings. It is a question of balance, between strict liability and the rights of athletes. WADC Article 3.2 (and its derivatives) seeks to strike that balance.

80. ADR Article 8.3.2 requires a shift in the burden of proof whenever an athlete establishes that it would be reasonable to conclude that the ISL departure could have caused the AAF. In other words, the athlete must establish facts from which a panel could rationally infer a possible causative link between the ISL departure and the presence of a prohibited substance in his/her sample. As the CAS panel put it in *Veronica Campbell Brown v JAAA & IAAF* (CAS/2014/A/3487)[3]:

155. […] the Panel considers that Rule 33.3(b) requires a shift of the burden of proof whenever an athlete establishes that it would be reasonable to conclude that the IST departure could have caused the Adverse Analytical Finding. In other words, the athlete must establish facts from which a reviewing panel could rationally infer a possible causative link between the IST departure and the presence of a prohibited substance in the athlete's sample. For these purposes, the suggested causative link must be more than hypothetical, but need not be likely, as long as it is plausible. [emphasis added]

81. As to what that means it continued:

157. […] To ensure that anti-doping bodies strictly adhere to those standards [the International Standards], and to ensure that athletes are not unfairly prejudiced if they fail to do so, IAAF Rule 33.3(b) must be interpreted in such a way as to shift the burden of proof onto the anti-doping organisation whenever a departure from an IST gives rise to a material – as opposed to merely theoretical – possibility of sample contamination.

[3] Award dated 10 April 2014

82. That approach was endorsed and followed by the World Rugby Board Judicial Committee decision in *Mahlatse 'Chilliboy' Ralepelle*[4] relied upon by UKAD.

83. The above principles and approach applies equally to the ISTI. Accordingly, the Respondent must establish

83.1. An ISTI departure; and

83.2. That there is a plausible causative link between such ISTI departure and the presence of EPO in his A Sample.

(b) Departure from ISTI

84. The Respondent submits there was a departure from the ISTI in a number of respects, which are examined in turn.

Article 9.3.2 ISTI

85. In his written submissions of 16 September 2016 he asserted:

The samples should have been shipped on Monday the 7th Sept 2015 to arrive within International Standard for Testing and Investigations (ISTI) rules of 36 hours to preserve their integrity, they were stored in a car boot / bedroom cupboard until the 9th Sept 2015 arriving at the lab at 10.19 on the 10th Sept 2015, 113 hour after collection.

86. In support of this proposition he sought to rely on this link:

https://www.wada-ama.org/en/media/news/2016-09/wada-publishes-revised-international-standard-for-testing-and-investigations?utm_content=buffer42093&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer

87. That link takes one to a page on the WADA website about the 2017 ISTI. That argument is addressed below in the context of *lex mitior.* At this stage it is necessary only to say that it does not support his proposition that *all* samples must be analysed within 36 hours. Further, it does not help him at all on the storage argument.

[4] Award dated 16 June 2015, chaired by this Chairman

88. In further support of his argument he cited Article 9.3.2 of the ISTI. In support he cited Articles 9.1, 9.2, 9.2.1, 9.2.2, 9.3.1, 9.3.3-9.3.6 inclusive, each of which the Tribunal read and considered.

89. The test is not absolute. Taken together Article 9.3.2 and the UKAD DCH require:

89.1. The samples to be transported to the laboratory as soon as practicable post collection.

89.2. The samples to be stored in a secure location, which preserves their integrity, identity and security.

89.3. Storing the samples in a way which exposes them to excessive heat for extended periods of time should be avoided. Ideally, they should be stored in a cool place and out of direct sunlight.

89.4. The samples to be transported in a method which preserves their integrity, identity and security.

90. On this, the evidence from Paul Ouseley was as follows:

90.1. The journey time from the Event (where the samples were taken) to the DCO's home was some 30 miles, about 50 minutes by car. The samples were in his car boot for that period (or thereabouts) before being removed and stored in a secure cupboard in his home.

90.2. They were passed to the UPS courier on 9 September.

90.3. This was entirely all in line with usual practice, with the ISTI and with the UKAD DCH.

90.4. As is set out in more detail under the heading "*Chain of Custody"* below, the packaging and the samples within it arrived at the Laboratory properly sealed and intact. Neither the packaging nor the sample bottles had been tampered with when they arrived at the Laboratory.

90.5. He said that of the 1381 urine sampling missions conducted by UKAD in 2015, about 20% involved a period of 5 days or more between the taking of the samples and arrival at the laboratory.

91. Applying the ISTI and UKAD DCH to the evidence, the Respondent has failed to establish any breach of the ISTI (or UKAD DCH) in relation to the storage and transportation of the samples. In fact, the Tribunal is satisfied that there was no such departure.

Chain of custody

92. In his 16 September submissions the Respondent raised an issue on timing ('the timing issue'). He said:

The samples arrived at the Laboratory on Thursday the 10th September at 10.19 and left in an office, 113 hours / 5 days after collection. See Attached UPS documents

Exhibits

UPS Screen shot.jpg

UPS Delivery.jpg

The samples did not arrive at 10.45am as stated in the original bundle see page 12 of original bundle

Exhibit

page 12.jpg

UKAD have stated the samples arrived at 10.45 to cover up the discrepancy in the chain of custody. "the chain of custody has now also been broken".

93. The Tribunal notes the detailed chain of custody, described as a summary, from the Laboratory. That deals with their integrity from receipt at and within the Laboratory. It is sound and no fault or issue is apparent from an examination of the same. Indeed, the Respondent did not complain about that, save in respect of the timing issue.

94. Professor Cowan also gave evidence about the timing issue. He stated that according to the record relied upon by the Respondent the package was signed for at 10.19 (as per the UPS delivery screen shot). If that is accurate, it reflects the time the package containing the samples arrived at the Laboratory premises. That is to be distinguished from the time they reached the Laboratory itself. Professor Cowan said that the time of 10.45am, which appears on the "Sample Receipt", at the foot of the "Transport Document" and at the top of the "Sample Booking – Urine" form is the time the Laboratory Assistant opened the packages. He/she would have done so in the Laboratory itself. The noting of the time (which he said is rounded up to the nearest 5 minutes) is part of the second "*level of security*" as he put it. If the clock or watches from which the respective times were derived were synchronised or relatively so, that is a gap of about 26 minutes.

95. The Tribunal accepts this evidence as a logical and convincing explanation for the two different times. In so doing it rejects the Respondent's allegation that "*UKAD have stated the sample arrived at 10.45 to cover up the discrepancy in the chain of custody*".

96. In oral evidence Paul Ouseley confirmed, in accordance with his witness statement signed and dated 14 June 2016, the position between the taking of the samples until they arrived at the Laboratory. In summary, he said:

96.1. The samples bottles were sealed once taken from but in the presence of the Respondent.

96.2. They and the packaging arrived at the Laboratory properly sealed and in tact.

96.3. Neither the packaging nor the sample bottles had been tampered with when they arrived at the Laboratory.

96.4. The paperwork was completed properly and in accordance with standard procedures. The sample reference numbers and other information and documentation was all in order.

96.5. Upon receipt of every sample package the Laboratory carries out what is called an anomaly check. The purpose is to ensure the chain of custody is intact. If there is or are any issue/s it notifies UKAD. There was no such notification in this case.

97. Therefore the Respondent has failed to show any break in the 'chain of custody'. Accordingly, the Respondent has failed to establish any breach of the ISTI (or UKAD DCH) in that respect. In fact, once more the Tribunal is satisfied that there was no such departure.

Lex Mitior

98. In his submissions the Respondent stated: "*Wada Code 2017 samples must arrive within 60 hours and urine samples (ATP) to be treated the same as Blood samples from this date*". He points to an extract from WADA's website relating to revised International Standard for Testing and Investigations that will take effect on 1 January 2017. He argues that the Tribunal should apply those new standards and in doing so invites us to apply the principle of lex mitior.

99. The principle of *lex mitior* means that if since the commission of the ADRV the relevant law has been amended, then the less severe law should be applied. With respect to the Respondent (and we appreciate that he is not lawyer) this principle does not apply as he argues.

100. Further, the passage upon which he seeks to rely refers to *blood* samples, a point Professor Cowan confirmed in his oral evidence. He said it relates to an extension of time (from 36 hours to 60 hours) between the collection of blood samples and delivery to WADA accredited laboratories for the purposes of the *Athlete Biological Passport*. It is based on the concept of a "Blood Stability Score". It has nothing to do with urine samples. It does not assist the Respondent.

Conclusion

101. In the circumstances the Tribunal is not satisfied (to the requisite standard) that there was any breach of the ISTI. Indeed it is satisfied that there was no such breach.

(c) <u>The causative link had an ISTI departure been established</u>

102. In light of the conclusion in relation to the alleged ISTI departure it is not necessary to decide this element. However, had it been necessary the following evidence - which the Tribunal tested – would have been highly relevant.

103. EPO is produced in the body, mainly by the kidneys. This is called endogenous EPO. Exogenous EPO is produced synthetically and usually administered by injection, because oral administration breaks down exogenous EPO in the stomach:

103.1. Analysis of the A Sample showed no endogenous EPO, only exogenous EPO. Thus the endogenous EPO had been suppressed by the exogenous EPO.

103.2. There was no sign at all that the A Sample had degraded. It was received sealed and intact.

103.3. As for the possibility of a 'false positive', the Laboratory's results were confirmed by a second opinion.

103.4. Further, the methodology used by the Laboratory means the so-called 'urine effort effect' could not have caused the AAF.

103.5. In conclusion he said he could not conceive of how else the EPO could have been administered other than by injection.

104. Further and importantly, Professor Cowan could not have been clearer in his cogent evidence. EPO is a protein. When a sample degrades, protein breaks down. Therefore, if the Respondent's sample had degraded in any way the effect would have to reduce or eliminate completely the presence of exogenous EPO. That is precisely the opposite effect contended for by the Respondent.

105. Further, the Respondent did not submit any expert evidence to undermine or contradict Professor Cowan.

106. Accordingly, had it been necessary to decide this point, the Tribunal would have found against the Respondent.

(d) Conclusion

107. Therefore, UKAD has discharged the burden of proof under ADR Article 8.3.1 and established to the Tribunal's comfortable satisfaction that the Respondent committed an ADRV pursuant to ADR Article 2.1 by the presence of EPO in his A Sample.

D. SANCTION

108. ADR Article 10.7.4 states:

10.7.4 Additional rules for certain multiple offences

(a) For the purposes of imposing sanction under Article 10.7, an Anti-Doping Rule Violation will only be considered a second Anti-Doping Rule Violation if UKAD can establish that the Athlete or other Person committed the second Anti-Doping Rule Violation after he/she received notice, or after UKAD or its designee made a reasonable attempt to give notice, of the first Anti-Doping Rule Violation. Otherwise the Anti-Doping Rule Violations shall be considered as one single first Anti-Doping Rule Violation, and the sanction imposed shall be based on the Anti-Doping Rule Violations which carries the more sever sanction.

(b) If after the imposition of a sanction for a first Anti-Doping Rule Violation, UKAD discovers a second Anti-Doping Rule Violation by the same Athlete or other Person that occurred prior to notification of the first Anti-Doping Rule Violation, then an additional sanction shall be imposed based on the sanction that could have been imposed of the two Anti-Doping Rule Violations had been adjudicated at the same time.

109. The Second Charge is not a second ADRV since it was committed on 5 September 2015, before the Respondent received notice of the First Charge, namely on 8 October 2015. For the purpose of determining the appropriate sanction, this ADRV is to be treated as though it were his first.

110. ADR Article 10.2 provides:

10.2 The period of Ineligibility for an Anti-Doping Rule Violation under Article 2.1, 2.2, or 2.6 is that is the Athlete's or other Person's first anti-doping offence shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6.'

10.2.1 The period of Ineligibility shall be four years where:

a. The Anti-Doping Rule Violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the Anti-Doping Rule Violation was not intentional.

b. The Anti-Doping Rule Violation involves a Specified Substance and UKAD can establish that the Anti-Doping Rule Violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

111. Therefore the mandatory sanction (for the Presence of a Non-Specified Substance) is a period of Ineligibility of four years, unless the Respondent can establish that he did not act intentionally in committing the ADRV.

112. The burden is upon the Respondent to establish (on the balance of probabilities) that the ADRV was not intentional in order to reduce to two years the otherwise applicable period of Ineligibility.

113. "Intentional" is defined in ADR Article 10.2.3 thus:

As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes or other Persons who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance which is

only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

114. The Respondent did not seek to rely on ADR Article 10.2.3. He has not presented any explanation for the presence of EPO other than set out above. Therefore, he has not established that he did not act intentionally.

115. The Respondent has not sought to rely upon ADR Articles 10.4 (No Fault or Negligence) or 10.5.2 (No Significant Fault or Negligence). He could not do so without first establishing that the ADRV was not intentional. In this respect the Respondent failed to establish on the balance of probabilities that the ADRV was not intentional and so neither could apply.

116. Accordingly, pursuant to Article 10.2.1(a) a period of Ineligibility of four years must be imposed.

117. The Respondent competed on 13 September 2015. On the basis of the information before the Tribunal, he has not competed since being provisionally suspended. Therefore, in relation to the First Charge the Tribunal ordered that the period of Ineligibility should commence on 8 October, the date upon which he was provisionally suspended (ADR Article 10.11.3(a)). For the same reasons, that is the appropriate start date for this period of Ineligibility. It will run concurrently with the period of Ineligibility imposed in respect of the First Charge.

118. The Respondent's status during the period of Ineligibility is as provided in ADR Article 10.12.

119. By operation of ADR Article 9, upon the First Charge being upheld the Respondent was automatically disqualified from the Event on 5 September with all resulting consequences, including forfeiture of points and prize and appearance money, if any. It is not necessary to repeat it.

120. Given the imposition of a concurrent sanction, some may question the need for or purpose of these proceedings. To that UKAD submitted that there is a legitimate public interest both in (1) detecting amateur cyclists who cheat by using EPO, and (2)

informing amateur cyclists and the wider public that UKAD will test samples for the presence of such.

E. SUMMARY

121. For the reasons set out above, the Tribunal finds:

(a) The anti-doping rule violation (the Second Charge) has been established.

(b) The period of Ineligibility imposed is four years, commencing on 8 October 2015, concurrent with the sanction imposed in respect of the First Charge.

E. RIGHT OF APPEAL

122. In accordance with ADR Article 13 the parties may appeal against this decision by lodging a Notice of Appeal according to the applicable time limits.

Christopher Quinlan QC, Chairman
On behalf of the Tribunal
3 October 2016

Sport Resolutions (UK)
1 Salisbury Square
London EC4Y 8AE

T: +44 (0)20 7036 1966
F: +44 (0)20 7936 2602

Email: resolve@sportresolutions.co.uk
Website: www.sportresolutions.co.uk