SPORT RESOLUTIONS (UK)

NATIONAL ANTI-DOPING PANEL

SR/NADP/740/2017

**National Anti-Doping Panel**

**IN THE MATTER OF AN APPEAL BROUGHT UNDER THE ANTI-DOPING RULES OF THE RUGBY FOOTBALL LEAGUE**

**Before:**
**Mr Jeremy Summers (Sole Arbitrator)**

**Between:**

**ROSS BEVAN** **Appellant**

**-and-**

**UK ANTI-DOPING LIMITED ("UKAD")** **Respondent**

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**DECISION OF THE NADP APPEAL TRIBUNAL**

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**Date of Hearing (by telephone conference call): 10 March 2017**

## Introduction

1. This is the decision of the Sole Arbitrator sitting as an Anti-Doping Appeal Tribunal convened under Article 5.1 of the 2015 Procedural Rules of the National Anti-Doping

Panel ("the Procedural Rules") and Article 8.1 of the UK Anti-Doping Rules dated 1 January 2015 (" the ADR") in respect of an appeal brought by Mr Ross Bevan ("the Athlete") against a period of ineligibility imposed upon the Athlete by a written decision dated 16 December 2016 ("the Issued Decision").

2. For the reasons set out in the Issued Decision, UKAD imposed a period of ineligibility upon the Athlete of seven years and three months, expiring at midnight on 14 January 2024.

3. By Notice of Appeal dated 3 January 2017 ("the Notice"), the Athlete appeals against the Issued Decision.

4. I was assisted in advance of the hearing by helpful written submissions from Mr Leighton Davies QC on behalf of the Athlete and from UKAD. Mr Davies further represented the Athlete at the hearing at which UKAD appeared through Mr Louis Muncey. I record my gratitude to both advocates for the courteous and helpful way in which the matter proceeded.

5. This is my reasoned decision.

**Preliminary Issues**

6. The parties helpfully confirmed that the test I was required to apply was that as articulated at paragraph 30 to the decision on appeal in Evans v UKAD (July 2016), in the following terms:

In short, UKAD's submission which we endorse as correct, is that we should only interfere with UKAD/WADA's decision in the event that we decide that the exercise of their discretion was one that no reasonable decision maker could have reached and/or where the process whereby it was reached was flawed or unfair and/or where the decision maker misapplied the rules or failed properly to analyse and apply matters of evidence.

7. It was further confirmed that the overarching ground of appeal was the submission set out in the Notice as to "the undue harshness and severity of the length of the period

of ineligibility". In advancing that primary submission, Mr Davies relied upon the points made at 2 a i) - iii) in the Notice and, additionally, to the matters set out in an email from Mr Davies dated 6 March 2017 (21:28) responding to an issue I had raised with the parties.

8. Mr Davies further drew my attention to paragraphs 25 to 28 of written submissions lodged on behalf of UKAD dated 1 March 2017 ("the Written Submissions"). Those submissions related to documents submitted on behalf of the Athlete with a view to establishing that he had acted with candor and credibility. Mr Davies was concerned that UKAD now asked me to draw a potential inference, that was adverse to the Athlete, on the basis of evidence which had not been before UKAD at first instance when reaching the determinations that had led to the Issued Decision. In Mr Davies' submission, it was not permissible for me to take into account matters not considered at first instance, when reaching my determination.

9. I could readily see the force and logic of that argument, and accordingly indicated to the parties that, in reaching my determination, regard would not be had to the issues set out at paragraphs 25 to 28 of the Written Submissions.

**Facts**

10. Following a hearing on 12 May 2015, as recorded in a written decision dated 27 May 2015, the Athlete was made the subject of a two year period of ineligibility in consequence of an Anti-Doping Rule Violation ("ADRV") having been established against him.

11. The ADRV concerned was a violation of Article 2.1 of the ADR, presence of a Prohibited Substance, drostanolone and a metabolite thereof, in an Out of Competition sample taken on 9 February 2015.

12. The period of ineligibility imposed ran from 26 February 2015 until 25 February 2017.

13. Pursuant to ADR Article 10.12.3, an Athlete subject to a period of ineligibility shall remain subject to testing:

*10.12.3 - An Athlete who is Ineligible shall remain subject to Testing and must provide whereabouts information (as applicable) for that purpose during the period of Ineligibility.*

14. By letter dated 25 August 2015, UKAD confirmed to the Athlete that he remained subject to testing throughout the period of ineligibility. The letter also confirmed that UKAD was treating the address to which that letter had been sent as the Athlete's usual residential address and the address at which he would be available for testing.

15. The letter informed the Athlete about his options for removing himself from testing (and the jurisdiction of the ADR) by way of retirement and provided him with a form to complete and return to UKAD to confirm if he wished to do so.

16. The Athlete did not return any form to confirm either that his usual residential address had changed or that he wished to retire.

17. Pursuant to ADR Article 10.12.3, the Athlete therefore remained subject to testing for the duration of the period of ineligibility and was bound to comply with the ADR at all material times.

18. At 21:00 on 28 September 2016, a UKAD Doping Control Officer ("DCO") attended at the Athlete's home address to collect a sample from him pursuant to ADR Article 10.12.3.

19. The DCO attempted to contact someone inside the house at 21:00 and 21:15 without success. At 21:27 the DCO noticed the arrival of a vehicle at the rear of the premises and then saw a light being turned on inside the property.

20. The DCO thereafter knocked on the front door, which was answered by the Athlete. The DCO confirmed his identity and verbally notified the Athlete that he was required to provide a sample pursuant to the ADR.

21. The Athlete indicated that he was unable to provide a sample. He informed the DCO that his young child (who was in the care of his partner who was also then present at the property) was unwell.

22. The Athlete told the DCO that he needed to take his partner and his sick child to his mother's house, and asked the DCO to return the following day when he would be able to provide a sample. The DCO confirmed that he was unable to do so.

23. The Athlete refused to provide a sample, and further refused to sign a Doping Control Form to confirm his reasons for not providing a sample.

24. By letter dated 14 October 2016, UKAD issued the Athlete with a Notice of Charge ('the Charge') for a violation of ADR Article 2.3, specifically for refusing, without compelling justification, to submit to sample collection after notification on 28 September 2016.

25. On 25 October 2016, the Athlete provided a response to the Charge by e-mail which enclosed his written response to the Charge dated 24 October 2016. The Athlete denied the Charge against him.

26. On the basis of the Athlete's response to the Charge, UKAD referred the matter to the National Anti-Doping Panel ("NADP") for determination on 28 October 2016.

27. A Directions Hearing was convened before me on 8 November 2016 to set procedural Directions for determination of the Charge.

28. The Athlete was again represented at that hearing by Mr Davies QC, who indicated that his instructions were that the Athlete now wished to admit the Charge and further would not seek to rely on either ADR Article 10.4 (No Fault or Negligence) or ADR Article 10.5.2 (No Significant Fault or Negligence) in order to reduce the applicable period of ineligibility.

29. However, Mr Davies indicated that the Athlete would seek a reduction in the period of ineligibility pursuant to ADR Article 10.6.3 (Prompt Admission of an ADRV).

30. In light of that position, the matter was remitted to UKAD to determine the appropriate period of ineligibility. Given that the ADRV was the Athlete's second ADRV, ADR Article 10.7.1 was engaged in relation to the sanctioning of multiple violations. UKAD's determination was subject to the Athlete's right of appeal pursuant to ADR Article 13.

31. As noted above, the Athlete was made subject to the Issued Decision and subsequently appealed against that decision with detailed grounds later being set out in the Notice.

**Jurisdiction**

32. At the time of the commission of the first ADRV in 2015 the Athlete was registered as a player with the Rugby Football League ("RFL").

33. The RFL has adopted the UK Anti-Doping Rules as the ADR. The ADR apply to all members of the RFL who, by virtue of that membership, agree to be bound by and to comply with them.

34. As noted above, the Athlete remained subject to the jurisdiction of the ADR pursuant to ADR Article 10.12.3.

35. For completeness, jurisdiction was not challenged, and the Notice in fact specifically stated that it was intended to trigger the appellate jurisdiction of the ADR as provided for pursuant to ADR Article 13.4.1.

**The Appeal**

36. The Notice asserted that "the undue harshness and severity of the length of the period of ineligibility is the basic ground of appeal".

37. That overarching complaint was then, in summary, amplified as follows:

I. UKAD had not taken adequate or proper mitigating account of

a) submissions and evidence submitted in support of a reduction in the period of ineligibility pursuant to ADR Article 10.6.3; and/or

b) the fact that the Athlete's admission had been full, frank and unqualified in that he had not sought further mitigation pursuant to ADR Article 10.4

or ADR Article 10.5.2; and/or

c) the fact that the Athlete had not been motivated by an element of "cheating"

in refusing to provide a sample;

ii. UKAD had, in assessing the period of reduction granted to the Athlete, meted inordinately grave and excessive weight to the fact that the Appellant's refusal was "intentional" and, in so doing, had failed properly, or at all, to consider the seriousness of the Athlete's ADRV and his degree of fault.

38. UKAD opposed the appeal.

**Submissions**

39. In large part, Mr Davies urged me to rely on the arguments advanced in his document headed Further Submissions on behalf of the Appellant dated 22 February 2017.

40. In his submission no reasonable decision making body, which had properly analysed and taken into account all the evidence and the circumstances, would have granted such a limited reduction from the period of ineligibility imposed in light of the Athlete's prompt admission.

41. He noted that, even in the gravest and most serious of crimes, such as murder or rape, the courts grant a far greater discount, than had been afforded by the Issued Decision, for an immediate, unqualified and unequivocal plea of guilty. In Mr Davies' submission, the Athlete had entered such a plea.

42. In addressing the seriousness of the Athlete's violation, Mr Davies submitted that UKAD had erred in not conducting an effective assessment of the intention of the Athlete and, in particular, such an assessment needed to have been made both subjectively and objectively.

43. Central to that submission was the fact that the Athlete, in committing the violation, was motivated solely by his concern for his daughter's health. He had not

intended to cheat or to avoid the detection of the consumption by him of a prohibited substance, and there was no evidence to suggest that this had been his intention. In Mr Davies' view, the Issued Decision had unreasonably, and erroneously failed to conduct any, or any proper, subjective assessment of the Athlete's intention and had wrongfully approached the position from an entirely objective assessment of the evidence.

44. Turning to the degree of fault, which could fairly be attributed to the Athlete, Mr Davies again made complaint of the failure to have conducted a subjective assessment of the position. In his submissions the concept of "Fault" as referred to and explained in the ADR is not exhaustive and is no more than exemplary. Accordingly, consideration can, and should, be given, and would be given by a reasonable decision maker, to an athlete's subjectively assessed intention when determining his degree of fault.

45. In this regard, all the circumstances pertinent to the Athlete's reasons for refusing to provide a sample should have been considered but were not. This had led to a wholly objective and erroneous approach being taken by UKAD/WADA when making its determinations.

46. In particular, Mr Davies was critical of the finding (at paragraph 45 of the Issued Decision) that arrangements could have been made for the Athlete's partner to tend to his daughter and ensure that his daughter was cared for whilst a sample was provided. In Mr Davies' submissions there was no evidence to support that position. In fact, the actual evidence had been overlooked. No reasonable decision maker would overlook such actual evidence but would, on the contrary, take it into account in assessing an athlete's degree of fault.

47. It was stressed that the Athlete's sole concern had been his daughter's health and not any desire to conceal the presence of Prohibited Substances or otherwise cheat.

48. In concluding, Mr Davies urged that I allow the appeal and remit the matter back to UKAD for a further determination with the benefit of a recommendation from me as to the appropriate length of the period of ineligibility to be imposed. Such a decision being consistent with Option 2 as postulated in Evans, above.

49. In response, Mr Muncey agreed that, if the appeal was to be allowed, Option 2 should be followed. However, his primary submission was that the appeal should be

dismissed, and placed reliance on both the Written Submissions and the matters set out in an earlier Reply to the Notice of Appeal lodged by UKAD dated 16 January 2017.

50. The Written Submissions addressed jurisdiction, the low reduction in the period of ineligibility, seriousness and degree of fault.

51. In relation to jurisdiction, it was accepted that NADP had jurisdiction to consider whether UKAD had properly exercised the discretion afforded to it under ADR Article 10.6.3. UKAD though further submitted that the NADP's jurisdiction was limited to reviewing the process followed by UKAD and WADA in reaching a joint decision. In order to assess whether that process was fair, I was therefore able to review whether UKAD and WADA had taken into account all relevant factors and given them sufficient consideration.

52. As part of that exercise, I might seek to form a view as to the appropriate reduction to be given which could differ from the reduction agreed upon by UKAD and WADA. However, that would not mean UKAD and WADA's reduction was unreasonable, unless it fell within the ambit of paragraph 30 of Evans (above).

53. In any event, UKAD submitted that it was not within my jurisdiction to impose any formed view regarding an appropriate reduction in sanction. That was an issue in respect of which UKAD and WADA retained ultimate discretion under ADR Article 10.6.3.

54. In the view of UKAD, it had considered all evidence appropriately and the decision reached was not one that no reasonable decision maker could have made.

55. As to submissions made on behalf of the Athlete, that UKAD had only granted a meagre and mean discount to reflect the prompt admission made, UKAD noted that this was the Athlete's second ADRV. It further rejected the contention that the position as regards the discount to be afforded for a prompt admission should be viewed in a way that was consistent with, or analogous to, the approach adopted by the criminal courts in the UK when passing sentence on offenders who plead guilty.

56. The reduction afforded to the Athlete had been reflective of UKAD's analysis of the seriousness of the violation and the level of fault apparent as set out in both the Issued

Decision and the Written Submissions which, in UKAD's submission, demonstrated that account had been taken of all relevant matters.

57. In responding to the Athlete's submissions on seriousness and fault, UKAD noted that a violation under ADR Article 2.3 resulted in a mandatory period of Ineligibility of four years pursuant to ADR Article 10.3.1. Further, the commentary to the WADA Code indicated that "Refusing" sample collection contemplates intentional conduct by an athlete.

58. In UKAD's view, a refusal violation does not accordingly warrant an assessment of an athlete's reasons for, or intention in, refusing to provide a sample in order to determine that the mandatory sanction should apply. A refusal is an inherently intentional act.

59. The WADA Code restricts any reductions in mandatory periods of ineligibility where violations are committed intentionally and therefore views intentional violations as being extremely serious.

60. Based on the above, UKAD's position was that the Athlete's violation was at the most serious end of the spectrum and that therefore no reduction from the period of ineligibility was appropriate in relation to seriousness.

61. Similarly, no consideration of intention should be made when assessing the degree of fault present in a violation. UKAD asserted that all the matters highlighted in the written submissions submitted on behalf of the Athlete had been addressed in its assessment of the ADRV.

62. In answer to a question I had posed about previous cases where a discount for a prompt admission of guilt had been considered, Mr Muncey made reference to the decision in UKAD v Pugsley (2016). This case was not in the hearing bundle and I therefore directed that it should be made available and gave leave to the parties to make brief written submission, if they wished, in relation to it after the conclusion of the hearing. In reaching my decision, I considered both the decision and the submissions received.

**Decision**

63. I reminded myself of the test that would need to be satisfied for the appeal to be allowed and that the burden lay on the Athlete to establish to my comfortable satisfaction that:

1. the Issued Decision was one which no reasonable decision maker could have reached; and/or

2. the process whereby the Issued Decision had been reached was flawed or unfair; and/or

3. the decision-maker (UKAD/WADA) has misapplied the rules or failed properly to analyse the evidence.

64. In relation to the first of these potential foundations for a successful appeal, the period of ineligibility imposed upon the Athlete was in any view severe. Similarly, the reduction from the period of ineligibility imposed could reasonably be described as minimal.

65. Whether or not the period of ineligibility can be viewed as harsh or whether or not the reduction afforded can be viewed as minimal is not however the issue. What I am required to do, as an Appellate Tribunal, is determine whether the decision reached was so harsh as to be a decision which no reasonable decision maker could have taken. That is a demanding test. In this respect, it should not be overlooked that the anti-doping regime is purposefully strict and needs to be applied consistently on an international basis.

66. I considered carefully the complaint by Mr Davies that UKAD had erred in only having conducted an objective assessment whilst overlooking the Athlete's subjective state of mind. I am however satisfied that due consideration was given to the precise circumstances that the Athlete had faced on 28 September 2016, and that this was reflected in the reduction in the period of ineligibility that was granted.

67. Further, in my view, the difficulties apparent in advancing the case as to the Athlete's subjective belief also fall to be considered.

68. In this respect no independent evidence was submitted before UKAD with which to establish the nature or the seriousness of the condition to which the Athlete's daughter was subject to at the time the DCO attended to take a sample.

69. Most obviously there was no evidence from the family GP or a hospital. My understanding was that the Athlete's mother-in-law is a nurse and that the kernel of the Athlete's argument was that he had felt it imperative to return his daughter to his mother-in-law's house so that appropriate care could be afforded. There was however no evidence from the Athlete's mother-in-law that might have assisted.

70. Given that the health of the Athlete's daughter was central to the position, it was not clear to me why it had been felt necessary, or appropriate, for the Athlete's daughter to have accompanied him on what was close to a two hour round trip from his mother-in-law's house to the Athlete's house and back again, simply (on the evidence) to pick up additional nappies and clean pyjamas.

71. Arguably, if the daughter had been so ill, it would have been more prudent for her to have remained with her grandmother who, as a trained nurse, could have provided necessary care and attention.

72. Further, it was apparent from the evidence that the Athlete's partner had suggested that he provide a sample, but that the Athlete had rejected that suggestion.

73. For completeness, I had in evidence before me a letter from the Nelson Surgery dated 23 November 2016. This however referred to the Athlete's daughter having been seen on an emergency basis on the 31 October 2016. As above, the sample had been requested on 28 September 2016; no evidence as to the medical position of the daughter at that time was submitted.

74. I also carefully considered the submission that the reduction granted to the Athlete was inadequate and did not properly reflect his prompt admission of the ADRV. The prompt admission provision of ADR Article 10.6.3 is not a stand-alone provision (as it is for example in the context of criminal sentencing).

75. 10.6.3 reads as follows:

*An Athlete or other Person potentially subject to a 4 year sanction under Article 10.2.1 or 10.3.1 (for evading or refusing the sample collection or tampering with sample collection), may receive a reduction in the period of Ineligibility down to a minimum of 2 years, depending on the seriousness of the violation and the Athlete's or other Persons degree of Fault by properly admitting the asserted Anti-Doping Rule Violation after being confronted with it, upon the approval and at the discretion of WADA and UKAD.*

76. Accordingly, the level of discount that may be granted is subject to:

a. an assessment of the seriousness of the violation and the degree of fault involved; and

b. the discretion of the Authorities.

77. I was comfortably satisfied that UKAD, in arriving at the determinations which led to the Issued Decision, gave due consideration to the seriousness of the violation, not least that it was the Athlete's second ADRV. I was also satisfied that adequate consideration was given to the degree of fault involved. I have already referred above to the difficulties in arriving at an assessment of the subjective factors present that would have been favourable to the Athlete.

78. In my determination therefore, the period of ineligibility imposed was not one which no reasonable decision maker could have reached. Although not articulated in this way, I noted that the discount allowed was broadly 10% of the total period of ineligibility that would otherwise have been imposed.

79. I did not understand it to be asserted that the process followed by UKAD/WADA was flawed or unfair, but for completeness I did not find that to be the case.

80. To the extent that it could be implied from the submissions on behalf of the Athlete that UKAD had misapplied the rules or failed properly to analyse the evidence, I did not find that either eventuality arose in the process by which the Issued Decision had been reached.

**Conclusion**

81. For the reasons set out above, the appeal was dismissed.

82. The period of ineligibility as imposed by the Issued Decision accordingly remains in place.

**Jeremy Summers**

**23 March 2017**

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