

IN THE MATTER OF AN APPEAL IN PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF THE WELSH RUGBY UNION

Before:

Rod McKenzie (Chair)

BETWEEN:

Thomas Curry ("Athlete")

Appellant

-and-

UK Anti-Doping ("UKAD")

Respondent

DECISION OF THE ARBITRAL APPEAL TRIBUNAL

INTRODUCTION

1 This is the final decision of the Arbitral Appeal Tribunal comprising a sole arbitrator, appointed pursuant to Articles 5.3 and 15.1 of the National Anti-Doping Panel Procedural Rules 2015 ("NADP Rules"), to determine an appeal brought against the final decision of an Arbitral Tribunal dated 26 September 2017 ("the Tribunal Decision"), in proceedings brought against the Athlete by UKAD for a violation of Article 2.1 of the UK Anti-Doping Rules 2015 ("ADR") (as adopted by the Welsh Rugby Union ("WRU")). As with the proceedings before the Arbitral Tribunal the disputed issues in the appeal concern only the period of Ineligibility which should be imposed on the Athlete. The Athlete admitted the commission of a 'Presence' Anti-Doping Rule Violation ("ADRV") following Analytical Testing of a Sample provided by him as part of a Sample Collection Procedure following a rugby union match on 08 April 2017. The Athlete was not charged with a Use ADRV in terms of ADR Article 2.2.

2 The Arbitral Tribunal describes the commission of the ADRV, the Testing and Analytical Testing as follows:

"5. Article 2.1 of the ADR 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').

6. The Respondent is registered with the WRU as a rugby union player. He is a student and plays for Newcastle Emlyn RFC ('NERFC'). Last season was his first in senior rugby. On 8 April 2017, he played for NERFC against Glynneath RFC in a Swalec National Championship match ('the match'). The Swalec National Championship is a Competition which is authorised by the WRU. The match started at 14.30.

7. Following the match, the Respondent provided four urine samples. Each was split into two separate bottles which were given individual reference numbers. Two did not have suitable specific gravity for analysis pursuant to clause D.4.16

of the WADA 2017 *International Standard for Testing and Investigations* ('ISTI').

8. All samples were transported to the Drug Control Centre, Kings College, a World Anti-Doping Agency ('WADA') accredited laboratory ('the laboratory'). The laboratory analysed the First A Sample, Second A Sample and Fourth A Sample in accordance with the procedures set out in WADA's *International Standard for Laboratories*. The samples were timed and labelled as follows:

8.1 A1135080 (1.002) sealed at 16:44 hours;

8.2 A1126343 (1.003) sealed at 17:09 hours;

8.3 A1133957 (1.000) sealed at 18:32 hours.

9. Each of the three A samples identified in the foregoing paragraph returned an Adverse Analytical Finding ('AAF') for benzoylecgonine. Benzoylecgonine is a metabolite of cocaine. Cocaine is classified as a Non-Specified Stimulant under section S6a of the 2017 WADA *Prohibited List*. It is prohibited In-Competition only.

10. The Respondent did not have a TUE to permit the use or presence of cocaine.

11. He was first notified and charged with the ADRV by letter dated 28 April 2017. The letter set out the details of the alleged ADRV with which he was charged. It also contained a summary of the facts and the evidence relied upon by UKAD. The letter also imposed a provisional suspension with immediate effect. 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."

3 By letter dated 15 May 2017 UKAD notified the Athlete of an amendment to the Charge. There had been four Samples taken from the Athlete at Sample Collection and UKAD had caused the 1st, 2nd & 4th Samples to be Analytically Tested. The 2nd Sample had the highest specific gravity. Each of the Samples Analytically Tested returned an Adverse Analytical Finding ("AAF") for benzoylecognine. The Athlete advised that he did not want any of the B Samples

to be Analytically Tested and he formally confirmed his admission of having committed a 'Presence' ADRV in a document submitted by him entitled "Defence" dated 13 June 2017.

- 4 In this 'Defence' document the Athlete advanced a detailed explanation as to how it was alleged that he had come to have a metabolite of Cocaine in his system when he was the subject of Sample Collection at circa 18:32 hours on 08 April 2017. He asserted that he had gone out socially with university friends on the evening of 05 April 2017 during which he had consumed an unknown quantity of alcohol. In the early hours of the morning of 06 April 2017 he had gone to the home of one of his friends and had their consumed cocaine "for recreational purposes".
- 5 In his witness statement the Athlete estimates that he consumed the cocaine in 'lines' over a 2 to 3-hour period from around 4am to around 7:30 am. The Athlete asserted that he took ('snorted') one line at a time on between 3 to 5 occasions. A Mr Bansal who advises in his witness statement that he was present with the Athlete at this time asserts that he personally saw the Athlete, it was his flat to which they had returned, ingesting the first line of cocaine at 4:45am "by sniffing it up his nose". He, Mr Bansal, believed that the Athlete had done this on 3 or 4 occasions
- 6 In the Tribunal Decision, the Arbitral Tribunal records, at paragraphs 16 to 24 inclusive, that the Athlete gave oral evidence at the hearing as well as a detailed written witness statement. Mr Bansal also gave oral evidence. The oral evidence given by the Athlete and Mr Bansal on the issue of where, when and how much cocaine was consumed by the Athlete did not differ in any material respect with that set out in paragraphs 4 and 5 above.
- 7 The intimation of an appeal by the Athlete was first made by email from his representative, Mr Torrance, of 30 October 2017. At that stage of the appeal, it was asserted, it would be advanced on the ground that since the Arbitral Tribunal had accepted the accuracy of the scientific evidence, then, based on certain cited previous CAS decisions, there was scope for the Panel (Arbitral Tribunal) to have found that the Athlete had ingested cocaine on a later date than that admitted by

the Athlete but still 'Out-of-Competition' and thereby meeting the requirements of ADR Article 10.2.3.

8 A Hearing on Directions in the Appeal was convened on 30 November 2017, by which time, no further detail on the Grounds of Appeal had been received. At the hearing on directions the Athlete was represented by Mr Torrance, Trainee Solicitor, and UKAD was represented by Mr Giovanelli of counsel. The first Note of Directions, following the Hearing on Directions, was issued on 04 December 2017. The note is at pages 20 to 24 of the agreed appeal bundle.

9 The note discloses, that at the hearing, parties agreed that the relevant Procedural Rules for the Appeal are the 2015 NADP Procedure Rules and the relevant Anti-Doping Rules are the UK Anti-Doping Rules, adopted as the Welsh Rugby Union Anti-Doping Rules. The relevant edition of the WADA Code is the 2015 Code.

10 Parties also agreed:

- (i) that the Appeal is brought in terms of Article 13 of the NADP Rules;
- (ii) that there was no objection to the appointment of the Chairman (the Sole Appeal Arbitrator) to the NADP Appeal Tribunal which would determine the Appeal brought by the Athlete;
- (iii) that there was no objection to the Chairman conducting the Hearing on Directions and making the directions;
- (iv) that in the event that the President of the NADP decided to appoint the Chairman to sit alone as the Arbitral Appeal Tribunal determining the Appeal as a sole arbitrator that there would be no objection from either of the parties;
- (v) that the standard of review in the Appeal should be in accordance with Article 13.4.2 of the NADP Rules; and

(vi) that the appeal should be determined by the Appeal Tribunal on the papers without a hearing, at which oral argument could be presented, being required.

11 Mr Torrance acknowledged that, at present, the Grounds of Appeal were in summary form and that it was appropriate that the Appellant set out his grounds in full in order to give fair notice of the basis on which the Appeal would be advanced.

12 Parties were required to conform to the following timetable:

- (i) by not later than 5pm on 15 December 2017 the Appellant was required to lodge fully particularised Grounds of Appeal; and
- (ii) by not later than 5pm on 19 January 2018 each party was required to lodge a detailed written argument, including citation of relevant authority, in support of their respective positions in the Appeal and parties were required to agree and lodge a joint bundle, including copies, of all relevant authorities, and an agreed joint list of documents considered relevant in the Appeal with a copy of each such document.

13 Thereafter the Appeal Tribunal would proceed to determine the Appeal based on the Grounds of Appeal, any detailed written arguments, relevant authorities and documents with a final written decision being issued in due course. Parties were given until 5pm on 08 December 2017 to request any further directions or to seek an amendment to any of the above directions. No such request was received, whether by 08 December or later, and the Appeal proceeded on the basis of the NADP Procedural Rules and the above directions. The President decided to and appointed the Sole Appeal Arbitrator to alone constitute the Appeal Arbitral Tribunal. This appointment was notified to Parties without comment or objection.

14 Mr Torrance requested an extension of the period in which to lodge his extended Grounds of Appeal. This was granted without objection and on 15 December 2017 what were, in effect, the first properly articulated Grounds of Appeal were lodged. These Grounds of Appeal were in the following terms:

"Mr Curry is appealing the Decision under Article 13.4.2 of the 2015 Rules of the National Anti-Doping Panel.

The basis of Mr Curry's appeal is that:

- i. The first instance tribunal imposed a four-year period of Ineligibility on Mr Curry, determining that Mr Curry had not established how the Anti-Doping Rule Violation occurred.
- ii. It was wrong of the tribunal to establish this and instead should have made a determination on whether or not Mr Curry ingested cocaine In or Out-of-Competition based upon the evidence presented to it.
- iii. If the tribunal did not find that Mr Curry used cocaine In-Competition in a context related to sport performance, then a two-year sanction should have been imposed
- iv. Given the evidence presented to the tribunal, there was no basis upon which the tribunal could have properly found that Mr Curry ingested cocaine In-Competition.
- v. The first instance tribunal failed to properly apply the guidance provided by CAS in relation to the application of the Anti-Doping Rules."

15 Rule 13.4 is in the following terms:

"13.4 Standard of review:

13.4.1 Where required in order to do justice (for example to cure procedural errors in the Arbitral Tribunal proceedings), appeals to an Appeal Tribunal pursuant to this Article 13 shall take the form of a rehearing de novo of the issues raised in the proceedings, i.e. the Appeal Tribunal shall hear the matter over again, from the beginning, without being bound in any way by the decision being appealed.

13.4.2 In all other cases, the appeal to an Appeal Tribunal shall not take the form of a de novo hearing but instead shall be limited to a consideration of whether the decision being appealed was erroneous."

16 There was no application by either Party for a *de novo* hearing, either in whole or in part, and neither party sought leave during the course of the Appeal, to adduce

any additional evidence which had not been before the Arbitral Tribunal. Accordingly, if the Athlete was to be successful in his appeal, it would be necessary for him to establish that the Arbitral Tribunal had been erroneous in a part or parts of its Final Decision. In the Grounds of Appeal, set out in paragraph 14 above, sub-paragraphs i to iv, are all directed to the decisions of the Arbitral Tribunal as regards ADR Articles 10.2.2 & 10.2.3. The final paragraph is so generally expressed as to be of limited value in giving notice of the arguments intended to be advanced on appeal and the respect or respects in which the Arbitral Tribunal's decisions were claimed by the Athlete to be erroneous. Further, it was not apparent from the Grounds of Appeal that the argument presaged in the email of 30 October 2017 was to be maintained. Both Parties lodged detailed written submissions dated 19 January 2018. UKAD then observed by email that aspects of the argument advanced by the Athlete in his written submissions were not reflected in his Grounds of Appeal. The Sole Appeal Arbitrator therefore convened a preliminary appeal hearing by conference call on 30 January 2018. At the preliminary hearing it was accepted by Mr Torrance that the then Grounds of Appeal were inadequate to the extent that they did not include for all of the arguments advanced in his written submissions and he requested an extension of time to lodge further Grounds of Appeal. This was not opposed by UKAD, Mr Torrance's application was granted, and he lodged amended Grounds of Appeal dated 06 February 2018. These amended grounds maintained all of the grounds set out in paragraph 14 above but were supplemented as follows:

"Mr Curry further submits that:

- i. Given the scientific expert evidence provided to the first instance tribunal Mr Curry cannot have intended to cheat, as defined in ADR 10.2.3, as the very nature of cocaine does not lend itself to performance enhancement and would, in fact, be detrimental to the performance of an athlete; and
- ii. Further to paragraph 4, if it is determined that Mr Curry did not ingest cocaine In-Competition [sic], CAS jurisprudence provides that Mr Curry has also established No Significant Fault or Negligence, for the purposes of ADR 10.5.2, and his level of fault should be assessed on this basis. Submissions on fault

were made at the first instance tribunal, however this matter was not dealt with in the written decision.”

- 17 Parties were invited to lodge additional written submissions dealing with these two additional paragraphs of text which now comprised part of the final version of the Grounds of Appeal. UKAD accepted the invitation so to do and lodged an Addendum to Written Submissions on 14 February 2018. Mr Torrance decided not to lodge any further written submissions and relied on his written submissions of 19 January 2018. The email exchanges which resulted in these procedural steps are not recorded in detail in this Final Decision since all extensions of time and permission to amend Grounds of Appeal were not opposed by, in each case, the other party.
- 18 In addition to the witness statements provided to the Arbitral Tribunal, the Sole Appeal Arbitrator was also provided with transcripts of the oral evidence given at the hearing by Professor David Cowan, Mr Shaun Leonard and Mr Marc Lloyd. In addition to the amendment to the Grounds of Appeal dated 06 February and the Addendum to UKAD Written Submissions of 14 February a complete list of the evidential and other materials before the Sole Appeal Arbitrator is comprised in the Index to the Agreed Appeal Bundle.
- 19 This Final Appeal Decision (“this Decision”) includes a summary of the relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence at the hearing. Additional facts and allegations found in the Parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion.
- 20 The Sole Appeal Arbitrator has carefully considered the entirety of, the Athlete’s Grounds of Appeal (as amended); parties’ written submissions; expert evidence; witness statements; documentary productions; relevant regulatory provisions; guidance; authorities; and, oral testimony at the Arbitral Tribunal hearing, as summarised in the Final Decision of the Arbitral Tribunal and comprised in the transcripts of some of the witness evidence. However, this Decision only refers to that evidence, other material, submissions and others which the Sole Appeal Arbitrator considers necessary to decide the issues in this appeal articulated in

the Grounds of Appeal and amendments to Grounds of Appeal, as set out in paragraphs 14 and 16 of this Decision (“the Amended Grounds of Appeal”).

21 The only disputes for determination in this appeal are whether the Arbitral Tribunal in reaching its final decision, was “erroneous” for the purposes of NADP Rule Article 13.4.2, in the respects contended for on behalf of the Athlete in the Amended Grounds of Appeal. That this appeal process is itself an arbitration is provided for in the NADP Rules at Article 13.6.2 which *inter alia* applies NADP Rule Article 5 to proceeding before an Appeal Tribunal. Article 5 provides *inter alia* that members of the NADP when determining matters pursuant to the NADP Rules are doing so as arbitrators.

22 The Grounds of Appeal begin at (i) with a proposition that the Arbitral Tribunal imposed the four-year period of Ineligibility on the Athlete “*determining that Mr Curry had not established how the Anti-Doping Rule Violation occurred*”. Paragraph (ii) goes on to assert that the Arbitral Tribunal was wrong to so conclude “and instead should have made a determination on whether or not Mr Curry ingested cocaine In or Out-of-Competition based upon the evidence presented to it”. It is not clear whether the Athlete’s complaint in this regard is whether the Arbitral Tribunal asked itself the wrong question i.e. why did the ADRV occur or whether, having asked itself the correct question, it was erroneous in the answer it concluded was the correct one to the question. The written submissions for the Athlete are only of limited assistance in this context given the terms of paragraph 10 of that document which suggest that the Arbitral Tribunal had found that the Athlete “had not established the ADRV”. However, the Arbitral Tribunal makes no such finding. It was never in issue that an ADRV had been established. That an ADRV was committed by the Athlete viz. the Presence of a Prohibited Substance in the Samples provided by the Athlete during Sample Collection, was never in issue nor was it in issue that the Samples had been collected In-Competition. The definition of “In-Competition” provides that the Sample Collection process related to a Competition, such as a rugby union match, includes the related Sample collection process. Rather, what was in issue in this context, was whether the ‘intention’, as explained in ADR Article 10.2.3, of the Athlete, when he caused himself to ingest the cocaine, was to commit an ADRV,

an issue which would be in part informed by the 'when' of each occasion or occasions that cocaine was ingested by the Athlete, in what quantities was cocaine ingested on each such occasion, and, in particular, was it ingested during the In-Competition Period relating to the rugby match i.e. the Competition, which commenced at 14:30 on 08 April.

23 ADR Article 10.2 provides that in the case of a presence ADRV, i.e. pursuant to ADR Article 2.1, that subject to certain conditioning provisions, in the case of an ADRV which does not involve a Specified Substance, it was accepted that the substance in this case was not Specified, that the resulting period of Ineligibility for a first offender would be four years unless the Athlete "*can establish that the [ADRV] was not intentional.*" In construing this provision, it is important to bear in mind that a 'presence' ADRV is a 'strict liability' violation. Per ADR Article 2.1.1 it is expressly provided that questions of fault, intent, negligence are not relevant considerations as to whether an ADRV in terms of ADR 2.1 has been committed. In terms of ADR Article 2.1.2(a) mere presence of a Prohibited Substance in an A Sample is sufficient to constitute the ADRV. Accordingly, when considering the intention of an Athlete, for the purposes of ADR Article 10.2.1(a), in ingesting a Prohibited Substance, which is a Specified Substance, whether the Athlete intended to gain a competitive advantage by so ingesting is not a question to which the provision is addressed. Rather, the relevant question is whether the Athlete intended, within the meaning of ADR Article 10.2.3, that the Prohibited Substance or its Metabolites or Markers be present in his system so that it or they would be present in a Sample provided by him in the event that he was required to provide a Sample for Analytical Testing.

24 Further, and contrary to what is suggested in the Grounds of Appeal, it was not for the Arbitral Tribunal to seek to establish anything regarding the context and/or timing of the Athlete's ingestion of cocaine. It was for the Athlete to establish, on the balance of probabilities, that when he ingested the cocaine he did not intend it to be present in a Sample collected from him in the event that he was subject to Sample collection. "Intentional", in this context, and by extension its derivatives, intend and intent, are given a particular meaning which extends beyond the usual dictionary meaning. The meaning, per ADR Article 10.2.3, has

the purpose of identifying Athletes who cheat and those who cheat include both: (i) Athletes who conduct themselves in a way that they know constitutes an ADRV; and (ii) those who know of a significant risk that their conduct might itself constitute or result in an ADRV but manifestly disregard that risk.

25 In this case, the Athlete did not suggest that he did not know that cocaine was a Prohibited Substance and he readily acknowledged that when he 'snorted' the 3 to 5 lines which he told the Arbitral Tribunal he ingested in the period from around 4am to 7:30am on 06 May he knew he was taking cocaine so that it would enter his system. He had been the recipient of some Anti-Doping awareness training in 2016 so he was well aware of there being Prohibited Substances, that cocaine was one of them, that he might be Tested and required to undergo Sample Collection in the context of a match, which was a Competition, and that there was liable to be sanctions if a Prohibited Substance was present and detected in a Sample provided by him.

26 He suggests that during that training he and others present were advised not to take *"recreational drugs within 24 hours of a game"*. Whilst at least one other who was present suggests that cocaine was specifically mentioned in this context that was not the evidence of the Athlete. It is noteworthy that Mr Leonard in his evidence is clear that there was no mention at the seminar regarding how long cocaine would remain detectable in a person's system after ingestion and that a period of 24 hours was not mentioned at all. Mr Lloyd in his evidence confirmed that there had been no specific discussion at the seminar regarding the detection time for cocaine post-consumption and that the discussion had been around *"recreational drugs"* generally.

27 The Arbitral Tribunal also had before it, and recorded at paragraphs 15, 17, 19, 21, 22 and 23 of the Tribunal Decision, detailed evidence concerning the WRU organised anti-doping seminar attended by the Athlete and a number of his friends and teammates on 16 September 2016. The evidence before the Arbitral Tribunal concerning what was said as regards 'recreational drugs' at the seminar, was variously to the effect that the person leading the seminar had, in response to a question, stated, *"not to use recreational drugs on the day of a game or on the evening before, but that otherwise using recreational drugs should not be a*

problem" or that the person taking the seminar had said that cocaine and cannabis would be out of a player's system 24 hours after being taken. The Athlete gave evidence to the effect that he understood, from what they had been told at the seminar, that as long as he took, for example, cocaine, no less than 24 hours before a match that he would not 'test positive' for cocaine if Tested following a Match.

28 It may be considered to have been difficult for the Arbitral Tribunal to fully reconcile this somewhat inconsistent evidence about what had been said at the seminar. Assuming, recreational drugs may be inferred as a reference to all narcotics, whatever the means of administration, the 'purity' of the drug consumed and the pharmacological nature of the narcotic in terms of its rate and timing of absorption by and excretion from the body, issues which are dealt with below, appear not to have been discussed.

29 It is manifestly not the case that taking the drug concerned 'the evening before' a competition will necessarily result in there being more than 24 hours between consumption of the narcotic and Sample collection. In the case of the Athlete his last Sample collection took place just before 18:32 for the final Sample collected; the first having been collected at 16:44. The Athlete arrived at the DCS at 16:18. Even taking account of the later time for the final Sample collected, that would allow a range of times for consumption of 'recreational drugs' during "the evening" before Sample collection, i.e. 07 April, and during the morning and early afternoon of 08 April, and with such consumption all being less than 24 hours before either or both of Sample collection and the beginning of the match at 14:30 on 08 April.

30 The relevant time details for Sample Collection are in the Doping Control Form on page 376 of the joint bundle. In the Athlete's written statement at paragraph 4, the position is further confused by his suggesting that the advice given was not to take "recreational drugs within 24 hours of a game". On the basis of a match commencing at 14:30 that would result in the putative 'no recreational drugs to be consumed' period beginning at 14:30 on the day before the match in question. It may be considered inherently unlikely that a person giving a seminar on anti-doping would suggest the time of a Competition as being in any way relevant to

whether Testing of Samples collected 24 hours or less later would result in an AAF for the presence of a Prohibited Substance. Manifestly, the timing of the beginning of a Competition e.g. a rugby union match, has no bearing on the detectability of a Prohibited Substance in a Sample collected at some indeterminate point following the Competition. What may matter is the time between ingestion of a Prohibited Substance and the time of Sample collection.

31 It is noteworthy, that on the Athlete's version of events, he must have knowingly and intentionally failed to make a full and frank disclosure when completing the Doping Control Form at page 376 of the bundle and answering the question at 25, regarding declaration of medication, whether prescription or non-prescription in the last 7 days; by stating only "MSC protein shake". On the Athlete's version of events, he had been very much influenced in deciding to ingest the cocaine in the early hours of the 6th of April by what he asserts he was told at the seminar regarding the detectability of recreational drugs in collected Samples. However, on the basis of the Athlete's stated belief, as at 08 April, there was no reason not to disclose his consumption of cocaine on 06 April in the Doping Control Form. On the Athlete's version of events, he was completely confident, based on what he alleges he had been told at the seminar, that the cocaine, taken by him two days previously, would not be detected in any Testing. If that was the case, why withhold the information regarding his consumption of cocaine which plainly falls within the range of substances to which question 25 is directed?

32 Cocaine and its Metabolites are both not a Specified Substance and are prohibited In-Competition. The relevant *Prohibited List* is the 2017 Edition which provides:

"IN ADDITION TO THE CATEGORIES S0 TO S5 AND M1 TO M3 DEFINED ABOVE,
THE FOLLOWING CATEGORIES ARE PROHIBITED IN-COMPETITION:"

This text appears immediately after the Section heading "*SUBSTANCES AND METHODS PROHIBITED IN-COMPETITION*". The Athlete argued at the hearing before the Arbitral Tribunal that ingestion of the 3 to 5 lines of cocaine by him between around 4am and 7:30am on 06 April was not In-Competition and that as

a result it was open to him to *“establish that the Prohibited Substance was Used by him Out-of-Competition in a context unrelated to sport performance”*.¹

33 The proposition for the Athlete, which seeks to encapsulate this argument is articulated at paragraph 19 of his written submissions as follows:

“Therefore, based upon the factual witness evidence provided, which was seemingly accepted at the first instance tribunal, Mr Curry did not ingest cocaine on the day of the game. As such, Mr Curry did not ingest cocaine In-Competition.”

34 The Arbitral Tribunal, on balance, accepted the evidence of and given by witnesses for the Athlete that the Athlete had consumed cocaine, in or about the quantity spoken to by the Athlete, on 06 April at or about the time advanced by him and supported by Mr Bansal. This issue is dealt with by the Arbitral Tribunal at paragraphs 50 and 53.1 of the Tribunal Decision. However, at paragraphs 51, 52 and the remaining parts of 53, what the Arbitral Tribunal also found, was that the Athlete must, on the evidence, have consumed a further quantity or quantities of cocaine subsequent to that first established consumption and before the beginning of the match at 14:30 on 08 April.

35 The Arbitral Tribunal accepted the evidence of Professor Cowan that for the only instance of consumption of cocaine by the Athlete to have been at the time claimed by the Athlete then given the levels of the metabolite of cocaine found in the Samples taken on 08 April that the Athlete would have required to have consumed over 2g of 100% pure cocaine which would have been “very likely” to have been a fatal dose. The assumption of 100% purity is, as with all of the other assumptions used in the analysis, the assumption most favourable to the Athlete’s case. For the levels of the Metabolite in the Samples to be consistent with an incident of consumption of between 3-5 lines of 100% pure cocaine the consumption would be likely to have been in the period between 16:00 and midnight on 07 April. The Tribunal having been satisfied that there was an incident of consumption of cocaine by the Athlete during the early hours of 06 April concluded that the Athlete had consumed an additional quantity or

¹ This section of quoted text is taken from the final sentence of ADR 10.2.3 and is identical to the equivalent text in WDA Code 2015 Art. 10.2.3. NB the Code has no explanatory comment on any of Art 10.2.

quantities of cocaine at some point between the early hours of 06 April and 14:30 on 08 April. However, the Arbitral Tribunal were unable to reach any conclusion as to when that/those incidents of consumption might have been since such additional consumption was adamantly denied by the Athlete and there was no evidence as to the time and quantity of ingestion.

36 As the Arbitral Tribunal concludes at paragraph 53.3:

“There are a number of possibilities as to when [the Athlete] took that additional cocaine, all of which he denied”.

Having accepted as reliable and credible the evidence of Professor Cowan, a conclusion, as regards his evidence, which the Arbitral Tribunal was entitled to reach, it was necessary, in the circumstances of this case, in order for the Athlete to discharge the evidentiary burden upon him, as provided at ADR Articles 3.1 and 10.2.1.1, that the Athlete establish, on the balance of probabilities, when it was that he consumed the cocaine and the quantities of the cocaine that he caused to enter his system, consistent with the accepted scientific evidence, in order for the Athlete to show that the presence ADRV committed was not intentional.²

37 The focus of what the Athlete must establish, to the requisite evidential standard, is the absence of intent with respect to the ADRV committed. As an established time of consumption of an amount of Non-Specified Prohibited stimulant becomes closer to the time of the Competition or, as here, where, on the evidence, the Athlete is considered by the Arbitral Tribunal not to have established on the balance of probabilities when and in what quantities he consumed the Non-Specified Prohibited stimulant, it will inevitably become more difficult for the Athlete to establish that such consumption was not intended to result in or that he was not manifestly disregarding the risk that such consumption might

² It is not necessary in every case that the Athlete proves how it was that the Prohibited Substance entered his system. Reference is made to paragraph 41 of the decision of the Arbitral Tribunal and NADP Appeal Panel decision in UKAD v Buttifant SR/NADP/508/2016 paragraphs 28 – 31. However, where, as here, the Athlete claims that his consumption of, in this case, a Non-Specified Prohibited stimulant, was recreational only, it is difficult to see how a decision maker is going to be satisfied that a presence ADRV was not intentional unless it is supplied with evidence about the time, quantity and method of consumption that is consistent with any scientific evidence with which it is supplied and which it considers is reliable and credible.

constitute or result in a presence ADRV in any Sample he provided as part of Testing post his participation in that Competition.

38 The focus of paragraph 19 of the Athlete's written submission, his first 5 Grounds of Appeal and the first of his supplementary grounds are therefore misdirected. The primary issue is not what the Athlete 'intended' by ingestion or use [sic] (in Ground of Appeal (iii) the word is in that form, but it is assumed that it was intended to be in the defined form "*Used*", as in ADR Article 10.2.3); as already observed this is not a case of a "*Use*" ADRV. The focus should instead be on whether the Arbitral Tribunal have reached a decision which is erroneous when it concluded that the Athlete has failed to establish on the balance of probabilities that the 'presence' ADRV which the Athlete admits to having committed was not intentional (as described in ADR Article 10.2.3).

39 There was no error in the decision of the Arbitral Tribunal that the Athlete had failed to establish that the ADRV was not intentional and that ADR Article 10.2.1 applied as provided for in ADR Article 10.2.2. This is an Athlete who has attended some anti-doping training. He knew 'recreational drugs', which he took to include cocaine, were Prohibited; he knew that if a Sample taken from him 'tested positive' that such would be an ADRV; notwithstanding that, he claims he was told that 24 hours was the 'risk' period for recreational drugs he consumed a considerable quantity of cocaine on the 6th with a match on the 8th of the same month; on the evidence accepted as reliable and credible by the Arbitral Tribunal he had consumed more and later but did not acknowledge having done so; he told the Arbitral Tribunal that this was the first time he had taken cocaine during the same week as a match³ presumably because he avoided doing so in light of the risks of committing an ADRV if he was required to provide a Sample; he had assumed, without any checking or verification that the general term "*recreational drugs*" included all forms of narcotic, including cocaine, taken without medical purpose.

41 If, in fact, he consumed cocaine within 24 hours of the match, which is consistent with the expert evidence, he knew that such would result in a presence ADRV if he was Tested, when he took the admitted cocaine (whether also the additional

³ Arbitral Tribunal Decision para.16.

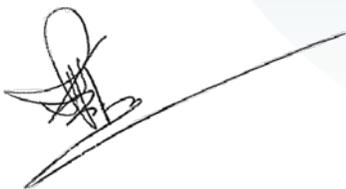
cocaine outside or inside the 24-hour period) he was at best in manifest disregard of the risk of a presence ADRV.

42 Further and in any event, the Arbitral Tribunal was not in error when it held that the Athlete had failed to establish (i) that the Athlete had Used the cocaine Out-of-Competition, the second and any subsequent Uses could have been up to match-time; and (ii) that the Use was unrelated to sport performance.

43 As regards the Athlete's second supplementary and final Ground of Appeal since it is a necessary pre-requisite of engaging ADR Article 10.5, except in the case of a minor, that the Athlete establish how the Prohibited Substance entered his body and since he cannot establish how a significant proportion of the cocaine which resulted in the 'Presence' ADRV did so, it follows that there was no error in the Arbitral Tribunal finding that ADR Article 10.5 was not engaged.

44 Further and in any event, it is clear from the circumstances found established by the Arbitral Tribunal that the Athlete bore considerable personal responsibility for the commission of the ADRV. He consumed significant quantities of cocaine knowing of its Prohibited status shortly before a match. As per the notes to the Code, ADR Article 10.5.2 applies only in exceptional circumstances and these were not such circumstances.

45 The final decision of the Arbitral Appeal Tribunal is that the Athlete's Grounds of Appeal be rejected and that the appeal be dismissed.



Rod McKenzie

Chair

NADP Appeal Arbitral Tribunal

22 May 2018



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