SR/056/2020

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

Before:

William Norris QC
Colin Murdock
Blondel Thompson

BETWEEN:

MARK JONES

Appellant / Athlete

and

UK ANTI-DOPING

Respondent / Anti-Doping Organisation

DECISION OF THE APPEAL PANEL

Introduction

1. On 21 December 2020, the Appeal Panel met by video conference to hear the appeal of Mark Jones, a 36-year-old amateur rugby player, against a decision of the National Anti-Doping Panel ("NADP") on 7 February 2020. That Panel had imposed a four year ban on Mr Jones (hereafter "the Athlete") for an Anti-Doping Rule Violation ("ADRV") under Article 2.1 of Welsh Rugby's Anti-Doping Rules ("the ADR").

2. There was and is no issue about jurisdiction because the Welsh Rugby Union ("the WRU") has adopted the ADR in their entirety and, for the purposes of those ADR, the WRU is a National Governing Body. Accordingly, the ADR apply to the Athlete pursuant to ADR Article 1.2.1.

3. Given that the ADRV was admitted, the only issue, therefore, was the appropriate sanction. UK Anti-Doping ("UKAD"), the relevant Anti-doping Organisation for these purposes, declined to exercise its discretion to reduce the otherwise mandatory four year sanction[1] notwithstanding the Athlete contending that he should have been granted a significant reduction in his sanction, pursuant to Article 10.6.3 of the ADR. That contention was based on the fact that he had made a prompt admission in circumstances where the violation was not the most serious, his degree of Fault relatively minor and he had offered a plausible explanation for how such ADRV could have occurred without him having intended to cheat.

4. UKAD's decision was subsequently endorsed by WADA, most recently in a letter from the WADA dated 15 December 2020.

5. In short, then, the issue for the NADP and for this Appeal Panel was whether the exercise of discretion by UKAD and WADA was wrong so that it should be quashed and should be set aside and, if so, on what basis.

6. As to the first part of that issue, the Athlete contended, in summary, that there was no good reason for either UKAD or WADA to have rejected the explanation he gave for the ADRV or to have regarded as inadequate any part of his assertion of innocence. His was therefore a case where he had made a prompt admission, which simplified the proceedings against him and had done so in circumstances where his violation was at the lower end of the scale and his degree of Fault very low because of the explanation he gave for the presence of clenbuterol in his system.

7. It was therefore submitted on his behalf that the decisions of those bodies were fundamentally flawed and should have been quashed by the NADP and should now be

[1] Under Art. 10.2.1, that is a period of four years ineligibility unless such period is reduced under Art. 10.6.3. The grant of such a reduction is a discretion that can only be exercised by the relevant Anti-Doping Organisation (here, UKAD) and with the agreement of the World Anti-Doping Agency (WADA)

quashed by this Appeal Panel. He further submitted that, having quashed those decisions, we should remit the matter back to UKAD and WADA "*with a recommendation that a two year sanction should be imposed*".[2]

8. In the alternative, the Athlete argued that the sanction imposed by UKAD and WADA was disproportionate and that, on that basis alone, it would be appropriate to recommend they substitute a lesser (two year) ban rather than the four year ban actually imposed.

Factual Background

9. The basic facts are not in dispute and we take them from the very helpful summary in the skeleton argument provided by the Athlete's counsel, Luke Pearce, instructed by Mark Lloyd (his solicitor).

10. The Athlete is an amateur Rugby Union player (for Cambrian Welfare RFC) which play in the Welsh National League, Division 1, East Central. His employment is as a Care Assistant by Rhondda County Council, in which capacity he helps people with learning disabilities gain access to employment. He is also an enthusiast for coaching and in such capacity would wish to continue coaching junior teams as well as playing.

11. On 25 April 2019, the Athlete was at his Club's training facilities when UKAD Doping Control Officers arrived with a list of players whom they intended to test. It is true that the Athlete was not on that list and it is also true, and it is submitted that this is significant, that the Athlete volunteered to be tested in their place because (it is said) he would hardly have done that had he thought he had anything to hide.

12. On the Doping Control Form, under 'Declaration of Medication' he wrote that he had taken "*Pre Workout Protein*" and "*Co-Codomol Ibuprofen*".

13. There was an unfortunate delay of some ten weeks before UKAD wrote to him on 4 July 2019, informing him that his A Sample had returned an Atypical Finding ("ATF") for clenbuterol, which is a Prohibited Substance under the ADR. However, the concentration

[2] See paragraph 3 of the Athlete's Skeleton at this hearing.

actually found (less than 5ng/mL) was very low: it was approximately 0.3ng/mL in the first A Sample and 0.9ng/mL in the second A Sample.[3]

14. At the time of providing that letter of information, the Athlete was also asked whether he had recently been to Mexico, China or Guatemala and, if so, whether he had eaten meat there. That was in accordance with the WADA Stakeholder Notice regarding meat contamination[4].

15. It may well be it was that notification which prompted the Athlete to offer what remains his explanation for the most likely source of his ATF, namely that he must have consumed contaminated meat. In a letter of 12 July 2019, he explained that because money was short, he tended to "*shop cheap*". He suggested that his "*current predicament*" was therefore "*a consequence of buying cheap meet [sic] at Splott market Cardiff, they were selling Australian corn fed steak and Chinese wagyu steak, which appealed to me based on costs reasons only, for this reason we bought bulk meat before Xmas around November 2018, which run out in April this year…*".

The process of charge and response

16. On 30 August 2019, and notwithstanding that explanation, UKAD charged him with a violation of ADR Article 2.1 and imposed a Provisional Suspension. In his response to that charge (6 September 2019), he repeated his explanation that he must have inadvertently consumed contaminated meat. He said that he was strongly opposed to all forms of drug taking and asked UKAD to lift his suspension. He also provided links to two articles which he said supported his account that contaminated meat could be the cause of his problems. It should be recognised that the Athlete has continued to maintain that contention throughout the disciplinary process.

17. On 8 October 2019, his formal response included an admission of the ADRV and he withdrew any challenge to the Provisional Suspension. He did not argue that he lacked

[3] Two urine samples were taken because the specific gravity of the first was too low.
[4] Dated 30 May 2019.

intent (as defined by Article 10.2.3)[5], nor did he try to establish "*No Fault or Negligence or No Significant Fault or Negligence*"[6], recognising that he was unable to obtain sufficient evidence to substantiate such arguments. He did, on the other hand, maintain his explanation that the source of the Prohibited Substance must have been the imported meat he had eaten and sought mitigation for a prompt admission under ADR Article 10.6.3 and for Substantial Assistance under Article 10.6.1. He sought, for those reasons, to have the period of Ineligibility backdated to the date of sample collection on the basis that he had made a timely admission and / or UKAD had unduly delayed in prosecuting the case. He also sought credit for the period of his Provisional Suspension.

18. In a telephone conversation on 17 October 2019, Ms Dutt of UKAD informed the Athlete's solicitor, Mr Lloyd, that UKAD were not willing to grant any reduction in sanction on the grounds of prompt admission. Essentially, the reason for that was that UKAD did not accept the Athlete's account of how clenbuterol had entered his system.

19. The matter, therefore, proceeded towards a hearing in front of the NADP and the Athlete served a Witness Statement in support of his case. He explained that he had tried but failed to find any corroborative evidence that he had purchased the Australian / Chinese meat from a vendor at Splott Market and attributed the failure of his efforts to his lack of means.

NADP Hearing – 29th January 2020

20. We have a transcript of the hearing before the NADP, as well as the Hearing Bundle submitted therefor which included witness statements from the Athlete (and evidence he submitted in support) and from an 'Intelligence Researcher', Daniel Cloke, who was instructed by UKAD and looked at material found in the Athlete's Instagram profile and related material as well as from a scientist, Nick Wojek, who explained how abuse of clenbuterol has become an increasing problem in rugby.

[5] As to which, see below.
[6] See ADR Articles 10.4 and 10.5

21. We also have the Tribunal's Decision which we summarise as follows:

    (i) In relation to the prompt admission issue, the Tribunal accepted that, in principle, UKAD's decision whether to grant a reduction in sanction under Article 10.6.3 should be capable of review, but held that, in circumstances where no decision had been made by WADA as to the appropriateness of a reduction in sanction, and WADA were not present at the hearing, it would be futile for the Tribunal to interfere with UKAD's exercise of discretion.

    (ii) However, the Tribunal did grant the Athlete credit for a timely admission pursuant to ADR Article 10.11.2, such that his period of ineligibility commenced on 25 April 2019 (the date of the sampling).

    (iii) The Tribunal held that there should be no further reduction in sanction by way of a credit for the Provisional Suspension.

The Notice of Appeal

22. As already indicated, the Notice of Appeal (and, again, we summarise) identifies, essentially, two grounds. First, it is said that UKAD and WADA failed properly to exercise their discretion so as to grant him a reduction in the otherwise applicable sanction under ADR Article 10.6.3 and, second, that the imposition of what is otherwise the mandatory four year sanction would be disproportionate on the exceptional facts of this case.

The Relevant Rules

23. It may be convenient here to set out the relevant provisions of the ADR.

    (i) ADR Article 10.2 provides as follows:

> "***10.2 Imposition of a Period of Ineligibility for the Presence, Use or Attempted Use, or Possession of a Prohibited Substance and / or a Prohibited Method***

The period of Ineligibility for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6 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 Specific 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.

10.2.3 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."

(ii) Article 10.4 is concerned with cases where the Athlete is able to establish that he has acted without any Fault or negligence. It provides as follows:

"***10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence***

If an Athlete or other Person establishes in an individual case that he / she bears No Fault or Negligence for the Anti-Doping Rule Violation charged, then the otherwise applicable period of Ineligibility shall be eliminated."

(iii) The next tier is for Athletes who acknowledge some degree of Fault or negligence. The provision is as follows:

"**10.5 Reduction of the period of Ineligibility based on No Significant Fault or Negligence**

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Anti-Doping Rule Violations under Article 2.1, 2.2 or 2.6:

(a) Specified Substances

Where the Anti-Doping Rule Violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of fault.

(b) Contaminated Products

In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault.

10.5.2 Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1:

In an individual case where Article 10.5.1 is not applicable, if an Athlete or other Person establishes that he / she bears No Significant

Fault or Negligence, then (subject to further reduction or elimination as provided in Article 10.6) the otherwise applicable period of Ineligibility may be reduced based on the Athlete's or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period if Ineligibility is a lifetime, the reduced period under this Article may be no less than eight years."

(iv) Article 10.6 has two provisions (Art. 10.6.1 and 10.6.2) which are not material to the present case, but Article 10.6.3 we shall quote in full:

> "***10.6 Elimination, Reduction, or Suspension of the Period of Ineligibility or other Consequences for Reasons Other than Fault***
>
> *10.6.1 [Not applicable]*
>
> *10.6.2 [Not applicable]*
>
> *10.6.3 Prompt Admission of an Anti-Doping Rule Violation after being Confronted with a Violation Sanctionable under Article 10.2.1 or Article 10.3.1:*
>
> *An Athlete or other Person potentially subject to a four-year sanction under Article 10.2.1 or 10.3.1 (for evading or refusing Sample Collection or Tampering with Sample Collection), may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete's or other Person's degree of Fault by promptly admitting the asserted Anti-Doping Rule Violation after being confronted with it, upon the approval and at the discretion of WADA and UKAD*"

24. A further relevant provision is to be found in the Appendix to the ADR, under the heading "*Definitions*". Materially, for our purposes, a definition is provided of what constitutes "*Fault*". That reads:

> "*Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or*

other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2."

The Appeal Hearing; material provided – but in a manner that was unsatisfactory

25. Although, essentially, both this Appeal Panel and the NADP were reviewing the exercise of a discretion by UKAD and WADA on a relatively limited factual basis, the parties have provided us an appeal with a veritable library of material. That included:

    (i) the full bundle before the NADP, consisting of some 800 odd pages

    (ii) a chronology bundle also prepared for that hearing of over 90 pages

    (iii) a third bundle, specifically intended to be for the hearing of this Appeal, which extended to 901 pages.

26. As we observed at the beginning of the case, it is profoundly regrettable that the final version of that Appeal Bundle was not delivered to the Panel until late on the afternoon of Friday, 18 December, leaving only an intervening weekend before the hearing began at 10:00am on Monday, 21 December.

27. Not only was this unhelpful[7], it was also directly contrary to a Direction made by the Chair to the effect that the Appeal Bundle should be served upon the Panel no less than seven

[7] We put it as mildly as we reasonably can.

days before the start of the hearing. The fact that earlier iterations of an Appeal Bundle may have been served during the few days before the hearing began (albeit well after the seven day limit) is absolutely no mitigation whatsoever: what the Directions Order plainly envisaged was that the finalised bundle should have been served in accordance with those Directions and in good time.

28. That there might, subsequently, have to be minor additional documents added to a bundle served at the right time[8] is understandable, but that could easily have been achieved by providing a short supplementary bundle (as certainly would have been necessary to accommodate WADA's response of 15 December 2020) and (we stress) without attempting to renumber or delay the service of the papers[9]. We mention this so that UKAD is reminded (for the benefit of those who have to take part in other hearings in the future) that Directions are there to be complied with. If there is some difficulty with that compliance, the only legitimate option they have is to seek to have those Directions varied.

The hearing itself

29. After we had overcome our dismay and irritation at the late service of so much material, the hearing proceeded by oral submissions. Mr Jones was present but his case was presented by Mr Pearce, instructed by Mr Lloyd, We – and, no doubt, the Athlete – are enormously grateful to them for the industry, efficiency and skill with which they have prepared their case. That they acted *pro bono* is, frankly admirable.

30. Following the hearing, we (the Panel Members) received an email from the Athlete personally. No doubt he realises he should not have sought to communicate with us in that way but we have read it nevertheless and the points he makes are ones which we have already taken account having also been made elsewhere in the papers and/or in oral submissions.

[8] Such as WADA's belated response of 15th December 2020
[9] All files were served electronically. We read them and we mark them up as we do so. Never should we have to do the exercise twice just because someone has failed to prepare the bundle properly in time in the first place.

31. We should record that we were indebted to Ms Nisha Dutt who presented UKAD's case clearly, realistically and helpfully and was sensibly and appropriately apologetic in her response to our observations at the outset about the lamentable failure to have complied with the Directions as to the Hearing Bundles.

The Exercise of the Discretion: the Athlete's explanation as considered by UKAD

32. In our view, it would be wholly artificial to examine the exercise of discretion at a single moment in the past without regard for the reality that the decision-making process here continues over time – and, in this case, must be treated as having continued at least until WADA itself has given its final answer.

33. Our review therefore begins with the initial decision taken on the basis of the material then submitted, then considers any variation or reaffirmation of that decision thereafter (including taking account of material at the NADP hearing) and looks at UKAD's reasoning up until WADA's letter of 15th December 2020. This approach therefore allows for the decision to be justified or criticised on the basis of points made during the appeal hearing. That is because, in the circumstances of an appeal such as this, it is in effect a *de novo* review of the exercise of the discretion[10].

34. Although the reasoning behind the original notification of and justification for UKAD's Decision on 17 October 2019[11] was relatively short,[12] it is therefore relevant also to take account of the explanation provided by the Athlete for the NADP hearing. He provided a Witness Statement dated 29 November 2019 in which he set out his position as follows[13]:

> "*(a) He did not know at the time of Testing that clenbuterol is a Prohibited Substance.*

[10] See Art. 13.4 of the 2019 Rules of the NADP. It follows that we would have been able to consider new points made or fresh and relevant material had it been submitted even at the appeal stage and had we regarded it as fair for the parties (and for us) to have taken it into account
[11] In the conversation between Ms Dutt and Mr Lloyd, the Athlete's Solicitor.
[12] Ms Dutt explained that UKAD simply did not accept the Athlete's account of how the clenbuterol entered his system.
[13] We take this summary from UKAD's Appeal Submissions.

(b) *After receiving UKAD's letter dated 4 July 2019, it made him 'think about what could have caused it and [he] thought that it couldn't be the Maximuscle Cyclone because that was supposed to be safe'. He discussed the matter with a friend who suggested 'that it must have been the meat. There could be no other explanation'.*

(c) *He remembers purchasing 'Australian corn fed steaks and some Chinese Wagyu beef steaks from one of the traders at the market who was operating from a large white van' at 'some point in the Autumn of 2018'.*

(d) *The meat was vacuum packed and there was no labelling on the packaging. He paid in cash and did not keep a receipt.*

(e) *As far as he can recall the last of the meat was finished around April.*

(f) *he has tried to 'try and track done [sic] the seller of the meat without success' and has not been able to find the trader that sold him the meat.*"

35. As we have noted, the Athlete gave some oral evidence at the hearing, the effect of which is summarised in UKAD's submissions for the appeal hearing in these terms:

"*NISHA DUTT:* *So would it be fair to say that you think your Clenbuterol finding comes from meat but there might be other explanations for it?*

MARK JONES: *Possibly.*

NISHA DUTT: *Possibly supplements, possibly the blood that you referred to, possibly something else.*

MARK JONES: *I don't know if the blood was contaminated but I just thought it was worth mentioning because obviously like I said I almost died and I was very fortunate enough that the surgeon was brilliant. He sewed my brachial artery together. He saved my life.*"

36. As we have already noted, UKAD also relied on the evidence of UKAD's Head of Science and Medicine, Mr Nick Wojek, who essentially provided background information about clenbuterol and how it had arisen in Rugby Union cases already, and, on the evidence of Daniel Cloke, an Investigator, who identified a number of social media posts by the Athlete.

37. Mr Cloke's research established that the Athlete had used a variety of supplements, with a view to improving his performance, conditioning and / or recovery in circumstances where he could not have been confident that all such products were entirely legitimate[14]. Mr Cloke also found a post in January 2019 in which the Athlete had expressed his enthusiasm for a different meat supplier, "*Clinton Meats*". This was material because the implication of the Athlete's response of 12 July 2019[15] was that he had changed his meat supplier and the implication was that this was a response to finding out about the possibility that the meat he had bought in Splott Market could have been contaminated.

38. On that basis, UKAD sought to justify its scepticism about the Athlete's explanation at the time of the NADP hearing[16]. However, a subsequent exchange of correspondence (this time with WADA) may perhaps explain the basis of the exercise of that discretion even more clearly.

39. UKAD's reasoning, which was adopted in argument in the appeal hearing, is set out in an email of 19 March 2020, between Ms Dutt and WADA. The relevant summary of the facts appears under the heading "*Background*" on that email.

> "*<u>Background</u>*
>
> *Mr Jones was tested on 25 April 2019 Out-Of-Competition at a Cambrian Welfare RFC squad test. Analysis of Samples provided by Mr Jones returned Atypical Findings ('ATFs') for clenbuterol at a concentration estimated below 5ng/mL. As the concentration of clenbuterol in the Samples was estimated at below 5ng/mL, the Samples were treated as ATFs as opposed to Adverse*

[14] Some purchased before, some purchased after the date upon which he provided his sample.
[15] "*I am <u>now</u> buying meat off an award winning Welsh butcher*" [our added emphasis]
[16] As UKAD explain in their skeleton for this appeal, it only became aware of the nature of the positive case the Athlete was advancing in relation to Art.10.6.3 in advance of the NADP hearing on 20th January 2020 when there was an exchange of submissions on 15th January. It was this which apparently led to the preparation of the Chronology Bundle for that hearing.

Analytical Findings ('AAFs') in accordance with the amendment to Article 7.4 of the World Anti-Doping Code and in accordance with WADA's Stakeholder Notice regarding meat contamination ('the Stakeholder Notice') dated 30 May 2019.

UKAD carried out an investigation in accordance with the Stakeholder Notice and Mr Jones provided responses which did not disclose travel to China, Guatemala and Mexico (and meat consumption in those countries thereafter). Mr Jones' responses suggested that contaminated meat purchased and consumed in South Wales may be responsible for the ATFs.

The ATFs were therefore asserted as AAFs in accordance with the Stakeholder Notice and Mr Jones was charged with ADRVs pursuant to ADR Article 2.1 (Presence) on 30 August 2019. A formal response (the 'formal response') to the Notice of Charge was provided dated 8 October 2019. This formal response raised the application of ADR Article 10.6.3. The formal response was followed by a telephone discussion between UKAD and Mr Jones' representative on 17 October 2019 concerning (amongst other matters) ADR Article 10.6.3. UKAD indicated during that discussion that it could not exercise its discretion under ADR Article 10.6.3 on the following basis:

- *Mr Jones had no supporting evidence whatsoever that contaminated meat purchased and consumed in South Wales was responsible for his AAFs;*
- *Mr Jones' explanation in the absence of supporting evidence appeared inherently unlikely and therefore did not appear to be a 'full and frank' admission;*
- *UKAD could not accept Mr Jones' mere speculation that contaminated meat purchased and consumed in South Wales was responsible for his AAFs; and*
- *As a consequences, UKAD was not in a position to properly assess the Fault and seriousness of his ADRVs as set out in ADR Article 10.6.3 and consequently apply the provision to his case.*

UKAD having considered the application of ADR Article 10.6.3 to Mr Jones' case did not refer the case for WADA's consideration at that stage. It is UKAD's understanding that ADR Article 10.6.3 requires the approval of both UKAD and WADA and that the absence of agreement from one party renders the consideration of the provision by the other party entirely moot. Specifically, UKAD considered the correct approach to be that which was set out at paragraph 30 of RFU v Lancaster *(attached) and this was the approach taken by UKAD in this case. UKAD could not proceed beyond the approach set out at paragraphs 30.1 and 30.2 as it could not conclude that exercise of its discretion and such a reduction was justified.*

A directions hearing subsequently took place on 4 November 2019 and a hearing was scheduled for 20 January 2020. It was UKAD's understanding that as Prompt Admission is a matter for UKAD and WADA rather than the NADP, this point had already been dealt with during the discussion on 17 October 2019. However, UKAD misunderstood the position taken by Mr Jones' representatives and the application of ADR Article 10.6.3 was pursued further at the hearing. Paragraphs 46-49, 56-59 and 72-82 of the Decision set out the NADP's consideration of ADR Article 10.6.3.

The NADP imposed a 4 year period of Ineligibility commencing from the date of Sample collection as a result of the application of ADR Article 10.11.2."

Our Power to Review a Discretionary Decision and the right approach to Art.10.6.3

40. As we have already indicated, we approach this appeal on the basis that we are reviewing the exercise of a discretion which is an exercise that is necessarily constrained in its scope. In essence, our role is to decide if the discretion has been exercised on a legitimate basis, with proper respect for process so that the decision-maker has reached a conclusion that is reasonable (rather than irrational, illogical, unsubstantiated or just plainly wrong) in all the circumstances. We certainly cannot evaluate it on the basis of what we might have chosen to do were we in the position of the decision-maker.

41. Both parties to this appeal accepted that the correct approach was that summarised in paragraph 30 of the decision of the NADP in *Evans v UKAD*[17]. We quote the relevant passage with some diffidence[18] but because the parties both agree that the Decision in *Evans* at paragraph 30, represents an accurate statement:

> "*30. 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 to properly analyse and apply matters of evidence.*"

42. As Ms Dutt submitted, both in writing and orally, the application of ADR Article 10.6.3 is discretionary: indeed, the provision is framed on that basis - '*An Athlete… may receive a reduction…*' [our added emphasis].

43. It follows that UKAD must evaluate all the circumstances and reach a reasonable decision, an approach confirmed in *WADA v International Ice Hockey Federation & F*[19] where, at paragraph 84, it is said that:

> *'To trigger the possibility of a reduction from what would otherwise be a four-year sanction, a player must have admitted the asserted anti-doping rule violation promptly after being confronted with it by the IIHF; and have the approval of both WADA and IIHF. Even in such circumstances, his receipt of such reduction is dependent on the discretion of those two bodies – the key word in the Article is "may" not "must" – and depends upon the severity of the violation and the player's degree of fault.'*

44. Likewise, UKAD cannot be compelled to accept any explanation from an Athlete and to 'plea-bargain' unless it is persuaded that the plea is cogent and acceptable. Only then can

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[17] SR/NADP/515/2016
[18] Because it is rather unattractive for a judicial or arbitral body to cite its own decisions in support of a later one. But see also *Ross Bevan v UKAD* SR/NADP/740/2017 and paras 22-24 of UKAD's skeleton argument on this appeal.
[19] CAS 2017/A/5282

it assess the seriousness of the violation and Fault. To return to the *International Ice Hockey* case, at paragraph 90:

> *'The Panel concludes that to allow for the meaningful application of all elements of Article 10.6.3 to an Article 2.1 of the WADC violation, an athlete must describe the factual background of the anti-doping rule violation both fully and truthfully and not merely, accept the accuracy(s), of the adverse analytical finding. This enhanced admission would enable the adjudicative body seized of his/her case to determine whether he/she would potentially be subject to a sanction of four years for an intentional violation…'*

45. That limited basis for reviewing such decisions is accepted by WADA who, in their letter of 15 December 2020, put it in these terms:

> "*First, WADA accepts that the exercise of a discretion pursuant to Article 10.6.3 UK ADR is subject to review to ensure that it is not exercised in an arbitrary or otherwise unlawful manner. In* WADA v. World Squash Federation & Nasir Iqbal[20]*, the Court of Arbitration for Sport (CAS) panel stated:*
>
> > *'… a party affected by a decision like the one not to grant the approval required under Article 10.6.3 WSF ADR, must be entitled to appeal by reason of the rule of law, notwithstanding the absence of an express provision to that effect. However, the WSF has wide discretion whether or not to grant such approval and the Panel cannot identify and the Athlete has not proposed any particular reason why the WSF's denial of approval was improper.[21]*'
>
> *However, in WADA's view, this is not a case where WADA exercised its discretion in an arbitrary, grossly disproportionate or otherwise improper manner. WADA's correspondence to UKAD dated 30 March 2020 (which sets out WADA's position in relation to the application of Article 10.6.3 UK ADR to the Appellant's case) was reasoned and carefully considered all of*

[20] 2016/A/4919
[21] *Ibid* at paragraph 87

the documentary evidence submitted to WADA by UKAD in relation to this matter.

In the absence of an express finding that WADA's discretion was exercised in an arbitrary or otherwise unlawful manner, it would be inappropriate for the Appeal Tribunal to substitute its own discretion in replacement of WADA's simply because it would have come to a different conclusion[22]*. Such a result would frustrate the clear intention of the drafters of the World Anti-Doping Code and the UK ADR in giving WADA such a discretion in the first place.*[23]

In any event, WADA's approval must be sought prior to any reduction under Article 10.6.3 being applied. In WADA v. International Ice Hockey Federation & F.[24]*, WADA expressly acknowledged that it would agree to a 6-month reduction if the preconditions for any reduction under Article 10.6.3 were held by CAS to be satisfied*[25] *and the CAS Panel noted that:*

> *'To trigger the possibility of a reduction from what would otherwise be a four-year sanction, a player must have admitted the asserted anti-doping rule violation promptly after being confronted with it by the IIHF; and have the approval of both WADA and IIHF. Even if in such circumstances, his receipt of such reduction is dependent on the discretion of those two bodies – the key word in the Article is 'may' not 'must' – and depends upon the severity of the violation and the player's degree of fault (CAS 2016/A/4534, para. 48).'*[26]

In contrast, in WADA v. Anti-Doping Agency of Kenya & Rose Jepchoge Maru[27] *the Sole Arbitrator noted that:*

> *'…WADA has not approved a reduction of the Athlete's four year period of ineligibility and therefore it follows that the four-year period of*

[22] See *CAS 2019/A/6245 Cesar Macnaught Ramirez Rodriguez v ITF*, paragraph 84
[23] See *2017/A/5282* at paragraph 85
[24] *2017/A/5282*
[25] *Ibid* at paragraph 47
[26] *Ibid* at paragraph 87
[27] *CAS 2019/A/6157*

ineligibility imposed on the Athlete cannot be reduced based on her prompt admission.'[28]

In World Curling Federation (WCF) v. Aleksandr Krushelnitckii[29]*, the CAS Anti-Doping Division at the 2018 Olympic Winter Games in PyeongChang held that:*

> *'The purpose of Article 10.6.3 is to obviate the need for disciplinary procedures and save resources of anti-doping organisations. The Sole Arbitrator accepts the WCF submission that a simple acknowledgment of an adverse finding does not appear to be sufficient for an athlete to obtain any benefits thereunder because it concedes nothing that is not already vouched for by the adverse finding, whose accuracy is to be presumed unless rebutted.*
>
> *Article 10.6.3 does not provide for an automatic reduction of a period of ineligibility from four years to two years. As WCF submits, any reduction of sanction based on a prompt admission must be negotiated between the Athlete, WADA and WCF, and it is clear that WADA did not consent to any reduction. Although the Athlete raised a question at the hearing as to the basis of the WADA decision, there was no challenge to the statement by WCF that WADA were provided with a complete copy of the file in this matter at the time of seeking consent to a reduction, which was ultimately not forthcoming. In this case there was no Prompt Admission by the Athlete within the meaning of Article 10.6.3, and no approval by WADA. The Athlete therefore fails to establish an entitlement to a reduction in a period of ineligibility under Article 10.6.3.*[30]

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[28] *Ibid* at paragraph 73. See also determination of Australian National Sports Tribunal dated 3 December 2020 in *Ashcroft v Sports Integrity Australia and Powerlifting Australia* paragraph 75

[29] *CAS 2018/O/003*

[30] *Ibid* at paragraphs 218-219

UKAD's reasoning – Discussion and Conclusions

46. In analysing UKAD's reasoning, we focus on those four bullet points contained in their letter of 19th March 2020 and set out above (paragraph 39) and shall review the exercise of its discretion by reference to the principles just stated.

47. As to the first bullet point, it is factually correct that the Athlete had no supporting or corroborative evidence for his case that he had bought meat that might have been contaminated at Splott Market.

48. We consider UKAD was justified in expecting him to have gone rather further than he did. Of course, every allowance must be made for the fact that market traders come and go, and that the Athlete, a layman of limited means, could hardly be expected to have acted as a detective (or commissioned a professional) in tracing everybody who had ever sold any sort of meat at Splott Market.

49. But it does not seem fanciful to suggest that the Athlete might have gone further than he did. He adduced no factual evidence from anyone else (family or friend) who ate or bought this meat or who might have dealt with this alleged supplier. The Athlete had none of the meat left, having finished it, he said, at around the time he was tested. Nor did he have any wrapper or other evidence of his purchase. It must also be accepted that, despite his explanation about buying the meat because it was cheap and he was hard up, he was nevertheless expressing enthusiasm for the 'award –winning butcher (Clintons) in January 2019 even though that was while (assuming he has remembered the sequence of events correctly and bought the Splott meat in November 2018 and only finished it in April 2019) he must still have had some of the Splott Market meat as yet unconsumed.

50. In short, then, the Athlete adduced no other evidence of the existence of the trader who allegedly sold him the meat. Rather, his account was limited to saying that the market trader was no longer there and there appeared to have been no sign of him. But UKAD were not told whether, for example, he enquired of the local Council to see if such traders needed a licence and/or if there was some record of such a person at the time.

51. Nor did the Athlete attempt to substantiate his account by any (or at least any substantial) enquiries of any other meat vendors (or other stall holders in the same area) to see if they

had any recollection of a man in a white van[31] who had once sold meat, including imports from Australia and China. The Athlete did not even provide a clear map of where exactly the relevant van might have been parked, nor did he produce evidence from any other customer with any knowledge or record of the vendor.

52. Of course, none of the foregoing means that the Athlete cannot in fact have been giving an accurate account. But that is not the question for us: what we must decide is whether UKAD's only reasonable approach to that account would have been to have accepted the truth of that account.

53. Obviously, the Athlete might have been telling the truth, but it was only his word to that effect. That does not mean that an uncorroborated assertion must always be rejected, but that is not the issue, as we have explained. Rather, the issue here is whether the decision-maker (UKAD / WADA) acted irrationally in thinking that the Athlete could and should have done more to substantiate his account and when they were not prepared just to accept what he said.

54. The second bullet point in the email of 19th Match 2020 caused us a little more concern, at least initially. That is because we wondered whether it really could be said to have been "*inherently unlikely*" that there might have been a vendor selling (for example) meat from China which happened to be contaminated. The fact that the Stakeholder Notice referenced people who might have consumed meat in the countries identified (including China) would not, at first sight, render it implausible that meat from those countries might have been exported elsewhere, including to the UK.

55. On the other hand, we do not think we would go so far as to say that it was irrational for UKAD / WADA to be sceptical about that assertion, bearing in mind the absence of any other known examples of such importations of contaminated meat causing an adverse finding in the UK (and in South Wales in particular) especially in circumstances where there was good reason to consider the possibility that clenbuterol might have entered his system in other ways, given that the Athlete's own social media records indicate that he also purchased supplements which were not all from necessarily reliable[32] sources.

[31] As described by the Athlete.
[32] i.e. proven to be safe

56. In those circumstances, the third bullet point, to the effect that UKAD was not inclined to accept the Athlete's "*mere speculation*", is not an approach that we could characterise as irrational. They would have been entitled to have accepted it, but equally they would have been entitled to say that it was unsubstantiated and that, at least in all the other circumstances discussed above, they did not.

57. It follows that, in our view, UKAD was entitled to exercise its discretion as set out in the fourth bullet point – i.e., on the basis that it was not in a position to properly assess the degree of fault and seriousness of his ADRV because of the absence of an account that they considered could be accepted. It is true that his admission of an ADRV was prompt and that, at least in theory, it may have simplified the case against him. But UKAD and WADA were both entitled to exercise their discretion on the basis that this was a serious violation and that they were not satisfied by his explanation that he had not been seriously at fault[33].

58. We add, as a comment, that we do think that UKAD could improve on the way it approached its evaluation of the Athlete's account. A face to face interview with him[34] might have offered a rather more illuminating opportunity to test his evidence and to make him focus on the sort of material he should have been looking for if trying to persuade someone to accept his account. But the fact that did not happen here is not of itself a reason to conclude that the process behind UKAD's decision making rendered that decision unsound, even allowing for the fact that it was in his favour that he had originally volunteered to take the test.

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[33] The fact that the levels of clenbuterol were very low cannot, of itself, mean that the Athlete's fault was not serious. There was no scientific evidence about how long clenbuterol, even if taken deliberately in some form, might remain in an athlete's system at low but detectable levels. One's instinct might be that a low level was more consistent with accidental contamination (through meat, perhaps) but that is not to say that it would not also be consistent with it having come from a supplement, for example, taken at some stage possibly well in advance of the test. In short, we regard the low level as consistent with accidental contamination through eating meat but not decisive or even persuasive of that explanation.

[34] Even if conducted remotely. A telephone call between UKAD and the Athlete's legal representative such as occurred here between Mr Lloyd and Ms Dutt on 17th October 2019 is not likely to be as satisfactory as an interview with the player.

WADA's Response; and Art. 10.2.3 and Art. 10.6.3

59. As we have explained, the discretion under Article 10.6.3 is one that lies with both UKAD and with WADA. We must therefore take account of what WADA says otherwise our analysis would be incomplete and quashing that decision and requiring its reconsideration might be futile.

60. At an earlier stage of the various directions given in relation to this case, we invited WADA to explain its own position and, at the beginning of November 2020, WADA agreed that it would do so "*shortly*". Unfortunately, "*shortly*" did not furnish us with an answer until Monday, 15 December 2020. Nevertheless, we do now have an explanation of WADA's position and that we can summarise.

61. WADA began, as we have said, by acknowledging the basis upon which this Appeal Panel might be able to review such a decision and reiterated its position that WADA approval must be sought prior to the application of any reduction under Article 10.6.3. It went on to express the view that:

> "*Secondly, WADA considers that the Appellant has not established how the prohibited substance entered his system which would allow a meaningful application of Article 10.6.3 UK ADR. This is because the application of Article 10.6.3 is stated to be dependent on the 'seriousness of the violation and the Athlete's … degree of Fault'. 'Fault' is a defined term in the Appendix to the UK ADR and the definitions of both 'No Fault or Negligence' and 'No Significant Fault or Negligence' explicitly require an athlete to establish how the Prohibited Substance entered his system. It was not possible for WADA to assess the seriousness of the violation or the Appellant's degree of Fault in the absence of an acceptable explanation as to how the prohibited substance entered his system.*
>
> *On this point, the established CAS jurisprudence on origin provides that 'it is not sufficient for the Athlete merely to make protestations of innocence, provide hypothesis or suggest that the prohibited substance must have entered his body inadvertently from some supplement, medicine or other product which the Athlete was taking at the relevant time. Rather, the Athlete must provide concrete, persuasive and actual evidence, as opposed to mere*

speculation, to demonstrate that a particular supplement, medication or other product that he took contaminated the prohibited substance' in question.

In Alexsandra de Aguiar Goncalves v. IWF*, the CAS Panel found that the athlete failed to provide any cogent explanation of how the Boldenone came to be in her urine and quoted with approval the statement of Yves Fortier QC in* Canadian Centre for Ethics in Sport and Canadian Weightlifting Federation Halterophile Canadienne v Taylor Findlay *(SDRCC DT 16-0242) where he said:*

> *'I cannot fathom nor rule on the intention of an athlete without having initially been provided with evidence as to how she had ingested the produce which, she says, contained the Clenbuterol. With respect to the contrary view, I fail to see how I can determine whether or not an athlete intended to cheat if I do not know how the substance entered her body'*

In WADA v. EGY-NADO & Radwa Arafa Abd Elsalam*, the CAS Panel found that if an athlete cannot prove how a prohibited substance got into his / her body, he / she cannot exclude the possibility of intentional or significantly negligent use and in cases of meat contamination:*

> *'... it must – as a minimum – be a requirement that the Athlete sufficiently demonstrates where the meat originated from. For example, where did the butcher buy the Brazilian meat, how was the Brazilian meat imported into Egypt, has any of the other imports of meat been examined or tested for the presence of Ractopamine, etc.?'*"

62. During the course of the Appeal, Mr Pearce and Ms Dutt offered competing analyses of how Article 10.2.3 interacted with Article 10.6.3. Ms Dutt's submission, which we prefer, is that there is not the illogicality that Mr Pearce has sought to identify. Whilst Article 10.2.3 focuses on those who have "*an intention to cheat*", a violation can still be "*intentional*"

within the meaning of Article 10.2.3, even if they do not intend to cheat, and in such a case they can benefit from Article 10.6.3[35].

63. We also prefer the analysis provided by WADA in its letter of 15 December 2020 that is expressed in these terms:

> "*Thirdly, and in any event, it is clear that this is an 'all or nothing' case depending on whether meat contamination is established as a matter of fact. If the Appellant's explanations are accepted by the Appeal Tribunal and contaminated meat is found to have been the cause of the ADRV, the Appellant will be entitled to a reduction either under Article 10.4 (No Fault or Negligence) or Article 10.5 (No Significant Fault or Negligence) but Article 10.6.3 will have no application (as the Appellant will not be someone potentially subject to a four year period of ineligibility). Alternatively, if the Appellant's explanations are not accepted on the balance of probabilities (i.e. the ADRV was found to be not caused by meat contamination as a matter of fact), the Appellant's degree of Fault cannot be assessed and Article 10.6.3 cannot be applied (see above).*"

Proportionality

64. Given that we reject what we have characterised as the Athlete's first ground of appeal – namely, that the UKAD / WADA discretion was exercised on an unsound basis – it is not necessary for us to express any view on what we would have regarded as an appropriate reduction to the otherwise mandatory four year suspension. But the issue of proportionality is raised as a separate and additional ground of appeal: in short, it is submitted that this Appeal Panel should reduce the four year ban because such a ban would be disproportionate in all the circumstances.

[35] An example was given, at the close of submissions, of the case of *UKAD v Adam Carr* (on appeal, reference SP/197/2020; NADP reference SR/074/2020) a case in which Mr Murdock was on the Panel at first instance and Ms Thompson on the Panel for the appeal. Mr Carr acted intentionally but did not intend to cheat because he intended to take the banned substance (Clenox, which contained Clenbuterol) only as a fat burner to improve his body image.

65. The Athlete relies on a number of factors, including the low levels found, the Athlete's lack of anti-doping education, the adverse impact upon him of a long ban, bearing in mind his age and his aspirations to coach, his relative means and so forth. As against that, Ms Dutt rightly draws our attention to the definition of "*Fault*" under the Anti-Doping Rules, where it is made clear that any analysis of Fault should not make any allowance for such particular circumstances in relation to a particular athlete.

66. Nevertheless, it is still legitimate to ask whether there is any basis for impugning the mandatory sanction as disproportionate in the context of a 36-year-old amateur athlete of limited means and (we are prepared to assume) no formal anti-doping education[36], and what we should probably regard as a limited awareness of the dangers of drugs in sport and of the need for athletes to be scrupulously careful as to any substances they introduce into their bodies.

67. We do not accept that the mandatory four year period is necessarily disproportionate. Whether there is any scope for arguing that the concept of "*Proportionality*" is even now (2020/2021) a free-standing requirement which can provide a basis for challenging mandatory suspensions seems to us very doubtful, at least in the more recent iterations of the Code.

68. The latest of the cases which might support such a freestanding argument is that of *Puerta v ITF*[37], but we prefer the recent and conventional approach of tribunals which have recognised that the provisions of the Code already have built in the requirements of proportionality so that there is no reason to depart from them on the grounds of proportionality alone. There is still, potentially, scope for the concept of proportionality to have some value, such as in a case where there is a lacuna in the rules. But that is not the case here and hence we follow the approach of the NADP in more recent cases, such as *UKAD v Adam Machaj*[38], of *UKAD v Mark Dry (Appeal)*[39] and of *UKAD v Adam Carr* (see above).

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[36] Mr Pearce drew our attention to the "*Tailored Review of UKAD – January 2018*" and the emphasis of that report upon widening the scope of anti-doping education.
[37] CAS 2006/A/1025
[38] SR/061/220 at paragraph 38
[39] SR/324/2019 at paragraph 47

Conclusions

69. We consider that the Panel was correct to reach the decisions it did on matters as they then stood. We also endorse and agree with that decision in the light of all the material submitted in explanation of the exercise of UKAD's and WADA's discretion in applying ADR Art.10.6.3. In summary, we consider that such discretion was properly exercised and that the 4 year sanction imposed was proportionate. We also endorse the NADP's approach to determining such period of Ineligibility.

70. In all those circumstances, we:

    (i) dismiss the Athlete's appeal and confirm that he has committed an ADRV under ADR Article 2.1 in that he had the presence of a Prohibited Substance in the Sample provided on 25 April 2019;

    (ii) confirm that the Athlete has failed to discharge the burden on him under ADR Article 10.2.1(a) to establish that the ADVR was not "*Intentional*" as that term is defined in ADR Article 10.2.3;

    (iii) reject the submission that UKAD and / or WADA have wrongly exercised their discretion to allow no reduction in the period of Ineligibility pursuant to the terms of ADR Article 10.6.3;

    (iv) confirm that, therefore, the Athlete's period of Ineligibility is one of four years under ADR Article 10.2.1, such period to run from 25 April 2019 (by application of ADR 10.11.2).

William Norris QC, Chair

For and on behalf of the Appeal Panel

London, UK

24 December 2020

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