

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF  
THE WELSH RUGBY UNION (“WRU”)**

Before:

Jeremy Summers (Chair)  
Blondel Thompson  
Dr Terry Crystal

**BETWEEN:**

**UK ANTI-DOPING LIMITED (“UKAD”)**

**Anti-Doping Organisation**

and

**MORGAN JONES**

**Respondent**

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**DECISION OF THE NATIONAL ANTI-DOPING PANEL**

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**INTRODUCTION**

1. This is the unanimous decision of an Anti-Doping Tribunal ("the Tribunal") convened under Article 5.1 of the 2019 Procedural Rules of the National Anti-Doping Panel ("the Procedural Rules") and Article 8.1 of the UK Anti-Doping Rules dated 1 October 2019 ("the ADR") to determine an Anti-Doping Rule Violation ("ADRV") alleged against Mr Morgan Jones ("the Athlete").

2. The alleged ADRV is a violation of ADR Article 2.1 (Presence of a Prohibited Substance in the Athlete's Sample).
3. The Athlete was charged by letter issued by UKAD on 3 March 2020. The Tribunal was appointed by the President of the National Anti-Doping Panel ("the NADP").
4. At a hearing, held remotely on 30 March 2021, the Athlete was represented pro bono by Mr Matthew de Maid, solicitor and UKAD appeared through Ms Ailie McGowan. The Tribunal records its gratitude to both advocates for their assistance in this matter.
5. Additionally, present at the hearing were:
  - Ms Alisha Ellis, NADP Secretariat.
  - Ms Nisha Dutt, UKAD observing.
  - Mr Paul Jones, Athlete's father
  - Ms Leah Thomas, WRU observing
  - Ms Elizabeth Sermol, trainee solicitor, Osborne Clarke LLP
6. This is the reasoned decision of the Tribunal. Each member contributed to it and it represents our unanimous conclusions. It is necessarily a summary. It is reached after appropriate consideration of all the evidence, submissions and the other material placed before us. Nothing is to be read into the absence of specific reference to any aspect of the material or submissions before us. We considered and gave appropriate weight to it all.

## **JURISDICTION**

7. Jurisdiction was not challenged, but for completeness the Athlete is a semi-professional rugby player, who at the material time was registered as a player with Bridgend RFC.
8. The WRU is the National Governing Body ("NGB") for rugby in Wales and has adopted the ADR as its anti-doping rules. The ADR apply to all members of the WRU who, by virtue of that membership, agree to be bound by and to comply with them.

9. The Athlete was at all material times a registered member of the WRU.

10. ADR Article 1.2.1 provides that:

*1.2.1 These Rules shall apply to:*

*(a) all Athletes and Athlete Support Personnel who are members of the NGB and/or of member of affiliate organisations or licensees of the NGB (including any clubs, teams, associations or leagues);*

*(b) all Athletes and Athlete Support Personnel participating in such capacity in Events, Competitions and other activities organised, convened, authorised or recognised by the NGB or any of its member or affiliate organisations or licensees (including any clubs, teams, associations or leagues), wherever held;*

11. Pursuant to ADR Article 1.2.1(a) and ADR Article 1.2.1(b), the Athlete was subject to, and bound to comply with, the ADR at all material times.

12. UKAD submitted a request for arbitration to the NADP by letter dated 14 December 2020.

## **THE FACTS**

13. On 7 December 2019, pursuant to Mission Order M-1074911000, the Athlete was selected for In-Competition Testing after a match between Bridgend RFC and RGC 1404 RFC.

14. The Athlete provided seven urine Samples, all Samples were split into two bottles. These were given the reference numbers:

I. A1156516 (the 'First A Sample') and B1156516 (the 'First B Sample');

II. A1156445 (the 'Second A Sample') and B1156445 (the 'Second B Sample');

III. A1156444 (the 'Third A Sample') and B1156444 (the 'Third B Sample');

IV. A1156508 (the 'Fourth A Sample') and B1156508 (the 'Fourth B Sample');

V. A1156452 (the 'Fifth A Sample') and B1156452 (the 'Fifth B Sample');

VI. A1156510 (the 'Sixth A Sample') and B1156510 (the 'Sixth B Sample'); and

VII. A1156515 (the 'Seventh A Sample') and B1156515 (the 'Seventh B Sample').

None of the Samples met the requirement for Suitable Specific Gravity for Analysis.

15. All Samples were transported to the World Anti-Doping Agency ("WADA") accredited laboratory in London, the Drug Control Centre, Kings College (the "Laboratory").

16. The Laboratory analysed the First A Sample and the Seventh A Sample pursuant to clause G.4.11 of the WADA International Standard for Testing and Investigations ("the 'ISTI'"), which specifies that where three or more Samples are collected during the same Sample Collection Session, the Laboratory shall prioritise and analyse the first and last Samples collected.

17. Analysis of the First A Sample and the Seventh A Sample returned, in each case, an Adverse Analytical Finding ("AAF") for benzoylecgonine (a metabolite of cocaine).

18. Cocaine is classified as a non-Specified Substance under S6a (Stimulants) of the WADA 2019 Prohibited List, that is prohibited In-Competition only.

## **THE CHARGE**

19. The Athlete was accordingly charged with committing an ADRV alleging the presence of benzoylecgonine (a metabolite of cocaine) in respect of the first and seventh Samples provided on 7 December 2019, in violation of ADR Article 2.1.

20. ADR Article 2.1 provides as follows:

*2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample, unless the Athlete establishes that the presence is consistent with a TUE granted in accordance with Article 4.*

21. The Athlete, by way of a written statement submitted through his solicitor dated 12 March 2020, admitted the charge and thus the ADRV.

## RELEVANT REGULATIONS

22. Of great significance to these proceedings, the ADRV was committed whilst the ADR remained in force. However, not least due to the Covid lockdown, there was perhaps a longer than normal period between the commission of the ADRV in December 2019 and the hearing in March 2021. That period saw the coming into force, on 1 January 2021, of the World Anti-Doping Code 2021 (the "WADC") and the UK Anti-Doping Rules (the "2021 ADR").

23. Reflecting the provisions of Article 27.2 of the WADC, Article 1.6.2 (d) of the 2021 ADR enables tribunals, where a case is pending as of the Effective Date, to apply the 2021 ADR where they determine that the principle of *lex mitior* is applicable, in that it provides as follows:

*(d) Any case that is pending as of the Effective Date and any case brought after the Effective Date based on an Anti-Doping Rule Violation that allegedly occurred prior to the Effective Date will be governed by the substantive anti-doping rules in effect at the time the alleged Anti-Doping Rule Violation occurred, and not by the substantive anti-doping rules set out in these Rules (unless the panel hearing the case determines that a lex mitior in these Rules in relation to Consequences should apply instead), while the procedural aspects of the case will be governed by these Rules.*

24. The Effective Date is 1 January 2021.

25. Reverting to the ADR (as in force at the date of ADRV), it was common ground that this was the Athlete's first ADRV. As such ADR 10.2 applied:

***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 Specified Substance and UKAD can establish that the Anti-Doping Rule Violation was intentional.*

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

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.*

26. Article 10.2 above is similarly included in the 2021 ADR. The 2021 ADR then proceeds to add a new provision at Article 10.2.4, which provides as follows:

10.2.4 *Notwithstanding any other provision in Article 10.2, where the Anti-Doping Rule Violation involves a Substance of Abuse:*

(a) *If the Athlete can establish that any ingestion or Use occurred Out-of-Competition and was unrelated to sport performance, the period of Ineligibility shall be three (3) months; provided that it may be further reduced to one (1) month if the Athlete satisfactorily completes a Substance of Abuse treatment program approved by UKAD. The period of Ineligibility established in this Article 10.2.4(a) is not subject to any reduction pursuant to Article 10.6.*

*(b) If the ingestion, Use or Possession occurred In-Competition, and the Athlete can establish that the context of the ingestion, Use or Possession was unrelated to sport performance, the ingestion, Use or Possession shall not be considered intentional for purposes of Article 10.2.1 and shall not provide a basis for a finding of Aggravating Circumstances under Article 10.4.*

27. Cocaine is classified as a "Substance of Abuse" on the WADA 2021 Prohibited List.

28. Out-of-Competition is defined in the ADR and the 2021 ADR as:

*Any period which is not In-Competition*

29. In-Competition is defined in the ADR as:

*Unless provided otherwise in the rules of the International Federation for the sport in question or the ruling body of the Event in question, the period commencing 12 hours before a Competition in which the Athlete is scheduled to participate through to the end of such Competition and the Sample collection process related to such Competition.*

30. That definition (In-Competition) was, however, amended in the 2021 ADR to provide as follows:

*The period commencing at 11:59 p.m. on the day before a Competition in which the Athlete is scheduled to participate through the end of such Competition and the Sample collection process related to such Competition; provided, however, that WADA may approve, for a particular sport, an alternative definition if an International Federation provides a compelling justification that a different definition is necessary for its sport. Upon such approval by WADA, the alternative definition shall be followed by all Major Event Organisations for that particular sport.*

31. Consequences are defined in the ADR and the 2021 ADR so as to include Disqualification, Ineligibility, Provisional Suspension and public disclosure. That list was further added to in the 2021 ADR by the inclusion of Financial Consequences. Each of these terms is further defined in both sets of rules.

32. In summary therefore, given that the ADRV involved the ingestion of cocaine, which is a Substance of Abuse and also a non-Specified Substance, if the Athlete was able to

establish that the ingestion occurred Out-of-Competition and was unrelated to sport performance, a period of Ineligibility of three months would be the prescribed sanction (unless the Athlete satisfactorily completed an approved Substance of Abuse treatment program in which case it would be further reduced to one month).

33. In the event that the Athlete was unable to avail himself of the above provision (in the 2021 ADR) then, provided he was able to establish that he had not acted intentionally, he would be able to reduce the period of Ineligibility to two years pursuant to Article 10.2.1 (a) ADR.

34. That two year period could then be further reduced if the Athlete could establish that he bore No Significant Fault or Negligence pursuant to Article 10.5.2 ADR (now found at Article 10.6.2 of the 2021 ADR).

***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 of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight years.*

## **STRUCTURE OF THE HEARING**

35. Given the issues, and with the agreement of the parties, the hearing proceeded firstly to hear submissions with regard to *lex mitior*, then to receive evidence before concluding with submissions in relation to No Significant Fault or Negligence.

36. The Tribunal indicated that the process laid out in the Procedural Rules did not provide for the giving of an *ex tempore* decision and that, accordingly, written reasons would be given in due course in respect of all matters on which the Tribunal reached findings.

37. The Tribunal was further assisted by having the benefit of being able to additionally



consider detailed written submissions from the parties as follows:

- Athlete submissions dated 5 March 2021.
- UKAD submissions dated 19 March 2021.
- Athlete further submissions dated 29 March 2021.

38. These were carefully considered by the Tribunal, who record their thanks to the advocates for the assistance that they provided.

## **LEX MITIOR**

39. *Lex mitior* is a principle derived from the criminal law that has been applied for some time in the context of anti-doping proceedings. In summary, it provides that, if the law relevant to the offence of the accused has been amended, the less severe law should be applied. Doing so ensures that the accused gets the benefit of the more favourable sanction, even if that sanction was not in place at the time the relevant offence was committed.

40. The parties were in dispute as to the applicability of *lex mitior* in this matter. UKAD argued that, because of the change in the definition of "In-Competition" made in the 2021 ADR, the timing of the ADRV had in fact been In-Competition, whereas for the purposes of the ADR the ADRV had occurred Out-of-Competition.

41. Applying the 2021 ADR would, therefore, result in the Athlete receiving a four year period of Ineligibility, which could be reduced to two years if he could establish that, despite having ingested the cocaine In-Competition, the ingestion had been unrelated to a sports purpose pursuant to Article 10.2.4 (b) of the 2021 ADR.

42. Accordingly, in UKAD's submission, a correct application of the *lex mitior* principle would not result in the Athlete being able to secure a more lenient sanction under the 2021 ADR given the precise facts of this case. That argument was rejected by the Athlete.

43. The parties' positions on the point were fully set out in the written submissions referred to above and developed further during the course of oral submissions.

44. On behalf of the Athlete, Mr de Maid took the Tribunal to Article 27.2 of the 2021 WADC and noted the slight difference between that provision and the wording of Article 1.6.2 (d) of the 2021 ADR. The WADC refers to the *lex mitior* principle applying under the "circumstances of the case" whereas the 2021 ADR provides that a panel may determine that a *lex mitior* should apply "in relation to Consequences".

45. In his submission this was significant. The reference to Consequences could only apply to the question of penalty and this was consistent with the *lex mitior* principle, which in his submission applied only to penalty and not the elements of a violation.

46. In support of that submission, Mr de Maid placed reliance on a CAS decision in Drug Free Sport New Zealand ("DFSNZ") v Kris Gemmell<sup>1</sup>.

47. The facts of this case were not of relevance to the present proceedings, not least because Mr Gemmell was seeking to apply to his benefit a new provision that was not yet in force. The authority was however of relevance, in Mr de Maid's submission, in that Mr Gemmell was seeking to apply the *lex mitior* principle to the elements of the violation rather than to sanction. DFSNZ opposed that interpretation and, in finding in favour of DFSNZ, at paragraph 112 of its decision CAS stated:

*As already indicated, even if the rule had been in force this Panel is of the view that it applies to sanctions only and not to the elements of the violation. This view is based on the origin of the lex mitior principle, namely a rule to allow a criminal to be sentenced under a more lenient regime, which is in force at the date of sentencing and is reinforced by the manner in which the Court of Arbitration for Sport has applied the principle.*

48. He further referred to the conclusion reached on this point at paragraph 125:

*In summary, the principle of lex mitior does not assist Mr Gemmell. It does not apply to a provision which is not yet in force and when it does apply, the authorities indicate it applies to sanctions and not the elements of a violation.*

49. Mr de Maid next referred the Tribunal to the decision in Jakub Wawrzyniak v. Hellenic Football Federation<sup>2</sup>, relying on paragraphs 1 and 16 of that decision, which respectively

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<sup>1</sup> CAS 2014/A/2

<sup>2</sup> CAS 2009/A/2019

state as follows:

1. *Under a well established CAS jurisprudence, in order to determine whether an act constitutes an anti-doping rule infringement, the Panel applies the law in force at the time the act was committed. In other words, new regulations do not apply retroactively to facts that occurred prior to their entry into force, but only for the future. The principle of non-retroactivity is however mitigated by the application of the “lex mitior” principle.*

16. *The principle of non-retroactivity is however mitigated by the application of the “lex mitior” principle. In this respect the Panel fully agrees with the statements contained in the advisory opinion CAS 94/128 rendered on 5 January 1995, UCI and CONI (Digest of CAS Awards (1986-1998), p. 477 at 491), which read (in the English translation of the pertinent portions) as follows:*

*“The principle whereby a criminal law applies as soon as it comes into force if it is more favourable to the accused (lex mitior) is a fundamental principle of any democratic regime. It is established, for example, by Swiss law (art. 2 para. 2 of the Penal Code) and by Italian law (art. 2 of the Penal Code). This principle applies to anti-doping regulations in view of the penal or at the very least disciplinary nature of the penalties that they allow to be imposed. By virtue of this principle, the body responsible for setting the punishment must enable the athlete convicted of doping to benefit from the new provisions, assumed to be less severe, even when the events in question occurred before they came into force. This must be true, in the Panel’s opinion, not only when the penalty has not yet been pronounced or appealed, but also when a penalty has become res iudicata, provided that it has not yet been fully executed.*

*The Panel considers that [...] the new provisions must also apply to events which have occurred before they came into force if they lead to a more favourable result for the athlete. Except in cases where the penalty pronounced is entirely executed, the penalty imposed is, depending on the case, either expunged or replaced by the penalty provided by the new provisions”.*

50. In Mr de Maid's submission, this provided clear authority that the *lex mitior* principle operates to apply only with regard to penalty as provided for under the 2021 ADR, and that the elements of the violation had to be determined by reference to the ADR.

51. The Tribunal had the discretion to apply the *lex mitior* to the sanctions that they impose,

and in his view it should exercise this discretion in the way the 2021 rules invited them to do so.

52. In response, Ms McGowan on behalf of UKAD acknowledged that, when appropriate, athletes were entitled to reductions in their sanction through the operation of *lex mitior* principle, and noted that six athletes had already benefited from that position in relation to Substances of Abuse since the start of 2021.

53. In contrast, UKAD's view in relation to the Athlete's case was that the benefit of *lex mitior* was not available to him because, under the 2021 ADR, he would not be eligible for a reduction in the sanction. In this respect, she relied on the wording of Article 10.2.4 (as above) being the relevant provision dealing with Substances of Abuse.

54. In UKAD's submission, the term In-Competition was part and parcel of the sanctioning regime prescribed by the regulations. That term is defined within the 2021 ADR as any period being not Out-of-Competition, with In-Competition, as defined, starting at 23:59 pm on the day before the match the Athlete had participated in.

55. The Athlete had accepted, in his written statement, that he ingested cocaine between 00:00 and 01:00 on the day of the game in which he then played.

56. Accordingly, in UKAD's submission, pursuant to the 2021 ADR definition of In-Competition, the Athlete would not be entitled to a reduction of the period of Ineligibility, having ingested the cocaine during the In-Competition window, for the purposes of the 2021 ADR.

57. In light of that fact, under Article 10.2.4 (b) of the 2021 ADR, the Athlete would be subject to a four year period of Ineligibility unless he could establish that the ingestion, which had given rise to the ADRV had been unrelated to a sports purpose, in which event his period of Ineligibility would be two years. This would be the same period of Ineligibility that would apply pursuant to the ADR.

58. Ms McGowan also sought to place reliance on *DFSNZ v Gemmell* (above). UKAD did not dispute the essence of what that decision was saying, but took issue with the interpretation that Mr de Maid was seeking to place on it. In her view, this was to limit *lex mitior* to penalty alone and not apply it, correctly in her view, to the entirety of the sanctioning regime.

59. In support of that proposition, Ms McGowan referred to paragraph 112 of the Gemmell decision, which reads as follows:

*As already indicated, even if the rule had been in force this Panel is of the view that it applies to sanctions only and not to the elements of the violation. This view is based on the origin of the lex mitior principle, namely a rule to allow a criminal to be sentenced under a more lenient regime, which is in force at the date of sentencing and is reinforced by the manner in which the Court of Arbitration for Sport has applied the principle.*

60. In Ms McGowan's submission, the reference to "regime" was critical. Under the 2021 ADR, part of the regime included the In-Competition period, that period being as defined and set out above.

61. She next drew the Tribunal's attention to paragraph 115 of the decision as follows:

*Lastly, in this Panel's view, it is appropriate that the principle only applies to sanctions, as there is a need to protect the principles of the level playing field. It is inappropriate to apply what would in effect be a modified lex mitior principle.*

62. With regard to the level playing field referred to, Ms McGowan placed further reliance on paragraph 108:

*A relevant consideration, advanced by Mr Hikaka on behalf of DFSNZ, is that if lex mitior applies to the elements of the violation, it leads to an uneven playing field, a situation which the WADA Code does not support. The underlying point is that fairness dictates that all athletes compete on a level playing field. To allow some athlete to gain a competitive advantage by the retrospective application of the rule providing for different elements of a violation, creates an uneven playing field.*

63. In Ms McGowan's view, Mr de Maid was effectively asking the Tribunal to carve up Article 10.2.4 and apply both the ADR and the 2021 ADR.

64. To do so would enable the Athlete to receive a more lenient sanction than any other athlete under the 2021 ADR. If an athlete went out tomorrow and took cocaine at 01:00 on a match day, he or she would receive a two year period of Ineligibility. To therefore allow the Athlete to get a more lenient sanction would not result in a level playing field being achieved.

65. In the view of UKAD, the *lex mitior* principle was not available to the Athlete. Mr de Maid

was, incorrectly, seeking to rely solely on penalty rather than the entirety of sanctioning regime in order to secure a more lenient sanction, which the WADA regime did not allow.

66. Ms McGowan was asked by the Tribunal if she could assist by referring to any decision that established that the Consequences should be read as referring to the sanctioning regime and not penalty. Ms McGowan was unable to point to an authority but relied instead on the provisions of Article 1.6.2. of the 2021 ADR. This referred to Consequences. Consequences, as already noted, was defined, and did not refer to a penalty. Accordingly, in her submission, the definition of In-Competition was tied to the sanctioning regime, and this was not an element of the violation. One could not get to penalty without the definition of In-Competition in the 2021 ADR. Because of that, the 2021 ADR did not provide for a more a lenient penalty in respect of the Athlete's ADRV and thus *lex mitior* was not applicable to the Athlete.

67. In response, Mr de Maid submitted that UKAD's position was incorrect. In his view the authorities were clear and one could not retrospectively change the elements of the violation.

68. In his submission, the violation could be committed both In-Competition and Out-of-Competition, under either the ADR or 2021 ADR. The Athlete could fairly say that, at the time he took cocaine, he knew that he was wrong to do so but that he did so Out-of-Competition as it was at the time. The unfairness would come from now seeking to apply the change of definition that had occurred two years after the ADRV. In his view, the question of In-Competition was an element of the violation that had to be judged on the basis of the rules in force when the ADRV was committed, failing which the Athlete would be punished excessively through the retrospective application of today's standards.

69. Mr de Maid rejected UKAD's submission in relation to the definition of Consequences. In his view the definition clearly referred to penalties, which were listed. In his submission, that definition assisted the Athlete's position and not UKAD's. The Tribunal could see what is included in the definition and come to its own conclusions. He disagreed with the interpretation of *lex mitior* as presented by Ms McGowan, and, in his view, the level playing field argument advanced by Ms McGowan would in fact work unfairly against his client.

## EVIDENCE

70. In addition to the evidence set out in the hearing bundle, the Tribunal received and carefully considered oral evidence from the Athlete who spoke with candour notwithstanding that the experience was clearly stressful for him.
71. He confirmed, without equivocation, that he had ingested cocaine in circumstances where he knew he was due to be playing the following day. He had done so because he had felt that his life was falling apart and was one big mess. His rugby, which was the biggest aspect of his life was going downhill, having broken the same leg on three separate occasions and he was not enjoying work. He had then lost his great grandfather with whom he was very close and everything *"just escalated"*.
72. He had got to the stage where *"I just had enough of everything really. I was broken and fed up with life"*
73. He had not sought help at the time because he did not want to believe that he had a problem and instead he had sought release through alcohol and drugs.
74. He confirmed that on the night in question he had nasally ingested cocaine at three separate times between approximately 21:00 and 01:00 during which period he had also drunk a considerable amount of alcohol comprising of beers, Jaegermeister shots, vodka lemonades and a bottled drink, WKD.
75. Having received his Notice of Charge his family became involved, in consequence of which he had sought help from a Dr Alastair Clarke-Walker, a consultant in substance misuse and psychiatry. He was still under his care.
76. The Athlete was subject to quite extensive, but commendably sympathetic, cross-examination from Ms McGowan. He accepted that he had received anti-doping training, knew that cocaine was a Prohibited Substance and was personally aware of teammates who had been banned having tested positive for cocaine. He had known that he had been selected, albeit on the bench, to play the following day and that there was a risk of being tested. His mental state had been such however that he had just thought *"screw it"*.
77. Although his health was still such that his view on this fluctuated, he hoped one day to

resume his playing career.

78. The Athlete's father, Mr Paul Jones, also gave evidence speaking as to the difficulties his son had faced, how the family had not really appreciated the extent of the problem until these proceedings and how they had then obtained medical help for the Athlete from Dr Clarke-Walker.

79. Written statements from two colleagues of the Athlete, which corroborated the Athlete's evidence as to the events on 6 December 2019, and the ingestion of cocaine at that time, were considered by the Tribunal.

80. The Tribunal also had before them written reports from Dr Clarke-Walker and Dr Alan Currie, a consultant psychiatrist instructed by UKAD.

81. Dr Currie concurred with Dr Clarke-Walker's diagnosis that the Athlete was suffering from a depressive disorder in consequence of which his decision making was impaired noting that:

*"In a depressed state it is common for a patient's judgement to be greatly affected by their depressed mood and pessimistic thinking. This has the power to influence decision making and lead to bad decisions taken without the usual caution as regards the consequences."*

82. In light of the common ground between the medical experts, neither was asked to give oral evidence by the parties or the Tribunal.

## **SUBMISSIONS AS TO FAULT**

83. Ms McGowan reiterated that UKAD's primary position was that the principle of *lex mitior* was inapplicable on the facts. Accordingly, the Athlete fell to be sanctioned in accordance with Article 10 of the ADR.

84. Whilst this was a matter for the Tribunal to determine, UKAD did not assert that the Athlete had acted intentionally for the purposes of Article 10.2.3 ADR. Accordingly, the starting point was a period of Ineligibility of two years.



85. In light of the evidence, UKAD accepted that the Athlete could potentially benefit from the provisions of Article 10.2.5 in relation to No Significant Fault or Negligence. In this regard, Ms McGowan referred to the decision in Cilic v ITF<sup>3</sup>, which set out principles that could be followed when assessing the degree of Fault to be attributable to an athlete. In doing so it referred to three gradations:

1. Considerable Fault
2. A normal degree of Fault; and
3. A light degree of Fault.

86. This approach was then followed in FIS v Johaug and Norwegian Olympic and Paralympic Committee<sup>4</sup>, which considered Cilic in specific reference to Article 10.5.2 ADR concluding that:

*"considerable fault may lead to a sanction of 20 – 24 months, a normal degree of fault may lead to 16 – 20 months, and a light degree of fault may lead to 12 – 16 months."*

87. Ms McGowan noted that the guidance in Cilic suggested that, in assessing Fault, tribunals should give consideration to both objective and subjective elements, giving prominence to the objective elements.

88. In UKAD's submission, the objective facts were that the Athlete had known that cocaine was a Prohibited Substance, known that he had been selected to play the following day and had nevertheless ingested cocaine. Given those facts, his Fault fell to be found as considerable.

89. Turning to the subjective elements, UKAD accepted the evidence of impairment as diagnosed by both Dr Clarke-Walker and Dr Currie and in those circumstances suggested that the Athlete's Fault should be assessed as being at the lower end of the considerable Fault range.

90. UKAD further acknowledged that the Tribunal had the discretion to go to a lower degree

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<sup>3</sup> CAS 2013/A/

<sup>4</sup> CAS 2017/1/5015

of Fault if felt that it was appropriate to do so.

91. As to the commencement of the period of Ineligibility, UKAD accepted that the Athlete had respected the terms of his Provisional Suspension that had been imposed on 3 March 2020, and that therefore, pursuant to Article 10.11.13, the Athlete could have that period credited against any order now imposed by the Tribunal.

92. To the extent that it was argued that there had been substantial delays not attributable to the Athlete or other Person so as to engage Article 10.11.1 ADR, UKAD rejected any suggestion that it had been responsible for such delay. In UKAD's view, the commencement of any period of Ineligibility should therefore not be backdated.

93. Mr de Maid's primary submission on behalf of his client was that the *lex mitior* principle should be applied so as to engage Article 10.2.4 of the 2021 ADR, which would result in the Athlete receiving a period of Ineligibility of three months.

94. If the Tribunal was not with him on that, in his view the Tribunal should exercise its discretion to find that the Athlete's degree of Fault for the purposes of Article 10.5.2 ADR was less than that urged by UKAD.

95. Whilst he did not criticise UKAD in this regard, in his submission there had been a substantial delay in the hearing process, and in so doing he noted the impact of the Covid-19 crisis. In his view this should be reflected to the benefit of the Athlete as provided for under Article 10.11.1, with the commencement of any period of Ineligibility being backdated to the date of Sample collection.

## **DECISION**

96. The Tribunal carefully considered all the evidence and submissions before it and reminded itself of the relevant burdens that rested upon the parties.

97. On the Athlete's own admission, he had committed the ADRV as alleged, and the Tribunal formally found that the charge against the Athlete had been proven.

98. The issue for the Tribunal to determine was accordingly sanction, which remained in

dispute, most critically as to whether the Athlete was entitled to benefit of the principle of *lex mitior*. The Tribunal proceeded to consider that issue first, on the basis that, if it were to find in favour of the Athlete, many of the remaining issues would then fall away.

99. To the extent that this was necessary, the Tribunal was comfortably satisfied that the mode of ingestion of the cocaine found in the Athlete's Sample had been through its consumption between 21:00 on 6 December 2019 and 01:00 on 7 December 2019 during the course of a social event attended by the Athlete. It made a further formal finding in this regard.

100. Given that the ingestion of the cocaine had also been accompanied by the consumption of significant alcohol, it was perhaps self-evident that the cocaine was unrelated to sport performance. This point was not challenged by UKAD, and the Tribunal accordingly found that the cocaine had been ingested in a manner that was not related to sport performance.

101. The remaining, and critical issue was whether the Athlete had ingested the cocaine In-Competition. As set out above, for the purposes of the ADR the Athlete had ingested the cocaine Out-of-Competition, but for the purposes of the 2021 ADR it had been ingested In-Competition. This issue lay at the core of whether or not the Athlete could benefit from the application of *lex mitior*.

102. UKAD's position on the point had changed during the course of the written submissions. It had initially asserted that the principle was inapplicable because the change to the definition of In-Competition brought about in the 2021 ADR meant that the Athlete had committed the ADRV In-Competition, and that, in consequence there was no lesser sanction available to him.

103. That position was then amended following Mr de Maid having drawn attention to the decision in Gemmell (above). As noted, this provided clear authority, from a CAS appellate decision, that the principle of *lex mitior* only applied to penalty and not the elements of the violation. That position had been robustly asserted by DFSNZ, which are the equivalent anti-doping enforcement body to UKAD in New Zealand.

104. UKAD's response to that authority, and Mr de Maid's submissions in relation to it, now asserted that the definition of In-Competition was not an element of the violation, but was part of the sanctioning regime, and that the entirety of the sanctioning regime had to be

considered the determining penalty.

105. Whilst Ms McGowan advanced her argument in this regard with great skill and commitment, in the view of the Tribunal the argument was artificial and ultimately wrong.

106. Beyond the briefest of references to the word "regime" at paragraph 108 of Gemmell as recorded at paragraph 59 above, Ms McGowan advanced no authority to support the proposition that the reference to penalty should be read as referring to sanctioning regime or that the Competition window should not be regarded as an element of the violation.

107. In the Tribunal's view, the Competition window was an element of the violation. The violation could be committed either In-Competition or Out-of-Competition, and so the determination in that regard had to be considered to be an element of the violation.

108. Further, the effect of Ms McGowan's argument was to seek to import the 2021 ADR into the events of the 6 and 7 December 2019. In the opinion of the Tribunal, it was plainly wrong to do so. Pursuant to the rules then in force, the Athlete had ingested cocaine Out-of-Competition, and the submission that he should be subject to rules that were not then in force, to bring him within the In-Competition window (to prevent him from benefiting from the principle of *lex mitior*) was not one with which the Tribunal could agree. That argument was accordingly rejected.

109. To do otherwise would, in the Tribunal's view, run contrary of to the underlying principle of *lex mitior* that an athlete should be able to benefit from a lower sanction that had become available.

110. As noted, UKAD had accepted the applicability of *lex mitior* in respect of six other cases since the start of 2021. To seek to deprive the Athlete of that benefit, on the basis of an argument that was unsupported by any authority, was wrong. If there was any doubt as to the position in this regard, the Tribunal considered that this should be assessed in favour of the Athlete

111. In light of its findings, the Tribunal concluded that the Athlete was entitled to the application of the *lex mitior* principle. Having done so, the Tribunal imposed a period of Ineligibility of three (3) months upon the Athlete pursuant to penalty prescribed in Article 10.2.4 (a) of the 2021 ADR.

## **COMMENCEMENT OF THE PERIOD OF INELIGIBILITY**

112. UKAD accepted that the Athlete had respected the terms of the Provisional Suspension imposed upon him on 3 March 2020, and that accordingly he should receive credit for the time he had already served, pursuant to Article 10.11.3 ADR.

113. That being the position, the Athlete had already served a period of Ineligibility well in excess of the three months it is now ordered that he serve. The Athlete is accordingly free to resume all sporting activities with immediate effect. To the extent that this is also necessary, the Provisional Suspension should also be lifted, again with immediate effect.

## **SUMMARY**

114. The violation asserted against the athlete is found proven.

115. The appropriate penalty for that ADRV is the imposition of a period of Ineligibility of three (3) months.

116. That period having been served pursuant to a Provisional Suspension, the Athlete has complied with the order of this Tribunal and can participate in all sport again with immediate effect

## RIGHT OF APPEAL

117. In accordance with ADR Article 13.4, the parties may appeal against this decision to the NADP Appeal Tribunal. In accordance with Article 13.5 of the NADP Procedural Rules any party who wishes to appeal must lodge a Notice of Appeal with the NADP Secretariat within 21 days of receipt of this decision. The Appeal should be filed to Sport Resolutions, 1 Salisbury Square, London, EC4Y, 8AE and contact can be made via [resolve@sportresolutions.co.uk](mailto:resolve@sportresolutions.co.uk).



Jeremy Summers, Chair

For and on behalf of the Panel

London, UK

12 April 2021

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