SPORT RESOLUTIONS

SR/134/2021

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF UK ATHLETICS

Before:

Jeremy Summers (Chair)
Katherine Apps
Carole Billington-Wood

BETWEEN:

Mark Dry

Appellant

and

UK Anti-Doping Limited ("UKAD")

Respondent

DECISION OF THE NATIONAL ANTI-DOPING APPEAL PANEL

INTRODUCTION

1. This is the unanimous decision of the National Anti-Doping Appeal Tribunal (the "Tribunal") convened pursuant to Article 5.3 of the 2021 Procedural Rules of the National Anti-Doping Panel (the "Procedural Rules") and Article 8.1 of the UK Anti-Doping Rules dated 1 January 2021 (the "ADR") to determine an appeal lodged by Mr Mark Dry (the "Athlete") against a decision issued by UKAD (the "Issued Decision") dated 7 May 2021.

2. The Issued Decision imposed a 28-month period of Ineligibility upon the Athlete. In light of the procedural history of this matter as set out below, that period of Ineligibility will expire on 24 January 2022.

3. The underlying alleged Anti-Doping Rule Violation ("ADRV"), which resulted in the Issued Decision was a violation of ADR Article 2.5 (*Tampering or Attempted Tampering with any part of Doping Control by an Athlete or other Person*).

4. With the agreement of the parties, the Appeal was determined by the Tribunal on the papers alone following a remote deliberation conducted on 23 July 2021.

5. 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 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

6. Jurisdiction was not challenged, but for completeness the Athlete is a highly successful hammer thrower, having represented both Scotland and Great Britain at the highest levels, including the Olympics. He has won bronze medals at two Commonwealth Games.

7. UK Athletics ("UKA") is the National Governing Body ("NGB") for athletics in the UK, and has adopted the ADR as its anti-doping rules. The ADR apply to all members of the UKA who, by virtue of that membership, agree to be bound by and to comply with them.

8. The Athlete was at all material times a registered member of the UKA.

9. ADR Article 1.2.1 provides that:

"1.2.1 These Rules shall apply to:

(b) all Athletes (including International-Level Athletes) and Athlete Support Personnel who are members of the NGB and/or of the NGB's members or affiliate organisations or licensees (including any clubs, teams, associations or leagues) or otherwise under the jurisdiction of the NGB (including Recreational Athletes);

(c) all Athletes (including International-Level 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;"

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

The Facts

11. From February 2017 onwards, the Athlete had been included in UKAD's Domestic Testing Pool ("DTP"), meaning that he had to provide certain information to UKAD relating to his whereabouts so that he could be located for testing whilst Out-of-Competition. He did not have to provide the full whereabouts required of members of the National Registered Testing Pool ("NRTP"), including the one hour time-slot. If the Athlete failed to provide the whereabouts requested, or provided it but then was not where he had said he would be, he would not be subject to a Whereabouts Failure contrary to ADR Article 2.4. However, three such failures would lead to him being put into the NRTP and, in turn, expose him to an Article 2.4 ADRV for three further failures.

12. UKAD attempted to test the Athlete on 15 October 2018, at his home in Shepshed, Leicestershire, being the location noted in his whereabouts filing. He was not there, and a neighbour told the Doping Control Officer that he had gone to Scotland on 12 October 2018. The Athlete updated his whereabouts information, stating that he had gone to Scotland, on 16 October 2018.

13. On 18 October 2018, UKAD wrote to the Athlete requesting an explanation for his absence on 15 October 2018, failing which a Whereabouts Failure (or 'strike') would be recorded against him. In response, the Athlete falsely claimed that his neighbour had been mistaken, and that he had not gone to Scotland until 16 October 2018. He had (he claimed) in fact been in Shepshed on 15 October 2018, but had been out fishing when the testers called. Had that statement been true, this would not have amounted to a Whereabouts Failure.

14. When UKAD asked if he had any supporting evidence for this explanation, the Athlete provided what purported to be corroboration of his account from his partner. On 24 October 2018, she wrote to UKAD stating:

> *"I am emailing as Mark Dry's partner to provide a witness statement for his whereabouts on Monday 15th October 2018. I can confirm that Mark was out fishing on the morning of the Monday 15th October and we travelled to Scotland to visit his family the following day (Tuesday 16th October). I did mention to a neighbour that we would be away for a few days but I did not specify dates as this was a conversation that happened in passing".*

15. On 3 December 2018, UKAD invited the Athlete to a formal interview, indicating that it was investigating whether he had provided false information. At that point, some seven weeks later, the Athlete abandoned his previous statement and admitted that he had in fact been in Scotland on 15 October 2018.

16. In a letter dated 11 December 2018 he explained that:

> *"I did not want to have a strike against my fully clean record and so opted for what I now know was completely the wrong decision".*

17. He confirmed at interview on 23 January 2019 that he had deliberately and intentionally lied, and had got his partner to do the same, in order to avoid getting a 'strike'.

Procedural History

18. This is a somewhat unique matter in that prior to the Issued Decision the Athlete had been subject to substantive first instance and appeal proceedings before NADP

Tribunals as detailed below. These proceedings ultimately resulted in a four year period of Ineligibility being imposed upon the Athlete on 25 February 2020[1].

19. On 8 May 2019, UKAD charged the Athlete with Tampering with Doping Control, in violation of Article 2.5 ADR, by providing or allowing the provision of false information to UKAD regarding his whereabouts on 15 October 2018. He was provisionally suspended as from 8 May 2019.

20. In response to the charge, the Athlete claimed that he had lied because he:

> *"was not in his normal state of mind and panicked about getting in trouble …. Furthermore, the medication he was taking to treat his nerve pain (Gabapentin) impacted his memory, especially when it interacted with alcohol."*

21. He denied Tampering on the basis that nothing he had done had subverted Doping Control, because (he argued) the DTP was not part of the ADR and so is not part of the Doping Control process.

22. Alternatively, he sought a reduced sanction on proportionality grounds, asserting that he had not acted intentionally but rather with No Significant Fault or Negligence, because he was '*under physical, emotional, and cognitive duress as a result of the medicine that he was taking'*.

23. Following a first instance hearing in September 2019, the NADP Tribunal issued its decision on 8 October 2019. It rejected the Athlete's claim that he had not truly intended to deceive UKAD when he lied to UKAD on 18 October 2018, but instead had been unable to form a genuine intent because the balance of his mind had been disturbed from cognitive impairment due to medical treatment he was receiving. The NADP Tribunal found his conduct in lying to UKAD, and in getting his partner to lie to UKAD 'reprehensible'. However, it accepted his argument that his conduct did not subvert Doping Control or evade the operation of the ADR, because the IAAF ADR (on which the ADR were based) did not mention the DTP, and therefore the DTP operated outside the ADR.

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[1] SR/324/2019

24. UKAD appealed that decision on the basis that the DTP is expressly provided for in the ADR and was therefore undoubtedly part of the Doping Control process. Accordingly, the Athlete's actions constituted a deliberate attempt to evade the proper operation of the ADR, namely, recording a ‘strike’ against the Athlete that would lead, if followed by two more, to his inclusion in the NRTP.

25. Following a hearing on 25 February 2020, a NADP Appeal Tribunal upheld the UKAD appeal, and subsequently issued a decision ruling that that the Athlete had Tampered with Doping Control by deliberately providing false information to UKAD with the intention of evading the operation of the ADR. In light of that finding, it imposed the fixed four year period of Ineligibility for Tampering mandated by ADR Article 10.3.1, giving him credit for the five months that he had been provisionally suspended, with the result that period of Ineligibility ran from 25 February 2020 to 24 September 2023.

Reduction of the imposed period of Ineligibility

26. In November 2019, the WADA Foundation Board approved the 2021 World Anti-Doping Code, which amended Art 10.3.1 to introduce a flexibility to reduce a ban for Tampering in exceptional circumstances, to between two to four years, ‘*depending on the Athlete or other Person’s degree of Fault.*’

27. The 2021 Code (Article 27.3) also provided that anyone who was still serving a period of Ineligibility imposed under the 2015 Code as of the date the 2021 Code came into effect (1 January 2021) could ask the Anti-Doping Organisation that brought the charge (here being UKAD) ‘*to consider a reduction in the period of Ineligibility in light of the 2021 Code*’.

28. This is reflected in Article 1.6.2 (e) ADR, which states:

> *“Where a final decision finding an Anti-Doping Rule Violation has been rendered prior to the Effective Date, but the Athlete or other Person is still serving the period of Ineligibility as of the Effective Date, the Athlete or other Person may apply to UKAD before the period of Ineligibility has expired to reduce the period of Ineligibility in light of a lex mitior in these Rules.”*

29. In light of those changes, UKAD invited the Athlete to make an application for a reduction of his period of Ineligibility.

30. Some eight months later, on 16 December 2020, the Athlete submitted that application, seeking a reduction in his period of Ineligibility from four years to two years, and also requesting that the commencement of that sanction was back-dated to start from 15 October 2018, pursuant to Article 10.8.2 of the 2021 Code. This would have enabled the Athlete to start competing again on 1 January 2021.

31. In making that application, the Athlete provided no substantive reasoning in support of the requested relief. UKAD therefore asked for further supporting grounds, which were not provided until 3 March 2021.

32. In his final submissions of that date, the Athlete did not pursue his request for the backdating of the commencement of the ban, but instead (in addition to seeking a reduction in the sanction to two years), asked that credit was given for the five months of Provisional Suspension he had served from May to October 2019, in which event his period of Ineligibility (if reduced to 24 months) would end on 24 September 2021.

33. The Issued Decision reduced the period of Ineligibility to one of 28 months (a reduction of 20 months) but declined to backdate to the commencement of that period. The reduced period of Ineligibility is (subject to this appeal) to expire on 24 January 2022.

34. The Athlete now appeals against the Issued Decision.

Test on Appeal

35. This was a matter where there was little agreement between the parties on the core issues and, reflecting that general position, the test to be applied by the Tribunal when determining the appeal, was in dispute.

36. It was common ground that the hearing should not be *de novo.* UKAD's position was that the appeal should proceed on the basis of a review for error on the part of UKAD in

reaching the Issued Decision. That analysis was not accepted on behalf of the Athlete, but no alternative test was then advanced.

37. The Tribunal accordingly first considered the test that it would apply. It noted that there was no test prescribed by the ADR in the event of an appeal against an Issued Decision, and that, in advancing its submission in this regard, UKAD placed reliance on ADR Articles 13.7.4 and 13.7.5, although in the case of latter, had not cited this entirely correctly.

38. Article 13.7.4 ADR provides:

> *"The scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker. Any party to the appeal may submit evidence, legal arguments and claims that were not raised in the first instance hearing so long as they arise from the same cause of action or same general facts or circumstances as were raised or addressed in the first instance hearing."*

39. Article 13.7.5 ADR provides:

> *"In making its decision, CAS shall not give deference to the discretion exercised by the body whose decision is being appealed."*

40. UKAD's submission as to how these provisions should be applied was as follows:

> *"However, UK ADR Art 13.7.5 states: 'In making its decision, [the appeal panel] shall not give deference to the discretion exercised by the body whose decision is being appealed'. That would be entirely redundant if the appeal was to be heard de novo (since starting again from the beginning means there is no exercise of discretion to defer to or not). Because an interpretation that would render express provisions redundant is to be avoided if at all possible, 3 UKAD considers that Art 13.7.5 means the standard of review on this appeal must be review for error, not a re-hearing de novo."*

41. The Tribunal, respectfully, did not fully agree with that analysis. As will be noted, Article 13.7.5 ADR is drafted so as only to apply to CAS appeal proceedings, which are conducted on a *de novo* basis and are expressed as being so in the notes within the World Anti-Doping Code. The 2021 WADC at 13.1.1 and 13.1.2 are materially identical to Articles 13.7.4 and 13.7.5 ADR (including the reference to CAS in 13.7.5).

42. Furthermore, Article 13.7.4 ADR permits a tribunal to consider new evidence and submissions not advanced at first instance, provided that there is a link to the issues advanced at first instance. This, in the Tribunal's view, had the potential to give it a wider remit than being simply restricted to a review for error made by the decision maker, which would usually be restricted to the evidence before the decision maker (and only exceptionally would permit later evidence or arguments to be adduced).

43. In the absence of an express test being provided in the ADR, and the lack of agreement between the parties, the Tribunal proceeded on the dual basis of first reviewing the Issued Decision for error (but also having regard to all submissions and evidence submitted in this appeal under ADR Article 13.7.4) and then, in the event that this was required, to determine what sanction it would itself have arrived at.

44. For the reasons set out below, the Tribunal reached the same position in applying each approach.

Grounds of Appeal

45. The Tribunal had the benefit of being able to carefully consider detailed written submissions from the parties, for which they record their gratitude.

46. The Athlete's primary written submissions are set out at Appendix 1, with those in response from UKAD being at Appendix 2. These are not therefore further rehearsed for the purposes of this decision, but in summary four grounds of appeal were advanced on behalf of the Athlete:

    1) That the sanction imposed was "*completely disproportionate*".

    2) That the Tribunal should consider the fraudulent behaviour, or lack of it on the part of the Athlete, when assessing his degree of Fault.

3) That UKAD had erred in its application of the '*degree of fault*' specifically with reference to the application of the case of Cilic v ITF[2], which had resulted in UKAD incorrectly imposing a 28-month period of Ineligibility.

4) That the Tribunal should backdate the commencement to the date of the offence being 15 October 2018.

47. UKAD opposed all four grounds of appeal.

48. For completeness, the Athlete also submitted additional written submissions headed "Appellant's response to Respondent's submissions dated 30 June 2021 and UKAD also lodged a further documents headed "The test to be applied by the NADP Appeal Panel". Neither substantially advanced the previous written submissions in a material way, but both were considered fully by the Panel.

49. The Athlete's position in this later document can be summarised as follows:

- The test to be applied by UKAD was whether the sanction was "proportionate" in the wider sense.
- That Puerta v ITF[3] does not restrict UKAD or the Tribunal to consider proportionality only where there is a "lacuna" in the Code.
- Contesting UKAD's submission that he was attempting to re-argue question of whether he had committed an ADRV.
- *Cilic* "applies only as guidance and does not create a standard of tariffs of Ineligibility in an indiscriminate manner."
- The Athlete's Fault was "at the lowest end of the spectrum."
- The Athlete should have the same length of sanction as was recorded in Rugby Football Union v (1) Joseph Stafford (2) Rupert Kay[4].

[2] CAS 2013/A/3327
[3] CAS 2006/A/1025
[4] SR/311/2019

- ADR Article 13.10.1 should be applied because the Respondent "used technicalities" to ensure that the Appellant would miss the Tokyo 2020 Olympics.

- The Athlete's representative denied that the possibility of applying for a review had been flagged to him in April 2020.

Decision in relation to proportionality

50. To the extent that the Athlete's first three grounds each invited the Tribunal to conclude that UKAD had erred in consequence of which the Athlete had received a disproportionate sanction, the Tribunal addressed this issue by considering each ground together.

51. UKAD's approach to the review application under ADR Article 10.3.1(b) was heavily influenced by the approach to Fault taken by CAS in _Cilic_ (above) under what was then WADA Code 10.4 (*Elimination or reduction of the period of Ineligibility for specified substances under specified circumstances*).

52. In _Cilic,_ CAS had approached the question of Fault through three tiers (*1) significant degree of or considerable fault (b) normal degree of fault and (c) a light degree of fault*. These tiers took into account "both the objective and the subjective level of fault."

53. At [71] CAS stated:

> *"In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities."*

54. UKAD did not consider that it was bound to apply the tiered structure adopted in Cilic but considered that it *"assist*[s]."

55. UKAD listed the "*objective and subjective*" elements they balanced at [25]. These included:

a) His age and anti- doping education (at 25(a)).

b) That the provision of false information "*was not a momentary lapse of judgment. He lied specifically and consciously to avoid a "strike" so as to maintain a clean record"* (at 25(b)).

c) The duration of the lie. He lied on 18 October 2018. He encouraged his girlfriend to lie on 24 October 2018 and he "*did not come clean until 11 December 2018 after he had been called to an interview by UKAD*" (at 25(b)).

d) He "*did not just lie himself; he also allowed his girlfriend to lie to UKAD on his behalf*" in corroboration (at 25(c)).

e) That the ADRV in this case was "*very different*" (by which it was meant, very much less serious) than had an athlete provided false information to prevent a finding that he had committed an ADRV. The Athlete's intention had been to avoid a "*strike.*" Given that he was in the DTP, a "*strike" would never have led to an ADRV, but only (if followed by two more) to his elevation to the National Registered Testing Pool.*" (para 26(a)).

f) That the Athlete had admitted his wrongdoing when he was invited to interview (para 26(b)).

56. UKAD's Response to this appeal goes rather further than the decision challenged in a number of respects.

57. First, it seeks to argue that the review power is far more limited than a full proportionality reconsideration of the sanction. UKAD seeks to rely on the decision of the previous Appeal Tribunal's rejection of the proportionality argument (see Response at Appendix 2 para 22.1).

58. Secondly, UKAD also appears to go further than the decision itself in relation to the *Cilic* case. UKAD argues that the reference to "*Fault"* in the 2021 WADA Code 10.3.1, which is identical to the word used in the rule considered in *Cilic*, means that the *Cilic* principles "must also be useful to assess Fault under the 2021 code" (see Response at Appendix 2 para 26.1.2). UKAD asserts that, in the 2021 WADA Code Fault is "*defined carefully*."

59. The Tribunal considered that these two submissions (which do not form part of the decision appealed) go too far. Whilst the Tribunal did not conclude that its findings in this regard affected the result of this appeal, it rejected these two arguments for the following reasons.

60. Firstly, UKAD is correct that ADR Article 10.3.1(b) is not an unfettered proportionality assessment. It does not permit UKAD, or indeed this Tribunal, to carry out a full proportionality reassessment without any regard to the express wording of the WADA Code or the ADR. The starting point is that the Code itself reflects a careful proportionality approach to anti-doping sanctions, which has been carefully considered and deliberated at international level and adopted by UK Athletics and other NGBs worldwide.

61. However, it is clear that ADR Article 10.3.1(b) is significantly different than the provisions of the WADA Code, which applied at the time of the Athlete's appeal. The four year sanction (without the power to backdate) was mandatory and allowed for no discretion, a consequence in respect of which the Appeal Tribunal expressed serious misgivings.

62. Following the 2021 WADA Code there now exists a power to reduce a sanction to two years, rather than four years in the case of "*exceptional circumstances that justify a reduction of the period….depending on the …degree of Fault*".

63. This does not require or permit a free standing proportionality analysis to be carried out. However:

    a) It allows the decision maker to take account of all relevant considerations when determining whether exceptional circumstances apply.

    b) It roots the necessary analysis as one which focusses on the athlete's individual "*Fault*" for the ADRV.

    c) It does not require a decision maker to take no account at all of the full period that an Athlete has been barred or suspended.

d) Indeed, when focussing on assessing Fault, the decision maker necessarily assesses whether the level of "*Fault*" shown by the Athlete is proportionate to the length of the sanction imposed.

e) A decision maker must take account of the "*usual"* sanction being four years, and that periods below that length will be exceptions.

f) It is likely that it will only be in the cases of the very lowest "*Fault"* that a 24 month sanction would be appropriate.

64. This is not a point which the previous Appeal Tribunal decisively determined because the new rule was not before it.

65. The Tribunal considered that the approach outlined at paragraph 62 was the approach that UKAD adopted when arriving at the Issued Decision. The Tribunal was satisfied that there had been a clear acknowledgment (by UKAD) of the exceptional nature of the power and a careful balancing of the relevant considerations.

66. The Issued Decision did not conclude that the Athlete's conduct was exactly the same as has occurred in any other case. That would not have been a helpful approach to have adopted. Comparator cases are very rarely of direct assistance when determining levels of individual subjective and objective Fault. Instead, UKAD correctly focussed primarily on the nature of the conduct, the objective and subjective degree of Fault, and the mitigation put forward by the Athlete and the arguments raised by him in his application.

67. In the view of the Tribunal, UKAD was entitled to have concluded that the Athlete was in the "*middle"* of the light Fault tier under *Cilic*, but not at the very bottom.

68. If the Tribunal were to have exercised that judgment afresh it would come to the same conclusion. The Tribunal would have made reference to the same factors that UKAD recorded in their Issued Decision at paragraphs 25 and 26.

69. The Tribunal might additionally have made express reference to the total period the Athlete has, in effect, been subject to the period of Ineligibility, but it does not believe that this would have altered its ultimate decision. This was not an ADRV that carried the very lowest level of "Fault." It was sustained over a considerable period of time, and

could not be viewed as a momentary lapse of judgment in the heat of the moment. It was further aggravated by the encouragement of another to lie.

70. The wrongdoing, in the form of the two lies (by the Athlete and his partner), were not proactively corrected by the Athlete contacting UKAD, and in fact were only addressed at his first interview.

71. At no point during the process has the Athlete admitted the ADRV, and even in his submissions before this Tribunal, he has sought to minimise the seriousness of the conduct and the importance of proactively engaging with honesty and integrity with UKAD.

72. Of some note, the Athlete is not an inexperienced sportsman but has competed for a considerable period at national and international level and has received formal anti-doping education commensurate to his level of competition.

73. A period of 28 months from the date of the Appeal Decision (allowing for 5 months credit for suspension served) was an appropriate and proportionate sanction in the circumstances of this case and in the context of the 2021 WADA Code.

74. The Tribunal also rejected UKAD's second additional submission that the WADA Code 2021 necessarily requires or binds a decision maker to adopt the tiered approach in *Cilic*. If this was what had been intended, the tiers could and more likely would, have to have been included within the amended Code.

75. The Tribunal nevertheless agree with UKAD's position that it can be helpful to have regard to that approach, and considered it beneficial to have regard to those tiers in this case, not least given that there had been a finding of "*dishonesty*" by the Appeal Tribunal, that could not be characterised as an unintentional panicked slip up. The factual findings as to the Athlete's conduct are clearly expressed by the original Tribunal and Appeal Tribunal. The Athlete's submissions downplayed this conduct and did not show an understanding of the importance of communicating honestly and openly with UKAD that should be expected from such an experienced athlete.

76. In the view of the Tribunal, there was, and is, a clear and understandable basis for finding that the Athlete was not at the bottom of the lowest *Cilic* tier (i.e. 24 months) nor at the top of the lowest tier, but was mid-way (28 months).

77. It follows that the Tribunal found no reasons to conclude that UKAD's Issued Decision had been in error in imposing a period of Ineligibility of 28 months. Further, had the Tribunal been required to have conducted the exercise afresh, it would not have accepted that that the Athlete should have been sanctioned by reference to the bottom end of light degree of Fault. It would have imposed a period of 28 months.

Decision on backdating

78. The Athlete seeks further relief by way of a backdating of the commencement of his period of Ineligibility. In this regard he relies on Article 10.13.1 ADR, which provides:

> *"Where there have been substantial delays in the hearing process or other aspects of Doping Control, and the Athlete or other Person can establish that such delays are not attributable to them, the period of Ineligibility may be deemed to have started at an earlier date, commencing as far back as the date of Sample collection or the date on which another Anti- Doping Rule Violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified."*

79. As submitted by UKAD, the Tribunal found that that lex mitior provision now at ADR Article 1.6.2 (e) does not extend to permit a backdating of a period of Ineligibility that has been reduced pursuant to the lex mitior provision. Accordingly, there is no legal basis under the ADR to grant the relief requested by the Athlete, and his submission in this respect was rejected.

80. For the avoidance of doubt, the Tribunal agrees that backdating under 2021 Code Article 10.8.2 would not be possible as the Athlete did not admit the charge at the earliest opportunity. He admitted the facts, but contested the ADRV and sought to explain it away through submission of medical evidence.

81. The Tribunal further noted that the Athlete had not requested any backdating in his application for a reduction in the period of Ineligibility imposed by the Appeal Tribunal. As such he could not now seek relief on appeal that had not initially been asked for.

82. Even if, such an argument were to be now open to the Athlete, the Tribunal was not persuaded that the Athlete was correct in his submission that there were "substantial delays" or that those delays were "not attributable" whatsoever, to him. In order to establish this, the Athlete bears the evidential burden. In applying that the Tribunal considered that it was more likely than not that the opportunity to apply for a review was flagged to his counsel in April 2020 (although we note that this has been denied by those acting for the Athlete and, even if flagged this might not have been understood). In any event, no party submitted that clarification was actively sought by the Athlete's representatives during 2020. It is accepted by all parties that the application was not made until December 2020, then further information needed to be sought by UKAD in March 2021. Even if the argument were to be available to the Athlete, which it is not, the Tribunal would not have accepted it on its merits as the Athlete did not discharge the evidential burden of establishing either that delays were "substantial" or that those delays were not attributable to the actions on his part or those acting for him at the time.

Conclusion

83. The Appeal brought on behalf of the Athlete is dismissed.

84. The Period of Ineligibly provided for in the Issued Decision accordingly remains in full force and effect, and will expire on 24 January 2022.

Jeremy Summers
Chair, on behalf of the Panel
London, UK
02 August 2021

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Appendix 1
Athlete's Detailed Submissions

Submissions

19. The submissions for the Appellant can be split into three main categories in respect of this Application. These are namely:

    a. The sanction levied against the Appellant is completely disproportionate to his overall conduct.

    b. As the present period of Ineligibility is based on a finding of Tampering, the Panel is invited to consider the element of Tampering, namely that of fraudulent behaviour, which will determine any consideration of the degree of Fault. The matter of **CAS 2017/A/4937 Drug Free Sport New Zealand v. Karl Murray** applies and it may be of assistance to the Panel.

    c. The Respondent has erred in its application of the 'degree of Fault' specifically with reference to the application of the case of **CAS 2013/A/3327 Cilic v ITF** and, therefore, produced an erroneous result in arriving at the 28-month period of Ineligibility. The degree of Fault of an athlete cannot be considered in a vacuum, nor is there a standard test applicable, especially when the Anti-Doping Organisation has created legitimate expectations for the Appellant (see Respondent's letter to the Appellant of 18 October 2019 that there are no consequences for what that Appellant did).

20. These submissions shall be made in detail below.

Disproportionate Sanction

21. Throughout the process of this matter, several submissions have been made in respect of the proportionality of the sanctions. The Appellant does not wish to repeat previous submissions (<u>which the Panel will see in the exhibits</u> that relate to the First instance Decision and the First Appeal Decision) however, additional submissions, in support of the present Application, are provided for below.

22. It is a long-held principle that sanctions must be just and proportionate to the conduct of the athlete in question.

23. In Puerta v ITF it was said that 'any sanction must be just and proportionate. If it is not, the sanction may be challenged. (...] When there is a cap or lacuna in the WADC, that gap or lacuna (...] is to be filled by the Panel applying the overarching principle of justice and proportionality on which all systems of law, and the WADC, is based'.[5]

24. Furthermore, in the case of **FINA v Mellouli**,[6] the Court of Arbitration for Sport ("CAS") reduced the sanction to below the level of the WADC guidance (an 18-month sanction) due to the low degree of Fault and the disproportionality of the potential sanction.

25. It is quite clear that the 28-month period of Ineligibility against the Appellant is unjust and disproportionate. In the premises, it is respectfully submitted, that a reasonable person would labour under great difficulty in comprehending the choice of a 28-month ban and its origins (as opposed to a 24-month ban).

26. These submissions are requesting that a 24-month sanction be held on the basis of the WADC guidance. This is entirely reasonable in the circumstances particularly considering the case law listed above.

27. The world anti-doping regime is often said to be in place to punish the real cheats as opposed to athletes who have inadvertently fallen foul of the system.

28. It is submitted that there is no evidence that the Appellant has ever cheated, and no submission has ever been put forward by the Respondent to this effect. Furthermore, in respect of this matter, no submission has ever been made that the Appellant deliberately failed to update his whereabouts status in an attempt to cheat. However, the Appellant has been punished as if he did attempt to cheat in these circumstances, or put it simply, he has injected himself with steroids (so anything above a 24-month ban can be justified).

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[5] Puerta v ITF CAS 2006/A/1025, para 11.7.23
[6] FINA v Mellouli CAS 2007/A.1252/para 97

29. The Appellant has never doped, never failed to update his whereabouts information before, and never had any "blotch" on his record at any stage before the present matter. It is submitted this fact adds to the disproportionate nature in the way he has been treated.

30. The Panel is respectfully referred to the matter of the **RFU v (1) Joseph Stafford (2) Rupert Kay**[7] where an agreement was reached before the National Anti-Doping Panel. The appropriate documentation is attached at **Exhibit 13** which is disclosed on the Respondent's website.

31. In this case, it was found that Rupert Kay deliberately drove Joseph Stafford away from the training ground in order to help him deliberately evade a Sample being collected. Rupert Kay and the RFU agreed to a sanction of 2 years for this ADRV.

32. The Appellant is inviting the Panel to contrast this case with the present matter involving the Appellant. The Appellant has not deliberately attempted to evade a test (nor has any submission been put forward to this regard) in contrast to the matter involving Rupert Kay. Yet the Appellant is serving a sanction which is 4 months longer than that of Rupert Kay. It is submitted that this is unjust and disproportionate.

33. Three different decisions in the present matter have yielded three very different results. At the First Instance Decision no sanction was awarded, and all charges were dismissed, whereas upon the first appeal a 48-month ban was imposed. Subsequently the Issued Decision reduced this ban to 28 months. Much rest on this submission.

34. The Respondent embarked upon a polemic approach against the Appellant and ferociously sought a 48-month period of Ineligibility to be imposed at the First Instance and First Appeal hearings, yet as part of the Issued Decision has unequivocally stated that a 48-month ban is clearly disproportionate and warrants reduction.[8] The fact that the Respondent has changed its mind significantly in respect of what it considers a proportionate sanction suggests that this matter warrants further adjudication and reduction.

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[7] Rugby Football Union v (1) Joseph Stafford (2) Rupert Kay SR/311/2019
[8] Paragraph 22 of the Issued Decision Notice

Tampering

35. The Panel is respectfully referred to the exhibits and submissions that have previously been made in respect of the alleged 'Tampering' of the Appellant pursuant to **Article 2.5** of the **World Anti-Doping Code 2015**. The Appellant apologies in advance to the Panel for this necessary referencing to the definition and elements of Tampering. The Panel, eventually, would agree that any consideration for a further reduction of the period of Ineligibility, rests exclusively with the Appellant's behaviour and the charge upon which the Appellant was sanctioned. The degree of Fault, therefore, cannot be fully determined, without reference to the offence under consideration and the Appellant's overall stance and behaviour.

36. The submissions within this appeal remain consistent with the submissions raised previously in that the behaviour of the Appellant does not amount to a violation of 'Tampering' under article 2.5.

37. **Art. 2.5** of the **World Anti-Doping Code 2015** prohibits conduct that "subverts the Doping Control process"; and specifically defines "Tampering" as follows: "intentionally interfering or attempting to interfere with a Doping Control official. Providing fraudulent information to an Anti-Doping Organization or intimidating or attempting to intimidate a potential witness." **Art. 2.5** must be interpreted in a manner that does not conflict with the requirements of due process, procedural fairness, or natural justice. In the premises, it is respectfully submitted that the Respondent must not ignore its rules and it must not interpret them in such manner that would lead to an error of law and injustice.[9] In the event of a conflict, rules must be interpreted contra preferentem against the party who drafted them.

38. In this case, it is submitted that the action which "subverted the doping control process" was the Appellant's failure to update the whereabouts system in advance of travelling to Scotland on 15th October 2018.

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[9] IAAF v Jeptoo, CAS 2015/O/4218, paragraph 16

39. The subsequent actions and lies told by the Appellant, whilst regretful and unfortunate, did not subvert the Doping Control Process. This point has been set out by the Respondent in the Issued Decision at paragraph 26a as follows:

> *"Mr Dry's lie was only intended to avoid him receiving a whereabouts 'strike', which would have been his first. Such a 'strike'* ***would never have led to an ADRV****, but only (if followed by two more) to his elevation to the National Registered Testing Pool. This is very different to circumstances where an Athlete deliberately provides false information in an effort to prevent a finding that he has committed an ADRV, or in an effort to sustain an unwarranted plea in mitigation of sanction and so to avoid the rightful period of Ineligibility from sport." Emphasis added.*

40. No submissions have been made by the Respondent that the failure to update the whereabouts system was "intentional" or an "attempt to interfere". It is submitted that the failure to update the whereabouts was not an intentional act and thus does not constitute "Tampering". The Panel is also invited to consider the Skeleton Argument submitted by the Appellant at the First Instance hearing, marked as **Exhibit 14**.

41. Finally, in **Drug Free Sport New Zealand v Murray**[10] the CAS Panel held that 'Article 2.5 purposely construed covers the investigation period and an allegation of fraudulently misleading an investigation requires an intent to subvert the investigation'. It was found in Drug Free Sport New Zealand v Murray that telling a lie does not necessarily constitute fraudulent behaviour and also does not necessarily constitute a violation of Article 2.5 (the threshold and subsequent burden of proof are both considerably high).

42. It is submitted that the lies told by the Appellant were insignificant, would have only led to a first strike and did not affect the Doping Control Process. The Appellant's further Representations (at **Exhibits 5** and **7**) clearly demonstrate the unfair and prejudiced stance exhibited by the Respondent in handling this matter. This cannot be right and proper by a national anti-doping organisation funded by the public.

43. This is further supported by the comments of the Respondent at paragraph 26a of the Issued Decision namely that "This is very different to circumstances where an Athlete

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[10] CAS 2017/A/4937

deliberately provides false information in an effort to prevent a finding that he has committed an ADRV."

44. Although the Appellant is certain as to the reasons the Respondent has vehemently avoided the application of the matter of **Murray**, the Appellant cannot comfortably explain why the Panel at the First Appeal hearing did the same. The Appellant's respectful submission is that the lie told by the Appellant does not amount to 'tampering', and, therefore, his degree of Fault is at the bottom of the lower end of the spectrum. In any event, the Appellant respectfully submits that the matter of Murray applies.

Degree of Fault

45. It is submitted that the Respondent has respectfully erred at law in referring to Cilic v ITF[11] in determining the degree of Fault.

46. The Respondent has stated at paragraph 23 of the Issued Decision that:

> *"The approach to determining a period of Ineligibility within a wide spectrum based on an Athlete's degree of Fault was explored in Cilic v ITF, which introduced three different gradations of Fault: (1) significant degree of or considerable Fault (which the panel considered warranted a ban in the top third of the 0-24 month spectrum, i.e., in the range 16-24 months); (2) a normal degree of Fault (8-16 months); and (3) a light degree of Fault (0-8 months)."*

47. It is submitted that this is the incorrect approach to take in order to determine the degree of Fault in the present matter and given the particular characteristics and evidential background of the present matter, Cilic must be distinguished.

48. In Cilic, at paragraph 69, the CAS panel determined that the three different gradations of Fault were derived from Article 10.4 of the WADC 2009. More specifically this states:

> *"The breadth of sanction is from 0 – 24 months. As Article 10.4 says, the decisive criterion based on which the period of ineligibility shall be determined within the applicable range of sanctions is fault. The Panel recognises the following degrees of fault: a. Significant degree of or considerable fault. b. Normal degree of fault. c. Light degree of fault."*

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[11] CAS 2013/A/3327

49. This is not relevant in the current case where the Respondent has confirmed that **WADC 2021** is the appropriate legislative scheme to reconsider the sanction pursuant to **Article 1.6.2(e)** of the **2021 UK ADR**, implementing Article **27.3** of the **2021 World Anti-Doping Code**.

50. It is submitted that this case warrants a reduction in sanction to 24 months due to 'exceptional circumstances' pursuant to **2021 UK ADR Article 10.3.1(b)**.

51. The exceptional circumstances are that actions of the Appellant do not fit neatly within the definition of 'Tampering' as has been set out in this Appeal. The actions of the Appellant have not subverted the Doping Control Process. The exceptional circumstances have been extensively outlined in the Appellant's Application to the Respondent and are attached here in **Exhibits 5** and **7**.

52. The Appellant has not sought to cover up an ADRV but simply keep his record clean in respect of his first strike on the domestic testing pool. The administration of justice has not been jeopardised as a result of this action; the sport has not suffered; the Appellant's competitors have not been disadvantaged. This is very different to an athlete deliberately trying to cover up an ADRV, and the Respondent is aware of and very familiar with recent public examples of other matters that are currently under its jurisdiction. Much rests on this submission and it is the Appellant's respectful submission that there is here more than meets the eye.

53. Furthermore, previously adjudicating Panels on the same matter agree that exceptional circumstances take place. The Panel at the First Appeal stated:

> *"We agree with the [first instance] Tribunal that such a penalty is an extremely harsh punishment on the facts of this case. Mr Dry told a deliberate lie and his behaviour was foolish in the extreme. But we share the unhappiness of the Tribunal in reaching the conclusion that this gave rise to a four-year ban."*

54. In addition to this comment, the Athletics Integrity Unit wrote to the Appellant on 14th December 2020 supporting the view that the Appellant has a low degree of Fault (**Exhibit 15**).

55. Therefore, it is submitted that the Appellant should receive a period of Ineligibility of no more than 24 months based on the low degree of Fault and the conduct fitting in with the definition of 'exceptional circumstances'.

Appendix 2

UKAD's Detailed Submissions

Addressing the Grounds of Appeal

19. UKAD agrees that Mr Dry has a right to appeal that decision to the NADP Appeal Tribunal, further to 2021 UK ADR Article 1.6.2(e) and Article 13.4.

20. On 27 May 2021, Mr Dry appealed the decision, seeking the reduction of the ban to 24 months and the back-dating of the start date of the ban to 15 October 2018. He bases his appeal on four grounds, which are addressed here in turn.

21. First, Mr Dry argues that, whereas a 24 month ban is 'reasonable' [para 26], a 28 month ban 'is completely disproportionate to his overall conduct', and therefore must be rejected [para 19a, citing Puerta and Mellouli), because Mr Dry is not accused of having cheated or attempted to cheat, but is being punished 'as if ... he has injected himself with steroids' [para 28]. Nor did he deliberately try to evade a test, yet UKAD has given him a ban that is four months longer than the two year ban that the RFU agreed with another Athlete who had tried to help his colleague deliberately evade a test (paras 30-32, citing RFU v Stafford and Kay [Exh 13]).

22. In response, UKAD notes that:

    22.1 The Appeal Tribunal that heard the original appeal in this case already considered and rejected Mr Dry's proportionality arguments based on Puerta and Mellouli. In particular, it held that Puerta is authority only for the proposition that if the Code does not specify a sanction for a particular offence, the Tribunal must fill that gap with a sanction that is just and proportionate, but where (as here) the Code specifies the sanction that applies for a particular offence, proportionality is already factored in, and no discretion exists for the tribunal to depart from what the Code provides.[12]Mr Dry fails even to acknowledge that ruling, let alone provide any good reason to depart from it.

[12] Exh 2 at paras 42-47.

22.2 Mr Dry’s attempted comparisons do not assist him at all:

22.2.1 Mr Dry’s suggestion that his ban is disproportionate because it is the same as he would get if he had injected himself with steroids is just wrong. If Mr Dry had injected himself with steroids, his ban would be four years, further to Article 10.2.1.1 of the 2021 Code, which is 20 months more than the 28 month ban that UKAD has decided on for Mr Dry.

22.2.2 Deliberately evading a test would also trigger a four-year ban, under 2021 Code Art 10.3.1, unless (as here) there were exceptional circumstances warranting a reduction to 2-4 years. Therefore, a 28 month ban (reflecting his lesser Fault) cannot be said to be disproportionate.

22.2.3 In RFU v Stafford and Kay, the RFU agreed to a two year ban for an Athlete who was complicit in another Athlete’s evasion of a doping test (he drove that Athlete away from the training ground when the testers arrived). UKAD was not a party to that agreement, which involved a different ADRV based on very different facts, with a different sanctioning regime (two years to (then) four years, depending on the seriousness of the violation). UKAD does not see any reason why it should be compelled to act in this case in a manner that is consistent with that decision. Even if the two cases were in any way analogous (which they are not), it is more important to be correct than to be consistent.

22.3 Therefore, Mr Dry’s argument that banning him for 24 months would be reasonable but banning him for 28 months is ‘completely disproportionate’ fails as a matter of principle, and on the law, and on the facts.

23. Second, Mr Dry argues that a ban for Tampering is based on ‘fraudulent behaviour’, and therefore it is an assessment of that behaviour that ‘will determine any consideration of the degree of Fault’ [19b]. He claims that what he did does not amount to Tampering under Art 2.5 [para 36], because the rules ‘specifically define Tampering as “intentionally interfering or attempting to interfere with a Doping Control official. Providing fraudulent information to an Anti-Doping Organization or intimidating or attempting to intimidate a potential witness”’ [para 37]. He argues his lie did not subvert the Doping Control process

because it did not cover up an ADRV [para 39]; his failure to update his whereabouts was not intentional and does not constitute Tampering [para 40]; and (citing DFSNZ v Murray, CAS 2017/A/4937) telling a lie does not necessarily constitute fraudulent behaviour amounting to Tampering [para 41].

24. UKAD also rejects this argument:

24.1 Mr Dry made (or could have made) all of these arguments to the NADP Appeal Tribunal on his first appeal, which (correctly) rejected them and upheld the charge that he had committed an Art 2.5 Tampering ADRV by deliberately providing false information with the intention of evading the operation of the UKA ADR. That ruling is res judicata and cannot now be re-opened and re-argued by Mr Dry.[13]

24.2 It is no surprise that the first Appeal Tribunal rejected his arguments. What he quotes is not the definition of Tampering in the 2015 Code, but instead examples of Tampering set out in 2015 Code Art 2.5 (see footnote 6, above). In any event, the first Appeal Tribunal was clear (as was the first instance NADP tribunal) that the deliberate provision of false information with the intention of evading the operation of the ADR amounts to 'providing fraudulent information' within the meaning of that example given in Art 2.5. The fact that his lie covered up a DTP Whereabouts Failure rather than an ADRV does not change that conclusion: he still was seeking to evade the proper operation of the ADR (in the form of the recording against him of a whereabouts 'strike'). UKAD agrees that his original failure to update his whereabouts does not constitute Tampering, but neither UKAD nor the Appeal Tribunal ever said that it did. And while the Appeal Tribunal agreed that telling a lie does not necessarily constitute fraudulent behaviour within the meaning of Art 2.5 (and therefore does not necessarily constitute Tampering), it explained clearly why in this case the lie that Mr Dry told (and then got his partner to repeat) to cover up his failure to update his whereabouts information does constitute Tampering.[14]

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[13] See eg Salem v GMC [2017] EWHC 840 (Admin), para 11 (doctrines of res judicata and issue estoppel apply with equal force in disciplinary proceedings).

[14] Exh 2, paras 33-41.

24.3 For these reasons, UKAD respectfully submits that the argument that Mr Dry's Fault is at the bottom end of the spectrum because what he did does not amount to Tampering should be rejected out of hand.

25. Third, Mr Dry argues that UKAD was wrong in law to follow the approach suggested in Cilic to the exercise of a sanctioning discretion, because that case related to the exercise of sanctioning discretion under Art 10.4 of the 2009 Code, whereas here the 2021 Code applies [para 49]. Furthermore, Mr Dry asserts, Fault 'cannot be considered in a vacuum', and 'there is no standard test applicable', particularly where UKAD created a legitimate expectation for Mr Dry (in a letter that it wrote to him on 18 October 2018) 'that there are no consequences for what [he] did' [para 19c]. He asserts that 'The administration of justice has not been jeopardised as a result of this action; the sport has not suffered; the Appellant's competitors have not been disadvantaged. This is very different to an athlete deliberately trying to cover up an ADRV ...' [para 52]. He submits that he 'should receive a period of Ineligibility of no more than two years based on the low degree of Fault and the conduct fitting in with the definition of "exceptional circumstances"' [para 55].[15]

26. In response, UKAD notes:

26.1 First, the suggestion that it was an error of law for UKAD to follow the Cilic principles in this context is just wrong:

26.1.1 The CAS panel in Cilic specifically and expressly issued its award in an effort to give panels guidance on how to exercise a broad sanctioning discretion conferred on them by the Code, and so to promote consistency in sanctioning decisions.[16] While it referred to 2009 Code Art 10.4, that Article (like the one now under consideration) specified that the sanction

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[15] Mr Dry also asserts: 'the Respondent is aware of and very familiar with recent public examples of other matters that are currently under its jurisdiction. Much rests on this submission and it is the Appellant's respectful submission that there is here more than meets the eye' [para 52]. With great respect, UKAD has no idea what is being referred to here, and therefore it cannot respond to this submission. It invites the Appeal Tribunal to place no weight on it.

[16] Cilic v ITF, CAS 2013/A/3327, para 66: 'The ITF made clear in its submissions that, whether it was successful or not in this case, it would welcome guidance on how to approach the determination of sanctions within the 0-24 month range specified in Article 10.4. It invited the setting out of principles which could guide a hearing panel's discretion to encourage consistency. The Panel has accepted that invitation, since it agrees that it would be helpful to have guidelines to assist stakeholders when considering the application of Article 10.4'.

should be fixed within the range specified based on the Athlete's 'degree of Fault', and the principles that the Cilic Panel identified have been endorsed and applied by subsequent CAS Panels applying 2015 Code Art 10.5.1 (No Significant Fault or Negligence cases leading to a ban of 0-24 months, 'depending on the Athlete or other Person's degree of Fault')[17] and 2015 Code Art 10.5.2 (No Significant Fault or Negligence cases leading to a ban of 12-24 months, 'depending on the Athlete or other Person's degree of Fault'),[18] as well as 2015 Code Art 10.3.2 (whereabouts cases leading to a ban of 1-2 years, 'depending on the Athlete's degree of Fault').[19]

26.1.2 So too here 2021 Code Art 10.3.1 says that if exceptional circumstances exist, the ban for Tampering may be reduced to 2-4 years, 'depending on the Athlete or other Person's degree of Fault', i.e., exactly the same phrasing as in the provisions noted above, where the Cilic principles were applied. And the definition of 'Fault' in the 2021 Code remains exactly the same as it was in the 2015 Code,[20] meaning that if the Cilic principles were useful to assess Fault under the 2015 Code, they must also be useful to assess Fault under the 2021 Code.

26.2 Second, UKAD agrees with Mr Dry that Fault 'cannot be considered in a vacuum'. Instead, as the definition makes clear, it has to be assessed based on the facts

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[17] Errani v ITF, CAS 2017/A/5301, para 205; Lea v USADA, CAS 2016/A/4371, para 90.
[18] Guerrero v FIFA, CAS 2018/A/5546, para 81 ('The Panel deems it appropriate, in assessing the correct period of ineligibility, to follow the guidance given in the seminal Cilic case founded on WADC 2009 (CAS 2013/A/3327) and suitably adapted to WADC 2015 and, therefore, to determine the appropriate period of ineligibility based on three different categories of fault and sanction ranges'); FIS v Johaug, CAS 2017/A/5015, para 169.
[19] Coleman v World Athletics, CAS 2020/A/7528, para 186 et seq (describing the Cilic principles as 'a helpful guide' and following them to determine the appropriate sanction in an Art 2.4 whereabouts case).
[20] It is defined as follows: '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 Protected Person, 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 a career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.6.1 or 10.6.2' [Exh 12].

of the specific case, which is exactly what UKAD has done in the appealed decision.

26.3 Third, the suggestion that 'there is no standard test applicable' is wrong. 'Fault' is defined carefully in the 2021 Code (see footnote 26), as it was in the 2015 Code, and it is that definition that the 'seminal' Cilic award gives hearing panels useful guidance in applying.

26.4 Fourth, UKAD's letter of 18 October 2018 certainly did not give Mr Dry any legitimate expectation 'that there are no consequences for what he did'. As the first NADP Appeal Tribunal noted,[21] that letter said that one DTP Whereabouts Failure (on its own) would have no consequences, but if it was followed by two others the Athlete would be put in the NRTP. Nothing in the letter purported to address what the consequences would be if Mr Dry lied to cover up his Whereabouts Failure. Instead the rules were clear that such lying would constitute Tampering, for which a fixed four year ban applied under the 2015 Code.

26.5 Fifth, UKAD agrees that Mr Dry's Tampering only had a limited negative impact on clean sport, because he was covering up only one Whereabouts Failure, not a completed ADRV, and because he admitted his lie relatively quickly. And UKAD specifically took that into account in its appealed decision; in fact, that was why it decided his Fault was in the middle of the 'light' range: see Exh 8, para 26(a). But that is only one aspect of the Fault borne by Mr Dry in this case. There are several other relevant factors (as UKAD pointed out at para 25 of the appealed decision):

a. Mr Dry was 31 years old at the time of his ADRV and an Athlete who had competed at the highest level in sport. A Rio 2016 Olympian, he twice won bronze medals in the hammer throw at the Commonwealth Games (Gold Coast 2018 and Glasgow 2014). Furthermore, as an Athlete competing in elite sport, he received formal anti-doping education commensurate to his level of competition. Therefore he was old enough and educated enough

[21] Exh 2, paras 30-31.

to know what his anti-doping responsibilities were, and that lying to UKAD was wrong.

b. Although Mr Dry states that he 'panicked' when he was asked to account for his whereabouts on 15 October 2018, his provision of false information was not a momentary lapse of judgment. He made the lie specifically and consciously to avoid a 'strike', so as to maintain a 'clean record', on 18 October 2018 (when he first responded to UKAD). On 24 October 2018 his girlfriend provided a response to UKAD on his behalf corroborating his lie. He did not come clean until 11 December 2018, after he had been called to an interview by UKAD.

c. Mr Dry did not just lie himself; he also allowed his girlfriend to lie to UKAD on his behalf, to corroborate his own lie. UKAD considers the fact that Mr Dry allowed a third party to also lie in order to corroborate false information that he had provided some days earlier, to be a particularly aggravating factor.

26.6 Mr Dry cannot and does not seek to rebut any of these points on this appeal. They stand uncontested, and make it clear that UKAD was completely justified in declining to reduce his ban by the maximum 24 months, and instead reducing it by 'only' 20 months. Lying knowingly in a deliberate attempt to cover up non-compliance with the requirements of the anti-doping rules is extremely serious misconduct. UKAD does not have the financial or investigative resources to be able to check independently every representation that an Athlete makes to it as part of the Doping Control process. It has to assume that Athletes will make those representations honestly and with integrity, so that it does not have to verify them all as a matter of course. As a result, of necessity a serious punishment must be imposed on an Athlete who deliberately lies to avoid the proper consequences of non-compliance, in order to ensure that other Athletes are deterred from taking the same course.

26.7 UKAD has given due credit to Mr Dry for the limited harm his actions caused, and for admitting his lie relatively quickly: that is why it has reduced his ban by 20

months. But someone who has the degree of Fault that Mr Dry has (including not only lying himself but also persuading another person to lie for him to UKAD, a serious aggravating factor, regarded by the first instance NADP Tribunal as 'reprehensible')[22] cannot possibly be put at the very bottom of the 2-4 year spectrum. Put differently, there is simply no basis to disturb UKAD's assessment that his ban should be reduced by 20 months but not by the maximum allowed, i.e., 24 months.

27. Fourth and finally, Mr Dry notes that 2021 Code Art 10.13.1 gives a hearing panel discretion to back-date the start of the ban 'where there have been substantial delays in the hearing process or other aspects of Doping Control, and the Athlete or other Person can establish that such delays are not attributable to the Athlete or other Person'. He argues that that discretion should be exercised in his favour here, because the First Instance Decision was handed down nine months after he formally admitted his lie in January 2019, and the Appeal Decision was handed down five months after that [paras 59-72]. In addition, he applied for a reduction of sanction in December 2020, but a decision was not issued until May 2021 [para 59].

28. UKAD rejects these arguments too, for the following reasons:

28.1 First, 2021 Code Art 27.3 and Art 1.6.2(e) of the 2021 UK ADR provide only that an Athlete who is still serving a ban as of 1 January 2021 may apply to 'reduce' that ban based on a lex mitior in the 2021 Code (see para 13, above). They say nothing about applying to back-date that ban, whether based on a lex mitior or otherwise. Therefore, there is no provision in the applicable rules permitting this request, and the Appeal Tribunal has no jurisdiction to hear it or to grant it.

28.2 Second, in any event 2021 Code Art 10.13.1 is not a lex mitior compared to the 2015 Code. On the contrary, it appeared almost verbatim in the 2015 Code (at Art 10.11.1).

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[22] Indeed, getting someone to submit a 'witness statement' with a knowingly false statement in it comes very close to serious criminal conduct. See Perjury Act 1911, c. 6, s.1 (perjury). See eg Salekipour v Parmar [2018] Q.B. 833, para 95: 'The suborning of a witness by a party to give perjuried evidence in order to succeed at trial is a most serious matter [...]'.

28.3 Third, because the provision also appeared in the 2015 Code, Mr Dry could have argued that it should be applied by the NADP Tribunals that heard his case in 2019, to take account of any alleged delays in the hearing process up to that date, but he did not do so. He is therefore estopped from trying to rely on it now: the first Appeal Tribunal's decision is res judicata, and issue estoppel applies not only as to all arguments that he did make, but also as to all arguments that he could have made in that case (see footnote 19, above).

28.4 Fourth, UKAD invited Mr Dry to apply for a reduction of his sanction under 2021 Code Art 10.3.1 in April 2020. It is his own fault that he delayed in applying until 16 December 2020, and he cannot blame UKAD for that delay.

28.5 Fifth, there were no substantial delays in UKAD's consideration of the application to reduce the sanction once it was eventually made. Mr Dry failed to address all relevant points in his application, and UKAD had to give him two opportunities to do so, which he only took in March 2021 (see footnote 16, above). UKAD was then entitled to some time to consider the matter and come to a considered and reasoned conclusion, which it did by early May 2021, which is not unreasonable.[23]

28.6 Sixth, in any event, in his application Mr Dry did not argue for the back-dating of his sanction under 2021 Code Art 10.13.1. Instead, originally he argued for back-dating under Code Art 10.8.2, an entirely different provision. And when UKAD pointed out that that provision could not apply in this case (because Mr Dry did not admit the tampering charge when confronted with it by UKAD), he dropped the argument, and revised his request for relief to seek only a reduction in the sanction (from 48 months to 24) and credit for his five month Provisional Suspension. In other words, he asked only for his ban to end on 24 September 2021 (see para 16, above). He did not ask for back-dating of his ban due to delays in results management. He cannot seek greater relief on appeal of UKAD's decision than he sought from UKAD in the first place, particularly when he offers

[23] See Al Rumaithi v FEI, CAS 2015/A/4190, para 63 ('for the FEI Tribunal to render its decision within the period taken was by no means excessive for a case of this nature, a fortiori where two different individuals and violations had to be addressed and where the Appellant himself, while conceding liability, raised so many and diverse arguments on sanction so making himself responsible in part for any delay').

no excuse (and has none) for his failure to seek that relief from UKAD in the first place.