

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF THE RUGBY FOOTBALL LEAGUE

Before:

William Norris KC (Chair)
Dr Tim Rogers
Jennifer McLoughlin

BETWEEN:

UK Anti-Doping Limited

Anti-Doping Organisation

and

David Foggin-Johnston

Respondent

DECISION OF THE NATIONAL ANTI-DOPING PANEL

Introduction

1. Mr Foggin-Johnston was born on 19 August 1996 and is a professional rugby league player. It is to his great credit that he has overcome difficult personal circumstances to play at the highest level and, indeed, has played for some of the top clubs in the sport. He has also been the main carer for his mother and the main source of financial support for other members of his family, as well as devoting himself to a number of charitable

causes. Nevertheless, as the circumstances of this case demonstrate, in the years leading up to the alleged Anti-Doping-Rule-Violations (“ADRVs”) which this case is concerned with, he has developed a serious cocaine habit and has abused alcohol.

2. On Sunday, 27 August 2023, Mr Foggin-Johnston was contracted to Bradford Bulls and played in a game between that club and Swinton Lions. After the game, he was tested In-Competition and provided a urine Sample which, on analysis, returned Adverse Analytical Findings (“AAFs”) for cocaine and its Metabolite benzoylecgonine. He was then aged 27.
3. Mr Foggin-Johnston had no Therapeutic Use Exemption (“TUE”) for cocaine and his Doping Control form (“DCF”) records six items of medication that he acknowledged taking.
4. Cocaine is listed under section S6A of the World Anti-Doping Agency (“WADA”) 2023 Prohibited List as a Stimulant. It is a non-Specified Substance that is prohibited In-Competition only. Pursuant to Article 4.2.3 of the World Anti-Doping Code (“the Code”), cocaine is also specifically identified as a Substance of Abuse in the WADA 2023 Prohibited List.
5. On 11 October 2023, Mr Foggin-Johnston received a letter from UK Anti-Doping Limited (“UKAD”) notifying him that he “*may have committed a violation of the RFL’s Anti-Doping Rules (‘ADR’)*”. He was told that he was provisionally suspended with immediate effect from participation in all Competitions in accordance with the provisions of ADR Article 7.10.1.
6. On 19 October 2023, Mr Foggin-Johnston wrote saying that he intended “*to admit the violation and make a submission in mitigation of the sanction by explaining the circumstances surrounding my ADRV*”. The material part of that Response was in the following terms:

“On Thursday 24th August, before my ADRV, I decided to go out with some friends as I was told I wouldn’t be playing at the weekend. I decided to buy cocaine and started ingesting nasally at around 8pm. I continued to use cocaine nasally until around 6pm on Friday 25th August, and in total ingested around 4 grams, taking the drug every 30 to 45 minutes. I had also been drinking alcohol. I started drinking alcohol around 7.30pm on

Thursday 24th August, and finished drinking around 7pm on Friday 25th August. I'm not sure how much alcohol I consumed but I would estimate I drank the equivalent of 1 pint of lager every hour, the equivalent of 1 shot every 2 hours."

7. Mr Foggin-Johnston said in the same letter that he was seeking professional help for his habits and intended to take part in a substance abuse programme to ensure that he had the *"knowledge and skills to prevent this from happening again"*. He also explained that he was 5 feet 8 inches tall and weighed 74kg.
8. On 4 December 2023, Mr Foggin-Johnston was charged under the ADR of the Rugby Football League ("RFL") on the basis of the analysis which had established that the Sample had returned Adverse Analytical Findings ("AAFs") for cocaine, and its Metabolite, benzoylecgonine, at estimated concentrations of 1.4 µg/mL (1,400 ng/mL) and 79 µg/mL (79,000 ng/mL), respectively.

The Charges

9. The charges were particularised as follows. They allege the commission of:
 1. *An ADRV pursuant to ADR Article 2.1, in that the Prohibited Substance cocaine, and its Metabolite, benzoylecgonine, were present in a urine Sample provided by you on 27 August 2023, numbered A1187450;*

and/or
 2. *An ADRV pursuant to ADR Article 2.2, in that you Used a Prohibited Substance, namely cocaine, at or after 11.59pm on 26 August 2023."*

The Issue for this Panel – In Summary

10. At the hearing which took place on 16 July 2024, the charge under Anti-Doping Rules ("ADR") Article 2.1 was admitted and the only issue was whether Mr Foggin-Johnston was eligible for a reduction to the mandatory four-year period of Ineligibility for a non-Specified Substance under the application of the provisions of ADR Article 10.2.4.

11. Under ADR Article 2.2 it is for UKAD to establish to our comfortable satisfaction that Mr Foggin-Johnston's use of cocaine occurred In-Competition. The burden in respect of that issue is on UKAD and it should be noted at the outset that Mr Foggin-Johnston has consistently asserted that he took the drug Out-of-Competition. He also asserted that, in any case, his use of cocaine was for social and recreational reasons, without any intention on his part to improve or adversely impact his performance. This is of particular relevance to issues arising under ADR Article 10.2.4.
12. The focus of the hearing in relation to ADR Article 10.2.4 was on whether Mr Foggin-Johnston could establish, on a balance of probability, first, that his ingestion or Use of cocaine occurred Out-of-Competition and, second, that it was unrelated to sport performance.
13. If both those things were established, then Mr Foggin-Johnston would be entitled to a reduced three-month period of Ineligibility in accordance with ADR Article 10.2.4(a). On the other hand, if it were established that he must have taken cocaine In-Competition but in circumstances unrelated to sport performance, that would result in a two-year period of Ineligibility in accordance with ADR Article 10.2.4(b).

Jurisdiction

14. Mr Foggin-Johnston was a player registered with the RFL at all material times, and was a participant in Competitions and other activities organised, convened, authorised, or recognised by RFL. He was therefore bound to comply with the ADR.
15. UKAD is the National Anti-Doping Organisation ("NADO") in the UK. In accordance with Article 7.2 of the UK ADR, UKAD acts as the Results Management Authority in this matter.
16. The rules we must therefore apply for the purposes of the present case are the UK ADR, as adopted by the RFL. The applicable version are the rules which were in effect from 1 January 2021.

The Relevant Provisions of the ADR

17. As we have already noted, Mr Foggin-Johnston was charged pursuant to ADR Articles 2.1 and 2.2.

18. ADR Article 2.1 provides:

“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.

2.1.1 It is each Athlete’s personal duty to ensure that no Prohibited Substance enters their body. An Athlete is responsible for any Prohibited Substance or any of its Metabolites or Markers found to be present in their Sample. Accordingly, it is not necessary to demonstrate intent, Fault, negligence or knowing Use on the Athlete’s part in order to establish an Article 2.1 Anti-Doping Rule Violation; nor is the Athlete’s lack of intent, Fault, negligence or knowledge a valid defence to an assertion that an Article 2.1 Anti-Doping Rule Violation has been committed.

2.1.2 Proof of any of the following to the standard required by Article 8.4.1 is sufficient to establish an Article 2.1 Anti-Doping Rule Violation:

(a) An Adverse Analytical Finding of the presence of a Prohibited Substance or any of its Metabolites or Markers in the Athlete’s A Sample, where the Athlete waives analysis of the B Sample and so the B Sample is not analysed.

(b) An Adverse Analytical Finding of the presence of a Prohibited Substance or any of its Metabolites or Markers in the Athlete’s A Sample, where analysis of the Athlete’s B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete’s A Sample.

(c) Where the Athlete’s Sample has been split into two parts, and there has been an Adverse Analytical Finding of the presence of a Prohibited Substance or any of its Metabolites or Markers in the first part of the split Sample, and the Athlete waives analysis of the confirmation part of the split Sample, or else analysis of the confirmation part of the split Sample confirms

the presence of the Prohibited Substance or its Metabolites or Markers found in the first part of the split Sample.”

19. ADR Article 2.2. provides:

“2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method, unless the Athlete establishes that the Use or Attempted Use is consistent with a TUE granted in accordance with Article 4.

2.2.1 *It is each Athlete’s personal duty to ensure that no Prohibited Substance enters their body and that no Prohibited Method is Used. Accordingly, it is not necessary to demonstrate intent, Fault, negligence or knowing Use on the Athlete’s part in order to establish an Anti-Doping Rule Violation for Use of a Prohibited Substance or a Prohibited Method; nor is the Athlete’s lack of intent, Fault, negligence or knowledge a valid defence to an assertion that an Article 2.2 Anti-Doping Rule Violation of Use has been committed.*

[...]

2.2.4 *Out-of-Competition Use of a substance that is only prohibited In-Competition is not an Article 2.2 Anti-Doping Rule Violation. If, however, an Adverse Analytical Finding is reported for the presence of such substance or any of its Metabolites or Markers in a Sample collected In-Competition, that may amount to an Article 2.1 Anti-Doping Rule Violation.”*

20. It is important to note that the term “*In-Competition*” is defined within the ADR. The relevant definition is as follows:

“*In-Competition*

The period commencing at 11:59pm 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.”

21. Mr Foggin-Johnston was tested at 17:57 on Sunday, 27 August 2023, after the end of the match that afternoon. It follows that the “*In-Competition*” period commenced at 11:59pm on the previous (Saturday) night.

The Parties’ Competing Positions Summarised

22. As we have said, the main factual dispute between the parties focused on when Mr Foggin-Johnston last consumed cocaine prior to his test on Sunday, 27 August 2023.
23. UKAD’s position is that it was overwhelmingly likely that he took some cocaine during the In-Competition period. On the other hand, Mr Foggin-Johnston insisted that he took no cocaine at all on the Saturday (and none on the Sunday). He said that the last cocaine he had taken had been on the Friday night. He said that he was in bed at home on the Saturday, recovering from the effects of the night / days before, until awakened by an unexpected call in the early afternoon telling him that he was going to be playing the next day, whereafter he concentrated his efforts on recovering from the ill effects of what he had taken and drunk over the previous days.

Process

24. The matter was referred to the National Anti-Doping Panel (“NADP”) for determination on 1 February 2024. The Chair of the present panel was appointed on 15 February 2024 and gave Directions on 5 March 2024, and one of those directions provided for an In-Person Hearing which, as we have already said, took place on 16 July 2024. Jennifer McLoughlin and Dr Tim Rogers were appointed to the Panel on 02 July 2024.
25. At that hearing the parties were represented as follows:

UKAD

Ciaran Cronin, Lawyer

Tom Middleton, Head of Case Management

James Laing, Lawyer

Joseph Wightman, Legal Officer

Professor David Cowan, Independent Scientific Expert

The Respondent

David Foggin-Johnston, the Player

Yasin Patel, Counsel

Caitlin Haberlin-Chambers, Assisting Counsel

Garreth Carvell, Witness

Nimrah Ali, mini pupil of Yasin Patel

Sophia Choudhury, mini pupil of Yasin Patel

26. We pay particular tribute to Mr Patel for providing his invaluable services on a pro bono basis. He, and those who instructed and assisted him, have enabled Mr Foggin-Johnston's case to be presented to the best possible advantage and we are extremely grateful to them.
27. We are also indebted to Mr Cronin, who presented UKAD's submissions with clarity, moderation and sensitivity.
28. We should note that, at the beginning of the hearing, the parties raised no issues as to the composition of the Panel.

The Evidence at the Hearing

29. In addition to a considerable volume of documentary material, we heard from Mr Foggin-Johnston himself, from his mentor and supporter Garreth Carvell, and from Professor David Cowan, the last-named being called by UKAD. Professor Cowan is, as is well

known, an Emeritus Professor attached to King's College London, with a speciality in evidential drug analysis, particularly focusing on forensic toxicology and drugs in sport.

30. Mr Foggin-Johnston's account of his cocaine and alcohol consumption was originally set out in his Response of 19 October 2023, to which we have already referred in paragraph 6.
31. At that stage, he asserted that he went out on 24 August 2023 (Thursday) with friends in the expectation that he would not be playing at the weekend and took cocaine from around 8:00pm that evening until "*around 6pm on Friday, 25 August*". He estimated that he had ingested a total of around 4g, taking the drug every 30 to 45 minutes. He said that he had drunk alcohol from the Thursday evening through until about 7:00pm on Friday, 25 August 2023.
32. In a "*Further Supplementary Response to Charge*" which was provided on behalf of Mr Foggin-Johnston by his Counsel in response to a UKAD Request for Information of 11 January 2024, a different account of his consumption was put forward.
33. In that later account, it was said that Mr Foggin-Johnston stopped taking cocaine "*some time between 23:00 – 24:00 on 25 August 2023*" and that "*the last time he took cocaine on that evening was no more than 0.2g of cocaine*". It was said directly that he took no cocaine on 26 August 2023 (Saturday) but said that he had continued drinking rather longer than had been suggested previously and that he "*last consumed alcohol on 26 August 2023 at approximately 01:50*".
34. It should also be noted that in paragraph 18 of his "*Supplementary Response to Charge*" on 9 January 2024 (which led to that Request for Information) it was asserted on Mr Foggin-Johnston's behalf that the actual amount of cocaine taken must have been "*around 6g of cocaine: it could even have been more considering his tolerance levels with cocaine*".
35. In his oral evidence, Mr Foggin-Johnston maintained that position. He continued to deny taking any cocaine at any time on Saturday 26 or Sunday 27 August 2023. He said that the last alcohol he took was probably in the very early hours of Saturday at '*approximately 01:50*'. and he went to bed at around 02:00 on the Saturday and "*tried recovering*". He

said that he then slept until early afternoon, when he had the unexpected call telling him that he was, after all, going to be playing the next day.

36. We also heard from Garreth Carvell, a thoroughly impressive witness in every respect, but Mr Carvell was not a first-hand witness to any of the events with which we are directly concerned. Nevertheless, we acknowledge that he had provided a lot of support and guidance to Mr Foggin-Johnston in the past and, although this may be evidence that was strictly inadmissible, we do note the fact that he evidently accepted the truth of Mr Foggin-Johnston's account.

37. Professor Cowan's evidence, which was given orally and supplemented his report of 10 November 2023 and Supplementary Report of 23 January 2024, has to be considered against the background of the analytical evidence, set out in a letter from Christiaan Bartlett, dated 5 October 2023. This provides the following information:

"The concentration of the mentioned substance was obtained by comparison of the response of the sample with the response of a positive quality control sample for the same mentioned substance or an internal standard analysed in the same sample batch. The indicative estimate for the concentration of the mentioned substance in the sample obtained in this manner is approximately:

Cocaine: 1.4µg/mL

Benzoylecgonine: 79µg/mL"

38. WADA provides a Guidance Note for Anti-Doping organisations in respect of In-Competition Use. That Guidance is to the effect that, first, the quantity most likely to correspond to In-Competition Use is "(i) Presence of cocaine parent compound at an estimated urinary concentration above (>) 10ng/mL; or (ii) Presence of benzoylecgonine (main metabolite of cocaine) at a urinary concentration above (>) 1000ng/mL combined with the presence of cocaine parent compound between (\geq) 1ng/mL and (\leq) 10ng/mL".

39. UKAD acknowledges that this is only guidance but drew attention to the fact that the levels in Mr Foggin-Johnston's Sample far exceed the levels identified by WADA as being most likely to correspond to In-Competition Use of cocaine. As UKAD says in paragraph 41 of its Written Submissions, "*the estimated concentration of cocaine parent compound*

*in Mr Foggin-Johnston's Sample is **140 times greater** than the levels outlined in the WADA note; the estimated concentration of benzoylecgonine is **79 times greater** than outlined in the note".*

40. Consistently with that Guidance, Professor Cowan concluded, as UKAD accurately summarised at paragraph 44 of its submissions, that:

- "i. Mr Foggin-Johnston would have had to ingest an 'impossibly large' dose of cocaine on 24 and 25 August to account for the estimated concentration of benzoylecgonine and cocaine in his system.*
- ii. A dose of cocaine similar to that declared by Mr Foggin-Johnston (4 grams), taken during the In-Competition period, is a plausible explanation for the Laboratory findings.*
- iii. Overall, Mr Foggin-Johnston is more likely to have administered cocaine during the In-Competition period."*

Conclusions on the Charges Under Article 2.1 ADRV and Article 2.2 ADRV

41. In our judgement, the answer to the issue of whether it is or is not likely that the cocaine was consumed during the In-Competition period does not depend on where the burden of proof lies in respect of all or any of the matters we have to decide.

42. In short, we are comfortably satisfied that the likelihood is that Mr Foggin-Johnston consumed cocaine at some time during the In-Competition period. Although Mr Foggin-Johnston says otherwise, and he may believe what he has said, it is evident that he had been involved in what we shall refer to, colloquially perhaps, as a binge session that had begun on the Thursday. If it is true that he had no expectation of playing on the Sunday, then there was no particular reason for him to have stopped on the Saturday.

43. Mr Foggin-Johnston may now believe what he says, but it is clear from the different accounts he has given that his recollection is faulty. We do not accept that the first explanation he gave of his consumption of cocaine and alcohol was inaccurate only because he was embarrassed and/or trying to protect others. Even if his later account(s)

were not deliberately tailored to try and take account of what Professor Cowan had said in his first report (as to which we make no finding), we do consider the change in explanation at least demonstrates that his memory of events is not as good as he evidently now thinks it is.

44. It is also notable that there is no corroborative evidence whatsoever to support his account of events. It is perhaps understandable that we have heard nothing directly from those who were with him on the Thursday or the Friday, and that there is no written or other records of what he may have spent or where he may have been during that period. However, it is particularly surprising to the Panel that we heard nothing to confirm what the Club's intended team was for the Sunday match and what Mr Foggin-Johnston will have been told about playing or not playing. Even more conspicuous is the absence of any confirmation from any independent source about when and by whom he was told he was, in fact, going to play.
45. In our view, Mr Foggin-Johnston's own imperfect recollection is not enough to displace the overwhelmingly powerful scientific evidence that Professor Cowan has drawn to our attention or to contradict the conclusions that he has drawn from that evidence. Indeed, we considered Professor Cowan a careful witness who was scrupulous in offering opinions within his expertise without speculating on matters that were strictly outside it. In so far as other studies supposedly supporting Mr Foggin-Johnston's case were put to him, he was able to deal with them satisfactorily and was unmoved in the opinion earlier expressed. In short, no allowance for Mr Foggin-Johnston's long-standing habit, metabolic rate or the like would, in Professor Cowan's opinion, be sufficient to explain the ADRVs.
46. We accept Professor Cowan's opinion as accurate.
47. For those reasons, we find that UKAD has proved both these charges and we turn, therefore, to consideration of the appropriate sanction.

Sanction

48. Since these are Mr Foggin-Johnston's first ADRVs, they must be sanctioned as a single ADRV in accordance with ADR Article 10.9.4(a).
49. The starting point for determining the period of Ineligibility is set out in ADR Article 10.2 for a first offence involving a non-Specified Substance. The relevant provision is as follows:

"10.2.1 Save where Article 10.2.4(a) applies, the period of Ineligibility shall be four years where:

- (a) The Anti-Doping Rule Violation does not involve a Specified Substance or Specified Method, unless the Athlete or other Person can establish that the Anti-Doping Rule Violation was not intentional ...*

[...]

10.2.2 If Article 10.2.1 does not apply, then (subject to Article 10.2.4(a)) the period of Ineligibility shall be two (2) years."

50. It was the 2021 Code which introduced an exception to the applicable period of Ineligibility established by ADR Article 10.2.1 for cases involving a Substance of Abuse. As UKAD explained (at paragraph 52 of its Submission), *"The purpose of this new sanctioning regime was to recognise those cases where Athletes ingest substances that are frequently abused in society recreationally outside the context of sport"*.
51. It was this exception which was the focus of our attention once we had found against Mr Foggin-Johnston on the issue of whether the cocaine had been taken In or Out-of-Competition.
52. ADR Article 10.2.4 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.”

53. The first of those exceptions does not apply because we have already found that the Use of cocaine did not occur Out-of-Competition. We have, therefore, to concentrate on ADR Article 10.2.4.(b) and on whether Mr Foggin-Johnston’s Use of cocaine In-Competition was “*in a context unrelated to sport performance*”.
54. Mr Cronin very fairly accepted that the submission at paragraph 62 of UKAD’s submissions, to the effect that Mr Foggin-Johnston could not rely on this exception because he had not asserted that he had used cocaine In-Competition in a context unrelated to sport performance, was putting the matter rather too high.
55. It seems to us entirely fair to approach this matter on the basis that, once we have found against Mr Foggin-Johnston on the “*In-Competition*” point, it is plainly implicit in the case he advances that he says in the alternative that his Use of cocaine was recreational and unrelated to sport performance.
56. We have concluded that Mr Foggin-Johnson has satisfied us that his Use of cocaine was entirely recreational and, on that basis, we consider that he has discharged the burden upon him under this second limb such as to establish that his ADRVs were not “*intentional*” for the purposes of ADR Article 10.2.4(b).
57. We were also invited to consider the question of whether there was an absence of significant Fault or negligence on Mr Foggin-Johnston’s part. We say, without the slightest hesitation, that we consider this is not even arguable. That is because there was

nothing accidental about Mr Foggin-Johnston's Use / consumption of cocaine whenever it may have been taken. It was a deliberate act, taken by someone who knew exactly what he was doing and, indeed, asserts that his taking cocaine was the result of a long-standing (and obviously illegal) habit.

58. There is therefore no reason whatsoever to reduce the two-year sanction any further, by virtue of the provisions of ADR Article 10.6.2.

59. With commendable diffidence, Mr Patel advanced a further submission to the effect that we might consider it appropriate to reduce the sanction further on the basis of some generalised or inherent power to take account of mitigating circumstances, so as to reduce the period of Ineligibility prescribed by the Rules.

60. As Mr Cronin politely (and, in our view, correctly) responded, no such power exists within the Rules as they are written. The relevant provision is perfectly clear: in the event that we are satisfied (in the context of our other findings) that Mr Foggin-Johnston's Use of cocaine In-Competition was unrelated to sport performance, the only reduction that is allowed is one that takes the period of suspension down to two-years.

Decision and Commencement of the Period of Ineligibility

61. We impose a suspension of two years for the reasons given.

62. ADR Article 10.13 provides that the normal position is that a sanction starts on the day of a Decision. We communicated our decision on the day of the hearing, so the two-year period of suspension should start on 16 July 2024.

63. However, ADR Article 10.13.2 requires that an Athlete should receive credit for the period of Provisional Suspension.

64. The Provisional Suspension was on 11 October 2023 and UKAD accepts that Mr Foggin-Johnston has respected the terms of that suspension, so he should be afforded credit for the period that has passed (11 October 2023 to date).

65. The period of Ineligibility shall commence on 11 October 2023 and shall end at 23:59 on 10 October 2025.

Right of Appeal

66. 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.
67. Pursuant to ADR Article 13.4.2(b), the Appeal should be filed to the National Anti-Doping Panel, located at Sport Resolutions, 1 Paternoster Lane, London, EC4M 7BQ (resolve@sportresolutions.com).



William Norris KC
Chair, on behalf of the Panel
London, UK
01 August 2024

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