

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ROYAL AUTOMOBILE  
CLUB MOTOR SPORTS ASSOCIATION LTD ANTI-DOPING RULES**

*Before:*

*Christopher Quinlan QC (Chair)*

*Lorraine Johnson*

*Dr Tim Rogers*

**BETWEEN:**

**UK Anti-Doping**

*Anti-Doping Organisation*

and

**Paul Bird**

*Respondent*

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**DECISION OF THE ANTI-DOPING TRIBUNAL**

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## A. INTRODUCTION

1. This is the final decision of the Anti-Doping Tribunal ('the Tribunal') convened pursuant to Article 5.1 of the National Anti-Doping Panel Procedural Rules to hear and determine a charge brought against Paul Bird ('the Respondent') for the alleged violation of Article 2.3 of the Royal Automobile Club Motor Sports Association Ltd Anti-Doping Rules ('ADR'). The Royal Automobile Club Motor Sports Association Ltd has adopted the UK Anti-Doping Rules as its own ADR. The Royal Automobile Club Motor Sports Association Ltd trades as Motorsport UK.
2. Paul Bird is a rally driver. At the relevant time he was a participant in the British Trial and Rally Drivers Association ('BTRDA') Gold Star Rally Championship. He was a registered member of the Royal Automobile Club Motor Sports Association Ltd.
3. The Tribunal hearing was held on 11 and 12 December 2018 and was attended by:
  - The Respondent
  - Mary O'Rourke QC (Counsel for the Respondent)
  - Aidan Carr (Solicitor for the Respondent)
  - Phillip Law, UKAD Solicitor
  - James Laing, UKAD
  - Nick Sargent, UKAD (observing)
  - Chloe Davis, UKAD (observing, day 1)
  - Finbarr Nobile, UKAD (observing, day 2)
  - Alisha Ellis, NADP Case Manager
4. This document constitutes our final reasoned decision, reached after due consideration of the evidence, submissions and the arbitral awards placed before us. It is necessarily a summary of that material. We had proper regard to it all.

## B. ANTI-DOPING RULE VIOLATION

5. On 14 April 2018 the Respondent was competing as a driver in the Rallynuts Stages (Seven Valley Stages) Rally at the Royal Welsh Showground, Builth Wells, Powys, Wales ('the Rally'). This was at the third stage of the BTRDA Gold Star Rally Championships. He was one of six drivers selected to provide an In-Competition Sample. He did not give a Sample. Accordingly, by letter dated 11 July 2018 the Respondent was charged with the following Anti-Doping Rule Violation ('ADRV') contrary to Article 2.3 ADR:

*'Evading Sample collection, or without compelling justification, refusing or failing to submit to Sample collection after notification of Testing as authorised in these Anti-Doping Rules or other applicable anti-doping rules.'*

6. The Respondent denied the alleged ADRV. On 20 July 2018 his solicitor stated: "*Paul Bird denies the ADRV...He will put UKAD to strict proof of the lawfulness of the request for a sample and will furthermore rely on the defence of compelling justification.*"

7. On 07 November 2018, Mr Bird through his solicitor stated: "*The Respondent has no submissions to make but puts UKAD to strict proof of the allegations brought against him*". That was in response to Directions issued by the Tribunal which required him "*By 16.00 on 02 November 2018[to] serve upon the NADP Secretariat...His written submissions ('Skeleton Argument')...*".

8. Shortly before the hearing he served a document entitled "Defence Statement" similar in content and form to a document of that name served by a defendant in criminal proceedings. Therein he asserted:

*"The general nature of the Respondent's defence is:*

- a) failure to lawfully request a sample*
- b) entrapment by provocation and set-up"*

9. Before the hearing, through his solicitor he abandoned entrapment.

## (1) UKAD's Case

10. UKAD served witness statements in advance of the hearing from the following:

- 10.1. Jennifer Carty, a Royal Automobile Club Motor Sports Association Ltd Compliance Officer;
- 10.2. Walter Hood, UKAD Chaperone who notified the Respondent;
- 10.3. Hamish Coffey, UKAD Deputy Director of Operations (Testing);
- 10.4. David Thomson, UKAD Lead Doping Control Officer ('DCO') on 14 April 2018; and
- 10.5. Gareth Thomas, race steward.

11. Each gave evidence at the hearing. By agreement between the parties (approved by us), their witness statements stood as their 'evidence-in-chief'<sup>1</sup>, once each affirmed the truth and accuracy thereof (which each did). Each was cross-examined.

12. On 14 April 2018, by virtue of Mission Order M-751552754, UKAD Doping Control Personnel ('DCP') were present at the Rally to perform In-Competition testing. Walter Hood ('WH') was acting in the role of chaperone. By the time of the hearing he told us he had completed 700 such missions. At around 15:54, WH approached the Respondent as he was getting out of his car, having completed the Rally. He had parked his car in the slot allocated to the third-place finisher, within the 'finishing shed' (a large barn on the showground). In paragraphs 20 and 21 of his witness statement, he dealt with what happened next as follows:

*"20. As Mr. Bird got out of his vehicle I walked up to him and said "Hello, is it Mr. Bird" and he replied "Yes". I then asked, "Mr. Paul Bird" to which he replied "yes". I then showed him my ID badge which had my name, photograph, role, accreditation expiry date and UKAD logo on it and introduced myself telling him I was a chaperone for UKAD. I was wearing black trousers and a dark blue top, I was not wearing any UKAD branded clothing. My ID was being worn on a lanyard around my neck and was visible.*

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<sup>1</sup> Subject to some additional questions.

21. As soon as Mr. Bird realised that I was working for UKAD I felt his attitude changed immediately and he replied, "not this fucking shit again I don't have time for this". At this point he did not make me aware of any reason why he did not have time for the process."

13. The Respondent tested positive for benzoylecgonine (a metabolite of cocaine) and furosemide (a diuretic) following an In-Competition test on 11 July 2015, and was declared Ineligible for a period of two years.

14. WH continued:

*"I then informed him that he had been selected for doping control and that he was required to report to doping control immediately. I was reading through the normal notification that I am always required to give to athletes but I couldn't complete the notification fully because Mr. Bird interrupted me to say, "I haven't got time for this, my father is seriously ill, I am leaving and I am going straight away" or words to that affect. He also muttered something under his breath which was "they can come and see me at my house next week" or something similar. There were a lot of people around and car engines running so I didn't quite catch exactly what he said."*

15. In paragraph 24 of his witness statement he stated:

*"I then said, "are you definitely leaving" to which Mr. Bird replied "yes" and I then followed this by saying "are you aware that if you leave there may be some consequences or a sanction, are you sure you still want to go" or words to that affect and Mr. Bird replied "yes". I then asked a couple more times if he definitely wanted to go and Mr. Bird said "yes". I then asked Mr. Bird if he would sign the Doping Control Form to confirm that he was aware that he had been notified and a refusal to comply could result in an anti-doping rule violation and Mr. Bird signed the form. I can exhibit the Doping Control Form (DCF) as exhibit WH/1. The same form also records the notification time as 15.54."*

16. The evidence before us was that he left the barn, climbed into a helicopter and left the showground.

17. Mr Hood produced a copy of the Doping Control Form ('DCF') WH/1. In Box 9 of the form is a signature UKAD asserted to be that of the Respondent. Alongside that box

is the text: *"I am required to provide a Sample(s) and must report to the Doping Control Station immediately. I understand that refusing or failing to comply with this request may constitute an anti-doping rule violation"*. He also produced a Supplementary Report Form (the 'SRF') as WH/2. He said he completed the SRF within thirty minutes of the incident. Therein he wrote, *inter alia*, that he had notified the Respondent that he *"should report to doping control to provide a urine sample"* and that *"he said he would not be coming and that he was leaving straight away as he had a family emergency [sic]*. His handwritten entry in the SRF continued: *"I advised Mr Bird that if he left this may result in a sanction he [sic] said he was still leaving, I then had [sic] him to sign to say he had been notified he [sic] then left the building..."*

18. He was questioned by Ms O'Rourke in detail about aspects of his witness statement and the precise sequence of events. He was adamant that the Respondent did use the expletive he attributed to him, though volunteered that he believed it was not aimed at him. He did not recall the Respondent using spectacles during the incident. He insisted that he asked the Respondent not simply to *"sign my form"* but to do so to *"confirm that he was aware that he had been notified and a refusal to comply could result in an anti-doping rule violation"*.
19. He was asked about Box 31 in the DCF. That box is headed 'DCO Certification' and is blank. It contains the following:
  - 19.1. Box 1, alongside which is the text: *"I certify that, subject, to the comment above, the sample collection was conducted in accordance with the relevant procedures"*.
  - 19.2. Box 2, alongside which is the text: *"I certify that the athlete refused to submit to sample collection or failed or submit to sample collection, or otherwise evaded sample collection, for the following reason (athlete to provide and sign, if applicable)."*
20. The DCF provides for the relevant box to be signed and spaces for the appropriate signatures. He did not sign it as it was for the DCO, not for him. Shown JC/1, he said he believed that showed the moment the Respondent signed the DCF. The Respondent is not wearing spectacles in that photograph.

21. Jennifer Carty ('JC') was present. She observed, but did not participate in, the notification of the Respondent. She took a photograph of it, which was exhibited (JC/1). It shows the Respondent, WH and another gentleman. WH has his back to the camera, the Respondent's left side is towards the camera and both men appear to be looking down, at something on or close to the car's nearside front wing. The third man is three or so paces from them, behind but facing the Respondent.

22. In paragraph 21 of her first witness statement she said:

*"...I couldn't hear everything that was being said between the UKAD representative and Mr Bird but could see they were talking. I did not hear the notification given by the UKAD representative but I understood that that was what was happening. During the conversation I heard Mr Bird say "not this shit again" shortly followed by "I don't care, I am not doing it". "[sic]*

23. She said she then witnessed the Respondent running from the barn. She also produced a number of other exhibits including JC/4 – a video retrieved by Ms Carty that shows Mr Bird being interviewed (mid-Rally). We saw it and have a transcript. During that interview, the Respondent said that after the Rally he would be travelling to Paul Ricard to watch his son race and then back to Brands Hatch. He made no mention of the need to travel home.

24. She was questioned extensively by Ms O'Rourke. JC said that the Respondent was targeted for testing because he had just returned following his suspension. She had not received a 'tip-off'. She opined that such was a reasonable basis for selecting him. We do not disagree. She denied taking the photograph to "*set him up*". She denied the idea to test him at the subsequent rally was to "*fit him up*" in case he had a defence to this matter. She knew a man named Steve Perez ('SP') and denied that he had anything to do with the selection of the Respondent for testing at the Rally.

25. She was recalled on the second day, after disclosure overnight of an email thread which included one from SP (sent on 10 May 2017) to a third party, who then forwarded it to JC, in which SP said:

*"I understand his ban was only able to last two years, I have a real concern that he will reoffend. UKAD look mainly at performance enhancing drugs, Paul Bird's use of Class A drugs for recreational purposes in motorsport are not performance enhancing, but highly dangerous especially to spectators, officials and the crew on rallies. For example, for safety reasons even co-drivers, following an epileptic seizure are not allowed to compete for many years, as happened to one of my previous co drivers."*

26. JC forwarded that email to Tony Jackson at UKAD the same day. Ms O'Rourke said this demonstrated that JC had lied to the Tribunal, when she denied SP played any part in the selection of the Respondent for testing. When questioned, she denied lying and said SP's email had nothing to do with the Respondent's selection.
27. Hamish Coffey outlined the Respondent's testing history. He has a previous ADRV from a Sample collected on 11 July 2015. He produced the DCF for that test, which is similar in content and format to the DCF he signed on 14 April 2018. Questioned by Ms O'Rourke he did not know why the Respondent was selected in July 2015. He said there are a number of factors UKAD considers relevant to the selection of people to target test and a previous 'ban' is one of them.
28. Gareth Thomas was acting as a Royal Automobile Club Motor Sports Association Ltd steward at the Rally. Informed of the testing and who was to be tested, he identified the competitors to DCP as they entered the control area at the finishing line. He identified the Respondent to WH. He also identified his entries on the DCF, including his signature.
29. David Thomson ('DT') was the Lead Doping Control Officer ('DCO') on 14 April 2018. The Doping Control Station ('DCS') was set up in a hotel between the finishing shed and Rally HQ. JC told him that all of the six selected for testing, were to be notified of that fact once they reported to rally HQ (after completing the Rally), save for the Respondent, who was to be told in the finishing shed. He informed WH accordingly and in the event, they agreed to notify all six in that way. He was at the DCS when the notifications took place.

30. In his statement, he dealt with Box 31 on the DCF. That box is headed 'DCO Certification' and was blank. DT said he did not sign it as he had not witnessed the refusal.

31. He was questioned by Ms O'Rourke. Asked about Box 8 on the DCF, he said he would not expect the chaperone to go below that line, which was normally for the DCO to complete.

## **(2) Respondent's Case**

32. The Respondent relied upon his witness statements dated 25 June 2018 and 11 October 2018. In so far as is material, in paragraph 7 of the statement dated 11 October, he said this:

*"I told this gentleman [WH] that I couldn't provide a sample at that time as the helicopter was waiting and my father was ill, but I would be happy for him to make any alternative arrangements he wished for me to provide a sample within the next few days."*

33. In paragraph 8 of that statement he continued:

*"My firm recollection (and indeed my understanding and belief at the time) is that the man accepted my statement/explanation and said word to the effect that that was okay so long as I signed a form which he handed"*

34. He continued that he signed that form without reading it. He said that he boarded the helicopter and *en route* to his father received a message that his father was *"recovering and would be alright [sic]"*. Therefore, he went on to Brands Hatch.

35. He supplemented the statements by informing us that he has been using spectacles to read for two years. Before us, save for the top line, the remainder of the DCF was *"very vague, just a blur"* without his reading spectacles. Referred to the JC/1 he observed that he was not wearing spectacles and did not put them on at any time during this exchange with WH. He had no recollection of seeing JC at all on 14 April 2018.

36. He was questioned by Mr Law and the Tribunal Chairman. He said he had received no anti-doping education, but by April 2018 he was aware of UKAD and knew they could test him. Asked about 11 July 2015, he said he was keen to get away but stayed to provide a Sample. He denied he did so as he was aware that he might commit an ADRV if he left. He was taken to the DCF for 11 July 2015 and said he "*could not confirm*" he read that DCF, but did sign it.
37. As for the 14 July 2018, he agreed he was asked to provide a Sample and did not. He said he tried to "*organise*" giving one at a later date. He said his father was just "*generally unwell*" at that time but could not give specifics. He denied saying "*not this shit again*" which he said was "*a word I would never use*". He denied refusing to be tested and said he asked if he could possibly arrange to have a test done at a later date, like the following week. He said WH agreed, or he thought WH agreed.
38. He was asked about the signature in Box 9 of the DCF. He said variously that he "*believed*" it was his, that it looked "*very similar*" and "*similar*" to his and that it looked "*fairly familiar*" to him. In answer to Ms O'Rourke he said the signature was his.
39. In answer to questions from the Tribunal Chairman, and doing his best to recall the precise words he used, he thought he asked WH, "*would it be possible to arrange to have sample taken on a different day*". He said he used "*round about those words*". He said "*something along the lines of either tomorrow or next week*". "*I told WH my father was ill and could not recall if he replied.*" He said WH asked him to sign the form and he was free to go.
40. At the start of her closing submissions on the Respondent's behalf, Ms O'Rourke stated in unequivocal terms that he was not (1) seeking to establish compelling justification or (2) advancing any argument that he had not signed the DCF or (3) that he was not asked to provide a Sample. During the course of her submissions, she also stated that he was not running (as had been advanced before the hearing) any 'defence' of 'entrapment'. The relevance, she submitted, of such alleged behaviour was that it demonstrates that JC had an *animus* towards him and her evidence should be treated with "*absolute care*"

41. In summary, Ms O'Rourke submitted that the Respondent's case was that he did not refuse to provide a Sample; and she submitted there was no evidence that he had. There was evidence (from WH) he offered to give it on another day, but that, she argued, was not the same as a refusal. She said the Respondent was not the "*most impressive*" witness but the case did not turn on him; on the issue of whether he refused, it turned on WH.
42. On the failure charge, she accepted that the Respondent did not provide a Sample and therefore had 'failed'. She accepted further that the Respondent's conduct may well be, or indeed was, negligent. She said she was accepting that because she said he had not reached an agreement with WH as to when the Sample would be provided before leaving. She said that fact was relevant to sanction. She invited us to find that (1) the Respondent genuinely believed it was okay to leave (as he was not stopped nor told he could not) and so (2) was not significantly at Fault or Negligent for the purposes of sanction.
43. Ms O'Rourke expressly stated that the Respondent was not relying on the statements of Neil Buckley or Jack Morton, both dated 25 June 2018 and included in the evidence bundle prepared for the hearing. The former drove the Respondent to the helicopter and the latter was his co-driver for the rally. Ms O'Rourke informed us that they were included in the bundle by UKAD and not at the request of the Respondent's legal team.

### **(3) Finding**

44. UKAD's primary case was that the Respondent refused, without compelling justification, to submit to Sample collection after notification. Alternatively, he failed to submit to Sample collection.
45. To sustain the charge that the Respondent refused, without compelling justification, to submit to Sample collection in breach of ADR Article 2.3, UKAD must prove, to the comfortable satisfaction of the Tribunal, the following:
- 45.1. He was properly notified of the Testing;

- 45.2. That such notification was authorised under the ADR;
- 45.3. That he refused to provide the Sample required; and
- 45.4. His refusal was intentional.

46. To prove the alternative charge of failure to submit to Sample collection, UKAD must establish the first two elements above, and that the Respondent:

- 46.1. Failed to provide the Sample requested; and
- 46.2. The failure was either intentional or negligent.

47. We consider first the refusal allegation. Since the Respondent put UKAD 'to proof' we deal with each element.

48. First, that he was properly notified of testing. We accept the evidence of WH. He is a vastly experienced chaperone and we accept he did not deviate from his long-established practice. We disagree with Ms O'Rourke's assessment of him as a witness. We accept that WH showed the Respondent his UKAD identification and told him (1) he was selected for doping control and (2) he was required to report to doping control immediately.

49. Further, we are comfortably satisfied that the Respondent signed the notification section of the DCF, namely Box 9. The text alongside it reads: "*I am required to provide a Sample(s) and must report to the Doping Control Station immediately. I understand that refusing or failing to comply with this request may constitute an anti-doping rule violation*". It is no defence subsequently to claim (as he did) he did not know (because he said he could not read it) what he was signing. As a CAS Panel has observed (and we agree):

*"In the Panel's view, the Appellant's plain signature of the doping control records expresses his approval of the procedure and prevents him – short of compelling evidence of manipulation of the records or fraud or any similar facts – from raising any such issue at a later stage."*<sup>2</sup>

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<sup>2</sup> V v FINA, CAS 2003/A/493

50. Therefore, we are comfortably satisfied that the Respondent was properly notified that he required to provide a Sample for the purposes of testing.

51. Second, that such notification was authorised under the ADR. Ms O'Rourke did not argue that it was not. In any event we are comfortably satisfied that it was. Royal Automobile Club Motor Sports Association Ltd is the National Governing Body for four-wheeled motor sport in the UK. It has adopted the UK Anti-Doping Rules. Royal Automobile Club Motor Sports Association Ltd Regulation H.3.1.1 provides that registration for its events "*will be effected by the issuing of a Competition Licence by the Royal Automobile Club Motor Sports Association Ltd*". At the time of the Rally, the Respondent held a Royal Automobile Club Motor Sports Association Ltd competition licence, which expired on 31 December 2018. He was therefore subject to and bound by Royal Automobile Club Motor Sports Association Ltd Regulations and so the ADR. Further, by virtue of his membership of the BTRDA, Mr Bird was also subject to the Royal Automobile Club Motor Sports Association Ltd Regulations.

52. Further, the proposed testing was authorised under the ADR. The Royal Automobile Club Motor Sports Association Ltd has engaged UKAD to perform testing on its behalf. Furthermore, Mission Order M-751552754 authorised DCP to collect Samples at the Rally.

53. We turn to the third issue, namely whether he "*refused*" to submit to Sample collection. The Respondent did not provide a Sample of urine. "*Refused*" is different from "*failed*" and the difference is a real one. The Respondent's own case, as per paragraph 7 of his witness statement was, "*I told [WH] that I couldn't provide a sample*". In this context, "*couldn't*" is the same as 'will not'; and there is no dispute that thereafter he did not provide a Sample.

54. Ms O'Rourke's express submission was that WH's evidence amounted to the Respondent not agreeing to provide a Sample at that time, which, she submitted, was not the same as a refusal. We disagree. First, we accept WH's evidence as to what the Respondent said. We do so for the following reasons:

54.1. WH was a straightforward witness, with considerable experience as a chaperone. He volunteered a matter in the Respondent's favour, which he did

not need to<sup>3</sup>. His almost contemporaneous account in the SRF was, on the material matters, essentially consistent with his witness statement. The difference in wording between the two was not, in our assessment, material. The substance and meaning of each was consistent.

54.2. Further, it was supported (to some limited extent) by the evidence of JC. We do not accept she had an *animus* towards the Respondent. It seems to us perfectly legitimate to target the Respondent, returning after a 'doping ban'. Even if there was some malign conspiracy to (in some way) 'get him' (which we reject) it could never compel him to act in a particular way, namely to refuse to submit to testing. In our judgement, her credibility survived Ms O'Rourke's questioning.

54.3. In any event, the Respondent (characterised by his own counsel as not the most impressive witness – with which assessment we agree<sup>4</sup>) was not certain as to what he did say.

55. On that basis we are comfortably satisfied that the Respondent said that he:

55.1. Was leaving;

55.2. Did not have time for the process;

55.3. Gave a reason as why he said he was leaving (his father); and

55.4. Used words to the effect that they (the DCP) can see or visit him the following week.

56. Second, using or speaking words to the effect that the DCP can see or visit him the following week is not an unequivocal undertaking to supply a Sample on any such future occasion. Even if we had been persuaded that it was reasonably capable of such an interpretation or indeed that the Respondent did undertake in terms to comply with testing on another occasion, the requirement on him is to submit to testing *then and there*. As WH stated, and we accept his evidence on this, he told the Respondent that he had been selected for doping control and was required to report to doping control "*immediately*". The reasons are obvious. Testing is not conducted on notice. It is done by surprise and not on notice. It is carried out in that way to test what is in the Athlete's system at that time. If it were not thus, and an Athlete could

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<sup>3</sup> Namely that the swear word was not uttered at him.

<sup>4</sup> By way of example, his apparent unwillingness to admit it was his signature of the DCF.

simply defer testing, it would drive the proverbial 'coach and horses' through the efficacy of the testing programme. A cheating Athlete could simply defer testing to enable the Prohibited Substance(s) to pass through and out of their system.

57. It follows that we are comfortably satisfied that he did refuse.

58. Finally, was that refusal "*intentional*"? Article 2.3 ADR is derived from Article 2.3 of the World Anti-Doping Code 2015. The comment to latter provides, *inter alia*:

*"...A violation of 'failing to submit to Sample collection' may be based on either intentional or negligent conduct of the Athlete, while 'evading' or 'refusing Sample collection contemplates intentional conduct by the Athlete."*

59. For these purposes, "*intentional*" is not defined. The term "*intentional*" is defined in ADR Article 10.2.3 as follows:

*"As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes ... who cheat..."*

60. That definition is expressly limited to Article 10.2 and 10.3. It does not apply to Article 2.3. Therefore, in the context of Article 2.3, "*intentional*" is to be given its ordinary and natural meaning.

61. We are comfortably satisfied that:

61.1. The Respondent knew he had been asked to submit to testing for the purposes of providing a Sample for anti-doping purposes;

61.2. WH told him words to the effect that leaving (and so not submitting to testing) may result in a sanction being imposed on him; and

61.3. He signed the DCF indicating he understood both of the facts and that he may be committing an ADRV if he left without complying.

62. Therefore, we are comfortably satisfied that his conduct in refusing was deliberate and it was informed in the sense that it was done in full knowledge that such refusal

might be deemed an ADRV for which he could be sanctioned. All against the background of his having been through the same anti-doping process in 2015.

63. We should note that a warning as to consequences of refusing to submit to testing is only mandatory (under International Standard for Testing and Investigations<sup>5</sup>) if an Athlete refuses to sign the DCF to acknowledge and accept notification. That does not apply here as he did sign the DCF.

64. It follows that we are comfortably satisfied that his refusal was "*intentional*", within the meaning of ADR Article 2.3.

65. The defence of entrapment was not advanced before us. The fundamental problem with that case or the case of 'set up' (as it was called) is obvious: no one could compel the Respondent to refuse to provide a Sample (as we found he did). That was entirely his own decision.

66. Accordingly, we are comfortably satisfied that the Respondent refused to submit to Sample collection after notification in breach of ADR Article 2.3. It was not argued that there was any compelling justification for that refusal. We thereby find the ADRV established to the requisite standard.

67. It is not necessary therefore to consider the alternative basis upon which the ADRV was alleged, namely failing to submit to testing. It is necessary only for us to say (1) the Respondent did fail to submit to testing and (2) in light of our factual findings, we would have concluded that such failure was intentional.

## **C. SANCTION**

### **(a) Ineligibility**

68. This is Mr Bird's second ADRV. Article 10.7.1 provides:

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<sup>5</sup> §5.4.3

*"10.7.1 For an Athlete's or other Person's second Anti-Doping Rule Violation, the period of Ineligibility shall be the greater of*

*(a) six months;*

*(b) one-half of the period of Ineligibility imposed for the first Anti-Doping Rule Violation without taking into account any reduction under Article 10.6; or*

*(c) twice the period of Ineligibility otherwise applicable to the second Anti-Doping Rule Violation treated as if it were a first violation ..."*

69. Had this been his first ADRV, then Article 10.3.1 provides:

*"10.3.1 For an Anti-Doping Rule Violation under Article 2.3 or Article 2.5 that is the Athlete's ... first anti-doping offence, the period of Ineligibility shall be four years unless, in a case of failing to submit to Sample collection, the Athlete can establish that the commission of the Anti-Doping Rule Violation was not intentional (as defined in Article 10.2.3), in which case the period of Ineligibility shall be two years."*

70. It is to be noted that Article 10.3.1 expressly refers to *"failing to submit"* and not *"refusing or failing to submit to Sample collection"*.

71. As we have noted, the term *"intentional"* is defined in Article 10.2.3:

*"As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes ... who cheat. The term, therefore, requires that the Athlete ... engaged in conduct which he or she knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk ..."*

72. UKAD contended that the refusal was intentional and so the appropriate period of Ineligibility was eight years, namely twice the period of Ineligibility had it been a first ADRV (four years).

73. Very fairly UKAD brought to our attention two arbitral awards which might assist the Respondent. It did so but indicated that it disagreed with both decisions. In *Brothers v FINA*, CAS 2016/A/4631 a CAS Panel ruled that an athlete who has intentionally refused to submit to testing might nevertheless have his ban reduced on grounds of No Significant Fault or Negligence. That CAS Panel found that the objective fact of an intentional refusal did not automatically make the Athlete a cheat within the meaning of 10.2.3<sup>6</sup>. What might be thought to be the clear words in Article 10.3.1 ("*in a case of failing to submit to Sample collection*") did not exclude refusal cases. In its opinion, the words "*failing to submit...more properly serves as an 'umbrella' concept to describe all type of actions or situations which result, for whatever reason, from the objective fact of having not submitted to the test*"<sup>7</sup>. That CAS decision was followed by an Independent Tribunal decision (first instance) in *ITF v Mak*, dated 07 November 2017.

74. In light of those awards, UKAD submitted that even if Article 10.3.1 applied to refusal cases (which it did not accept it did), the ADRV was "*intentional*" within the meaning of Article 10.2.3. We agree and therefore do not need to analyse the interpretative conclusions reached in those awards in respect of Article 10.3.1 and the express reference only to failing and not refusal. In light of our factual findings above<sup>8</sup> the refusal was "*intentional*" both in the ordinary meaning of that word and also within the meaning given to it by Article 10.2.3. It was "*intentional*" within the meaning of Article 10.2.3 in that we are comfortably satisfied that the Respondent engaged in conduct which he knew constituted an ADRV or he knew that there was a significant risk that the refusal might constitute or result in an ADRV and manifestly disregarded that risk.

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<sup>6</sup> §94

<sup>7</sup> §95

<sup>8</sup> See §61-62

75. Accordingly, pursuant to Article 10.7.1(c) a period of Ineligibility of eight years must be imposed.

76. The Respondent was provisionally suspended with immediate effect by letter dated 11 July 2018. We understand he has not competed since. Accordingly, the period of Ineligibility shall start on that date (ADR Article 10.11.3(a)).

77. The Respondent's status during the period of Ineligibility is as provided in ADR Article 10.12.

(b) Disqualification of Results

78. By operation of Article 9, the Respondent is automatically disqualified from the Rally with all resulting consequences, including results, forfeiture of points, prize and appearance money, if any.

79. Pursuant to Article 10.8 we order that any results achieved by the Respondent subsequent to his ADRV shall be disqualified, with all prize money and points forfeited.

**D. SUMMARY**

80. For the reasons set out above, the Tribunal finds:

- (a) The Anti-Doping Rule Violation has been established.
- (b) The period of Ineligibility imposed is eight years commencing on 11 July 2018.
- (c) The Respondent is automatically disqualified from the Rally with all resulting consequences.
- (d) Any results achieved by the Respondent following the Rally shall be disqualified with all resulting consequences.

## **E. RIGHT OF APPEAL**

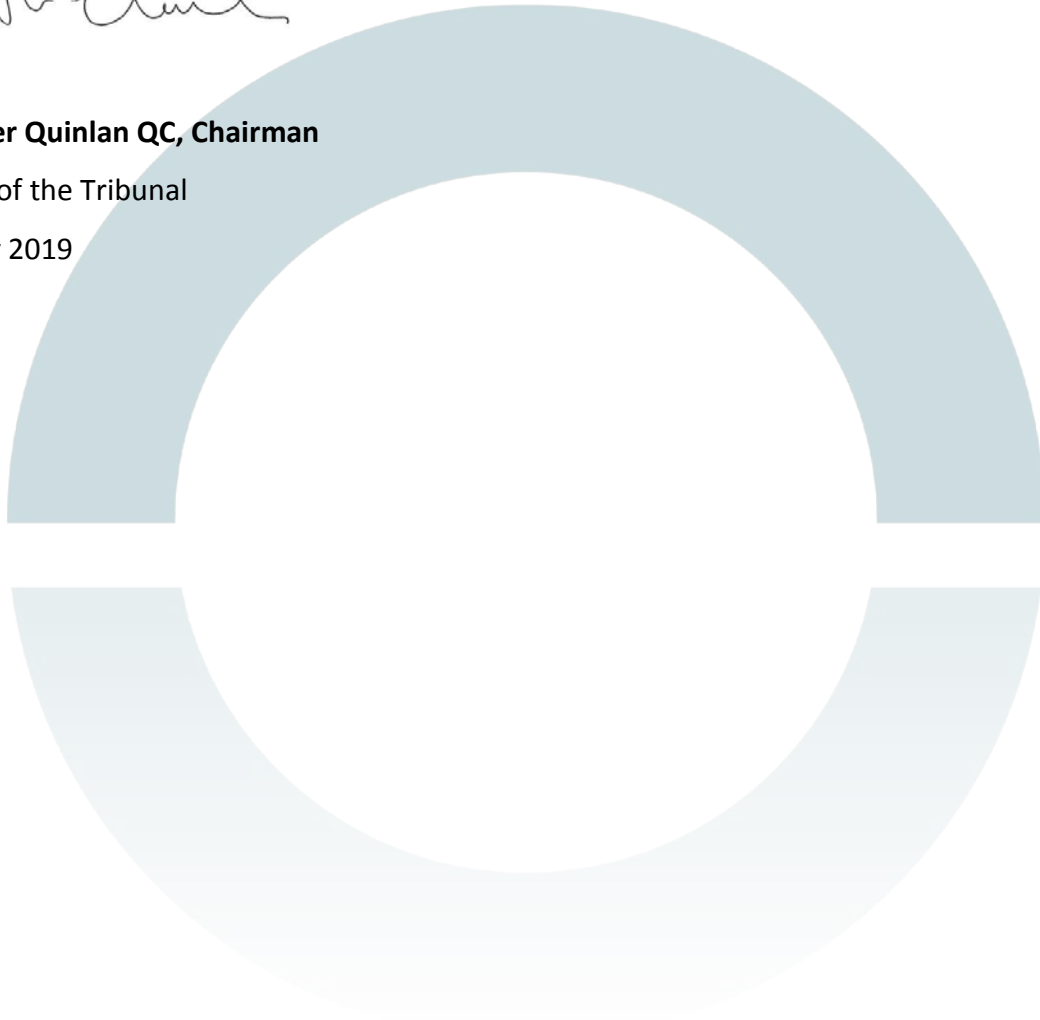
81. In accordance with ADR Article 13 the parties may appeal against this decision by lodging a Notice of Appeal according to the applicable time limits.



**Christopher Quinlan QC, Chairman**

On behalf of the Tribunal

08 January 2019





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