BEFORE THE NATIONAL ANTI-DOPING PANEL

BETWEEN:

MARK DRY **Appellant**

- and –

UK ANTI-DOPING **Respondent**

- ANTI-DOPING ORGANISATION

APPELLANT'S SUBMISSIONS

Following the Respondent's *Issued Decision* dated 7th May 2021

Introduction

1. These are the submissions submitted on behalf of the Appellant following the Issued Decision of the Respondent dated 7th May 2021 ("the Issued Decision" – ***Exhibit 8***).

2. The Issued Decision follows the Appellant's Application for a Reduction of Sanction, filed to UKAD on 16 December 2020 (***Exhibit 3***), with further representations on a case resolution agreement and exceptional circumstances on 31 December 2020 (***Exhibit 5***) and 3 March 2021 (***Exhibit 7***). The Issued Decision reduces the Appellant's period of ineligibility from 48 months to 28 months.

3. The Decision and Representations referred to Paragraph 2 above, follow the First Instance Decision dismissing all charges against the Appellant dated 8th October 2019 ("the First Instance Decision"), and the Appeal Decision imposing a 48-month period of ineligibility against the Appellant, which is dated 25th February 2020 ("the First Appeal").

4. The present Appeal prays for a further reduction of the period of ineligibility to 24 months, subject to the relevant provisions of the World Anti-Doping Code 2021.

5. Save for where the Appellant expressly admits or denies any allegation(s) set out in any previous or present submission, such allegation is neither admitted, nor denied and the Anti-Doping Organisation is required to prove the same.

6. For ease of reference, and without any admission to any allegation made therein, unless otherwise so applied, the Appellant adopts, unless otherwise stated, the headings and abbreviations applied in the Issued Decision by the Respondent.

7. References to paragraph numbers are, unless otherwise stated, references to paragraph numbers in the Issued Decision document.

Documents

8. In support of this Application and for the convenience of the Panel, the following documents are exhibited:
    a. The First Instance Decision at ***Exhibit 1***;
    b. The First Appeal Decision at ***Exhibit 2;***
    c. The Issued Decision at ***Exhibit 8***;
    d. Copies of the Appellant's skeleton argument in advance of the First Instance Decision at ***Exhibit 14***;
    e. Copies of the Appellant's Application for the Reduction of Sanction dated 16 December 2020 at ***Exhibit 3***
    f. Copies of the Respondent's response to the Appellant's Application for Reduction at ***Exhibit 4***;
    g. Copies of the Appellant's further Representations to the Respondent dated 31 December 2020 at ***Exhibit 5;***
    h. Copies of the Respondent's response to the Appellant's further Representations, dated 24 February 2021 at ***Exhibit 6;***
    i. Copies of the Appellant's further Representations dated 3 March 2021 at ***Exhibit 7;***
    j. A copy of the procedural rules of the National Anti-Doping Panel is attached and marked as ***Exhibit 9***;
    k. The UK Anti-Doping Rules 2021 at ***Exhibit 10***;
    l. The WA Anti-Doping Rules, 2021 version at ***Exhibit 11;***
    m. The World Anti-Doping Code (2021 version) at **Exhibit 12;**
    n. Consent order relating to ***Rugby Football Union v (1) Joseph Stafford (2) Rupert Kay SR/311/2019*** at ***Exhibit 13.***
    o. A letter of support from the Athletics Integrity Unit is attached at ***Exhibit 15***.

Jurisdiction

9. The jurisdiction of the *National Anti-Doping Panel* derives from Rules 1 and 4 of its Procedural Rules (as of 1 January 2021) and the *UK Anti-Doping Rule* 8 (as of 1 January 2021).

Admissibility

10. Rule 1.2 of the National Anti-Doping Panel's Rules states:

'Where the Anti-Doping Rules or any other rule, regulation, agreement, submission or reference confer jurisdiction over a matter on the NADP, the parties shall be taken to have agreed that such matter shall be heard and resolved in accordance with the following rules, as amended from time to time (the 'NADP Rules').'

Applicable Law

11. The Appellant has a right to Appeal pursuant to 2021 *UK ADR* Articles 13.4 and 13.7.

12. Rule 1.3 of the *National Anti-Doping Panel* sets the pre-requisites for the legal basis of the present proceedings. It states:

'The NADP Rules shall constitute an agreement to arbitrate, and proceedings under the NADP Rules shall constitute arbitration proceedings with a seat or legal place in London, England, for the purpose of triggering the application of the Arbitration Act 1996.'

13. As the seat of the *NADP* is in the United Kingdom, the arbitration is subject to the rules and provisions of the ***Arbitration Act 1996***.

14. In accordance with the relevant provisions of the rules and regulations governing the sport of athletics, the *UK Anti-Doping Rules*, the *AIU Anti-Doping Rules,* and the *WADA Code* apply primarily. In case of conflict, the *WADA Code* prevails. The contractual relationship (express or implied) between the Anti-Doping Organisation and the Appellant is *prima facie* governed by the law of England and Wales, which may, therefore, also be relevant.

15. The Appellant is entitled to rely on the provisions of WADC 2021 in this Appeal pursuant to Article 1.6.2(e) of the 2021 UK ADR, implementing Article 27.3 of the 2021 World Anti-Doping Code, which provides:

'…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 … 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…'

Background Facts

16. The background facts of this case have been set out repeatedly in the previous submissions of both parties to this matter. In the interest of avoiding duplication of effort by the panel in reading into the background facts, and for reasons of procedural economy, the Panel is respectfully referred to ***Exhibits 1***, ***2*** and ***14***, for the salient background facts.

17. The Appellant means no discourtesy to the Panel in referring to previous ***Exhibits*** for provision of the background facts and will be at the Panel's disposal if a further summary of the background facts would be convenient.

Application

18. The Appellant respectfully requests that the Panel make the following decisions:

    a. The applied period of ineligibility be reduced to 24 months (from 28 months); and
    b. The commencement period of the applied sanction be backdated to the date of the attempted sample collection (15th October 2018).

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 (which the Panel will see in the exhibits 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'*[1].

[1] Puerta v ITF CAS 2006/A/1025, para 11.7.23

24. Furthermore, in the case of ***FINA v Mellouli***[2]**,** 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).

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***[3] 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.

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[2] FINA v Mellouli CAS 2007/A.1252/para 97

[3] Rugby Football Union v (1) Joseph Stafford (2) Rupert Kay SR/311/2019

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[4]. 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.

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.

[4] Paragraph 22 of the Issued Decision Notice

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[5]. 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.

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

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

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***[6] 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 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***[7] in determining the degree of fault.

[6] CAS 2017/A/4937
[7] CAS 2013/A/3327

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'

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'*.

Backdating of Sanction

56. Pursuant to article ***10.13.1 WADC 2021***, the Panel has the discretion[8] to backdate the start date of the sanction where there have been delays not attributable to the athlete.

57. There are two conditions that must be satisfied to trigger discretion to backdate a sanction[9] which are namely:

    a. Substantial delays.

[8] ***WADA v Bellchambers et al, CAS 2015/A/4190***, para 167
[9] ***Al Rumaithi v FEI, CAS 2015/A/4190***

b. That are not attributable to the athlete or other person.

58. In the case of ***Fauconnet v ISU***[10], the start date of the ban to the date of the sample collection due to the fact it took ten months to render a decision notwithstanding the athlete's cooperative attitude.

59. It is submitted that the ***Fauconnet*** case is comparable with the present matter. The Appellant's unsuccessful testing attempt was on 15 October 2018 (which the Appellant corrected his whereabouts information on the same day, without knowing that a testing attempt was in progress) and the interview where he admitted to his lie was on 23rd January 2019 (where the Respondent threatened the Appellant with an 8-year ban knowing that such sanction does not exist under the rules). In addition, the Application for the reduction of sanction was submitted on 16 December 2020, whereas a Decision on such Application was only rendered on 7 May 2021.

60. The First Instance Decision, where the Appellant received no sanction, was on 8th October 2019 which was 12 months after the whereabouts failure and 9 months after admitting to the lie.

61. The First Appeal was a further 5 months later in February 2020 with the Issued Response made on 7th May 2021.

62. This matter now sits 2 years 7 months after the whereabout failure and 2 years 4 months after admitting to the lie with the matter yet to be determined.

63. The Appellant has suffered significant prejudice where he has not been able to compete or run his physiotherapy practice during this time. The Appellant has received 3 different sanctions during this period of time (0 days of ineligibility at the First Instance Decision, 48 months of ineligibility at the First Appeal and 28 months of ineligibility via the Issued Decision) in addition to his provisional suspension. All this for an act that bore no consequences. This is indeed a very difficult concept for anyone to follow.

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[10] CAS 2011/A/2615

64. The delays encountered in this matter are not at the fault of the Appellant after admitting to the lie on 23rd January 2019. Therefore, the legal test set out in ***Al Rumaithi v FEI*** has been satisfied.

65. It is requested that the commencement period of the applied sanction be backdated to the date of the attempted sample collection (15th October 2018).

Conclusion

66. It is respectfully requested that the Appellant's sanction be reduced to a 24-month period of ineligibility, based on the arguments set out within this appeal and the submissions already filed along with the Appellant's Application for the Reduction of the Sanction to the Respondent in December 2020 and March 2021.

67. The period of ineligibility of 28 months is unjust and disproportionate to the conduct of the Appellant. The Appellant requests that the 28-month period of ineligibility be set aside and be replaced with a 24-month period.

68. The Respondent has respectfully erred at law in respect of their consideration of the degree of fault. The case of ***Cilic v ITF*** is not relevant to the present case and must be distinguished on the facts and the evidential background and thus the Respondent's determination of the degree of fault is incorrect.

69. It is submitted that the Appellant does not possess a degree of fault which warrants a sanction of more than 24 months of ineligibility

70. Finally, the Appellant has suffered prejudice in having to wait a significant period of time for this matter to be determined. Pursuant to article ***10.13.1 WADC 2021*** the Panel has a discretion to backdate the sanction to the date in which the sample is taken.

For these reasons

71. It is submitted that this sanction should be backdated to the 15th of October 2018 and a period of ineligibility be reduced to 24 months.

For the Appellant Mr Mark Dry

Olivia Andrews

Matthew Kirk

Liberty Miller

Graeme Poole

On 28th May 2021