IN THE MATTER OF THE APPEAL BROUGHT BEFORE THE NADP APPEAL TRIBUNAL BY MR MARK DRY AGAINST THE DECISION MADE BY UK ANTI-DOPING ON 7 MAY 2021

UKAD'S ANSWER TO THE APPEAL

A. Introduction

1. UKAD sets out in this Answer (1) the key facts on which the original proceedings against Mr Dry were based (Section B); (2) a brief account of the proceedings before the first instance NADP tribunal and the first NADP Appeal Tribunal, which led to the imposition of a four year ban on Mr Dry in February 2020 (Section C); (3) a short summary of Mr Dry's subsequent application to reduce that four year ban based on a lex mitior in the 2021 World Anti-Doping Code, and UKAD's decision to reduce the ban not by 24 months (as requested by Mr Dry) but instead by 20 months (Section D); and (4) Mr Dry's four asserted grounds of appeal against that decision, and the reasons why UKAD submits they should all be rejected without any relief being granted (Section E).

B. Facts

2. Mr Dry 'has had a long and highly successful career as a hammer thrower, having represented both Scotland and Great Britain on very many occasions at the highest levels, including the Olympics. Indeed, he is a double Commonwealth Games bronze medallist'.[1]

3. From February 2017 on, Mr Dry was included in UKAD's Domestic Testing Pool (**DTP**), meaning that he had to provide certain information to UKAD about his whereabouts so that he could be located for testing while 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, and if he 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 an Art 2.4 ADRV. However, three such failures would lead to him being put into the National Registered Testing Pool, which would expose him to an Art 2.4 ADRV for three further failures.[2]

4. UKAD tried to test Mr Dry out of competition on 15 October 2018, at the location he had said he would be in his whereabouts filing (his home in Shepshed, Leicestershire). He was not there, because (as his neighbour told the testers) he had gone to Scotland on 12 October 2018, but failed to update his whereabouts to reflect that change until 16 October 2018.

5. On 18 October 2018, UKAD wrote to Mr Dry as part of its standard results management process, asking for an explanation for his absence on 15 October 2018, failing which a whereabouts failure (or 'strike') would be recorded against him. In response, Mr Dry lied and said that his neighbour had been mistaken, that he had not gone to Scotland until 16 October 2018, and that he had been in Shepshed on 15 October 2018, but had been out fishing when the testers called (which, if true, would not have amounted to a whereabouts failure).

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1 1st instance decision, Exh 1, para 1.

2 Appeal decision, Exh 2, paras 23, 31.

6. When UKAD asked if he had any supporting evidence for this explanation, Mr Dry got his partner to corroborate the lies he had told to UKAD. On 24 October 2018, she wrote: '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'.[3]

7. On 3 December 2018, UKAD invited Mr Dry to a formal interview, saying it was investigating whether he had provided false information to it. It was only at that point (i.e., almost seven weeks later) that Mr Dry abandoned his lie and admitted the truth about his whereabouts on 15 October 2018, explaining in a letter dated 11 December 2018 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'.[4] 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'.[5]

C. Procedural history

8. On 8 May 2019, UKAD charged Mr Dry with Tampering with Doping Control, in violation of Art 2.5 of the IAAF Anti-Doping Rules (**IAAF ADR**), as incorporated into the UK Athletics Anti-Doping Rules (**UKA 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.[6]

9. In response to the charge, Mr Dry claimed that he had lied because he 'was not in his normal state of mind and panicked about getting in trouble … . Furthermore, the medication Mr Dry was taking to treat his nerve pain (Gabapentin) impacted his memory, especially when it interacted with alcohol'.[7] He denied Tampering on the basis that nothing he had done had subverted Doping Control, because (he argued) the Domestic Testing Pool is not part of the UKA ADR and so is not part of the Doping Control process.[8] Alternatively, he sought a reduced sanction on proportionality grounds, on the basis that he had not acted intentionally but

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3 1st instance decision, Exh 1, para 10.

4 Ibid, para 11.

5 Ibid, para 12.

6 2015 UK ADR Art 2.5 provides: 'Tampering or Attempted Tampering with Doping Control. Conduct that subverts the Doping Control process … . Tampering shall include, without limitation intentionally interfering or attempting to interfere with a DCO, providing fraudulent information to an Anti-Doping Organisation or intimidating or attempting to intimidate a potential witness'. Tampering is defined as 'Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing, misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring' [Exh 2, paras 16-17].

7 Exhibit 1, para 25.

8 Exhibit 14, para 6a. The UKA ADR define 'Doping Control' as 'all steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as provision of whereabouts information, sample collection and handling laboratory analysis, TUEs, results management and hearings' [Exh 2, para 18].

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').[9]

10. Following an evidentiary hearing in September 2019, the NADP tribunal issued its decision on 8 October 2019. It rejected Mr Dry'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 UKA ADR were based) did not mention the Domestic Testing Pool, and therefore the Domestic Testing Pool 'operates outside the ADR'. It also lifted the provisional suspension that Mr Dry had served to that date (i.e., for five months).[10]

11. UKAD appealed that decision on the basis that the Domestic Testing Pool is expressly provided for in the UKA ADR and is therefore undoubtedly part of the Doping Control process, and Mr Dry's actions therefore constituted a deliberate attempt to evade the proper operation of the UKA ADR (namely, recording a 'strike' against Mr Dry that would lead, if followed by two more, to his inclusion in the NRTP).

12. Following a hearing, on 25 February 2020 the NADP Appeal Tribunal issued a decision agreeing with UKAD's submissions and upholding the appeal on that basis. It found that Mr Dry had Tampered with Doping Control by deliberately providing false information to UKAD with the intention of evading the operation of the UKA ADR, and imposed the fixed four year ban for Tampering mandated by Article 10.3.1 of the 2015 World Anti-Doping Code and therefore by Article 10.3.1 of the IAAF ADR (as incorporated into the UKA ADR).[11] Giving him credit for the five months that he had been provisionally suspended, the Appeal Tribunal said the ban should therefore run from 25 February 2020 to 24 September 2023.[12]

D. Mr Dry's application for reduction of the four year ban

13. In November 2019, the WADA Foundation Board had 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 2-4 years, 'depending on the Athlete or other Person's degree of Fault'.[13] The 2021 Code 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) may ask the Anti-Doping Organisation that brought the charge 'to consider a

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9 Exh 14, paras 7-9.

10 1st instance decision, Exh 1, especially paras 5, 27, 34-38, 39, 42-43.

11 IAAF ADR Art 10.3.1 states: 'For an ADRV under Article 2.3 or 2.5 that is the Athlete or other Person's first anti-doping offense, the period of Ineligibility imposed shall be four years unless, in a case of failing to submit to Sample collection, the Athlete can establish that the commission of the ADRV was not intentional (as defined in Article 10.2.3), in which case the period of Ineligibility shall be two years'.

12 Exh 2, para 49.

13 2021 Code Art 10.3.1 states: 'For violations of Article 2.3 or 2.5, the period of Ineligibility imposed shall be four (4) years except: (i) in a case of failing to submit to Sample collection, the Athlete can establish that the commission of the ADRV was not intentional, the period of Ineligibility shall be two (2) years; (ii) in all other cases, if the Athlete or other Person can establish exceptional circumstances that justify a reduction of the period of Ineligibility, the period of Ineligibility shall be in a range from two (2) to four (4) years depending on the Athlete or other Person's degree of Fault …' [Exh 12].

reduction in the period of Ineligibility in light of the 2021 Code' (2021 Code, Art 27.3). This is reflected in Art 1.6.2(e)) of the 2021 UK Anti-Doping Rules (**UK ADR**), which UK Athletics has now adopted, which states: 'Where a final decision finding an ADRV 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'.

14. After checking with WADA, UKAD confirmed to Mr Dry in April 2020, via counsel (Taylor/Jacobs), that he could make that application immediately, based on the *lex mitior* in 2021 Code Art 10.3.1, and invited him to do so.

15. For unknown reasons, however, Mr Dry only made the application eight months later, on 16 December 2020. He asked for his ban to be reduced from four years to two years, and he also asked for the ban to be back-dated so as to start from 15 October 2018, pursuant to a Case Resolution Agreement (i.e., based on the powers set out in 2021 Code Art 10.8.2), so that he could start competing again on 1 January 2021.[14] Even then, however, initially he did not provide reasoning to support the reduction and back-dating that he was requesting, just a bare assertion that a four year ban was 'disproportionate and harsh'.[15]

16. UKAD was forced to ask for the supporting reasoning, which was only partly forthcoming, requiring UKAD to give him a further opportunity to make submissions on the relevant points.[16] In his final submission, dated 3 March 2021, Mr Dry dropped his request for a back-dating of the start date of the ban, and instead sought a reduction in the ban to two years, and credit for the five months of provisional suspension he had served from May to October 2019.[17] That request, if granted, would have seen him banned until 24 September 2021.

17. On 7 May 2021, UKAD issued its decision on Mr Dry's application:

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[14] 2021 Code Art 10.8.2 states, in relevant part: 'Where the Athlete or other Person admits an anti-doping rule violation after being confronted with the anti-doping rule violation by an Anti-Doping Organization and agrees to Consequences acceptable to the Anti-Doping Organization and WADA, at their sole discretion, then: (a) the Athlete or other Person may receive a reduction in the period of Ineligibility based on an assessment by the Anti-Doping Organization and WADA of the application of Articles 10.1 through 10.7 to the asserted anti-doping rule violation, the seriousness of the violation, the Athlete or other Person's degree of Fault and how promptly the Athlete or other Person admitted the violation; and (b) the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied, the Athlete or other Person shall serve at least one-half of the agreed-upon period of Ineligibility going forward from the earlier of the date the Athlete or other Person accepted the imposition of a sanction or a Provisional Suspension which was subsequently respected by the Athlete or other Person'.

[15] Exh 3.

[16] See UKAD email dated 24.12.20 [Exh 4], asking for clarification of the exceptional circumstances that were said to apply, the factors said to be relevant to Mr Dry's degree of Fault, and why he thought the ban could be back-dated pursuant to a Case Resolution Agreement, given that Code Art 10.8.2 specifies such agreements may only be made when the Athlete admits the ADRV charged after being confronted with it and agrees to the consequence proposed. Mr Dry responded on 31 December 2020 [Exh 5]. In response, UKAD noted on 24 February 2021 that he had not explained how Art 10.8.2 could apply in the absence of an admission, but invited any further submissions or confirmation that Mr Dry had no further submissions to make [Exh 6]. Mr Dry made further submissions on 3 March 2021 [Exh 7].

[17] Exh 7, p.4.

17.1 It decided that 'exceptional circumstances' did exist, within the meaning of 2021 Code Art 10.3.1, as required to trigger the discretion to reduce the sanction from four years. These were that the Appeal Tribunal had specifically noted that it considered a four year ban to be 'an extremely harsh punishment on the facts of this case', and the Athletics Integrity Unit at World Athletics had agreed with that view [Exh 8, paras 19-22].

17.2 Following the principles set out in Cilic v ITF, CAS 2013/A/3327, para 69, it decided that Mr Dry's objective Fault and his subjective Fault should be assessed to determine whether his Fault was 'considerable' (warranting a ban in the range of 40-48 months), or 'normal' (32-40 months), or 'light' (24-32 months). It noted that he was an experienced Athlete who knew what his anti-doping responsibilities were and that lying to UKAD was wrong; that his lying was not a momentary lapse of judgment but rather a specific and deliberate lie, maintained from 18 October until 11 December 2018, made in order to avoid the proper recording of a whereabouts 'strike' against him; and that he had also got his partner to lie to UKAD to corroborate his false account, which was 'a particularly aggravating factor'. But on the other hand his lie only covered up one whereabouts strike, not a completed ADRV; and he did subsequently admit his lying, apologised and cooperated with UKAD's investigation, which meant that the consequences of his lie 'were limited in time and in scope'. On this basis, UKAD considered that his Fault lay in the middle of the 'light' category of Fault, i.e., 28 months (the mid-point of the 24-32 month range for 'light' Fault). It therefore reduced his ban from 48 months to 28 months [paras 23-28].

17.3 It noted that back-dating the start date of the (reduced) ban pursuant to 2021 Code Art 10.8.2 (Case Management Agreements) was not an option, because Art 10.8.2 only applies when the Athlete admits the ADRV after being confronted with it by UKAD, and Mr Dry did not admit the ADRV, either after being confronted with it by UKAD or subsequently. In fact, he still disputed that he had committed an ADRV in his application for a reduction of the sanction [paras 29-33].

17.4 UKAD did however give Mr Dry credit for the five months of his provisional suspension, so that his (reduced) ban would expire on 24 January 2022 [para 34].

18. In other words, UKAD granted Mr Dry all the relief that he had sought (see paragraph 16, above), save that it reduced his ban by 20 months instead of by the 24 months he had requested.

E. 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.[18] Mr Dry fails even to acknowledge that ruling, let alone provide any good reason to depart from it.

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"'

[18] Exh 2 at paras 42-47.

[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.[19]

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.[20]

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

[19] 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).

[20] Exh 2, paras 33-41.

than two years based on the low degree of fault and the conduct fitting in with the definition of "exceptional circumstances"' [para 55].[21]

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.[22] While it referred to 2009 Code Art 10.4, that Article (like the one now under consideration) specified that the sanction 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')[23] 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'),[24] 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').[25]

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,[26] meaning that if the Cilic principles were

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[21] 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.

[22] 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'.

[23] Errani v ITF, CAS 2017/A/5301, para 205; Lea v USADA, CAS 2016/A/4371, para 90.

[24] 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.

[25] 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).

[26] 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

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 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,[27] 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 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

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].

[27] Exh 2, paras 30-31.

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'[28]) 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,

[28] 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 […]'.

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).

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.[29]

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.

F. Conclusion

29. For all of these reasons, UKAD respectfully asks the NADP Appeal Tribunal to reject Mr Dry's appeal, and to leave undisturbed UKAD's decision to reduce Mr Dry's ban to 28 months but to give him credit for his five month provisional suspension, so that his ban will end on 24 January 2022.

[29] 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').

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