



CASE 2 – Decision

INTRODUCTION

1. These are not conventional anti-doping rule violation proceedings. By agreement of the parties I was appointed as Sole Arbitrator to determine a very short point of construction under the Anti-Doping Rules of the International Association of Athletics Federations ("the IAAF Rules"). They have been adopted (with supplementary provisions) by UK Athletics Limited, and it is common ground that they are applicable to the Respondent, Athlete N.
2. None of the facts are in dispute. My sole function is to decide the short point of construction upon which the parties cannot agree. On 26 January 2016 I issued Directions after hearing the parties. These Directions recorded:

Upon the agreement of both parties that (a) the issue to be determined is suitable for resolution by me as Sole Arbitrator (b) I should determine the issue on the basis of written submissions without the need for an oral hearing and (c) the issue should be determined in early March 2016, I make the following directions pursuant to the 2015 Procedural Rules of the National Anti-Doping Panel ("NADP")

I have received written submissions from both UK Anti-Doping Limited and from Mills & Reeve LLP who represent Athlete N. On the basis of those submissions I now set out my Decision on the issue which divides the parties.

THE BACKGROUND

3. Athlete N is a talented sprinter who has in the past represented Great Britain. In June 2011 she was participating at the Bedford International Games when she was found to have two anabolic steroids in her system, testosterone and clenbuterol. As is evident from its Decision, an Anti-Doping Tribunal regarded this anti-doping rule violation as a serious case with aggravating circumstances. It rejected Athlete N's defence and imposed a sanction of four years ineligibility from 9 July 2011. Her subsequent appeal was dismissed. Accordingly, the expectation was that Athlete N would be ineligible to compete again until midnight on 8 July 2015.

4. Even though Athlete N was not eligible to compete, she was required to provide an Out-of-Competition sample on 12 February 2015. This was found to contain clomiphene. Athlete N was accordingly charged with the commission of this second anti-doping rule violation. UKAD imposed a Provisional Suspension which was to run from 8 July 2015, the date when her existing ineligibility under the first anti-doping rule violation was due to expire.
5. Athlete N promptly admitted this second anti-doping rule violation. As far as sanction for the second violation is concerned, the following common ground is agreed:
 - (1) The starting point is to ascertain the appropriate sanction if this had been a first violation; this sanction should then be doubled (subject to possible reductions) pursuant to IAAF Rule 40(8)(a)(iii).
 - (2) It was agreed, with the concurrence of both WADA and the IAAF, that the appropriate sanction if this had been a first violation would have been 20 months' ineligibility. Thus, given that this was a second violation, the applicable sanction (subject to possible reduction) would be 40 months' ineligibility.
 - (3) Athlete N has provided UKAD with Substantial Assistance, as defined in the IAAF Rules, and accordingly there would under the IAAF Rules be the possibility of total or partial suspension of the ineligibility.
 - (4) UKAD, in agreement with both the IAAF and WADA, has determined that a 75% suspension of the 40 month period of ineligibility would be appropriate in this case. This is acceptable to Athlete N.
 - (5) Accordingly, the applicable period of ineligibility for Athlete N is 10 months for the second anti-doping rule violation.

THE ISSUE

6. The parties have been unable to reach agreement as to the date from which the 10 month period of ineligibility should run. IAAF Rule 40(11) provides for the general principle and then continues in material part under sub-rule (b) for cases where, as here, there has been a timely admission by an athlete:

Commencement of Period of Ineligibility

11. Except as provided below, the Period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.

(b) **Timely admission:** where the Athlete promptly admits the anti-doping rule violation in writing after first being confronted (which means no later than the date of the deadline given to provide a written explanation in accordance with these Anti-Doping Rules or the Anti-Doping Regulations and, in all events, before the Athlete competes again), 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 Rule is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction or the date the sanction is otherwise imposed.

7. In the present instance the date of Sample collection was 12 February 2015. A period of 10 months from that date would therefore expire at midnight on 11 December 2015. However, Athlete N was already subject to ineligibility for some of that period pursuant to the sanction for the first anti-doping rule violation. That period of ineligibility did not expire until 8 July 2015.
8. The issue between the parties is accordingly whether the period of ineligibility for the second anti-doping rule violation should be a period of ten months from (a) 12 February 2015 or (b) 8 July 2015.

UKAD'S SUBMISSIONS

9. IAAF Rule 40(11) makes no special provision for cases where, at the time a sample is collected, an athlete is already subject to ineligibility. UKAD acknowledges that what it terms a "strict application" of IAAF Rule 40(11) (b) would mean that an athlete already subject to ineligibility would be able to benefit from a start date for a second period of ineligibility commencing whilst the athlete was already ineligible. However, UKAD points

out that application of IAAF Rule 40(11) (b) in this way means that the effect is to reduce in practice the time during which an athlete is actually ineligible for a second anti-doping rule violation; indeed, in a hypothetical case the practical effect could even be that ineligibility for a second anti-doping rule violation would be entirely eliminated.

10. UKAD submits that such a "strict application" of the sub-rule cannot be right. All athletes should be treated equally. An athlete already subject to ineligibility should not be better off than an athlete committing a first anti-doping rule violation who receives exactly the same sanction.
11. Secondly, UKAD submits that IAAF Rule 40(11) (e) suggests that in a situation such as arises here the 10 month period of ineligibility for Athlete N's second anti-doping rule violation should commence on 8 July 2015. That is the date when her first period of ineligibility expired and she was provisionally suspended for the second violation. This sub-rule provides:

(e) No credit against a period of Ineligibility shall be given for any time period before the effective date of the Provisional Suspension or voluntary Provisional Suspension regardless of whether the Athlete elected not to compete or was not selected to compete.

Thus, it is submitted that the effect of this sub-rule is to defer commencement of a period of ineligibility to the date when a provisional suspension comes into effect. In the case of Athlete N, this was 8 July 2015, the commencement of the provisional suspension imposed for her second anti-doping rule violation.

12. In summary, the 10 month period of ineligibility in Athlete N's case should run, it is submitted, from 8 July 2015 until 8 May 2016.

CONTENTIONS FOR ATHLETE N

13. For Athlete N, Mills & Reeve LLP lodged very brief submissions in response to those of UKAD. There is no separate provision of the IAAF Rules catering specifically for a situation such as has arisen in the present case. Accordingly, Rule 40(11) (b) should be applied in the context of the sanction being imposed regardless of some other sanction. The sub-rule means what it says, and there is no room for simply disregarding the plain

meaning. If there is an anomaly, that is something for the rule makers to cure by amendment of the rules. Those applying the rules cannot change them.

14. If there is an ambiguity or an anomaly, then sub-rule (b) should be applied "contra proferentem" and hence in favour of Athlete N.
15. In all the circumstances Athlete N's suspension should under the IAAF Rules run from 12 February 2015 to midnight on 11 December 2015. Athlete N has therefore been free to compete since 12 December 2015.

DISCUSSION

16. Whilst sub-rule (b) of IAAF Rule 40(11) uses the word "may" before the words "start as early as the date of Sample collection ...", UKAD does not suggest that this gives the adjudicating body, whether UKAD itself or a Tribunal, some general discretion. In my view UKAD was right not to do so. The IAAF Rules cannot leave at large the date of commencement of a sanction so that there is no certainty at all for an athlete but the adjudicating body may choose for whatever reason it wishes to apply or disapply sub-rule (b) of IAAF Rule 40(11). The word "may" is used in recognition of the two possibilities for commencement of ineligibility under the sub-rule.
17. There is no provision of the IAAF Rules which makes any special provision for the commencement of a sanction when an athlete is already subject to a sanction for another anti-doping rule violation. I acknowledge the apparent oddity of the examples put forward by UKAD. It is possible to envisage a case in which an athlete committing a second anti-doping rule violation who is already subject to ineligibility becomes in practice subject to no further ineligibility beyond the expiry of the existing period of ineligibility. This may be thought surprising.
18. Despite the consequences to which UKAD points, it has to be said that it is not unknown for the law to create comparable consequences in other fields. Thus, where a Defendant in a criminal case receives concurrent custodial sentences for two offences, he may well not in practice serve any of the second concurrent sentence. Nevertheless, it could not be suggested that he has not received a custodial sentence for the second offence.

Indeed, even a fully suspended custodial sentence is nevertheless regarded as a custodial sentence.

19. I now turn to UKAD's reliance on sub-rule (e) of IAAF Rule 40(11). The sub-rule has to be read in context. It appears as the third sub-rule under the heading "Credit for Provisional Suspension or Period of Ineligibility Served". Of course, the imposition of any Provisional Suspension will antedate any ultimate sanction. The primary purpose of this part of IAAF Rule 40(11) is in fairness to an athlete to ensure that any period of ineligibility takes account of the fact that the athlete has not been able to compete since the Provisional Suspension. The apparent purpose of sub-rule (e) is to make it clear that it is only a true Provisional Suspension which is to be taken into account. The fact that an athlete may not in practice have competed, even though eligible to do so, is immaterial.
20. In the present case Athlete N is not seeking credit for any period against her period of ineligibility for the second anti-doping rule violation. She is asking for IAAF Rule 40(11) (b) to be applied as it stands with the unsuspended part of her period of ineligibility coming into effect from the date of sample collection.
21. It is my view that sub-rule (e) of IAAF Rule 40(11) cannot assist UKAD. I consider that there is no alternative but to apply IAAF Rule 40 as it stands. I am not able to say that sub-rule (b) can simply be disapplied.
22. Finally, I observe that I have reached my conclusion without any reliance on the contra proferentem principle. I doubt whether that principle has any application at all in the context with which I am concerned. But in any case I have decided the issue before me purely on the plain meaning of IAAF Rule 40(11) (b).

CONCLUSION

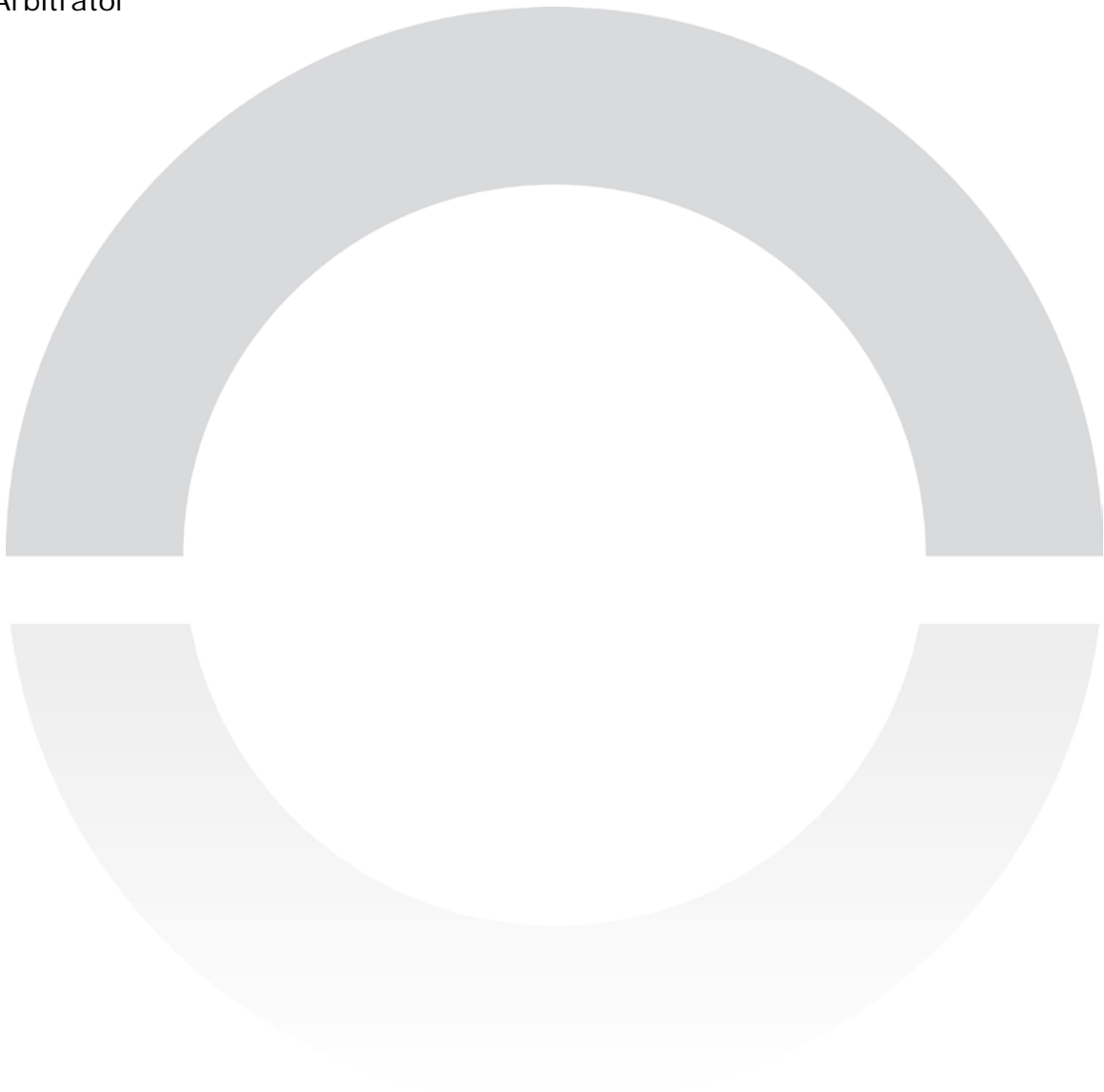
23. I conclude that, given the factors which are common ground, Athlete N has been free to compete since 12 December 2015.

R. P. Englehart

London, 8 March 2016

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Robert Englehart QC

Sole Arbitrator





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