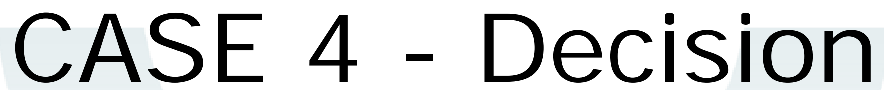
NATIONAL ANTI-DOPING PANEL



CASE 4 - Decision

NATIONAL ANTI-DOPING PANEL

INTRODUCTION

1. We were appointed as the Arbitral Tribunal to determine a Charge brought by the Anti-Doping Organisation ("UKAD") against the Respondent, Player A, a professional rugby league player. Before us UKAD was represented by Mr Dario Giovannelli. Player A was represented by Mr Daniel Saoul. We would wish at the outset to pay tribute to both representatives for their able and thorough presentation of the case. We are grateful to them for their written and oral submissions.

2. The Charge faced by Player A was of refusing or failing to submit to a drug test. More specifically, he was charged with committing an Anti-Doping Rule Violation under Article 2.3 of the applicable anti-doping rules. That Rule provides for the following to be an Anti-Doping Rule Violation:

   Evading, Refusing or Failing to Submit to Sample Collection

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

3. Player A is, as noted, a rugby league player. He is a player registered with the Rugby Football League and has over a distinguished career played for a number of different clubs. His current club, although he is currently subject to provisional suspension, is Rugby League Football Club A. That Club plays in both ██████ and ██████. There is no dispute between the parties that at all material times Player A has been subject to the Rugby Football League Anti-Doping Rules ("ADR").

THE FACTUAL BACKGROUND

4. We heard and, by agreement of the parties, read a considerable body of evidence during a hearing which stretched over three days. There were some disagreements of detail between the witnesses. However, we think it right to concentrate in our decision on those facts which are in our view material to our decision. Whilst we have had in mind the numerous disagreements in the evidence, for the purposes of this decision we shall not address every single factual point raised by the parties.

5. On 30 May 2017 the ████████ anti-doping agency, ███████ Centre for Ethics in Sport

("█████"), attended at Stadium A in City A in order to carry out urine and blood tests for UKAD on Rugby League Football Club A players. This stadium is where the club is based in ██████ and was on 30 May 2017 having a training session. The stadium is in fact owned by the local authority; it, rather than the club, was responsible for, amongst other matters, designating one room within the stadium as the Doping Control Station. The █████ Doping Control Officer on the occasion in question was DCO A. DCO B acted as a chaperone or drug tester.

6. One of the players selected for testing was Player A. He confirmed before us that he was very familiar with testing as he had been selected for testing on numerous occasions in the past and had undergone drugs education with his clubs.

7. DCO B told us how he and DCO A had visited a store on the morning of the test and had bought a considerable quantity of water for the purposes of the test. They had removed the plastic shrink wrapping around the bottles and placed them in the chaperones' cooler bags. It is right to note that on the day in question a number of other bottles of water were also used; they had come from DCO A's house. However, what matters for our purposes was the evidence that all the bottles in DCO B's cooler bag had in fact come from that morning's purchase. DCO B told us how he was wearing a wholly visible █████ lanyard and carrying his cooler bag when he approached Player A as the latter came off the training pitch.

8. DCO B told us that he greeted Player A with the words: "Hello, [*Player A*]. My name is [*DCO B*]. You have been selected today for doping control testing. Would you like to hydrate?". Thereupon, Player A took a bottle out of the cooler bag and drank three-quarters of the bottle. Player A's version was somewhat different. He told us that he was approached as he came off the training pitch by a stranger whom he did not know but was perhaps a journalist. The stranger just said: "Would you like some water?" whereupon he grabbed a bottle and drank it, for it was a very hot day. We are confident that Player A was doing his best to tell us as he remembers matters. Nevertheless, we have to say that we prefer the recollection of DCO B. It is improbable that Player A

would simply have grabbed a bottle of water from an unknown stranger. It is equally improbable that DCO B would not have introduced himself at all.

9. After the initial meeting Player A "hightailed it to the club house", as DCO B put it, with DCO B following. In the dressing room at the club house DCO B filled in an Athlete Selection Order in front of Player A and read out the following which appears on the face of the form:

> *You have been selected for doping control and you are required to comply with sample collection. Please be advised that failure to comply or refusal to provide a sample may result in an anti-doping rule violation.*

DCO B also told us that he read out the section of the form headed "**Athlete Rights and Responsibilities**". He also tried to show Player A the reverse of the form, but Player A declined to look at it saying he knew what it said because he had been tested so often in the past. As Mr Saoul points out, the reverse of the form includes a warning "that should the athlete choose to consume food or fluids prior to providing a sample, he/she does so at his/her own risk". Both DCO B and Player A then signed the form. Whilst these formalities were being addressed, DCO B and Player A were chatting in a friendly way. Player A seemed entirely co-operative and gave no indication that he did not want to provide a sample. During this time Player A took and consumed another bottle of water from DCO B's cooler bag. At the end of the process, which had lasted some 20-30 minutes, Player A stood up and asked for more water. He selected a bottle from DCO B's cooler bag and took a sip. He then commented that the screw top of the bottle did not "crack" when he opened it and asked to try another bottle. DCO B assured him that the bottles were in fact sealed as they had been bought by DCO A and himself about an hour beforehand but nevertheless offered another bottle. Player A opened the fourth bottle but again said that it had not "cracked", and he was worried that it might be contaminated. It was DCO B's evidence that he then asked a member of the training staff to open a bottle. That person did so and said that he had in fact felt a "crack"; the water was fine. We were told that the club has despite inquiry been unable to locate any such member of staff.

10. It was DCO B's evidence that he tried to re-assure Player A that the water could not be contaminated as it had just been bought, but Player A said it could have been contaminated in the shop. DCO B tried to reason with Player A and persuade him to take the test. As he put it in evidence: "I understand that his concern was legitimate, but my message to him was at all cost to provide a sample". He understood Player A's concerns. He himself had also not noticed any "crack", but there was no possibility of the water being contaminated. Although DCO B was doing his best to encourage Player A, we cannot accept the suggestion made that DCO B told Player A that he too would probably not take the test if he were in Player A's position. DCO B also said that, if he were worried, Player A should drink club water to which Player A said: "Why didn't you tell me that I could drink my own water?". In any case, it was in Player A's view too late. He had already drunk DCO B's water.

11. Since Player A was adamant that the water he had drunk might have been contaminated and he would not provide a sample, DCO B reminded him that failure to provide a sample might be an Anti-Doping Rule Violation. He also suggested that he would be quite content for Player A to compile a formal report in writing to express concern that he might have consumed contaminated water. But Player A was unmoved. He would not be providing a sample after having drunk the water which DCO B had provided.

12. DCO B then went with Player A to the room designated as the Doping Control Station where they spoke to DCO A after she had finished dealing with another player. When she was told what had happened, she again reminded Player A that not taking part in the test might result in Anti-Doping Rule Violation. But Player A said he was not going to do so since he could not guarantee that the water had not been tampered with. Despite DCO A's efforts to persuade him that this was impossible, since she had herself bought the water, he remained firm that he was not going to provide a sample. He also declined even to submit to a blood test since contaminated water might already have reached his blood stream.

13. It is right to note that Player A seems not to have been in any way truculent or aggressive. He readily completed an athlete refusal form in which he wrote [*sic*]:

I WAS APPROACHED BY THE UKAD CHAPERONE AFTER TRAINING AND HANDED BOTTLED WATER THAT I DRANK BUT THEN RAISED ISSUES ABOUT THE BOTTLES NOT BEEN SEALED. 2 BOTTLES THAT I CHECKED ALSO WASNT SEALED. IM CONCERED ABOUT THIS WATER COMPROMISED. ALSO THE CHAPERONE WHITNESSED THE BOTTLES NOT BEEN SEALED AND DIDNT HEAR THE LID CLICK WHEN TWISTED.

Despite all the attempts by DCO A and DCO B both to cajole Player A and to remind him how serious the consequences of refusal could be, Player A would not change his mind. He would not be deflected from his view that the water could have been contaminated. Indeed, he told us in evidence that he would act in the same way now; he was not going to jeopardise his career from having drunk potentially contaminated water before taking a drug test.

14. Whilst his behaviour may seem quite perverse, we have no doubt that Player A genuinely did think that the water might have been contaminated and simply could not take in the serious consequences of refusing a test. He explained in evidence that he "got jittery" and "his head just went"; he "just wanted to get out of the room". And he was not going to take the test because "it's my career on the line".

15. In his witness statement Player A summarised his feelings:

I thought I was being fitted up. Something did not seem right. The tester did not appear to know what was going on. The way he had approached me, got me to drink his water and then told me I was going to be tested was dodgy.

He described his symptoms while DCO B and DCO A were trying to persuade him to provide a sample:

At this point, my head was buzzing. Thoughts were racing through my mind. I did not know who was talking to me. I was panicking and my head goes all fuzzy when I am like this. I could have been anywhere. I just did not want to be there. I wanted to get out and be on my own. I just wanted out of the situation. It was all getting worse.

16. Having heard Player A give evidence we do not for one moment think that he is a cheat or was trying to cover up drug taking. Indeed, we note that a few days later Player A did in fact undergo a drug test (which was negative) without any problem.

THE MEDICAL EVIDENCE

17. There was a considerable amount of medical evidence tending to show that Player A unfortunately suffers from mental health problems. The background is that there is a history of depression within the family, and Player A has had his own emotional problems to contend with, including having at the age of 16 a son with cerebral palsy. Player A has undergone a number of concussive injuries in the course of his rugby playing career, and the evidence suggested that he can on occasion exhibit unusual behavior on the pitch. Player A's medical records indicate a history of Depressive Disorder, Attention Deficit Disorder and Bipolar Affective Disorder.

18. We heard evidence from two psychiatrists, Expert Witness A and Expert Witness B. We were particularly impressed by the evidence of Expert Witness A, although Expert Witness B also expressed considered and thoughtful views. Ultimately, there was little difference between the views of the two psychiatrists even though Expert Witness A was perhaps rather more forceful in his opinion. It was common ground between the psychiatrists that Player A does indeed suffer from three mental illnesses: (1) Bipolar Affective Disorder Type II (2) Attention Deficit Hyperactivity Disorder, and (3) Social Anxiety Disorder. The extent to which on 30 May 2017 the first two of these conditions were affecting Player A's behavior is not wholly clear, but in Expert Witness A's opinion his Social Anxiety Disorder was the key here. However, Expert Witness A's clear conclusion was:

> *[Player A's] mental state was, from a psychiatric perspective, the key component to his ability to think clearly to perceive events accurately and to make sound balanced decisions at the relevant time.*

19. Expert Witness B did not disagree with Expert Witness A's analysis although he was rather more cautious in his conclusions. He told us that the symptoms described by Player A in evidence as being present on 30 May 2017 were consistent with a mental disorder. In addition, Expert Witness B also carried out a cognitive function test. This raised some, albeit not dramatic, concerns, but he would have preferred further testing. And Expert Witness A thought that the key issue here is "Player A's ability to retain and process information in a state of anxious arousal rather than his baseline cognitive functioning assessed in a clinical setting".

20. Our overall conclusion on the psychiatric evidence is that it cannot be said that Player A's mental health impairment deprived him of all cognitive function. However, a triggering event like a concern over water bottles not being sealed is capable of producing a reaction in Player A which deprives him of all ability to think rationally or make any sensible decision. And this is the consequence of the mental illness from which Player A unfortunately suffers.

SUBMISSIONS FOR UKAD

21. As for the Anti-Doping Rule Violation under Article ADR 2.3 (cited above), UKAD's primary case was that there had been a refusal to submit to sample collection but, if this were not a refusal, there had certainly been a failure. The following elements were identified by Mr Giovannelli: (1) that Player A had been notified of the testing (2) that the notification had been authorised (3) that Player A had refused and (4) that the notification was intentional or, in the case of a failure, intentional or negligent. If these elements were made out, then the burden of demonstrating "compelling justification" lay on Player A.

22. There was no issue about the authority and DCO B's evidence clearly demonstrated that Player A had been notified. The reason why intention was said to be required for a refusal was that the Commentary to Article 2.3 of the WADA Code identifies "evading" or "refusing" as contemplating intentional conduct in contrast to "failing" which may be either intentional or negligent. Here, there was on the evidence a conscious and deliberate decision by Player A not to undergo sample collection. There was an intentional refusal. Moreover, whatever the impact of Player A's psychiatric

condition, it could not be said that he had lost all control of all his cognitive functions so that he had no capacity to form any intention at all.

23. The onus of showing some "compelling justification" was on Player A. But the authorities were quite clear. The matter had to be judged objectively. The fact that Player A may himself have thought he was justified in the refusal was immaterial. A narrow interpretation of the words "compelling justification" was required. We were referred to a number of CAS authorities to make good these propositions including Troicki *v ITF*, CAS 2013/A/3279 at paragraph 9.15, *Azevedo v FINA*, CAS 2005/A/4631 at paragraph 75 and *Brothers v FINA* CAS2016/A/4631 at paragraph 77-9. Our attention was also drawn to the observations of an NADP Appeal Tribunal in ████ *v WRU*, 9 June 2010 at paragraph 57.

24. On the basis that this was a refusal case, the mandatory period of Ineligibility under the ADR was four years: ADR Article 10.3.1. It was submitted that no reduction was possible under ADR Article 10.4 (No Fault or Negligence) or 10.5 (No Significant Fault or Negligence). The reason for this was that the Commentary to Article 10.5.2 of the WADA Code stated that the Rule was not applicable "where intent is an element of the anti-doping rule violation", and a refusal was an intentional act. No other argument was adduced for saying that ADR Articles 10.4 and 10.5 were not even capable of application. And Mr Giovannelli did very fairly draw our attention to two authorities where, contrary to his stance, ADR Article 10.5 had been applied in a refusal case.

25. Mr Giovannelli also drew our attention to various features of the evidence, particularly the medical evidence, which pointed to this not being such an "exceptional" case as to fall within either Article 10.4 or Article 10.5. Player A could not possibly be said to have exercised the "utmost caution"; on the contrary, he had been repeatedly warned about the serious consequences of refusing to provide a sample but had simply ignored these warnings. Finally, we were reminded that, even if we were to invoke Article 10.5, the mandatory period of Ineligibility here would still be two years: see ADR Article 10.5.2.

26. Mr Giovannelli also responded briefly to Mr Saoul's reliance on proportionality as a discrete ground for reducing or disapplying any sanction. In his submission there was no warrant for departing from the sanctioning regime established by the ADR based on the WADA Code.

27. In summary, Mr Giovannelli submitted that this was a clear-cut case of an Anti-Doping Rule Violation which under the ADR necessarily attracted a four year period of Ineligibility.

SUBMISSIONS FOR PLAYER A

28. Mr Saoul put at the forefront of his submissions what he described as a catalogue of procedural defects on the part of DCO B and the [redacted] testing in general. It was submitted that these defects were so fundamental that we ought summarily to dismiss the UKAD claim. The matters of complaint against [redacted] concerned: (1) DCO A having shown Mr RG in advance a list of players to be tested (2) DCO B's initial contact with Player A and the fact that DCO B had not shown Player A the reverse of the Athlete Selection Order (3) a failure to maintain a controlled environment at the Doping Control Station where no log was maintained, there was no privacy for a player, activities other than doping control were going on in the room and deviations from doping control requirements were not recorded and (4) DCO B having handled the bottles of water which were not, or seemed not to be, sealed. The testing was a "shambles" as shown by the evidence of Mr RW, Mr RG, Mr DN and Mr BK.

29. Mr Saoul submitted that the informal way in which DCO B had initially approached Player A and then waited until the dressing room before completing the formalities was particularly serious. There had been no proper notification of testing to Player A for the purposes of ADR Article 2.3. Moreover, even if the procedural defects had to be shown to be causative of the alleged Anti-Doping Rule Violation, the fact that Player A had not been told that he did not have to drink DCO B's water and the lack of privacy for him at the Doping Control Station were, in the light of Player A's mental condition, both causative of a sample not being provided.

30. Mr Saoul agreed with Mr Giovannelli in reliance on the Commentary to Article 2.3 of the WADA Code that there had to be intention for a refusal to submit to sample collection. However, he submitted that intention had to be judged by reference to the definition provided by ADR Article 10.2.3. A narrow construction of Article 2.3 was appropriate for that Article, for it was similar in effect to a penal provision: cf. Bennion on Statutory Interpretation (6th ed). There could not here be any intention either within the Article

10.2.3 definition or at all given Player A's mental condition. He was not a cheat and lacked capacity to form an intent.

31. We were also reminded by Mr Saoul of the requirement for an absence of compelling justification before there could be an Anti-Doping Rule Violation. He accepted that the threshold for establishing "compelling justification" was high. However, he maintained that we should take account of Player A's mental condition, as one would a physical infirmity, when considering the matter. And he referred to three decisions where compelling justification had been found: *IRB v Nelo Liu, USADA v Page* and *Greek Swimming Federation v Xynadas*. Whilst cases where a successful plea of compelling justification might be rare, it is important not to water down an express requirement to such an extent as to deprive it of all of all practical content. Mr Saoul submitted that, whether or not Player A was correct, he clearly had a legitimate fear that the water might have been contaminated and that this justified him in not taking a test. The water bottles provided to him were not sealed or at least did give that impression. And there could be no doubt as to the genuineness of Player A's belief.

32. If we were against Player A on everything else, Mr Saoul submitted that we should conclude that in the light of Player A's mental health and the medical evidence there was No Fault or Negligence or, at least, No Significant Fault or Negligence. Contrary to Mr Giovannelli's submission, it would be open to us to find that there was No Fault, or No Significant Fault or Negligence even if we were to find an intentional refusal by Player A; see for example *Brothers v FINA* CAS 2016/A/4631 especially at paragraph 96; *Azevedo* v FINA CAS 2005/A/925. He also referred us to observations made in a recent NADP Appeal decision, [redacted] *v* [redacted], 1 August 2014, at paragraph 101.

33. As CAS had on several occasions pointed out, it was important not to set the test for No Fault or Negligence so high as to make it impossible to meet. Here, Fault or Negligence has to be assessed by reference to Player A's mental infirmity. This is a truly exceptional case and it would be wrong to judge Player A by standards wholly inappropriate for him. He had had a genuine belief that he might have drunk contaminated water and due to his condition was entirely unable to think rationally.

34. Finally, Mr Saoul invited us to consider an overarching question of proportionality. A four year period of Ineligibility, or even on a certain hypothesis a two year period, would be grossly unfair for a mentally disturbed player nearing the end of his playing career who had held a genuine, even if unjustifiable, belief. In support of his argument Mr Saoul prayed in aid a number of cases which are familiar in the context of this argument such as the cases of *Puerta v ITF* CAS 2006/A/1025 and, more recently, *Klein v Australian Sports Anti-Doping Authority* CAS A4/2016 and *Football Association v Livermore*.

DISCUSSION

Refusal or failure

35. It appears to us that there cannot sensibly be any doubt but that Player A refused to submit to sample collection. He was urged to provide a sample on several occasions, and on several occasions he was adamant that he was not going to do so because the bottles of water from which he had drunk had, he said, not been sealed. Furthermore, Player A not only refused verbally. He also made his position crystal clear by signing the Athlete Refusal Form and then himself filling in and signing a Supplementary Report. His reaction to events and the way he responded may be regarded as irrational. But, an irrational refusal is still a refusal.

36. As for intention, Player A's refusal was on any showing, as Mr Giovannelli put it, conscious and deliberate. It was indubitably intentional on the ordinary meaning of that word. ADR Article 2.3 does not expressly refer to an intentionality requirement. However, we do note that the Comment to Article 2.3 in the WADA Code says:

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

By Article 1.5.4 of the ADR we are required to use this and other Comments to the WADA Code to interpret the ADR. The Comments are an aid to construction but not, of course, themselves free standing provisions of the ADR. Nevertheless, building on this Comment Mr Saoul submits that (1) UKAD has to establish intention to refuse on the part of Player A and (2) intention is to be judged by reference to the specific provisions of ADR

Article 10.2.3. On the facts, says Mr Saoul, Player A's mental condition is such that he could not and did not form any real intent.

37. There are a number of difficulties with this argument. First, intention is not referred to as a requirement in ADR Article 2.3 itself. In our view the Comment in question is doing no more than saying that, whilst a failure may be inadvertent, it is hard to see how a refusal can be anything other than deliberate. Secondly, whilst ADR Article 10.2.3 specifically refers to the application of the term "intentional" to ADR Articles 10.2 and 10.3 it makes no reference to Article 2.3. Instead, ADR Article 2.3 is expressly mentioned in Article 10.3.1 which provides:

> *For an Anti-Doping Rule Violation under Article 2.3 or Article 2.5 that is the Athlete's or other Person'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.*

It will be noted that this Article only mentions a case of failing, rather than refusing, to submit to Sample collection.

38. In our view, Player A plainly did intend to refuse the provision of a Sample whatever his state of mind. As with a refusal, an irrational intention is still an intention. In any event, we do not believe that ADR Article 2.3 is to be interpreted as if it incorporates what a criminal lawyer would refer to as *mens rea*. That would be to read too much into the Article.

Notification and Authority

39. In our view Player A plainly was notified of a request to provide a sample. He knew that he was being asked to do so; indeed, that was precisely why he refused. ADR Article 2.3 itself incorporates no specific requirement as to how the notification is to be effected. We shall address below what are said to have been the procedural defects in the form of notification. As for the authority under which the testing was to be carried out by ████ on behalf of UKAD, it is not in dispute that the testing was duly authorised.

Compelling Justification

40. The great preponderance of authority is to the effect that the existence of a "compelling justification" is to be judged objectively rather than by reference to a given athlete's own perception. As it was put in *Azevedo v FINA*, cited above:

> *No doubt, we are of the view that the logic of anti-doping tests and of the DC Rules demands and expects that, whenever physically, hygienically and morally possible, the sample be provided despite objections by the athlete. If that does not occur, athletes would systematically refuse to provide samples for whatever reasons, leaving no opportunity for testing.*

In the *Brothers* case, cited above, the Tribunal followed the same principle in saying at paragraph 77:

> *After due consideration, the Panel chooses to follow the precedent set in the Azevedo, Troicki and Boyle decisions cited above. If it remains "physically, hygienically and morally possible", for the sample to be provided, despite objections by the athlete, the refusal to submit to the test cannot be deemed to have been compellingly justified.*

To the same effect are a number of other decisions cited to us. We propose to follow the above approach. The subjective state of mind and thoughts of the athlete may come into play when considering a question of fault or negligence. But in our view, compelling justification is used in ADR Article 2.3 as a matter of objective fact. On that basis, there can be no question of compelling justification here. There was no valid reason for Player A not to have taken the test. Any concern of Player A over the water could have been catered for by doing as DCO B in fact suggested, that is by his making a written record of his concerns, and even retaining one of the bottles of water for subsequent analysis if necessary.

Procedural Defects

41. ADR Article 5.1 provides:

> *These Rules adopt and incorporate the International Standard for Testing and Investigations, as amended from time to time.*

We were also referred by Mr Saoul, in addition to that Standard ("ISTI"), to the WADA Blood Sample Collection Guidelines ("the Guidelines") which he informed us, without contradiction from Mr Giovannelli, were identical to guidelines for urine sample collection. The Guidelines do not form part of the ADR, but we accept they may potentially have some relevance.

42. As a practical matter, we do not think it fair to criticise [redacted] for the fairly informal way in which the testing of 30 May 2017 was conducted. DCO B was evidently anxious to secure the co-operation of players and his informal approach was designed to put Player A at his ease. Having said that, a number of departures from ISTI and the Guidelines were identified. We have to consider whether they were such as entirely to vitiate the proposed test for Player A which he refused to undergo.

43. The following departures from ISTI and the Guidelines were identified:

(1) DCO A had shown Mr RG, the Rugby League Football Club A Head Physio, a list of players to be tested in advance of commencement of the testing procedure for Player A. This was contrary to Article 5.3.7 of ISTI which provides for the Athlete to be the first person to be notified that he or she has been selected for sample collection.

(2) ISTI Article 5.4.1 has a list of matters of which the Athlete is to be informed "when initial contact is made". Player A was first approached as he came off the training pitch. There was a gap between then and the time when DCO B attended to the formalities in the dressing room. Moreover, DCO B did not read out all an Athlete's rights and responsibilities; his attempt to draw Player A's attention to what was said on the reverse of the Athlete Selection Order was thwarted by Player A's unwillingness to look at it because of his familiarity with testing. Thus, ISTI Article 5.4.1(g) was not complied with. This requires an Athlete to be informed: "That should the Athlete choose to consume food or fluids prior to providing a Sample, he/she does so at his/her own risk".

(3) Mr Saoul also complained of what was said to have been a failure to "maintain a controlled environment" for the Doping Control Station. DCO A kept no log of exits and entry contrary to the Guidelines, Article 6.2.1. There were breaches of ISTI Article 6.3.2 in that (a) activities other than just doping control were being conducted there (b) Player A was not attended to in private and (c) no record of deviations from the ISTI requirements was kept.

(4) The final complaint was of what was said to have been a breach of Article 6.1.2 of the Guidelines. This states that "the DCO/Chaperone should not handle food or drink items for the Athlete" and was said to have been breached by DCO A and DCO B buying the water bottles, unpacking them and putting them in DCO B's cooler bag. We do doubt if unpacking water bottles is really a vice at which the Guidelines are aiming.

44. In considering the allegations of procedural error we are required to bear ADR Article 8.3.6 and 8.3.7 in mind. They provide in material part:

> *8.3.6 Departures from any other [than sample analysis] International Standard or other anti-doping rule or policy set forth in these Rules of [sic] the Code that did not cause ... the factual basis for any other Anti-Doping Rule Violation with which the Athlete or other Person is charged shall not invalidate such evidence or results. If the Athlete or other Person charged with committing the Anti-Doping Rule Violation establishes the occurrence of a departure from another International Standard or other anti-doping rule or policy occurred that could reasonably have caused the .... factual basis for any other Anti-Doping Rule Violation with which the Athlete or other Person is charged, then UKAD shall have the burden of establishing that such departure did not cause the ... factual basis for such other Anti-Doping Rule Violation.*
>
> *8.3.7 Any other deviation from ... the procedures referred to in these Rules shall not invalidate any finding, procedure, decision or result under the Rules unless the Athlete or other Person relying on such deviation*

> *establishes that it casts material doubt on the reliability of that finding, procedure, decision or result, and UKAD is unable to rebut that showing.*

In summary, we are required by the ADR to consider the causative effect on the facts of any breaches of ISTI (and possibly, as well, the Guidelines).

45. Mr Saoul's primary submission was that the procedural defects which he identified were such fundamental breaches that we should dismiss the present case regardless of Article 8 of the ADR. In support of this submission he relied on four authorities, although Mr Giovannelli pointed out that three of the older cases antedated the introduction of a causation qualification in the WADA Code. Nevertheless, more recently, in *United States Anti-Doping Agency v Jenkins*, American Arbitration Association, 25 January 2008, it was said at paragraph 136:

    > *In view of the grave implications for athletes, such as Ms. Jenkins, who are held entirely in account for any transgression of applicable anti-doping rules, testing laboratories must also be held strictly to account for any non-compliance with those same rules. Failure to comply with the mandatory standard contained in ISL 5.2.4.3.2.2 cannot be viewed as a mere technicality. The strict liability regime which underpins the anti-doping system requires strict compliance with the anti-doping rules by everyone involved in the administration of the anti-doping regime in order to preserve the integrity of fair and competitive sport.*

    No doubt these are laudable sentiments, although we note that on the facts of that case the failure in question may have caused the Adverse Analytical Finding. We do not believe it is open to us simply to disregard the explicit provisions of ADR Article 8, however seriously any procedural defects are to be viewed. We turn, therefore, to consider the actual or potential causative effect of the defects in the present case.

46. We agree with Mr Giovannelli that none of the errors of which complaint is made could have been causative of the "factual basis" of Player A's refusal to provide a sample. It could perhaps be said that, if Player A had been told that he drank water "at his own risk", he might not have drunk the water at all and this was what resulted in his refusing to provide a sample. However, the difficulty with this argument is that the warning in question was on the reverse of the Athlete Selection Order and Player A himself declined

to read the document because, so he said, he was very familiar with the testing procedure and had heard it all before. And it is notable that it was after the completion of all the notification formalities in the dressing room that Player A in fact drank a second bottle of water without any concern. It was not until the third bottle of water that the problems arose.

47. The importance of anti-doping authorities observing the ISTI requirements should not be underestimated. Nevertheless, we also think that any Tribunal must have the substance rather than merely the form in mind. We do not dismiss the claim on account of any procedural errors on the present facts.

Anti-Doping Rule Violation

48. We have the greatest sympathy for Player A's mental health difficulties. However, it follows from the above that we are driven to conclude that there was an Anti-Doping Rule Violation in the refusal to submit to sample collection on 30 May 2017. This would necessarily involve a four year period of Ineligibility under ADR Article 10.3.1 unless the Rules about no, or No Significant, Fault or Negligence apply or, perhaps, if Mr Saoul's proportionality arguments are correct. Accordingly, we turn to these questions.

Fault or Negligence

49. Articles 10.4 and 10.5 provide in material part as follows:

> ***10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence***
>
> *If an Athlete or other Person establishes in an individual case that he/she bears No Fault or Negligence for the Anti-Doping Rule Violation charged, then the otherwise applicable period of Ineligibility shall be eliminated.*
>
> ***10.5 Reduction of the period of Ineligibility based on No Significant Fault or Negligence…***

10.5.2 Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1:

In an individual case where Article 10.5.1 is not applicable, if an Athlete or other Person establishes that he/she bears No Significant Fault or Negligence, then (subject to further reduction or elimination as provided in Article 10.6) the otherwise applicable period of Ineligibility may be reduced based on the Athlete's or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable…….

The definitions of Fault and No Significant Fault in the ADR are also relevant to the present case. Fault is defined as:

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 Minor, special considerations such as impairment, the degree of risk that should have been perceived by the 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 his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.

No Fault or Negligence and No Significant Fault or Negligence also bear defined meanings under the ADR:

***No Fault or Negligence**:*

The Athlete or other Person establishing that he or she did not know or suspect, and could not reasonably have known or suspected, even with the

exercise of utmost caution, that he or she had... violated an anti-doping rule....

***No Significant Fault or Negligence**:*

The Athlete or other Person establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relation to the Anti-Doping Rule Violation...

50. If our conclusion depended on the standard of the reasonable man, we would be quite unable to say that there was no, or No Significant, Fault or Negligence. Any ordinary rational person would not have refused to provide a sample because he had drunk from a water bottle which did not "crack". However, we are clearly of the view that the ADR test does not depend on how a reasonable man would have behaved. It is plain from the definition of fault that we are directed to an assessment of the individual circumstances of the individual committing the Anti-Doping Rule Violation. Indeed, we note with interest that the definition directs us specifically to, amongst other considerations, "special considerations such as impairment".

51. Mr Saoul described this as an extremely unusual – indeed unique - case. We agree. It must be highly unusual for an anti-doping tribunal to have to consider an individual with three different psychiatric conditions. The way Player A behaved with a sudden swing from evident co-operation to downright refusal was entirely irrational. As we have said, we were impressed with the psychiatric evidence, particularly the evidence of Expert Witness A. Although Player A was told that his refusal might be an anti-doping rule violation and that the consequences might be serious, his mind was quite unable to take in or process this information. We can only conclude that what made Player A adopt the attitude which he did was his serious mental impairment. On that basis we do not believe it to be right to conclude that he was at fault or negligent. It would be unfair to Player A and inconsistent with the approach of the ADR in its definition of fault to judge his actions artificially, that is by reference to an ordinary person lacking his psychological impairment.

52. We would therefore conclude in the very exceptional circumstances of this case that, unless there is some bar to our doing so, Player A bears No Fault or Negligence. Mr Giovannelli submitted that we would be precluded from such a finding because Articles 10.4 and 10.5 cannot apply to an intentional act like refusing to provide a sample. He

referred us to the Comment to Article 10.5.2 of the WADA Code. We query whether, strictly speaking, intent is actually an element of the Anti-Doping Rule Violation of refusing a sample although we agree that it is hard to envisage a case in practice of refusal without intent. But in any case Mr Giovannelli's submissions in our view read too much into the Comment. This Comment, like other Comments, is clearly addressing the position of the average ordinary person rather than the unusual individual with severe psychological impairments.

53. We do not think that we are precluded from reaching the conclusion that ADR Article 10.4 of the Code applies here in the extremely unusual circumstances. We are fortified in this conclusion by passages in cases to which we were referred, notably *Brothers v FINA* (cited above), *Azevedo v FINA* (cited above) and *ITF v* ███, 7 November 2017. We pay less attention to NADP cases in which UKAD has previously not disputed that a refusal case is at least capable of entailing No Significant Fault, that is *UKAD v Six* and *UKAD v Hale*.

54. Given our conclusion on ADR Article 10.4, we do not need to address ADR Article 10.5. We should, however, like to stress that the present is a truly exceptional case on its own very special facts and psychological evidence. We do not think that it should be taken as any sort of precedent for other cases.

Proportionality

55. In the light of our conclusion on ADR Article 10.4, we do not need to address the arguments on proportionality. We would only remark that we have the gravest doubts whether the principle can be properly used so as to disapply some result expressly mandated by the ADR and WADA Code. Possibly, the principle may apply to a genuine lacuna. But, our decision demonstrates that there is no lacuna here.

CONCLUSION

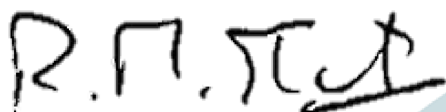
56. For the reasons set out above we find that:

    (1) the Anti-Doping Rule Violation is established; but

    (2) in the truly exceptional circumstances of his case, Player A bears No Fault or Negligence so that the otherwise applicable period of Ineligibility is eliminated;

(3) neither party sought an order for costs.

In accordance with Article 13 of the National Anti-Doping Panel Rules, either party may file a Notice of Appeal against this decision within 21 days of receipt of the decision.



Robert Englehart QC

Chairman on behalf of the Tribunal

London, 08 December 2017

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