SR/NADP/515/2016

NATIONAL ANTI-DOPING PANEL

IN THE MATTER OF PROCEEDINGS BROUGHT
UNDER THE ANTI-DOPING RULES OF
THE BRITISH CYCLING FEDERATION

Before:

Mr William Norris QC (Chairman)
Professor Peter Sever
Dr Terry Crystal

B E T W E E N:

GABRIEL EVANS

Appellant

- and -

UK ANTI-DOPING

Respondent

DECISION OF THE NATIONAL ANTI-DOPING PANEL

All references shown in [ ] are to the agreed bundle

Introduction and Summary

1. Mr Evans, to whom we shall hereafter refer as the Appellant, appeals against a decision of UK Anti-Doping ('UKAD') dated 18th December 2015, the effect of which was to impose a period of ineligibility of 3 years and 6 months running from 16th October 2015 to 15th April 2019.

2. UKAD's decision arose out of a finding that Mr Evans, then an 18 year old amateur cyclist[1], had possessed and used a Prohibited Substance: namely, erythropoietin, commonly known as EPO. The use of a Prohibited Substance would, obviously, be a clear breach of the UK Anti-Doping Rules[2] ('ADR') and the relevant provisions would be ADR Articles 2.2 and 2.6.

3. Following an investigation, UKAD exercised its power under ADR Article 10.6.3 to reduce the Appellant's period of ineligibility from 4 years to 3 years and 6 months. The exercise of that power was discussed with and approved by WADA and was promulgated by way of what is known as an "*Issued Decision*" on 18th December 2015.

[1] Date of birth 18th February 1997.
[2] Version 1, dated 1st January 2015 – [79-143].

4. The Appellant challenges that decision on a number of grounds contained in an Amended Notice of Appeal dated 24th May 2016 [9-10], developed in a skeleton argument by the Appellant's counsel, Andrew Smith [63-67], and in his oral submissions.

5. The basis on which UKAD reached its original "*Issued Decision*" [1-7] was analysed in UKAD's written submissions [69-76] and by Stacey Cross who represented UKAD at this appeal.

6. We wish to record our thanks to both parties and to their legal representatives for the clarity and courtesy with which they prepared for and conducted the appeal. We would wish, particularly, to pay tribute to Mr Smith who conducted Mr Evans's appeal with conspicuous skill, acting pro bono.

7. As we explain in more detail hereafter, we think there is no substance in this appeal and, moreover, no basis whatsoever for contending that the Appellant has been dealt with unfairly or treated unduly harshly. On the contrary, the unanimous view of the Panel is that, notwithstanding the Appellant's age at the time and relative inexperience, he was an intelligent and well-educated young man who committed a very serious anti-doping violation in circumstances in which he must have known that what he was doing was wrong at every imaginable level. Far from thinking that he has been dealt with harshly, the view of this Panel is that he has been dealt with leniently.

8. It therefore follows that we dismiss the appeal but, in deference to the arguments put forward by the parties and the possible wider interest and significance of the

issues that they have canvassed, we should develop our reasons in more detail thereafter.

The Facts

9. As we have already indicated, Mr Evans has at all material times been an amateur cyclist but has competed at a high level. As he explains in his witness statement [11], he has "*participated in national-level sport since the age of 13, in the sport of rowing until 16 years old, and the sport of cycling from then onwards*". He says he had "*notable success*" as a cyclist, winning the junior (under-19) National Cycling Time Trial Championships and was subsequently offered a place on the Catford CC Equipe/Banks team for the 2015 season which offer he accepted.

10. On his own admission,[3] he decided that he would take – or, as he would prefer to put it - "*experiment with*" EPO. He found a supplier over the internet and placed an order for six vials [25]. He accepted an invitation to join a teammate (hereafter referred to as LM) for a week's training camp in France and stayed with LM's family for the week beginning 11th August 2015. On his own admission [30] he took "*one vial prior to this trip. During this trip I finished another vial, one vial lasts approximately a week. During this trip I took another vial. Upon my return to England I destroyed all the vials and syringes*". He "*took*" his vial by injection into the stomach, a method that he explained he found out about online [37].

[3] Here we refer both to his witness statement [11-14] and to his answers in interview with representatives of UKAD [15-52] and to the "*statement*" he posted on "Time Trialling Forum" [53].

11. During the course of the trip (one surmises) LM and/or his father, DM, became suspicious and the latter found a vial hidden in the fridge. DM set up a Go-Pro camera which succeeded in filming the Appellant retrieving that vial from the fridge. DM confronted him. The Appellant initially lied, claiming it was insulin which he needed as a diabetic[4] and then said it was testosterone. DM recorded some or all of that conversation on his telephone [22]. DM evidently made some sort of report to responsible anti-doping authorities back in England and in due course the matter came to the attention of UKAD.

12. The Appellant says [12] that being confronted in this way by DM put him "*under a great deal of pressure*" and he became "*very emotional and frantic*". That same day (16th August 2015), he notified the organisers of the Junior Tour of Wales that he was withdrawing from the race due to be held on 29th August 2015. He returned home, he says, on 18th August 2015 [12] but did nevertheless compete in (and win) the National Junior 10m TT on 5th September 2015 [53].

13. At some stage,[5] he was contacted by Mr Graeme Simpson of UKAD and was invited for interview. Those interviews took place on 24th September 2015 [15-52].

14. The Appellant's explanation to UKAD was in line with the case he presented to us. He admitted what he had done but insisted that he had taken what he knew to be EPO not to gain any benefit in terms of competitive performance but out of "*curiosity really, experimenting*" – [28]. He nevertheless admitted that he was familiar with the case of Lance Armstrong and acknowledged that he knew that

[4] He was not a diabetic and he did not need insulin and the substance was in fact EPO.
[5] He says it was "*a few days after returning home*" – see para.11 [12].

taking EPO was a breach of the wider code [29]. He continued to insist that his use of the drug was an "*experiment*" and only done out of "*curiosity".*

UKAD's Issued Decision: Application of Relevant Anti-Doping Rules

15. It is common ground that at all material times, the Appellant was subject to the jurisdiction of the British Cycling Federation (BCF) which is the governing body for the sport of cycling in the United Kingdom. It is also accepted that, accordingly, the Appellant is bound to comply with the Anti-Doping Rules (ADR) and that, pursuant to those Rules, UKAD has results management responsibility in the event of an actual or suspected breach.

16. ADR Article 2.2 provides that the following constitutes an Anti-Doping Rule Violation:-

> *"2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method, unless the Athlete establishes that the Use or Attempted Use is inconsistent with a TUE granted in accordance with Article 4."*

Further, ADR Article 2.6 provides that the following constitutes an Anti-Doping Rule Violation:-

> *"2.6.1 Possession by an Athlete In-Competition of any Prohibited Substance or any Prohibited Method, or Possession by an Athlete Out-of-Competition of any Prohibited Substance or any Prohibited Method which is prohibited Out-of-Competition unless the Athlete establishes that the Possession is consistent with a Therapeutic Use Exemption ("TUE") granted in accordance with Article 4 or other acceptable justification."*

17. It follows that UKAD was bound to find that the Appellant had committed Anti-Doping Rule Violations pursuant to ADR Articles 2.2 and 2.6.

18. The question of sanction is dealt with in ADR Article 10.2. Particularly, ADR Article 10.2.1 provides that:

> *"10.2.1 The period of ineligibility shall be four years where:*
>
> *(a) The Anti-Doping Rule Violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the Anti-Doping Rule Violation was not intentional.*
>
> *(b) The Anti-Doping Rule Violation involves a Specified Substance and UKAD can establish that the Anti-Doping Rule Violation was intentional."*

19. It follows that the appropriate sanction was to impose a period of ineligibility of 4 years unless the Appellant was able to establish that the Anti-Doping Rule Violation was not intentional as provided for in ADR Article 10.2.3. We need not quote that provision in full since it is self-evident that the Appellant acted "*intentionally*" as that word is defined in ADR Article 10.2.3. Equally, there was no question of UKAD entertaining any argument that this was a case of "*no fault or negligence*" or "*no significant fault or negligence*" under ADR Articles 10.4 or 10.5, nor was any such argument advanced to that effect.

20. The real issue here concerns Article 10.6.3. This provides:

"*10.6.3 Prompt admission of an Anti-Doping Rule Violation after being confronted with a Violation Sanctionable under Article 10.2.1 or Article 10.3.1:*

An Athlete or other Person potentially subject to a four-year sanction under Article 10.2.1 or Article 10.3.1 (for evading or refusing Sample Collection), ***may*** *receive a reduction in the period of ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete's or other Person's degree of Fault by promptly admitting the asserted Anti-Doping Rule Violation after being confronted with it, upon the approval and at the* ***discretion*** *of WADA and UKAD.*"

[our added emphasis]

21. The effect of that provision is clear. It expressly provides that UKAD in conjunction with WADA has a "*discretion*"[6] to reduce the period of ineligibility down to a minimum of 2 years if he has made a prompt admission. However, such reduction expressly depends on "*the seriousness of the violation and the Athlete's degree of fault by promptly admitting the … violation*."

22. UKAD's view, expressed at paragraph 24 of the Issued Decision [3], was that these were "*very serious violations*" so that that element did not justify any reduction but nevertheless it felt able to make what it called "*a small reduction in the period of ineligibility based on Mr Evans's fault. In exercising this discretion, UKAD has taken the view that Mr Evans's decision making skills were in part affected by his relative immaturity*" – see paragraph 26 [4].

[6] As one sees, the word '*discretion*' actually appears in the Rule but would otherwise be provided for in the words "*may receive*" a reduction in sanction.

23. Paragraphs 27 and 28 of the Decision identify the period of ineligibility as being 3 years and 6 months and note that WADA confirmed their agreement by letter of the 7th December 2015 [4].

The Grounds of Appeal

24. The Appellant's Amended Notice [9-10] as developed in Mr Smith's Skeleton Argument [63-67] identify four grounds.

25. Ground 1 states that UKAD was wrong to take the view it did of the seriousness of the violation since the Appellant was not intending to improve his performance in competition, he was experimenting, and was in any case taking it only during training. In the same context, Mr Smith prays in aid the relatively short time during which the EPO was taken, the relatively small amount and the out-of-competition circumstances and relies also on the Appellant's previous "*unblemished record*".

26. Grounds 2 and 3, in relation to "*degree of fault*" focus on the absence of any formal anti-doping training and on the Appellant's age, inexperience and immaturity.

27. Ground 4 is characterised as "*mitigation more generally*" and focuses on the devastating effect on and consequences for the Appellant who is soon to begin a course at university[7] where he would ordinarily have hoped to enjoy full participation in sporting activities.

[7] Studying engineering.

The Appeal Panel's approach to and powers arising on this Appeal

28. We have already seen that ADR Article 10.6.3 is drafted so that, in effect and expressly, it provides UKAD and WADA with a discretionary power in relation to a reduction of the 4 year sanction.

29. Mr Smith sought to persuade us that our approach should be broad and pragmatic in the sense that, if we felt that the decision of UKAD/WADA was one with which we disagreed, we should feel able to overturn it. UKAD, on the other hand, argued that we should approach the appeal in exactly the same way as any appellate body would approach an appeal on findings of fact and, particularly, should recognise that the powers of an appellate body are constrained where the appeal is against the exercise of discretion.

30. In short, UKAD's submission which we endorse as correct, is that we should only interfere with UKAD/WADA's decision in the event that we decide that the exercise of their discretion was one that no reasonable decision maker could have reached and/or where the process whereby it was reached was flawed or unfair and/or where the decision-maker misapplied the rules or failed to properly analyse and apply matters of evidence.

31. Since our firm opinion was and is that we should approach the appeal on the basis that we were reviewing the exercise of discretionary power, it might well have been said that there was no need or indeed any good reason to hear fresh evidence on the appeal. We had, as we have already explained, the Appellant's

witness statements as well as the details of the interviews that he gave to UKAD. However, Mr Smith asked that we hear from the Appellant orally and UKAD did not object.

32. In hearing from the Appellant in evidence, because both parties were content with that course, we would certainly not wish to be seen to be suggesting that this practice should be followed as a matter of course. In any case, if our assessment of the Appellant's evidence matters at all, we feel bound to observe that we found the Appellant's explanation that he acted only out of "*curiosity*" utterly unconvincing. As observed above and as was readily apparent from his evidence, the Appellant was an intelligent and articulate young man who had had a good private education. If it had mattered, we would have had no hesitation in finding that he knew perfectly what EPO was and knew equally well that it was a major breach of the Rules to take it.

33. The idea that it was something which might only have helped him "*in training*" as opposed to "*in competition*" is, frankly, absurd. This substance is prohibited in or out of competition. Indeed, as the Appellant readily acknowledged in answer to a question from the Panel, even though training may be inherently enjoyable or interesting, at least one part of it is to prepare for competition. If one takes a substance which may affect one's performance in training, it necessarily follows that it may affect one's performance in competition.

34. Accordingly, our own judgment on the "*seriousness point*", which is the first criterion arising under ADR Article 10.6.3, would have been, as UKAD decided, that

this was a "*very serious violation*". The suggestion that the Appellant took a "*relatively small amount*" and for "*only a very short period of time*" [65] also completely misses the point. On his own admission, the Appellant had purchased and would have taken six vials and the only reason he stopped – hence the "v*ery short period of time*" - was because he was caught.

35. As regards Grounds 2 and 3, which relate to the "*degree of fault*" it is, in our view, also missing the point to suggest that he may have received no "*formal anti-doping training or education*". The Appellant was far too intelligent a young man to think – and in any case acknowledged that he knew – that EPO was other than a prohibited substance that no honest athlete should touch. Nor are we particularly impressed by the fact that he was relatively inexperienced, naïve or immature and his previous "*unblemished record*". He was old enough to know better.

36. Hence we would regard his relatively young age and inexperience as an insignificant consideration in context. In any case, we see from UKAD's Issued Decision at paras 25-28 [4] that it did in fact take account of his "*relative immaturity*": it was that consideration which persuaded them to exercise their discretion to reduce his period of ineligibility to 3 years and 6 months.

37. As we indicated above, we consider that such reduction was well within the scope of discretion of the reasonable decision maker. Even were we to have substituted our own judgment for that of UKAD, we would not have treated him any more leniently.

Our Powers on Appeal

38. The starting point for considering appeals is to look at ADR Article 13 [127]. It is common ground that UKAD's Issued Decision under ADR Article 10.6.3 is one that arises under the heading "*appeals from other decisions*" at Article 13.4.

39. Article 13.4.1 gives rights of appeal to (a) the athlete, (c) UKAD and (h) WADA. In the case of an international-level athlete, the appeal must be "*made exclusively to CAS*"[8] or otherwise it is made to an NADP Appeal Tribunal "*following the procedures set out in the NADP Rules and in Article 13.7 of these Rules, unless the parties to the appeal all consent that the appeal should be heard by CAS*" – see Art.13.4.2(b) [129].

40. It is to be noted that decisions from an NADP Appeal Tribunal such as the present one may "*be challenged by appeal to CAS only by WADA, the relevant international federation and, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, by the International Olympic Committee and Paralympic Committee as applicable*". Subject thereto, decisions of the NADP "*shall be the full, final and complete disposition of the appeal and would be binding on all of the Persons identified in Article 13.4.1*" – [129].

41. The one issue as to jurisdiction which remains unresolved and which was the subject of submissions during the course of and following the hearing of this

[8] Article 13.4.2(a) [128].

appeal concerned the extent of the NADP's power in the event that it were to allow an appeal.

42. The issue could be formulated in this way: are we limited to quashing a decision, leaving the decision maker (here UKAD/WADA) with an entirely free hand in the new decision making process (Option One)? Or can we quash it but make a non-binding recommendation to the decision maker (Option Two)? Or can we go so far as to quash it and substitute our own (and binding) decision in place of the decision of UKAD/WADA (Option Three)?

43. As should be apparent from the foregoing, far from quashing the decision under appeal we endorse it. Hence any issue as to what our powers might have been becomes academic and the observations which follow have to be regarded as such.

44. In a well-structured and thoughtful submission, Mr Smith argued that, in an appropriate case, the NADP does in fact have the power to substitute its own decision (Option Three). He prays in aid the terms of Art.13.7.4 which appear under Art.13.7 "appeal procedure". This provides that "*the scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker*" [130].

45. Mr Smith's argument is that the effect of that provision is to give the NADP an unlimited power to do what it regards as fair and just in an appropriate case – Option Three. To that extent, he invites us to depart from the decision of a RFU Anti-Doping Appeal Panel in *UK Anti-Doping v. The Rugby Football Union and Dan Lancaster*, a copy of the decision in which case we have at [144-156].

46. UKAD's submission, which it supplemented in an email sent (pursuant to a direction we made at the hearing of the appeal) on 24th June 2016, is that the *Lancaster* decision is correct. UKAD argues that this Panel has no power to substitute its own preferred sanction and that this is consistent with the powers of CAS. UKAD argues that this is because neither CAS[9] nor the NADP has any power to exercise a discretion that is expressly vested (by the ADR) in UKAD/WADA.

47. In response to that email, Mr Smith has re-affirmed his disagreement with that analysis and relies on his earlier submissions in answer to what UKAD has now added.

48. We can see that, in a case such as the present, if we did disagree strongly enough with UKAD/WADA's decision, it would be unsatisfactory if (per Option One) we could not even hint at what we felt would have been an appropriate sanction.

49. We can also see that there is a theoretical risk that, if our powers were limited to quashing a decision, albeit offering a recommendation as to the appropriate sanction (Option Two), that in the event that UKAD disagreed with our recommendation there might be an almost perpetual process of fresh decision followed by further appeals. However, we suspect that such risk is illusory.

50. For what it is worth, the view of this Appeal Panel is that we would approach matters on the basis that the NADP has no power, when allowing an appeal which has the effect of quashing a UKAD/WADA discretionary decision, to substitute a

[9] For CAS's powers, see ADR Art.13.7.5

binding ruling as to the appropriate sanction that should have been imposed (that is, we reject the argument that we could take Option Three).

51. Whether it would be appropriate to follow Option One or Option Two in the event that a UKAD/WADA decision is quashed on appeal would, in our view, depend on the facts of the individual case. If an appeal succeeded on the basis of procedural error, for example, then an Appeal Panel might prefer Option One. On the other hand, if the appeal were allowed on the basis that the sanction imposed by UKAD/WADA was so harsh that no reasonable body could have reached such a decision, it would be odd in the extreme if the Appeal Panel did not think it sensible to explain what it felt would have been a reasonable sanction. In that case, we imagine the Appeal Panel would prefer Option Two and we doubt that the fact that the Appeal Panel's recommendation was then non-binding would be of any significance in practice.

52. As a comment, we observe that we do not think that the Rules are as clearly written as they could be and it would be perfectly simple and no doubt would be helpful for this question of the extent of our powers to be dealt with directly.

53. But on the ADR as they stand, given that this debate is academic in the present case, what we say is intended to be helpful and no more. Our views are not binding on another panel which can address the issue as and when it arises directly, assuming that the ADR are not revised so as to eliminate any scope for variations of interpretation.

Conclusion

54. For those reasons, the Appeal is dismissed and the Appellant will serve a period of ineligibility which is deemed to have commenced from 16th October 2015[10] and that period of ineligibility will end at midnight on 15th April 2019. During that period, his status will be as detailed in ADR Article 10.12.

WILLIAM NORRIS Q.C.
For the Tribunal
5 July 2016

[10] Which is when he consented to a voluntary provisional suspension: he was charged on 5th November 2015 [1].

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