UNION CYCLISTE INTERNATIONALE

Anti-Doping Tribunal

UCI Anti-Doping Tribunal

Judgment

case ADT 02.2015

UCI v. Mr. Luca Paolini

Single Judge:

Mr. Ulrich Haas (Germany)

Aigle, 13 April 2016

INTRODUCTION

1. The present Judgement is issued by the UCI Anti-Doping Tribunal (hereinafter referred to as "the Tribunal") in application of the UCI Anti-Doping Procedural Rules (hereinafter referred to as "the ADT-Rules") in order to decide upon a violation of the UCI Anti-Doping Rules (hereinafter referred to as "the ADR") committed by Mr. Luca Paolini (hereinafter referred to as "the Rider").

I. FACTUAL BACKGROUND

2. The Rider is a professional cyclist of Italian citizenship. He was born on 17 January 1977 and is currently residing in Falloppio (Varese, Italy). He is affiliated to the Italian Cycling Federation and a License-Holder within the meaning of the ADR. The Rider turned professional in the year 2000. In 2011 he joined the UCI WorldTour Team Katusha with whom he appears to have remained under contract until 2015.

3. In 2015, the Rider competed in the 2015 Tour de France (hereinafter referred to as the "TdF"), which started on 4 July 2015. On stage 4 of the race, i.e. on 7 July 2015, the Rider was required to undergo a doping control conducted by the UCI. The Rider provided the sample at 06:35 in the morning and confirmed on the Doping Control Form that the sample had been taken in accordance with the applicable regulations. Furthermore, he declared on the Doping Control Form that he had taken no medications or supplements over the seven days preceding the test.

4. The urine sample provided by the Rider was then analyzed in the WADA-accredited Laboratory in Châtenay-Malabry (hereinafter referred to as the "Laboratory"), France. The report issued by the Laboratory shows that the Rider's A-sample contained benzoylecgonine (a metabolite of cocaine) at a concentration of approximately 110 ng/ml to 113 ng/ml (hereinafter referred to as the adverse analytical finding – "AAF"). Cocaine is listed under Class S6a Non-Specified Stimulants on the 2015 WADA Prohibited List adopted by the UCI. According thereto cocaine (and its metabolites) is prohibited in-competition.

5. On 10 July 2015, the Rider was notified of the AAF by the UCI. Furthermore, a mandatory provisional suspension was imposed on him by virtue of art. 7.9.1 ADR.

6. On 17 July 2015, the counsel of the Rider informed the UCI that his client had waived his right to have the B-sample analyzed and requested the A-sample Laboratory Documentation Package. Following this request, the UCI on 24 July 2015 sent to the Rider's counsel the A-sample Laboratory Documentation Package. In the same communication the Rider was invited to provide his explanation on the circumstances of the AAF.

7. On 6 August 2015 the counsel of the Rider submitted to the UCI the Rider's explanations as well as an expert report from Prof. Giuseppe Pieraccini. Following receipt of the Rider's submission, the UCI requested an opinion from an external scientific expert (Prof. Martial Saugy) concerning the possible source of cocaine metabolites in the Rider's sample. Prof Martial Saugy provided his expert opinion on 15 September 2015.

8. On 2 November 2015, the Rider was informed of Prof. Martial Saugy's expert opinion. Furthermore, the Rider was offered an Acceptance of Consequences pursuant to art. 8.4 ADR. He was also advised of the consequences in case he did not agree with the proposed Acceptance of Consequences.

9. On 12 November 2015, the Rider via his counsel informed the UCI that he would not consent to the Acceptance of Consequences proposed by the UCI. Following this information, the UCI referred the case of the Rider to the Tribunal for a determination of the sanction and consequences to be applied.

10. In its referral to the Tribunal the UCI requests as follows:

    (a) Declaring that Mr. Paolini has committed an Anti-Doping Rule Violation.

    (b) Imposing on Mr. Paolini a period of ineligibility of 2 years, or in any event, no less than 12 months.

    (c) Disqualifying all results obtained by Mr. Paolini at the Tour de France 2015.

    (d) Condemning Mr. Paolini to pay the costs of results management by the UCI (CHF 2,500) and the costs of the A Sample Laboratory Documentation Package (EUR 400).

II. PROCEDURE BEFORE THE TRIBUNAL

11. The jurisdiction of the Tribunal follows from art. 8 (2) ADR and art. 3 (1) ADT-Rules according to which "*the Tribunal shall have jurisdiction over all matters in which an anti-doping rule violation is asserted by the UCI based on a results management or investigation process under Article 7 ADR*".

12. In compliance with art. 13 (1) ADT-Rules the UCI has initiated proceedings before this Tribunal through the filing of a petition to the Secretariat on 4 December 2015. Before referring the case to the Tribunal, the UCI has tried to settle the dispute by offering the Rider an Acceptance of Consequences within the meaning of art. 8 (4) ADR and art. 2 ADT-Rules. The Offer of Acceptance was rejected by the Rider on 12 November 2015.

13. On 9 December 2015, the Secretariat of the Tribunal appointed Mr. Ulrich Haas to act as Single Judge in the present proceedings in application of art. 14 (1) ADT-Rules.

14. In application of art. 14 (4) ADT-Rules, the Rider was informed on 16 December 2015 that disciplinary proceedings had initiated against him before the Tribunal. Furthermore, the Rider was informed that a deadline until 7 January 2016 had been granted to submit his answer in conformity with art. 16 (1) and 18 ADT-Rules.

15. By letter dated 21 December 2015, the Rider acknowledged receipt of the foregoing correspondence and informed the Secretariat according to art. 15 (3) and 3 (2) ADT-Rules that he had no objections in relation to the Single Judge nor in relation to the jurisdiction of the Tribunal.

16. On 7 January 2016, the Rider submitted his answer within the deadline accorded to him.

17. On 19 January 2016 the Secretariat acknowledged receipt of the Rider's letters dated 21 December 2015 and 7 January 2016. Furthermore, the Parties were advised that in accordance with art. 17 (1) ADT-Rules the written proceedings were completed and that a hearing *in persona* would be held in this matter.

18. After consultation with the Parties the hearing was scheduled for and held on 4 March 2016 in Geneva. The hearing was attended on behalf of UCI by:

Mr. Antonio Rigozzi, attorney-at-law, Lévy Kaufmann-Kohler, Geneva
Mr. Simon Geinoz, party representative for the UCI

and on behalf of the Rider by:

Mr. Luca Paolini
Mr. Marco Cecconi, attorney-at-law, studio legale Cecconi – Schietti, Milan
Mrs. Valeria Laici, interpreter

During the hearing the following experts were heard by the Tribunal:

Prof. Martial Saugy (called by the UCI) and
Prof. Giuseppe Pieraccini (called by the Rider)

19. With letter dated 31 March 2016, the Tribunal reminded the Parties of the request submitted by the Single Judge during the hearing held on 4 March 2016 to submit their respective costs incurred in connection with the proceedings and fixed a final deadline in that respect until 7 April 2016.

20. With letter dated 7 April 2016, the UCI submitted its account of costs.

21. With letter dated 8 April 2016, the Tribunal acknowledged receipt of UCI's submission and forwarded it to the Rider. Furthermore, the Tribunal in its letter noted that it had not received any submissions as to costs and expenses from the Rider.

III. APPLICABLES RULES

22. Taking into account that the alleged anti-doping rule violation (hereinafter referred to as "ADRV") took place on 7 July 2015, it is the 2015 edition of the ADR in force at that time that is applicable to the case at hand (art. 25 (1) ADR).

23. Art. 2 ADR defines an anti-doping rule violation as follows:

> *" 2.1* **Presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in a *Rider's Sample***
>
> *2.1.1* It is each *Rider*'s personal duty to ensure that no *Prohibited Substance* enters his or her body. *Riders* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, *Fault*, *Negligence* or knowing *Use* on the *Rider*'s part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.
>
> *2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Rider's A Sample where the Rider waives analysis of the B Sample and the B Sample is not analyzed; or, where the Rider's B Sample is analyzed and the analysis of the Rider's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Rider's A Sample; or, where the Rider's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle. …"*

24. Art. 3 (1) ADR reads as follows:

> *"The UCI shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Rider or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability. …"*

25. As for the standard period of ineligibility the ADR provides as follows :

> *"The period of Ineligibility for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:*
>
> *10.2.1 The period of Ineligibility shall be four years where:*
>
> *10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Rider or other Person can establish that the anti-doping rule violation was not intentional. …*
>
> *10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.*
>
> *10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Riders who cheat. The term therefore requires that the Rider or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Rider can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Rider can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance."*

26. As for the possibilities to reduce the aforementioned periods of ineligibility based on fault, the ADR state as follows :

> "10.4 **Elimination of the Period of *Ineligibility* where there is *No Fault or Negligence***
>
> *If a Rider or other Person establishes in an individual case that he or she bears No Fault or Negligence, 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***
>
> *10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Article 2.1, 2.2 or 2.6.*
>
> *10.5.1.1 Specified Substances*
>
> *Where the anti-doping rule violation involves a Specified Substance, and the Rider or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Rider's or other Person's degree of Fault. …*

10.5.2 Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1 If a Rider or other Person establishes in an individual case where Article 10.5.1 is not applicable that he or 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 Rider 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. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight years."

27. In relation to the commencement of the period of ineligibility art. 10.11 ADR provides as follows:

> *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. …*
>
> 10.11.3.1 If a *Provisional Suspension* is imposed and respected by the *Rider* or other *Person*, then the *Rider* or other *Person* shall receive a credit for such period of *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed. If a period of *Ineligibility* is served pursuant to a decision that is subsequently appealed, then the *Rider* or other *Person* shall receive a credit for such period of *Ineligibility* served against any period of *Ineligibility* which may ultimately be imposed on appeal.

28. As for the liability for costs of the procedures, art. 10.10.2 ADR stipulates as follows:

> *If the Rider or other Person is found to have committed an anti-doping rule violation, he or she shall bear, unless the UCI Anti-Doping Tribunal determines otherwise:*
>
> *1. The cost of the proceedings as determined by the UCI Anti-Doping Tribunal, if any*
>
> *2. The cost of the results management by the UCI; the amount of this cost shall be CHF 2'500, unless a higher amount is claimed by the UCI and determined by the UCI Anti-Doping Tribunal. …*
>
> *5. The cost for the A and/or B Sample laboratory documentation package where requested by the Rider. …"*

IV. THE FINDINGS OF THE TRIBUNAL

A. ADRV

29. It is undisputed between the Parties that the Rider has committed an ADRV within the meaning of art. 2.1 ADR (Presence of a Prohibited Substance or its Metabolites or markers in a Rider's Sample). The Rider's A sample analysis showed the presence of benzoylecgonine, a metabolite of cocaine, which is listed under Class S6a Non-Specified Stimulants on the 2015 WADA Prohibited List. According to the WADA Technical Document – TD 2015MRPL (minimum required performance level) - non-threshold substances in classes S6, S7, S8 and P2 of the WADA Prohibited List, which are prohibited in-competition only, should not be reported below 50% of the MRPL. The MRPL for cocaine is 100ng/ml, so nothing below 50ng/ml should be reported. In the case at hand, the Laboratory correctly reported the presence of cocaine, since the concentration found was approximately 110 ng/ml – 113 ng/ml. According to art. 2.1.2 ADR sufficient proof of an ADRV is established – *inter alia* – by the "*presence of a Prohibited*

Substance or its Metabolites or Markers in the Rider's A Sample where the Rider waives the analysis of the B sample and the B Sample is not analyzed."

B. Consequences of the ADRV

30. The Parties agree that in the present case art. 10.2.1.1 ADR, which provides for a period of ineligibility of four years, is not applicable. Even though cocaine (or its metabolites) is not a Specified Substance, it is evident that the Rider did not commit the ADRV intentionally within the meaning of said rule. In this respect reference is made to art. 10.2.3 ADR which defines the term intentional. The rule provides in particular that an "*anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Rider can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance*." It is undisputed between the Parties and corroborated by the testimony given by the experts that the drug containing the prohibited substance was taken out-of-competition, i.e. before the TdF commenced and in a context unrelated to competition. Thus, subject to the applicability of further reductions, the standard period of ineligibility in the present matter is – according to art. 10.2.2 ADR – two years.

a. No Fault or Negligence

31. The Parties disagree on whether or not art. 10.4 ADR is applicable in the case at hand. According thereto the otherwise applicable period of ineligibility shall be eliminated in case the Rider bears "No Fault or Negligence".

i. The position of the Parties

32. The Rider submits that he has taken cocaine "*outside of sporting competitions*", i.e. in a "*recreational*" context and that cocaine is a substance that is prohibited in-competition only. Furthermore, he submits that he was unaware and could not be aware of how long the excretion time of the last dose of cocaine could be. In other words the Rider "*could* … [not] *calculate, in order to avoid testing positive, a period of time to keep in mind, in terms of evaluation of the presence of metabolites, when taking a substance that is prohibited during competition but not outside competitive context*". This is all the more true, since – according to the Rider – the excretion time was most likely altered due "*to the concomitant assumption of alcohol contained, as a substrate in the (legal) medication Minias taken by the …* [Rider]*, as well as in the beverages consumed by the same*." In conclusion the Rider finds that "*it appears evident that the behavior of the athlete in question cannot be censured, given that one could not reasonably expect, from the same, a greater diligence than the one manifested."* Finally, the Rider submits that this distinction between substances prohibited only in-competition and substances prohibited at all times is also reflected in the comment to the definition of No Significant Fault in the Appendix 1 of the ADR. The comment only relates to "cannabinoids". However, the Rider finds that this rule must apply by analogy to cocaine, since both substances are recreational drugs.

33. The UCI does not consent to the application of art. 10.4 ADR in the present case. The concept of "No Fault or Negligence" according to the UCI only covers very exceptional cases, i.e. instances where an athlete tests positive despite "*the exercise of utmost caution*". With respect to the Rider the UCI submits that "*knowing use of a prohibited substance, even 9-10 days prior to competition, is clearly inconsistent with this standard*." This is particularly true when comparing the facts and circumstances of this case with CAS jurisprudence (CAS 2014/A/3475; CAS 2009/A/1926) in which "No Fault or Negligence" was accepted as a defense. A common denominator of these cases is that – very different from the case at hand – the athletes did not

intentionally consume the prohibited substance. Finally, the UCI submits that the comment pertaining to "cannabinoids" to which the Riders makes reference in the Appendix 1 clearly relates to the definition of "No Significant Fault or Negligence" and not to the concept of "No Fault or negligence". Thus, according to the UCI the comment is of no avail in the context of art. 10.4 ADR.

ii. The position of the Tribunal

34. In the Tribunal's view there is no room for the application of art. 10.4 ADR in the present case. The threshold for "No Fault or Negligence" is high. The term is defined in the Appendix 1 to ADR as follows : "*The Rider or other Person's 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 Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule.*" This notion of "utmost caution" is incompatible with an athlete that deliberately and intentionally ingests a substance that is prohibited in-competition. This is particularly true when looking at the facts and circumstances of the present case.

35. Both experts agree that the excretion time for a "normal" dose of cocaine is usually a couple of days only and that – in a "normal" case 5 days would rather be at the far end of the detection period. Starting from the written submission of the Rider that he assumed cocaine "*during a period of time including the end of the month of June 2015*" and in light of the fact that the sample which tested positive for cocaine (or its metabolites) was taken on 7 July 2015, it is obvious that this is not a "normal" cocaine case. There are different factors that may influence the detection window. Both experts agree that the consumption of (rather large amounts of) alcohol may be such a factor. Furthermore, the experts also agree that in case of regular cocaine consumption the excretion time may also be extended. In the case at hand the Rider submits that he is not a regular (recreational) cocaine user, but that it was due to his regular and intensive consumption of alcohol during this period that it became completely unpredictable for him, when he could return to competition.

36. In the case at hand it is rather obvious for the Tribunal that … [*words omitted in application of art. 29 (2) ADT-Rules*] the consumption of alcohol as the only or even main factor causing the extension of the detection period can be excluded. … [*it follows the discussion of the experts' evidence, which is omitted in application of art. 29 (2) ADT-Rules*].

37. When asked by the Tribunal how often he consumed cocaine in the past, the Rider did not provide any direct answer. … [*sentence omitted in application of art. 29 (2) ADT-Rules*]. Furthermore, he submitted that in 2015 he went through a very difficult time with psychological problems which culminated during his preparation period for the TdF at the Passo Stelvio. It was there – according to the Rider – that he consumed cocaine on 27 June 2015.

38. Based on the findings above, i.e. that the Rider regularly and intentionally consumed a substance that is prohibited in-competition, the Tribunal finds that there is no basis to assume that he acted "with utmost care", i.e. with "No Fault or Negligence".

b. No Significant Fault or Negligence

39. The Parties also disagree on whether or not art. 10.5.2 ADR could on its wording be applicable in the case at hand. According thereto the otherwise applicable period of ineligibility may be reduced in case the Rider bears "No Significant Fault or Negligence" (hereinafter referred to as "NSF").

i. The position of the Parties

40. As a subsidiary prayer for relief the Rider requests that the otherwise applicable period of ineligibility (here 2 years according to art. 10.2.2 ADR) "*be reduced according to art. 10.5.2 ADR*". The Rider substantiates this request by referring to his submissions made in the context of art. 10.4 ADR ("*Lastly, in a purely tutioristic sense, should it be ruled that the dispositions of art. 10.4 cannot be applied, we believe that nonetheless the conduct of Mr. Luca Paolini can readily be subsumed under art. 10.5.2 ADR*"). In essence, the Rider submits that the circumstances of the case "*were such that the terms and scientific implications could easily have been overlooked by the defendant, who could not be reasonably be expected to have known that the ingestion of cocaine would have resulted in the presence of its metabolite … for such an extended period of time*."

41. According to the UCI the legal situation whether or not art. 10.5.2 ADR is applicable in the present case is not clear cut. The UCI submits that the ADR are based on the World Anti-Doping Code 2015 (WADC 2015). When looking at the rationale of the WADC 2015, a reduction based on NSF "*cannot be ruled out*" in the present case, since – according to WADA – the objective of the WADC 2015 was to "*provide for longer periods of ineligibility for real cheats, and more flexibility in sanctioning in other specific circumstances*"[1]. Since the Rider clearly did not intend to cheat, a reduction of the otherwise applicable sanction seems to be in line with the objectives and the rationale of the WADC 2015. However, when looking at the wording of the WADC 2015 / ADR things appear to be more difficult. The comment to the definition of NSF in the Appendix 1 of the ADR contains an express carve out for cannabinoids only. This explicit wording, in principle, suggests that the favorable regime of NSF only applies to cannabinoids and not to other drugs. However, the UCI questions whether *"the nature of the prohibited substance is really relevant for the purpose of determining the rider's level of fault once it is established that the substance was used recreationally and, thus, in a context unrelated to sport performance*." In view of this legal situation the UCI "*leaves it to the discretion of the Tribunal to determine whether 'No Significant Fault or Negligence' may apply in the case at hand.*" Even if the Tribunal were to admit the application of NSF in the present case the UCI submits that the period of ineligibility for the Rider cannot be reduced beyond "*one-half of the period of ineligibility otherwise applicable, i.e. 1 year*."

ii. The position of the Tribunal

42. The definition of NSF in the Appendix 1 of the ADR provides as follows:

> *"The Rider or other Person's 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 relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Rider must also establish how the Prohibited Substance entered his or her system.*
>
> *[Comment to No Significant Fault or Negligence: For Cannabinoids, a Rider may establish No Significant Fault or negligence by clearly demonstrating that the context of the use was unrelated to sport performance]"*

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1 https://www.wada-ama.org/en/media/news/2013-05/wada-executive-committee-and-foundation-board-approach-final-revision-of-2015; see also https://www.wada-ama.org/en/questions-answers/2015-world-anti-doping-code.

43. In order to establish whether or not an athlete has acted with NSF, the above definition requires that the athlete's behavior be compared to the standard of care that can be expected from a "reasonable person" in the athlete's situation. As a rule of thumb, CAS jurisprudence has found that the threshold of NSF is met if the athlete observes the "*clear and obvious precautions which any human being would take*" in the specific set of circumstances (CAS [20.7.2005] – 2005/A/847, no. 7.3.6). Obviously, a "reasonable person" would never have consumed drugs to begin with, in particular drugs like cocaine the addictive character of which is well known. However, this is not the (decisive) issue when assessing whether or not an athlete acted with NSF, since the definition of said term specifically states that the athlete's level of fault must be assessed "in relationship to the anti-doping rule violation". The consumption of cannabinoids or cocaine by itself is not an ADRV. Both substances are banned – according to the WADA Prohibited List – in-competition only. In doing so the WADA Prohibited List neither seeks to tolerate or encourage the consumption of drugs. However, from the standpoint of the fight against doping there is, in principle, no issue if these drugs are ingested in a recreational context unrelated to competition as long as the athlete does not return to competition with the drug still present in his or her system.

44. In CAS 2013/A/3327&3335 the Panel has held that in cases in which an athlete tests positive for a substance that is prohibited in-competition only and said substance was taken out-of-competition, the athlete, in principle, qualifies for NSF. The Tribunal concurs with the reasoning of the CAS Panel in said decision (at para. 75):

> "*For substances prohibited in-competition only, two types of cases must be distinguished: The prohibited substance is taken by the athlete in-competition. ... The prohibited substance is taken by the athlete out-of-competition (but the athlete tests positive in-competition). Here, the situation is different. The difference … is that the taking of the substance itself does not constitute doping or illicit behaviour. The violation (for which the athlete is at fault) is not the ingestion of the substance, but the participation in competition while the substance itself (or its metabolites) is still in the athlete's body. The illicit behaviour, thus, lies in the fact that the athlete returned to competition too early, or at least earlier than when the substance he had taken out of competition had cleared his system for drug testing purposes in competition. In such cases, the level of fault is different from the outset. Requiring from an athlete in such cases not to ingest the substance at all would be to enlarge the list of substances prohibited at all times to include the substances contained in the in-competition list. CAS jurisprudence supports the view that the level of fault … [in this] case … differs. The Panel in this respect is mindful of the decision in the case CAS 2011/A/2495 in which it is held: 'Of course the athlete could have refrained from using the [product] at all, but it can hardly be a fault (or at least a significant one) to use a substance which is not prohibited' (para 8.26)*."

45. However, the Panel in CAS 2013/A/3327&3335 also explained that NSF cannot be accepted in all instances, in which an athlete tests positive for a substance prohibited in-competition which he or she has ingested out-of-competition. In cases, in which an athlete engages in – what the Panel qualified as – particularly dangerous conduct, the athlete must take additional precautions in order to meet the threshold of NSF. The CAS Panel in 2013/A/3327&3335 refers by way of example (para 75) to cases in which an athlete uses a "*product that is advertised/sold/distributed as 'performance enhancing'. Here a particular danger arises, that calls for a higher duty of care.*" The same is true – according to the CAS Panel – where "*the product is a medicine designed for a therapeutic purpose. Again, in this scenario, a particular danger arises, that calls for a higher duty of care. This is because medicines are known to have prohibited substances in them*." The reason why an athlete must meet a higher burden of diligence in these circumstances in order to meet the threshold of NSF is that in these instances the athlete's out-of-competition behaviour can hardly be dissociated from his sporting performance. The link between the out-

of-competition sphere and the in-competition sphere is here particularly tight, thus, requiring a higher threshold with regard to the athlete's duty of care.

46. Following the above line of thinking it appears – at least at first sight – open to debate how to treat cases of recreational drug use, i.e. the use of drugs (prohibited in-competition only) in a social context unrelated to sport. One could argue here that the threshold for NSF should be rather high, since the athlete engaged in particular dangerous conduct by intentionally ingesting a substance that he or she knew is prohibited in-competition. However, there are also arguments in favour of a more nuanced approach, because recreational drug use – unlike the other dangerous conducts previously mentioned – clearly can be dissociated from the sporting sphere of the athlete. The WADC 2015 – at least for cannabinoids – opted rightfully for the second approach and provides that the mere fact that cannabinoids are consumed in a recreational / social context unrelated to sport performance qualifies as NSF.

47. The only question remaining, thus, is, whether the WADC 2015 advocates a dual approach when dealing with the consequences of social / recreational drug use depending on the kind of drug consumed by the athlete (cannabinoids or cocaine). This question must be answered in the negative. First, it is to be noted that a dual approach does not make much sense. Second, also the legislative history[2] of the current version of the WADC 2015 does not warrant a dual approach. In an initial version of the WADC 2015 (version 2.0) both drugs were being treated together as "Substances of Abuse" making it clear that recreational drug use merits "special treatment". The (draft) provision dealing with "Substances of Abuse" (that provided a sanction in the range of a reprimand up to one year) was criticized by stakeholders in the revision process in particular because it suggested rehabilitation at the expense of the athlete. Stakeholders feared that requiring an athlete to foot the bill for a rehabilitation program would result in discriminatory treatment among athletes with different financial means. Thus, the original concept of "Substances of Abuse" was dropped in the final version of the WADC 2015 with the consequence that the general provisions on fault-related reductions would apply to recreational drug use. It is to be noted that the final draft of the WADC 2015, which was circulated prior to the World Anti-Doping Conference in Johannesburg, did not contain any special provision relating to recreational drug use. In particular, the final draft of the WADC 2015 did not contain today's comment (in the definition section) relating to cannabinoids.

48. The problem related to recreational drug use was only tabled once again a couple of days prior to the World Anti-Doping Conference by some stakeholders. The latter felt that under the general rules relating to fault-related reductions recreational drug users would end up under the new WADC 2015 with much harsher sanctions than under the WADC 2009, which was not in line with the overall concept and purpose of the revision process to provide for more flexibility for "non-cheaters". It appeared, thus, that a solution had to be found quickly. Initially, a broad and cohesive concept dealing with recreational drug use was contemplated in the context of fault-related reductions of the periods of ineligibility. However, in view of the fact that there was no further consultation window available to get any feedback from stakeholders at this late stage, it was decided to keep changes to the final version of the text to a minimum. Thus, a comment was inserted in the definition of NSF dealing with the most relevant recreational drug use in practice, i.e. the use of cannabinoids. To conclude therefore, the Tribunal finds that neither the legislative history, nor the rationale of the WADC 2015 or of the comment in the definition section preclude this Tribunal to apply the carve out for cannabinoids by analogy also to the recreational use of cocaine. This is all the more true in order to avoid any inconsistencies with art. 10.2.3 WADC 2015 / ADR. The provision provides that the recreational use of a drug

[2] See in this context Rigozzi/Viret/Wisnosky, Does the World Anti-Doping Code Revision Live up to its Promises?, Jusletter 11 November 2013, no. 140 et seq.

(that is only prohibited in-competition) does not constitute "intentional doping". If this, however, is the case it would be contradictory to prevent the same athlete from recourse to the concept of NSF (enshrined in WADC 2015 / ADR) by pointing to his alleged intentional consumption of the drug. Consequently, the Tribunal finds that in the case at hand the Rider may establish NSF by clearly demonstrating that the context of the use of cocaine was unrelated to sport performance. In the Tribunal's view it is uncontested between the Parties and corroborated by the expert testimony of Prof. Saugy and Prof. Pieraccini that the Rider consumed cocaine unrelated to his sporting performance. Thus, the Tribunal finds that the Rider qualifies for a reduction under NSF.

49. Since cocaine is not a specified substance, a reduction of the otherwise applicable period of ineligibility based on NSF can only be sought in the case at hand in application of art. 10.5.2 ADR. According thereto the otherwise applicable sanction can only be reduced down to a period of ineligibility of one year. The question where to fix the sanction within the applicable range (one to two years) depends – according to the provision – on the Rider's degree of fault. The Tribunal fixes the length of the period of ineligibility at 18 months. In doing so, the Tribunal took into account the regular use of cocaine as well as the fact that the Rider found himself in a difficult psychological situation in 2015. Furthermore, the Tribunal took note that the Rider did not take any particular precautions (beyond the obvious ones) for not testing positive. It is agreed between the Parties that the Rider consumed cocaine on 27 June 2015. The in-competition period of the TdF started on 3 July 2015, since the first stage of the TdF was held on 4 July 2015. Thus, the Rider did not observe a particularly long "cooling-off period" before returning to competition. Finally, the Tribunal took also account of the fact that the Rider was allegedly addicted to the medication Minias which made him feel bad and made him consume cocaine in order to overcome his malaise.

c. Non-fault-related reductions

50. Contrary to the submission of the Rider, there is no room in the present case for any non-fault-related reductions of the period of ineligibility. In particular, art. 10.6.3 ADR (prompt admission) is not applicable in the case at hand. The provision provides for a reduction of the otherwise applicable sanction in case the athlete is sanctionable – inter alia – under art. 10.2.1 ADR, i.e. an intentional ADRV. However, in the case at hand it is undisputed between the Parties that the Rider is not liable under art. 10.2.1 ADR. Thus, there is no room for the application of art. 10.6.3 AD at the outset.

d. Commencement of the period of ineligibility

51. Art. 10.11 of the ADR provides as a general rule that the period of ineligibility shall start on the date of the Tribunal's decision. However, art. 10.11.3.1 ADR also provides that the Rider receives credit for any provisional suspension that was imposed on him. The Rider in the present case was provisionally suspended as of 10 July 2015. Furthermore, art. 10.11.2 ADR provides that where an athlete promptly admits the ADRV after being confronted with it, the commencement of the period of ineligibility may start as early as the date of sample collection. In the present case the Rider has promptly admitted the ADRV when being confronted with the findings of the Laboratory. Thus, the Tribunal finds that the period of ineligibility shall start on 7 July 2015, i.e. the date of the sample collection.

e. Disqualification

52. According to art. 9 ADR, an ADRV in connection with an in-competition test automatically leads to the disqualification of the results obtained in that "Competition" with all resulting

consequences. The term "Competition" is defined in the ADR as a "*single race organized separately (for example … a stage in a stage race)*". Consequently, the Rider's results in stage 4 of the TdF shall be automatically disqualified.

53. As for the results of the Rider obtained in other stages of the TdF, art. 10.1 ADR provides that an ADRV "*occurring during or in connection with an Event may, upon the decision of the ruling body of the Event, lead to Disqualification of all the Rider's individual results obtained in that Event with all Consequences* … ". The term "Event" is defined in the ADR as a "*series of Competitions conducted together as a single organization (for example … road stage race …)*". In view of the fact that the ADRV occurred during the TdF, the Tribunal finds it just to disqualify all results obtained by the Rider during the TdF.

f. Mandatory Fine and Costs

54. In view of the fact that the Rider did not commit the ADRV intentionally, no fine shall be imposed on the Rider pursuant art. 10.10.1 ADR. Art. 10.10.2 ADR provides that a Rider convicted of an ADRV shall bear – inter alia – the costs of the result management by the UCI (in the amount of CHF 2,500) and the costs of the A sample Documentation Package (in the amount of EUR 400).

V. COSTS OF THE PROCEEDINGS

55. In application of art. 28 (1) ADT-Rules, the Tribunal has to determine the costs of the proceedings as provided under art. 10 (10) (2) (1) ADR.

56. The Tribunal decides, based on art. 28 (2) ADT-Rules, that the present Judgment is rendered without costs.

57. Notwithstanding the above, the Tribunal may also order the unsuccessful party to pay a contribution toward the prevailing Party's costs and expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and experts (art. 28 (4) ADT-Rules). Furthermore, the provision states that if the prevailing party was represented by a legal representative the contribution shall also cover legal costs.

58. The Parties were invited in the hearing and by subsequent letter to submit their account of costs. UCI in its letter dated 7 April 2016 submitted the following account of costs: CHF 15,500 in legal fees and CHF 1,787.60 for the expert opinion provided by Prof Saugy. The Rider failed to submit his account of costs within the prescribed deadline. In view of the above and taking into consideration the outcome of the procedure as well as the fact that the Tribunal relied in its finding in particular on Prof. Saugy's expert report, the Tribunal decides to award the legal expenses incurred with respect to Prof. Saugy's expert report in full and to award a contribution to UCI's legal fees in the amount of CHF 5,000. Thus, the Tribunal finds that the Rider must pay the total amount of CHF 6,787.60 as a contribution to UCI's costs and expenses.

VI. RULING

59. In light of the above, the Tribunal decides as follows:

1. Mr. Paolini has committed an Anti-Doping Rule Violation (art. 2.1 ADR).

2. Mr. Paolini is suspended for a period of ineligibility of 18 months commencing on 7 July 2015.

3. The results obtained by Mr. Paolini at the Tour de France 2015 are disqualified.

4. Mr. Paolini is condemned to pay the costs of the results management by the UCI (CHF 2,500) and the costs of the A Sample Laboratory Documentation Package (EUR 400).

5. Mr. Paolini is condemned to pay a contribution in the amount of CHF 6,787.60 towards UCI's costs and expenses incurred in connection with these proceedings.

6. All other and / or further reaching requests are dismissed.

7. This judgment is final and will be notified to:

a) Mr. Luca Paolini;

b) Comitato Olimpico Nazionale Italiano;

c) WADA; and

d) UCI.

60. This Judgment may be appealed before the CAS pursuant art. 30 (2) ADT-Rules and art. 74 of the UC Constitution. The time limit to file the appeal is governed by the provisions in art. 13 (2) (5) ADR.

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Ulrich HAAS
Single Judge