

IN THE MATTER OF PROCEEDINGS UNDER THE ANTI-DOPING RULES OF UNITED KINGDOM ATHLETICS

Before:

Charles Hollander QC (Chairman)

Michelle Duncan

Dr Kitrina Douglas

BETWEEN:

UK Anti-Doping Limited

(Anti-Doping Organisation)

and

Mark Dry

(Respondent)

DECISION ON APPEAL

1. This is an appeal by UKAD, the national anti-doping organisation in the UK, against the decision of the Anti-Doping Tribunal ("the Tribunal") dated 8 October 2019 which dismissed the single charge against Mark Dry.
2. Mr Jon Taylor QC and Ms Stacey Cross appeared for UKAD. Mr Howard Jacobs and Dr Gregory Ioannidis appeared for Mr Dry. As is to be expected from these individuals, the advocacy on both sides was of a very high quality.
3. The Respondent, Mr Dry, is a British hammer thrower and Olympian. He has twice won bronze medals in the hammer throw at the Commonwealth Games (Gold Coast 2018 and Glasgow 2014). He is a member of the Domestic Testing Pool as of 20 February 2017 and as such is required to provide whereabouts information that facilitates effective Out-of-Competition testing.
4. By letter of 8 May 2019 Mr Dry was charged by UKAD with the commission of an Anti-Doping Rule Violation and was provisionally suspended. The letter of charge recited:

"Therefore, UKAD hereby charges you with the commission of an ADRV under IAAF ADR Article 2.5, in that on 18 October 2018 you tampered with Doping Control by providing false information to UKAD about your whereabouts on 15 October 2018."
5. The charge was subsequently amended on 10 July 2019, so as to read:

"Therefore, UKAD hereby charges you with the commission of an ADRV under IAAF ADR Article 2.5, in that on or around 18 October 2018 and/or 24 October 2018, you Tampered or Attempted to Tamper with a part of the Doping Control Process by providing, or allowing the provision of, false information to UKAD regarding your whereabouts on 15 October 2018."
6. Before the Tribunal, there was no dispute as to jurisdiction.

Facts found by the Tribunal

7. The appeal before the Tribunal proceeded on the basis of the facts found by the Tribunal.
8. Early in the morning of 15 October 2018 UKAD doping control personnel attended Mr Dry's Shepshed address for testing purposes. There was no response to the doorbell and no sign of anyone being present at the property. A neighbour said that Mr Dry was away in Scotland, and the UKAD personnel departed.
9. The next day, 16 October 2018, Mr Dry updated his whereabouts information to show his address from 16 October 2018 to 20 October as his parents' address in Scotland. On 18 October 2018 UKAD sent Mr Dry a formal letter advising him of an "*apparent Domestic Testing Pool filing failure*" on 15 October 2018 when he had seemingly not been at his Shepshed address. The letter asked for an explanation within 14 days and stated that if Mr Dry did not reply or was unable to establish that there had not been a filing failure, a Domestic Testing Pool filing failure would be recorded against his name. The letter went on to say:

"Consequences if Domestic Testing Pool Filing Failure Recorded

One Domestic Testing Pool Filing Failure does not have any consequences. However, if three (3) Domestic Testing Pool Filing Failures are committed within a 12-month period, then you will be moved to the National Registered Testing Pool of UK Anti-Doping."

10. Mr Dry responded by email on 18 October 2018.

"To whom it may concern

Thank you for my recent letter, my neighbour has misinformed the DCO as she knew we were coming home to Scotland this week which I have done so, from Tuesday the 16th as per my whereabouts, she was unaware of our departure date just the fact we were coming up this week.

I am an avid fisherman and have just recovered from a hip replacement 8 weeks ago and got the all clear from the surgeon on Friday morning to full wieghtbare [sic] and proceed with rehab and get out and about and carry on normal life so took advantage of

this and went fishing as I regularly do but haven't done for some time due to serious injury.

Let me know if you've received [sic] this so I know im not beyond the 14 day limit and any further questions just let me know

Thanks

Mark "

11. UKAD asked if Mr Dry could provide any supporting evidence, e.g. a witness statement from a partner or family member. A response came from Mr Dry's partner, Leah Govier, on 24 October as follows:

"Dear Pat,

I am emailing as Mark Dry's partner to provide a witness statement for his whereabouts on Monday 15th October 2018.

I can confirm that Mark was out fishing on the morning of the Monday 15th October and we travelled to Scotland to visit his family the following day (Tuesday 16th October). I did mention to a neighbour that we would be away for a few days but I did not specify dates as this was a conversation that happened in passing.

Kind regards

Leah Govier"

12. UKAD made further investigation and, being dissatisfied with the explanation of Mr Dry and his partner, invited Mr Dry on 3 December 2018 to a formal interview

"regarding a possible Anti-Doping Rule Violation(s) (ADRV) that you may have committed on Monday 15 October by providing information which may be considered fraudulent contrary to Anti-Doping Rules."

13. On receipt of this letter Mr Dry forwarded to UKAD a written statement in which he said:

"On Monday 15th October, I was in Scotland visiting my family and I forgot to update my whereabouts. My girlfriend is a teacher and was on her half term break and so we took the opportunity to visit my family who still live up in the Highlands where I grew

up. I thought this would not be serious as it was not an hour slot test; it was an out of hour's general whereabouts test. When I received the email informing me of a missed test I panicked and said I was out fishing. I did not want to have a strike against my fully clean record and so opted for what I now know was completely the wrong decision."

14. Thus Mr Dry admitted that what he had told UKAD about where he had been on 15 October was a lie. He confirmed this at a formal interview on 23 January 2019. At this interview he was entirely frank. He acknowledged that he had intentionally told an untruth and had also procured his partner to lie on his behalf. He had told the lie because he had not wanted to *"get in trouble and get a strike"*. His hope had been that with his explanation, supported by his girlfriend, the matter would then simply be dropped. Notably, he accepted at this interview that what he did was deliberate and at the time he did indeed mean to say what he said. We refer to Mr Dry's original version as "the lie".

15. Before the tribunal there was medical evidence relevant to Mr Dry's state of mind at the relevant time. The Tribunal rejected this as an explanation for his conduct, the point was in consequence not pursued on appeal.

The Decision of the Tribunal

16. The charge against Mr Dry alleges an (actual or attempted) Anti-Doping Rule Violation under Article 2.5 of the IAAF ADR. This provides:

"Tampering or Attempted Tampering with any part of Doping Control

Conduct that subverts the Doping Control process but that would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or attempting to interfere with a Doping Control official, providing fraudulent information to an Anti-Doping Organisation or intimidating or attempting to intimidate a potential witness."

17. The IAAF ADR definition of Tampering is:

"Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring."

18. The IAAF ADR definition of "Doping Control" is:

"all steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as provision of whereabouts information, sample collection and handling laboratory analysis, TUEs, results management and hearings."

19. The Tribunal held that the IAAF ADR applied in the present case without material amendment (see [1]). This led them to conclude that the Domestic Testing Pool operates independently of the IAAF ADR: [27] [42]. Thus, the Tribunal concluded that Mr Dry's conduct did not subvert the IAAF ADR Doping Control process and so did not constitute Tampering pursuant to Art 2.5 of the IAAF ADR.

20. The key part of the Tribunal's decision is at [40]-[43]:

40. *"In isolation, the words in Article 2.5 "providing fraudulent information to an Anti-Doping Organisation" might seem to cover the telling of a deliberate lie to UKAD. However, the telling of a lie, albeit a deliberate act, is not without more "fraudulent" in the context of Article 2.5. In support of this submission Mr Jacobs referred the Tribunal to the CAS decision in Drug Free Sport New Zealand v Murray (CAS 2017/A/4937) where the Panel specifically noted this at [143] it could not be fraudulent unless there was also a deliberate intent to subvert doping control:*

"A lie, in itself, does not amount to fraud or to providing "fraudulent information". Are lies such as those told by Mr Murray sufficient to establish the serious accusation of tampering? The majority of the Panel is of the view that there must be some consideration of the extent of the behaviour made to conceal the truth in order to be satisfied that there was an intent to subvert."

41. *In our view there are two matters of context which we should take into account when interpreting the words "providing fraudulent information" in Article 2.5. First, the Article is within the ADR and is concerned with the protection of the integrity of the ADR. It cannot be that every lie told to UKAD is always within Article 2.5. In our view, the words*

in question cover the deliberate provision of false information with the intention of evading the operation of the ADR. Second, the words in question must be interpreted in the light of the overall purpose and opening words of Article 2.5 which provide the general framework for a tampering violation. They are given as an illustration of tampering. It can only be if Mr Dry's conduct constituted Tampering as defined that it could have contravened Article 2.5."

42. There are two notable features of the present case:

(a) Mr Dry was a member of the Domestic Testing Pool and his purpose was to avoid the noting of a filing failure. However, this pool and the recording of filing failures operate independently of the ADR. They are different from the Registered Testing Pool and filing failures by those within that pool. The ADR address filing failures within the latter context: see Article 2.4. However, the ADR provide no sanction at all for filing failures by those in the Domestic Testing Pool. Mr Dry was in no respect evading the operation of the ADR.

(b) The untruth told by Mr Dry, as well as that of his partner, came in response to the UKAD letter of 18 October 2018. That letter expressly states that one Domestic Testing Pool Filing Failure (i.e. what Mr Dry sought to avoid) "does not have any consequences". The concept of fraudulently avoiding no consequences is indeed difficult to follow.

In the circumstances, we cannot be comfortably satisfied that the information which Mr Dry provided, whilst certainly false, was fraudulent for the purposes of the ADR.

43. Furthermore, we do not accept that Mr Dry's lie counts as Tampering for the purposes of Article 2.5. It was not "conduct that subverts the Doping Control process" (as defined). Doping Control is defined as:

All steps and processes from test distribution planning through to ultimate disposition of any appeal, including all steps and processes in between, such as provision of whereabouts information, Sample collection and handling, laboratory analysis, TUEs, results management, hearings and appeals

The above are all steps within the implementation of the ADR, not the implementation of a system outside the scope of the ADR. We accept the submission of Mr Jacobs that there was no subversion of the Doping Control Process (as defined)."

The Appeal

21. Thus the Tribunal accepted the submissions of Mr Jacobs on behalf of Mr Dry, and held that the lie had no effect on the operation of the ADR, because Mr Dry was in the Domestic Testing Pool and not the Registered Testing Pool. They concluded that a filing failure under the Domestic Testing Pool involved no sanction. To repeat the key passage in the tribunal's judgment at [42b]:

"the UKAD letter of 18 October 2018... expressly states that one Domestic Testing Pool Filing Failure (i.e. what Mr Dry sought to avoid) "does not have any consequences". The concept of fraudulently avoiding no consequences is indeed difficult to follow."

22. Thus they held that, because Mr Dry was in the Domestic Testing Pool, which operated separately, and outside the IAAF Doping Control arrangements, there was no ADR violation.

23. Mr Dry was placed in the Domestic Testing Pool in February 2017. The letter of 20 February 2017 notifying him of this states:

"A Domestic Testing Pool Ring failure shall only be recorded against you if UKAD is able to establish the criteria set out in Article 1.3 of the ISTI. Three Domestic Testing Pool Filing Failures in any 12 month period will result in you being designated for inclusion in the UKAD National Registered Testing Pool."

24. As a national organisation, UK Athletics ("UKA") are required to adopt IAAF Anti-Doping Rules. However, they are entitled to supplement those rules, but not to derogate from them. Section 1 of the UKA ADR makes this clear. The IAAF Anti-Doping Rules themselves incorporate WADA Testing and Investigations Rules and Procedures ("ISTI"). ISTI Art 4.8 recommends national organisations to adopt what is referred to as a "pyramid structure" whereby different levels of whereabouts obligations are imposed on athletes in different tiers of the structure. ISTI recommends that if an athlete in a lower level testing pool fails to comply with whereabouts obligations, the national organisation should consider moving up the athlete into the higher testing pool, with the more onerous obligations and consequences.

25.UKA has adopted that structure, with a Domestic Registered Testing Pool, a National Registered Testing Pool and the IAAF Registered Testing Pool.

26.UKA Rule 5.1 of Section 3 states:

'UKA appoints the NADO [National Anti Doping Organisation] to undertake Testing on Athletes in the UK'.

27.Rule 6.2 of Section 3 states:

The NADO shall (in consultation with UKA) establish the National Registered Testing Pool and the Domestic Registered Testing Pool and shall keep a register of those National Level Athletes who are required to provide Whereabouts Filings. Anyone included in the National Registered Testing Pool or the Domestic Registered Testing Pool will be notified in accordance with the NADO's procedures'

28.Rule 3.1 of Section 3 defines the Domestic Registered Testing Pool as

'the pool of athletes established by the NADO from time to time who are required to provide Whereabouts Filings and make themselves available for Testing at such whereabouts in accordance with Rule 8 below'.

Rule 3.1 of Section 3 also provides that:

'the definition of "Whereabouts Filing" in the IAAF shall be modified to include information provided by or on behalf of an Athlete in the National Registered Testing Pool or the Domestic Registered Testing Pool.'

Rule 4.3 of section 3 provides:

"It is the personal responsibility of each Athlete:

(g) when included in the IAAF's Registered Testing Pool, the National Registered Testing Pool or the Domestic Registered Testing Pool, to provide accurate and up-to-date Whereabouts Filings for the purposes of Testing."

Rule 8.1 of Section 3 states:

'Rules 35.19 (Whereabouts Filing requirements), 35.20 (Filing Failures/Missed Tests) and 35.21(Provision of inaccurate whereabouts information)of the IAAF Anti-Doping Rules (together with the provisions in the IAAF Anti-Doping Regulations relating to those rules) shall apply to Athletes in the National Registered Testing Pool and the Domestic Registered Testing Pool. Such Athletes shall provide their Whereabouts Filings to the NADO in such format as UKA or the NADO shall from time to time prescribe and such Whereabouts Filings shall be provided through ADAMS (or such other database management system as WADA may adopt from time to time).'

29. Thus the ISTI provides that national anti-doping organisations may identify pools of athletes who are required to provide whereabouts information and to make themselves available for testing at such whereabouts, including not only Registered Testing Pools, (where breach of the whereabouts requirements will constitute an Article 2.4 ADR) but also subsidiary pools (where breach of the whereabouts requirements will lead to an athlete being moved into a Registered Testing Pool.

30. The letter of 18 October 2018, which gave notice to Mr Dry of an apparent Domestic Testing Pool Filing Failing, required an explanation from Mr Dry and gave rise to the lie in his response. It also repeated what Mr Dry had been told when he was placed in the Domestic Testing Pool in 2017 as follows;

"One Domestic Testing Pool Filing Failure does not have any consequence. However, if three (3) Domestic Testing Pool Filing Failures are committed within a 12 month period, then you will be moved to the National Testing Pool of UK Anti-Doping.

Athletes in the National Registered Testing Pool are subject to more detailed whereabouts requirements. If an Athlete in the National Registered Testing Pool fails to comply with those requirements on three occasions within 12 months, this may result in an anti-doping rule violation under the Anti-Doping Rules and a ban of up to two years may be imposed."

31. The reference in the first sentence to "no consequence" is infelicitous and UKAD might do better to omit such a sentence in future. But the meaning is clear from the rest of the passage we have cited, and repeats what Mr Dry was told in February

2017. Three Domestic Testing Pool Filing Failures will lead to the athlete being removed from the Domestic Testing Pool and placed into the National Registered Testing Pool which has more onerous whereabouts requirements and where three filing failures will lead to a substantial ban.

32. It follows that the distinction drawn by the Tribunal between the Domestic Testing Pool and the National Registered Testing Pool is not correctly drawn. The different pools are not separate in the way that the Tribunal described. The Domestic Testing Pool is a lower level pool with less onerous requirements but it is part of the same pyramid structure, and a filing failure has the consequence, if there are two further failures, for the athlete of him being transferred to the National Registered Testing Pool with more onerous requirements and potentially serious consequences for non-compliance.

33. Before us, Mr Jacobs again placed weight on the CAS decision in *Murray* to which we have referred above and which the Tribunal placed reliance on at [40] of their decision. We have concerns as to some of the dicta in the *Murray* decision which seem to suggest that a lie which has no or negligible effect on the doping process cannot be the basis for a violation. We would accept that it is not every lie told during the doping process which amounts to an ADR violation, but if the athlete makes a statement in the course of the process which is a lie, it seems to us that it is not precluded from being an ADR violation merely because (to take an example) UKAD has irrefutable documentary evidence from the outset that the statement was a lie and therefore ultimately the lie has no causative effect. We do not think causation can be a relevant test. To the extent that *Murray* suggests the contrary at [145] we do not agree with those dicta.

34. However, none of this matters on this appeal because at [41] the Tribunal accepted that “*providing fraudulent information*”;

“*cover the deliberate provision of false information with the intention of evading the operation of the ADR*”.

35. We adopt that test, which we regard as correct, and therefore turn to consider whether that test is satisfied in the present case.

36. If Mr Dry had responded truthfully to the letter of 18 October 2018, he would have registered one Domestic Testing Pool Filing Failure. Two more failures would have had the effect that he would have been placed in the National Registered Testing Pool which had more onerous requirements and where further filing failures would have put Mr Dry at risk of a ban. Thus the Filing Failure would have been the first step towards a ban, albeit five more Filing Failures would have been required first.

37. The Tribunal considered that the failure had no consequences on the ADR process, and that the requirements of the Domestic Testing Pool were separate from those under the IAAF ADR. For reasons we have explained above, we do not consider this is correct. UKA's rules incorporated the IAAF rules into its rules but also supplemented IAAF rules with further rules of its own. Thus the definition of "Tampering or Attempted Tampering with any part of Doping Control" under Art 2.5 of the IAAF ADR, as well as the definitions of "Doping Control" and "Tampering" there must be read in that context. These definitions have been incorporated into UKA's rules, together with the additional provisions of UKA rules which supplement IAAF ADR.

38. Mr Jacobs substantially reiterated before us the submissions which had found success before the Tribunal. He reminded us we were bound by the findings of fact of the Tribunal, that the Tribunal had considered all relevant matters, and that it was not open to us to reach a conclusion which was at odds with the findings of the Tribunal.

39. For reasons given above it is, in our view, impossible to say that the lie, which the Tribunal held was "*to avoid the noting of a filing failure*" was outside the process of Doping Control and in our view subverts the Doping Control process, and thus falls within the definition of Tampering.

40. It follows that, on the basis of the findings of fact made by the Tribunal:

- a. The letter of 18 October 2018 and the lie in response were part of the Doping Control process.
- b. The purpose and effect of the lie was to avoid a first Filing Failure.
- c. The first Filing Failure would have had the effect that Mr Dry was only two "strikes" away from being added to the National Registered Testing Pool, with more onerous consequences and the potential for a ban in the event of further filing failures.
- d. The deliberate provision of false information was thus with the intention of evading the operation of the ADR.

41. In those circumstances, we disagree with the conclusion of the Tribunal and find the charge against Mr Dry proved. We are comfortably satisfied that Mr Dry committed an ADR violation. We should say that we had the benefit of much more extensive argument as to the ADR than did the Tribunal. Indeed, Mr Jacobs complained that the argument before us was different from that he had to meet before the Tribunal. The argument before us may well have been more extensive, but we are satisfied that what was argued before us was entirely open to UKAD.

Sanction

42. Having found an ADR violation proved, and having concluded that it was intentional (arising from a deliberate lie), as the Tribunal recognised, there is a mandatory suspension of four years. We agree with the Tribunal that such a penalty is an extremely harsh punishment on the facts of this case. Mr Dry told a deliberate lie and his behaviour was foolish in the extreme. But we share the unhappiness of the Tribunal in reaching the conclusion that this gave rise to a four year ban.

43. However, Mr Jacobs submitted that we had power to disapply Rule 10.2.1 if we considered the sanction disproportionate. The Tribunal noted this submission and,

as the point only arose at the end of the oral hearing, we asked for written submissions from both parties on the issue.

44. On behalf of Mr Dry it was submitted CAS had ruled that the sanction must comply with proportionality and that an arbitral body may be required to reduce a sanction otherwise provided for on grounds of proportionality: see in particular *Puerta v ITF*. It was submitted that, given the conduct which was the subject of the charge, a four year ban would be entirely disproportionate. It was also submitted that the appeal tribunal should remit the matter to the first instance tribunal to consider sanction.

45. UKAD submitted in response that *Puerta* does not give rise to a general discretion to depart from the sanctions set out by the ADR but found there was a lacuna in the rules which could only be filled by the Tribunal imposing a just and proportionate sanction. This was how it was interpreted by the panel in *UKAD v Ohuruogu* and *ITF v Sharapova* (Chairman Charles Flint QC in each case) and upheld on appeal to CAS, and more recently *Villaneuva v FINA* and *Guerrero v FIFA* and the panel in *ITF v Aleshchev*. In any event, the facts did not justify a finding that a four year ban was disproportionate.

46. In reply, it was submitted on behalf of Mr Dry that UKAD had misstated the effect of the first instance decision in the present case in their submissions, and the CAS authorities made clear that a just outcome of a disciplinary matter should take precedence over a technicality of the ADR.

47. This is not a case where there is a lacuna in the rules. What is proportionate is not simply a matter of the subjective views of the individual tribunal. The ADR are the product of years of consultation and application across sport worldwide. The sanctions contain elements of punishment and elements of deterrent. How can it be for the individual tribunal to decide on the basis of their own individual views what is proportionate as a penalty for a particular offence when the ADR mandate the applicable penalties? We consider, in line with cases such as *Ohuruogu* and

Sharapova, that we have no power to reach any conclusion other than to order a four year ban and do not consider the caselaw requires us to conclude otherwise.

Conclusion

48. We are comfortably satisfied that Mr Dry has committed an ADR Violation under Art 2.5 and allow the appeal from the Tribunal's decision.

49. The mandatory period of suspension is four years. Mr Dry has been provisionally suspended from 8 May 2019 until the date of the Tribunal decision, 8 October 2019. He therefore has served five months already. It follows that Mr Dry is banned for four years from today but subject to reduction of five months so that the ban ends three years and seven months from today's date.

A handwritten signature in black ink, appearing to read "Charles Hollander". The signature is written in a cursive style.

Charles Hollander QC (on behalf of the Tribunal)

London, UK

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