

**CAS 2004/A/707 Mr. David Millar v The British Cycling Federation**

**ARBITRAL AWARD**

delivered by the

**COURT OF ARBITRATION FOR SPORT**

sitting in the following composition:

President: Mr. Quentin **Byrne-Sutton**, Attorney-at-law in **Geneva**, Switzerland

Arbitrators: Mr. Jean-Jacques **Bertrand**, Attorney-at-law in **Paris**, France  
The Hon. Michael **Beloff**, MA QC, Barrister, President, Trinity  
College, **Oxford**, England

between

**Mr. David Millar**

Represented by Mr. Paul-Albert **Iweins**, Attorney-at-Law in **Paris**, France

and

**The British Cycling Federation**

Represented by Farrer & Co., **London**, United Kingdom

## **I. THE PARTIES AND THE ORIGIN OF THE DISPUTE**

### **A. The Parties**

#### a) *The Appellant*

1. The Appellant, Mr. David Millar (hereinafter referred to as “Millar”) is a world-class cyclist and member of the British Cycling Federation.

#### b) *The Respondent*

2. The Respondent, the British Cycling Federation (hereinafter referred to as “BCF”), is the national federation for cycling in the United Kingdom and a member of the International Cycling Union (hereinafter referred to as “UCI”).

### **B. The Nature of the Appeal**

3. Millar appeals against a decision of 4 August 2004 (hereinafter referred to as “the Decision”) of the BCF Anti-Doping Disciplinary Panel (hereinafter referred to as the “BCF Panel”) suspending him from all forms of cycling competition for a period of two years effective from 5 August 2004 until 4 August 2006.

### **C. The Origin of the Dispute**

4. Millar was born 4 January 1977.
5. At the age of 18, Millar decided to devote himself to cycling rather than to go to university. His goal was to change from the status of amateur to professional level in two years.
6. After receiving offers from several professional teams, Millar accepted the proposal of Cyril Guimard, Sports Director of a reputed French team named COFIDIS, which he duly joined at the end of 1996.
7. In 1997 and 1998, Millar achieved excellent results in the “*Tour de l'Avenir*” and gradually, despite his youth, became the leader of the COFIDIS team.
8. As a result of an investigation in 2004 against certain members of the COFIDIS team for possible doping offences, Millar’s residence in Biarritz was searched and two used

- syringes found there. In consequence on 22 June 2004, he was arrested and held in custody by the French police. While in custody Millar admitted to doping offences.
9. On 1 July 2004 Millar was charged with possessing and using toxic substances. During his hearing by the Examining Magistrate Richard Pallain, Millar explained he had taken erythropoietin (“EPO”) on the three following occasions<sup>1</sup>:
- In August 2001 in Italy whilst preparing for the “*Tour of Spain*”.
  - In May 2003 in Spain whilst preparing for the “*Dauphiné Libéré*”.
  - In September 2003 in Manchester whilst preparing for the World Elite Time-Trial Championship.
10. Millar explained the pressure placed upon him by his position as team leader, the need he faced to "produce results", and at the same time the personal isolation in which he found himself, all of which exacerbated his psychological vulnerability. Those factors in combination with a heavy race programme, various injuries, disappointing results in certain important races and consequential financial pressures made Millar succumb to the temptation to use prohibited substances.
11. On 2 July 2004, BCF, which had notification of Millar’s admissions owing to a leak of the proceedings before the Examining Magistrate, published the following press statement:
- “Following today’s statement from David Millar, in which he admitted the use of the banned substance EPO, British Cycling has suspended him from all competition pending further investigation and disciplinary action.*
- In his statement David also voluntarily withdrew from the British Olympic Team for Athens 2004 ...”*
12. On 19 July 2004, COFIDIS terminated Millar’s employment contract with immediate effect.
13. On 22 July 2004, Millar was summoned to a hearing in front of the BCF Panel, which took place on 4 August 2004. Millar chose not to be legally represented, preferring to explain matters in his own words and face up to his own acts.
14. After the hearing the Decision was read out to Millar and communicated to him in writing by means of a letter dated 6 August 2004, which stated as follows:

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<sup>1</sup> Millar has also admitted that on one of the occasions he had used a testosterone patch in combination with EPO.

*“Dear Mr Millar,*

***David Millar (Code UCI GBR19770104) / Admission of Doping***

*The Anti Doping Disciplinary Panel has heard your frank admissions of guilt to the allegations that, contrary to UCI Anti Doping Examination Regulations, you took EPO on 3 occasions to enhance your performance, and on one of these occasions you combined this with the use of testosterone patches to also enhance your performance. The Panel has no alternative but to impose a suspension, fine and disqualification from the three events in which you took part having used banned substances.*

*The Panel has however taken account of the mitigating circumstances put forward by you and has imposed a suspension from all forms of cycling competition for a period of two years effective from 5<sup>th</sup> August 2004 until 4<sup>th</sup> August 2006. Please note that this period, as you should be aware, is half of the minimum period laid down in Article 130 of the UCI Anti Doping Examination Regulations. In addition a fine of 2,000 SF is imposed which is the minimum fine that can be imposed under UCI Regulations.*

*The Panel has also disqualified you from the following races:*

- 2001 Tour of Spain*
- 2003 Dauphiné Libéré*
- 2003 World Elite Time Trial Championship.*

*The temporary suspension currently in force and imposed by the BCF Board is void as from today.*

*This is the final decision of the Panel, although you may appeal against the decision through CAS in Lausanne should you wish.”*

15. The minutes of the hearing of 4 August 2004 specify that:

*“Whilst not part of the official decision letter, the Secretary also read out the following since the Panel felt that DM should be aware of what had been taken into consideration as mitigating circumstances:*

- Your frank admissions both to French authorities and ourselves*
- The fact that you voluntarily stopped taking banned substances prior to any investigation*
- The genuine contrition shown*
- Your willingness to assist young riders to help them avoid falling into the trap of taking banned substances*
- The gravity of the consequences of the penalty for your sporting and economic position and the risk to your professional career.”*

## **II. SUMMARY OF THE ARBITRATION PROCEEDINGS**

16. On 26 August 2004, Millar filed a Statement of Appeal against the Decision.
17. On 9 September 2004, BCF wrote to the Court of Arbitration for Sport (“CAS”) requesting that the arbitration be conducted in English.
18. On 16 September 2004, BCF indicated that it was appointing Michael Beloff, QC, as arbitrator.
19. On 4 October 2004, CAS informed the parties that English would be the language of the proceeding.
20. On 11 October 2004, the Appellant indicated that it was appointing Jean-Jacques Bertrand as arbitrator.
21. On 20 October 2004, the Appellant filed its Appeal Brief, requesting that:

*“Conclusion*

*The Court of Arbitration for Sport will be pleased,*

- *in addition to confirming the fine and disqualification penalties, which have already been accepted,*
- *to moderate the penalty of suspension and to inflict on the plaintiff in appeal a penalty of firm suspension of no longer than one year, possibly accompanying it with an additional suspended penalty, with the starting point of 24 June 2004.”*

22. On 1 November 2004, CAS confirmed the formation of the Panel comprised of Quentin Byrne-Sutton (President), Jean-Jacques Bertrand and Michael Beloff Q.C.
23. On 10 November 2004, the Respondent filed its Answer requesting that:

*“Conclusion*

*For the reasons stated above, each of Mr Millar’s grounds of appeal is unfounded. The BCF respectfully invites the Court to dismiss Mr Millar’s Appeal. The BCF also submits, that in the circumstances of this case, the Court is entitled to and should dismiss the Appeal summarily rather than to put the parties to the expense of a full oral hearing.”*

24. On 17 November 2004, Millar indicated he was seeking a hearing.

25. On 17 November 2004, CAS informed the Parties the hearing would be held on 24 January 2005 in Lausanne, Switzerland.
26. On 16 December 2004, CAS sent the parties an Order of Procedure confirming the timetable and main procedural matters.
27. On 24 January 2005 the hearing took place in front of the Panel in Lausanne, Switzerland, with the Secretary General of CAS (Mr. Matthieu Reeb) in attendance. The following were present:
  - a) *Claimant*  
  
Mr. David Millar  
Mr. Paul-Albert Iweins, Counsel acting Millar  
Mr. Benjamin Sarfati, Counsel acting for Millar
  - b) *Respondent*  
  
Mr. Jean Hendry, Secretary General, BCF  
Mr. Andrew Hunter, Counsel acting for BCF  
Ms. Serena Hedley-Dent, Solicitor acting for BCF
28. During the course of the hearing, Millar gave evidence in support of his appeal to CAS and the Parties' counsel presented legal arguments. Millar requested, as an alternative to his main prayer for relief, that part of the two-year suspension be deferred.

### **III. THE PARTIES' CONTENTIONS**

#### **A. Millar**

29. In summary, Millar submits that:
  - On the basis of the *lex mitior* principle, the 2004 version of the Anti-Doping Rules of the UCI (hereinafter UCI Rules/04) should apply rather than the 2001 version (hereinafter UCI Rules/01) because the "... *new UCI regulations are more benign than the former ones ...*" in several respects.
  - In any event, "... *according to both previous and current UCI regulations, the ineligibility sanction may be reduced considering the specificity of the case*"<sup>2</sup>.

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<sup>2</sup> All italicized passages are from the Appeal Brief.

- BCF's sanction is disproportionate and should be reduced to a one-year period of suspension on the basis of article 124 of the UCI Rules/01 and/or article 266 of the UCI Rules/04 given the following circumstances:

*“Awarded Time-trial World Champion, David MILLAR never came to terms with this cheating within himself.*

*Moreover, he kept the two syringes of EPO used to prepare for this championship to remind himself that he had betrayed his sporting ideal.*

*[...] the faults he has committed are substantially the consequence of an immaturity and a psychological vulnerability which were not compensated by the kind of supervision he would have needed, to induce the stability of a young man whose life was entirely dedicated to competition and the results expected from him.*

*He was constantly pushed to provide outstanding physical performances, against a money-oriented background, and isolated in his personal and family life (he was living in Biarritz in France, while his mother lives in London and his father in HONG KONG), having no other friends than the racing cyclists of his team, and he periodically wondered, in solitude, about the meaning of his life.*

*The 2003 World Championships were, however, for him the occasion to meet the National British Cycling Team and to observe that this discipline could be exercised in conditions where he would be listened to, supported, and be supervised personally and medically, bearing no comparison with the atmosphere experienced in a professional team with a commercial purpose.*

*This was for him the occasion of a genuine awakening of his conscience relating to his outstanding sporting capacities in a favorable setting, and the rejection of all forms of cheating.*

*From August 2003 he thus ceased all doping.*

*David MILLAR did not of course start the 2004 Tour de France, which was however, one of his two goals of the season, the second being participation in the Olympic Games with the British team.*

*The media repercussions of his admissions also led the COFIDIS team to terminate his contract without allowance.*

*[...], his personal situation would be seriously compromised if the Court were to confirm the period of suspension which has been inflicted on him.*

*[...], he stopped his studies at the age of 18 to devote himself entirely to cycling; therefore he has no other profession or future project than his passion.*

*He has no other resources than those procured by the sport, and had started to build a house in Biarritz which constituted his only capital.*

*Following the termination of his contract he had to put this house, which was incomplete, up for sale.*

*A two-year suspension would put a definitive term to his career whereas, at the age of 27, he could hope to accomplish outstanding performances which the promising start of his career opened up to him, notably within the British national team.*

*The British national team, which is aware of his value and his moral change of heart since late 2003, has kept its confidence in him, and has offered, if his career is not definitively burdened, to entrust him with the training of young cyclists during his period of suspension, something which would enable him during this period to maintain a high level of training.*

*Such a proposal would not, however, be compatible with a suspension of over one year.*

*[...] his circumstantiated admissions and his collaboration in the investigation, a part from proving his repentance and his honesty, have enabled the authorities to fight doping in the world of cycling.”*

- *In addition, “... the starting point of the period of the firm suspension which shall be inflicted on him must be set from 24 June 2004, the date on which he admitted the faults to the police, thus de facto putting at least a provisional term to his sporting career, since these circumstantiated admissions prohibited him from starting the 2004 Tour de France.”*

## **B. BCF**

30. In summary, BCF submits that:

- *The UCI Rules/04 cannot apply because they came into effect on 13 August 2004 and under article 308.2.2 it is expressly provided they will not apply retrospectively to pending matters.*
- *Moreover, “the... New UCI Rules certainly provide for a different system of sanctions from the Former UCI Rules, but they do not provide for a more benign system. On the contrary, ... the appropriate sanction under the New UCI Rules would be more severe on the facts of this case”<sup>3</sup>.*
- *In any event, whichever rules are applied, “... the two-year suspension actually imposed by the Anti-Doping Commission on Mr Millar, is not only proportionate, but is in fact, very lenient...” considering:*
  - “(1) Many, if not all, of the personal circumstances described by Mr Millar are common to all professional cyclists, indeed all professional athletes.*
  - (2) The suggestion that a two year suspension will end Mr Millar's career whereas a one year suspension will not is not supported by evidence, and one which should be treated with scepticism. In any event, professional athletes who engage in deliberate doping take the risk of serious disruption to their careers.*



- (3) *Whilst it is true that Mr Millar admitted his offences, he did not do so until he was caught. Having committed doping offences, he did not come forward and volunteer his admission. In fact he actively concealed his doping offences for a significant period.*
- (4) *The mitigating factors must be balanced against the aggravating factors in this case: this was deliberate doping, undertaken with the intention of cheating; there were three different violations; in the context of the sport of cycling, this was the most serious form of unsporting conduct possible.*
- (5) *A review of CAS' jurisprudence indicates that this is not the type of case where Articles 124 and 125 should be relied on to further reduce the length of Mr Millar's suspension. Articles 124 and 125 do not usually provide a basis for mitigation in cases of intentional doping for competitive advantage. For example, where an athlete **unintentionally** failed to declare prescribed pain medication, application of Articles 124 and 125 resulted in a suspension of one year. (Arbitration CAS 2002/A/464 International Cycling Union (UCI) L, R, Feração Portuguesa de Ciclismo (FPC) Award of October 7, 2003 paragraph 7). Similarly, the application of Articles 124 and 125 resulted in a suspension for a quarter of the minimum period where the athlete was using prescribed pain relievers, suffering from a serious medical condition and competing for fun and training rather than for qualification or competition results. (Arbitration CAS 2003/A/505 Union Cycliste Internationale (UCI)/P, USA Cycling Inc (USA Cycling) & United States Anti-Doping Agency (USADA): Award of December 19, 2003 paragraph 8). Likewise, where a cyclist committed a doping violation due to taking prescribed medication for a shoulder injury, CAS upheld a suspension of two years in accordance with Article 130, but deferred 15 months of the suspension on consideration of Articles 124 and 125. (Arbitration CAS 2003/A/521 P/Royale Ligue Velocipédique Beige (RLVB): Award of March 18 2004 paragraphs 7-8). Mr Millar's case is clearly very different from all of these cases.”*
- *The commencement of the period of suspension cannot be modified because there “... is no provision allowing for the period of suspension to start any earlier even if there has been a provisional suspension in advance of the decision” and “ ... the mere fact that Mr Millar in fact did not compete after his arrest cannot amount to the voluntary acceptance of a provisional measure ... Mr Millar did not agree with the authorities that he would not compete during this period, he was just practically and politically unable to do so”.*

#### **IV. DISCUSSION OF THE CLAIMS**

##### **A. Jurisdiction**

31. The jurisdiction of CAS is not disputed. The appeal was made timeously under the applicable rules and in accordance with article R47 of the CAS Code.
32. The scope of this Panel's jurisdiction is defined in R57 of the CAS Code, which provides that: "*The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance*".

##### **B. Applicable Law**

33. R58 of the CAS Code provides that:

*"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

34. The Parties agree the Anti-Doping Rules of the UCI govern the matter under appeal. However, BCF is invoking the UCI Rules/01, whereas Millar argues the UCI Rules/04 should apply on the basis of the *lex mitior*.
36. The main provision invoked by Millar under the *lex mitior* as being more benign than the UCI Rules/01 is article 266 of the UCI Rules/04, such rule allowing collaboration by the athlete with the anti-doping authorities to count as mitigation.
37. The Panel considers article 124 of the UCI Rules/01 accords athletes the opportunity to benefit from the same mitigating circumstance as article 266 of the UCI Rules/04. Article 124 of the UCI Rules/01 provides as a matter of principle that all "*the penalties imposed must be proportionate with the offence committed*" and shall be fixed "*taking account of both the specific details of the case in hand and the characteristics of cycle sport and its various disciplines*". In other words, in fixing the penalty all relevant circumstances are to be taken into account. This is further emphasized by the words "*inter alia*" which preface the mentioned list of circumstances, making it clear the list is not exhaustive.
38. Thus, the content of article 266 of the UCI Rules/04 cannot in itself trigger the application of the *lex mitior*, whatever the scope of such principle.

39. Moreover, the UCI Rules/04 contain express transitory provisions, which clearly indicate the UCI's intent regarding the scope of application of such rules. Article 308.2.2 provides that "*These Anti-Doping Rules shall not apply retrospectively to matters pending before the date these Anti-Doping Rules came into effect*", while article 309 provides that "*This version of the Anti-Doping Rules of the UCI shall come into force on 13 August 2004 ... [followed by a list of exceptions which are inapplicable in this case and which in part provide for a later date of entry into force]*".
40. According to the foregoing transitory provisions, the UCI Rules/01 remain applicable in this proceeding because Millar's case was pending in front of the BCF Panel on 4 August 2004, i.e. before the UCI Rules/04 came into force on 13 August 2004, in addition to the fact that they were in operation at the time of Millar's doping offence.
41. For the above reasons, this Panel considers the UCI Rules/01 to apply and to allow it to take into account all the mitigating circumstances invoked by Millar.
42. Considering article 121 of the UCI Rules/01 provides that apart from applying the relevant cycling regulations, CAS shall rule "*... in accordance with Swiss law ...*", the Panel shall apply Swiss law to any issue not covered by the UCI Rules/01.

**C. The Disciplinary Sanction (Suspension Period)**

a) *The Length of the Suspension Period*

44. The Parties agree that, with respect to a doping offence of the type committed by Millar, the UCI Rules/01 allow a suspension penalty to be limited to a minimum period of one year (see articles 125 and 130).
45. This Panel agrees with the BCF Panel's positive statements as to Millar's attitude since his decision to cease doping, including the admissions that he made. Millar's frankness, determination and commendable intentions strikingly impressed this Panel which had the advantage of hearing and seeing him. This Panel noted the absence of any contradiction between his oral testimony and past statements recorded in or by the Press, French and English. It also took note of the support variously demonstrated for Millar in written statements from David Brailsford, Deputy Chief Executive of the BCF, Dr Peter Keen of Keenedge Consultation Training, Human Performance and Development and Dr Steve Peters, a Consultant Psychiatrist.
46. Nonetheless, the Panel considers, that when balancing all the relevant circumstances which come into play in deciding upon the length of the suspension, it is necessary to have regard to the indisputable fact that notwithstanding Millar's sincere change of heart in autumn 2003, his doping offence was a very serious one.
47. In his testimony before this Panel, Millar indicated that in 2001 he had formed the opinion that it was impossible to continue cycling as a "true" professional at a high level without recourse to doping. As a result he deliberately indulged in doping with

- significant performance enhancing substances on three separate occasions in preparation for important competitions over a period of two years.
48. While the Panel might accept that the pressures, difficulties and dilemmas Millar faced as a professional cyclist were, in part at least, common to those of his profession, his doping was nonetheless conscious, repetitive, substantial and designed to achieve unfair competitive advantage.
  49. Consequently, even if Millar's admissions were of assistance in discovering or establishing anti-doping violations by other persons (as to which the record is unclear) and, as such, are to be taken into account along with the other mitigating circumstances invoked by him, the Panel considers a two-year suspension to be proportionate, especially in the light of CAS jurisprudence cited by BCF. It is only half the minimum sanction for intentional doping where there is no mitigation at all (see article 130 of the UCI Rules/01).
  50. For the same reasons, the Panel considers the period of suspension in question cannot be deferred.
- b) *The Starting Date of the Suspension Period*
51. The Panel notes that the UCI Rules/01 do not pronounce on how to calculate the ineligibility period when between the date of a rider's admission of guilt and the date when the final penalty is imposed, the rider voluntarily withholds and/or withdraws from any form of competition or has been made subject to a provisional suspension.
  52. Therefore, in accordance with article 1§2 of the Swiss civil code, the Panel shall fill such gap in a manner that it deems compatible with both sets of rules and the particular circumstances of the case.
  53. The Panel considers that, given the purposes of a sanction of suspension and in the absence of an express rule to contrary effect, *lex sportiva* requires that a suspension run from the time an athlete is prevented from practising her or his sport, whether *de facto* or *de jure*. This is conducive to the values both of legal equity and legal certainty. The selection of any other date could result in an arbitrary prolongation of the athlete's removal from the sport, e.g. if the disciplinary hearing were deferred for any reason beyond the athlete's control or if the sanctioning authority were late in imposing a temporary sanction despite an athlete's withdrawal from all competitions.
  54. Given the particular circumstances of this case - in which Millar was arrested by the French police and admitted, before his discharge from custody, to being guilty of doping, thereby *de facto* excluding himself from the Tour de France and any other forthcoming competitions, while at the same time promptly announcing he was withdrawing from the British Olympic team for Athens - the Panel considers the two-year suspension should in fairness take effect from the date of his arrest.

55. From that date onwards, i.e. 24 June 2004, he was in practice through his own volition unable to compete. In this respect, BCF observe “*Mr Millar did not agree with the authorities that he would not compete during this assert period, he was practically and politically unable to do so*”. In the Panel’s view, whether there had been agreement with BCF or any other authority or a voluntary withdrawal, the result from Millar’s perspective was the same.
56. Consequently, the two-year suspension period decided by BCF must be calculated to run from 24 June 2004.
57. In this relation, it is also noteworthy that the appealed Decision contains an element of contradiction as to the computation of the suspension period. Although the Decision states that the penalty imposed has been limited to a two-year suspension period, applying the end date decided by BCF (4 August 2006) would in effect correspond to suspending Millar for 25 months at least, i.e. from 2 July 2004 (when he was provisionally suspended) until 4 August 2006.

## **V. COSTS**

58. Since Millar’s appeal is partially upheld and he finds himself in difficult financial circumstances as a result of the suspension - the Panel considers each party shall bear its own costs. Pursuant to art. R65.1 et R65.2, the procedure is free of charge with the exception of the Court Office fee paid by the Appellant and which is kept by CAS.

\* \* \* \* \*

**ON THESE GROUNDS**

The Court of Arbitration for Sport pronounces:

1. The appeal filed by Millar on 23 August 2004 is partially upheld.
2. The decision of 6 August 2004 issued by BCF is modified in accordance with paragraph 3.
3. Millar's two-year suspension from all forms of cycling competition is maintained, except that the said suspension takes effect on 24 June 2004 and ends on 23 June 2006.
4. This award is rendered without costs, except for the Court Office fee of CHF 500.-- (five hundred Swiss Francs) already paid by the Appellant, which shall be retained by the CAS.
5. Each party shall bear its own costs.

Lausanne, 17 February 2005

**THE COURT OF ARBITRATION FOR SPORT**

Quentin **Byrne-Sutton**

President of the Panel

Michael **Beloff Q.C.**

Arbitrator

Jean-Jacques **Bertrand**

Arbitrator