National Anti-Doping Panel

Before
Rod McKenzie
Carole Billington-Wood
Lorraine Johnson

BETWEEN

UK Anti-Doping — **National Anti-Doping Organisation ("NADO")**

and

Simon Gibbs — **Respondent**

In the matter of proceedings brought by the NADO under and in terms of the Great Britain Wheelchair Basketball Association Anti-Doping Rules, Version 1.6 approved on 13 December 2008 ("Anti-Doping Rules") and the Procedural Rules of the National Anti-Doping Panel 2010 ("NADP Rules") against Mr Simon Gibbs.

FINAL DECISION OF THE ANTI-DOPING TRIBUNAL ("the Tribunal")

A. INTRODUCTION

1. This is the final decision of the Tribunal convened under Article 8 of the Anti-Doping Rules to determine a charge brought against the Respondent of commission of a Doping Offence in breach of Article 2.1 of the Anti-Doping Rules.

2. Article 2.1 of the Anti-Doping Rules makes it a Doping Offence to have present in an Athlete's Sample a Prohibited Substance. The Respondent was charged by letter from the NADO of 25 March 2010 that he had committed an Anti-Doping Rule Violation in respect that a Prohibited Substance (4-methylmethcathinone) was found to be present in a Sample taken "in competition" for Doping Control Purposes from the Respondent (reference number A1089367) and provided by him on 21 February 2010.

3. The presence of this Prohibited Substance in the athlete's Sample constituted an Adverse Analytical Finding.

4. 4-methylmethcathinone is the full chemical description of the recreational drug known as mephedrone. It is a synthetic stimulant and entactogen drug of the amphetamine and cathinone classes. It was not until 16 April 2010 that mephedrone and other substitute cathinones were classified as Class B drugs and made "illegal" for consumption and supply in the United Kingdom by the Misuse of Drugs Act 1971 (Amendment) Order 2010.

5. 4-methylmethcathinone is a Prohibited Stimulant under Section S.6.b (Specified Stimulants) being a substance of similar biological effect and chemical structure to those listed in Section S.6.b in WADA's 2010 list of Prohibited Substances. It is a Specified Substance. Its legal status has no relevance to its status as a Prohibited Substance and a Specified Substance.

6. The Tribunal, made up of Rod McKenzie (Chairman), Carole Billington-Wood (Specialist Member) and Lorraine Johnson (Specialist Member), held a hearing on the charge on 17 May 2010 at the London Heathrow Marriott Hotel, Bath Road, Harlington, Hayes, UB3 5AN. The hearing was attended by the following persons in addition to the members of the Tribunal:

   Mr. Graham Arthur – Solicitor, Director of Legal for the NADO
   Ms. Elisa Holmes – Barrister for the Respondent
   Mr. David Jeacock – Solicitor for the Respondent
   Ms. Hannah McLean –Assistant Legal Officer, NADO
   Ms. Natalie Smith – NADO
   Mr. Simon Gibbs - Respondent
   Mr. Gavin Henderson – Witness
   Mr. Murray Tresedar – Witness – Great Britain Wheelchair Basketball Association
   Mr. Haj Bhamia – Great Britain Wheelchair Basketball Association
   Ms. Susan Humble – NADP Secretariat

7. This document constitutes the final reasoned decision of the Tribunal, reached after due consideration of the evidence tendered and heard and the submissions made on behalf of the parties attending at the hearing. The decision of the Tribunal on all matters before it for determination was unanimous.

8. In this decision capitalised terms, where the context so admits, have their defined meanings as provided for in the Anti-Doping Rules.

B. PROCEDURAL HISTORY:

9. The Respondent was charged with the Anti-Doping Rule Violation by letter dated 25 March 2010 from the NADO.

10. The NADO made a request for the appointment of an Anti-Doping Tribunal by letter to the NADP dated 21 April 2010. The members of the Tribunal were appointed by the President of the NADP in accordance with the NADP Rules and letters notifying the appointment of the members of the Tribunal were issued by the Secretariat of the NADP on 30 April 2010. There were no objections to the jurisdiction of the NADP or the Tribunal or to the membership of the Tribunal.

11. Directions pursuant to Article 7.8 of the NADP Rules were issued by the Chairman of the Tribunal on 4 May 2010.

12. By email of 1 April 2010 to the NADO, the Respondent's representative confirmed that the Respondent did not wish the B Sample to be tested.

13. By email of 8 April 2010 to the NADO the Respondent's representative advised that the Respondent did not challenge the finding of 4-methylmethcathinone in Sample A1089367.

14. By email of 10 May 2010 to the Secretariat of the NADP the Respondent's representative advised that the Respondent admitted the Anti-Doping Rule Violation set out in the charge from the NADO of 25 March 2010. That email went on to advise that the Respondent did not accept that pursuant to Article 10.2 of the Anti-Doping Rules that a period of Ineligibility of two years should be imposed. Further the email notified that the Respondent would rely on Articles 10.4 and 10.5 of the Anti-Doping Rules to seek to eliminate or reduce the period of Ineligibility.

15. There were no preliminary issues, raised by parties either before or at the Hearing on 17 May 2010 relative to the competency or fairness of the proceedings.

C. DECISION:

16. The Tribunal has determined for the reasons set out in this decision that:

(a) in contravention of Article 2.2 of the Anti-Doping Rules there was present in a bodily Sample given by the Respondent on 21 February 2010, 4-methylmethcathinone (mephedrone) which is a Prohibited Substance falling within Section 6. Stimulants (b): Specified Stimulants of the 2010 Prohibited List and is thereby a Specified Substance;

(b) in respect that there was not present a Therapeutic Use Exemption granted to the Respondent in accordance with Article 4 of the Anti-Doping Rules that an Anti-Doping Rule Violation was committed by the Respondent;

(c) the Respondent has failed to establish how the Prohibited Substance/Specified Substance entered his/her body/system for the purposes of Articles 10.4.1, 10.5.1 and 10.5.2 of the Anti-Doping Rules; and

(d) in respect of the Anti-Doping Rule Violation committed, the Respondent is Ineligible for a period of two years from 26 March 2010 until 25 March 2012 (both dates inclusive) with all of the consequences provided for in Article 10.10.1 of the Anti-Doping Rules.

D. EVIDENCE FOR THE NADO:

17. Witness statements of a Ms Hannah McLean, and four exhibits, and Dr Roger Palfreeman were lodged as evidence on behalf of the NADO. The content of those statements and the content of the exhibits was accepted both in writing and orally at the Hearing on behalf of the Respondent. The NADO's exhibits comprise, HM-1 a copy of the Anti-Doping Administration Management System Mission Order M-35387143 authorising the attendance of four doping control staff members of UK Anti-Doping at Telford College Arts and Technology, Telford to collect four "in-competition" samples from the GBWBA Super League fixture taking place that day, under mission code M-35387143; HM-2, a copy of the Lead Doping Control Officer's report; HM-3, a copy of the supplementary report form completed by the Lead Doping Control Officer, Mr David Thomson and; HM-4, a team sheet identifying, amongst other things, the selection of the Respondent for testing.

18. On Sunday 21 February 2010 the urine Sample collected from the Respondent was, in accordance

with Article 5 of the Anti-Doping Rules, split into two Samples and given reference numbers A1089367 and B1089367.

19. The two Samples were transported to the Drug Control Centre, Kings College, London which is a laboratory accredited by the World Anti-Doping Agency ("WADA") for analysis. The Drug Control Centre analysed sample A1089367 in accordance with the procedures set out in WADA's International Standard for Laboratories and returned an Adverse Analytical Finding for the Prohibited Substance 4-methylmethcathinone.

20. The Respondent did not have a Therapeutic Use Exemption issued under Article 4 of the Anti-Doping Rules to justify the presence of the Prohibited Substance in his body/system.

21. It was admitted that the Respondent had thereby committed an Anti-Doping Rule Violation.

22. The witness statement of Dr Palfreeman, a medical doctor with a Diploma in Sports Medicine who is a Fellow of the Faculty of Sports and Exercise Medicine, described the likely effects and experience which would arise were a person such as the Respondent to ingest 4-methylmethcathinone in a "drink" as had been described on behalf of the Respondent. Dr Palfreeman stated:-

> "(a) It is not clear from this explanation [a written explanation in a letter of 8 April 2010 from Mr Jeacock to the NADO] whether or not Mr Henderson [the Respondent's witness] put the entire 2 grams of the "Shake n Vac" into [the Respondent's] drink. Had he done so, Mr Gibbs would have experienced severe symptoms of various forms of discomfort, including agitation, palpitations, seizures and vomiting.
>
> (b) Had Mr Henderson put a small portion of the 2 grams of the "Shake n Vac" into Mr Gibbs' drink (for example 200 milligrams), Mr Gibbs is highly likely to have noticed both an unpleasant taste in his drink, and would have experienced certain effects associated with the use of 4-methylmethcathinone, including feelings of euphoria, increased alertness and empathy."

23. The relevant section of the letter of 8 April 2010 states as follows:-

> "I am instructed that 4-methylmethcathinone is the chemical name for mephedrone. I am

also instructed that mephedrone was at the time sold for recreational use under the name "Shake n Vac".

Mr Gavin Henderson has admitted that on Friday 19 February 2010 he purchased 2 grams of Shake n Vac from a supplier in Andover.

Later that evening in Mr Gibbs' absence and unbeknown to him, Mr Henderson admits putting Shake n Vac into Mr Gibbs' drink. Mr Henderson also says that he did not tell Mr Gibbs what he had done until he received a phone call from Mr Gibbs following your letter to him of 25 March 2010. He then admitted that he had put Shake n Vac into Mr Gibbs' drink on that night. He has since co-operated fully with Mr Gibbs and myself.

Since Mr Gibbs was unaware of the presence in his body of 4-methylmethcathinone it would not have been possible for him to have intended that it would enhance his performance or that it would mask another substance."

24. The opinion evidence of Dr Palfreeman was of limited assistance because it was not clear if his evidence concerning "taste" in drink included for alcoholic drink and whether the described effects of relatively small quantities of mephedrone would apply where the person concerned was already under the influence of alcohol.

E. EVIDENCE FOR THE RESPONDENT:

25. Written statements from the Respondent and Mr Henderson were submitted together with exhibits which accompanied the Respondent's statement. The evidence of the Respondent and Mr Henderson was supplemented by oral evidence given at the Hearing. In addition the coach of the Great Britain National Wheelchair Basketball team, Mr Tresedar, gave oral evidence at the Hearing. The following narrative of the evidence for the Respondent comprises material from the witness statements and the oral evidence given at the Hearing.

26. The Respondent is 31 years of age and lives with his partner and children at an address in Andover. The Respondent is a member of the Aces Wheelchair Basketball team and a member of the Great Britain International squad. He has toured in Israel and Australia with the National squad and had been selected in the final squad of 30 for the World Championship shortly before he was Provisionally Suspended on the issue of the charge letter of 25 March 2010.

27. The Respondent was involved in a motor cycle accident in January 2006 and in February 2008 a decision was taken to amputate one of his legs. He was introduced to wheelchair basketball as part of his rehabilitation programme following the amputation. Prior to the accident the Respondent had served in the Army.

28. Wheelchair basketball has become a major part of the Respondent's life and up until his Provisional Suspension on 26 March 2010 he had been training 6 days per week. Generally he did not train on a Friday.

29. The Respondent asserted that the first occasion on which he had been aware that there was a difficulty with the Sample given by him on 21 February 2010 was when he was telephoned by the Chief Executive of the Great Britain Wheelchair Basketball Association who advised him that he was to be Provisionally Suspended with effect from the following day because mephedrone had been found in the sample that had been analysed following the Match. Mr Arthur for the NADO accepted that it was likely that the Chief Executive would have described the substance identified in testing as mephedrone as opposed to using the technical name of 4-methylmethcathinone.

30. The Respondent went on to advise that he was "devastated" when he took the call and for a couple of hours had been unable to think straight. He then began ringing round people he knew to ask if they knew anything that could explain what had been found. During questioning by the Tribunal the Respondent clarified this to mean that he had telephoned only his partner and then the witness Mr Henderson. In light of what Mr Henderson had told him he had phoned no one else. He explained that he had been phoning round in an effort to identify if anyone had "spiked his drink" on the evening of 19 February through until the early hours of the morning of 20 February. The impression given by his statement was that the Respondent had telephoned more people than just his partner and Mr Henderson.

31. The Respondent advised that when he spoke to Mr Henderson, with whom he had been out socially along with his partner on the evening of Friday 19 February into the early hours of Saturday 20 February, that Mr Henderson immediately told him [the Respondent] that he [Mr Henderson] had put some "Shake n Vac" into "my drink" when they were out together that evening. He went on to say that "I understand Shake n Vac is one of the names given to mephedrone". Under questioning from the Tribunal the Respondent explained that he had only learned that Shake n Vac was a "trade" name given to mephedrone after he had been told of the Adverse Analytical Finding on 25

March.

32. The Respondent advised that Mr Henderson had come round to his [the Respondent's] home at around 6.30pm on Friday 19 February 2010 and that they had left between 10.45 and 11pm by taxi to go socialising in Andover. When they went out socialising that evening it was along with the Respondent's partner. The Respondent's partner did not give evidence orally or by statement.

33. The Respondent advised that he had drawn money from his bank and had initially gone to the "Redbridge" public house which was close to the bank. Prior to leaving his home the Respondent, Mr Henderson and the Respondent's partner had consumed approximately half a bottle of vodka. This was a standard 70cl bottle of 70 degree proof spirit. This was all the alcohol that the Respondent, his partner and Mr Henderson, had consumed at the Respondent's home.

34. The Respondent claimed to have a "pretty clear" recollection of the events of the evening of 19 February and the early hours of 20 February 2010.

35. The Respondent had known Mr Henderson for just over a year. It was put to the Respondent by Ms Holmes that he [Mr Henderson] was the Respondent's best friend. The Respondent did not demur from this proposition. Whether that be correct or not they were certainly close friends by the time of the events of 19 and 20 February 2010.

36. At the Redbridge the Respondent advised that he had drunk three pints of Stella with one standard measure of vodka added to each of the three pints.

37. Thereafter he had gone to another pub called the "Propaganda" in Andover and had stayed there until just before 1am when they had gone to the "Pub at Life" also in Andover. They had stayed at the Pub at Life until between 2.30 and 3am and had then returned to the Respondent's home where they; the Respondent, Mr Henderson and the Respondent's partner, had played cards until about 5am. According to the Respondent he drank only coffee on his return home. At that point the Respondent had gone to bed and had not woken until late in the afternoon of 20 February. Mr Henderson had stayed over at the Respondent's home and had left late on the 20th. The Respondent had not gone out to socialise on the evening of the 20th.

38. At Propaganda the Respondent advised that he had drunk 2-3 rounds consisting of pints of Peroni beer. At Pub at Life he had 2 bottles of beer. Over the course of the evening the Respondent had

therefore shared one half of a bottle of vodka with his partner and Mr Henderson, had drank 3 pints of Stella each and with a single measure of vodka added, had had 2-3 pints of Peroni and 2 bottles of beer. The impression given was that this was not an untypical level of alcohol consumption by the Respondent when he was out for an evening socialising. He was not so intoxicated that he could not spend around 2½ hours playing cards with his partner and Mr Henderson when he returned home.

39. The Respondent advised that he recollected no unusual effects being felt by him during the evening. On his evidence, he felt no unusual degree of euphoria and nothing that would amount to "increased alertness and empathy". There was no unpleasant taste in any of his drinks that he could recollect and certainly none of the feelings of discomfort described in Dr Palfreeman's statement.

40. On 21 February the Respondent played in the wheelchair basketball Match at which the Sample of urine referred to in paragraph 2 above had been taken. The Respondent advised that he had not at any point taken mephedrone knowingly including at any point prior to the Match on 21 February.

41. The Respondent advised that he was aware of the existence of mephedrone "Because it was being spoken about in the Press". The Respondent asserted that he had never knowingly taken a performance enhancing drug or any Prohibited Substance.

42. In his statement the Respondent said:-

> "I was aware of the existence of Mephedrone because it was being spoken about in the Press. However, I had no knowledge of its properties. I had heard about Shake n Vac as a substance from friends but I did not know what Shake n Vac was and I had certainly not taken any. I had no idea that it was Mephedrone or that it or Mephedrone might have performance enhancing properties."

43. When the Respondent was questioned about this part of his statement by the Tribunal he explained that the reference to "friends" in connection with Shake n Vac were to acquaintances of his who he knew through Mr Henderson. He also explained that the discussion that he had with these "friends" had post-dated 25 March 2010. This explanation did not seem consistent with the language of his statement; the sense of which was that he had heard of Shake n Vac prior to the events of 19 and 20 February.

44. The Respondent claimed that subsequent to receiving the letter of 25 March that he had been told by his solicitor, Mr Jeacock, who had taken advice from a Dr Robert Flannigan, a chemical scientist, that Shake n Vac contained 4-methylmethcathinone i.e. mephedrone.

45. In his statement the Respondent advises that he did not have any knowledge on 19 and 20 February that Mr Henderson had put anything in his drinks. He claims that Mr Henderson told him after he was Provisionally Suspended that this was the first time that he [Mr Henderson] had added Shake n Vac to the Respondent's drink and that he had first done so whilst the Respondent was at the toilet in the Redbridge public house and that the subsequent addition of Shake n Vac was whilst the Respondent, his partner and Mr Henderson were at Propaganda.

46. The Respondent explained that he had been moving around speaking to people that he knew in the three establishments visited and that he had no idea that his friend or anyone else would put something in his drinks if he left them unattended. The Respondent admitted having left his drinks unattended. He described himself in terms which amounted to him being a sociable person with a wide circle of acquaintances at these establishments amongst whom he was mingling and often away from his drinks.

47. The Respondent denied being drunk although accepted that he claimed he would have been increasingly under the influence of alcohol during the course of the evening of 19 February and the early hours of 20 February.

48. The Respondent advised that he had remained friendly with Mr Henderson after Mr Henderson advised him of what he had claimed to have done on the 19 and 20 of February as regards spiking the Respondent's drinks. Since the Respondent had been Provisionally Suspended he had been out socially with Mr Henderson on occasions. Notwithstanding the claimed actions of Mr Henderson on 19 and 20 February there appeared to have been no effect on the closeness of their friendship.

49. In his statement and oral evidence Mr Henderson advised that he had arrived at the Respondent's home at some time between 6.30pm and 7pm on the evening of 19 February 2010. He had previously arranged to go out with the Respondent and his partner that evening and he was expected by them. He had left work at between 4 and 5 and had gone to a public house in Andover and had had 2 pints of beer. He advised that on his way to the Respondent's home he had gone to

a shop called "Roots" in Andover and had there bought 2 grams of Shake n Vac divided into 2 one gram sachets at a cost of £25 per gram, total cost £50. He claimed this was the first occasion on which he had ever purchased mephedrone and had been told by friends that he could purchase Shake n Vac legally from this shop. He claimed not to have known that Shake n Vac was mephedrone until after the Provisional Suspension of the Respondent.

50. During the course of the evening, from around 7.30 through until around 10.30 he had shared half a bottle of vodka with the Respondent and the Respondent's partner. That was the only alcohol consumed at the Respondent's home. He claimed not to have told the Respondent that he had purchased the Shake n Vac and that did not disclose that he had done so until after the Respondent told him of his Provisional Suspension.

51. He advised that at about 10.30pm the Respondent and his partner had left with him to go to the Redbridge public house in Andover. He asserted that the Respondent was drinking Stella lager with vodka but that the Respondent had only had one Stella and vodka in the Redbridge. He claimed that at a point when the Respondent had gone to the toilet that he added some of the Shake n Vac to the Stella and vodka that the Respondent had left at the table they were sharing. He claimed that he added approximately one quarter of one of the two sachets of Shake n Vac that he had purchased. This would equate to approximately a quarter of a gram. He advised that he had added another quarter of a gram to his own drink. He claimed that he was drunk at the time and not thinking clearly and that he did not know that the Respondent should not have taken Shake n Vac if he was going to take part in a sporting event. His belief, he claimed, was that Shake n Vac was a legal "high" and that anyone could take it and there would be no consequences. He advised that he had felt no effects from the quarter gram of Shake n Vac that he had taken at the Redbridge public house and that he had detected no effects on the part of the Respondent.

52. He confirmed that the Respondent, his partner and he had then gone on to the Propaganda also in Andover. He claimed that the Respondent was not watching his drinks either here or in the Redbridge and that in the Propaganda when the Respondent's attention was diverted elsewhere he added another quarter gram of Shake n Vac to the Respondent's pint of Peroni beer. The remaining quarter of the first gram he then added to his own drink. Again he felt no effects and detected none in the Respondent. He claimed that by this time he [Mr Henderson] was so drunk that he could not recall events more precisely and could not remember what subsequently happened to the remaining one gram of the Shake n Vac. He confirmed that he had gone on to the Pub at Life with the Respondent and the Respondent's partner and that they had left there at

about 2.30 in the morning and returned back to the Respondent's home where they sat up playing cards until around 5am.

53. Whilst he recollected that the Respondent had only had one pint of Stella and vodka in the Redbridge he could not recollect how many pints of Peroni the Respondent had had in Propaganda or what he [the Respondent] had drunk in Pub at Life.

54. He claimed that the Respondent, after 2.30am, at his home had had "a couple of cans of beer". This was directly contradicted by the Respondent who advised that he had only drunk coffee on returning to his home.

55. Mr Henderson described this as a normal night out with the exception of adding the Shake n Vac to the Respondent's drink.

56. He claimed not to have been aware of any problem arising from his actions on 19 and 20 February until he was contacted by the Respondent around 25 March 2010 when he was told by the Respondent that he had been Provisionally Suspended from wheelchair basketball for having taken the stimulant mephedrone. Mr Henderson claimed to have immediately told the Respondent what he had done on 19 and 20 February by spiking the Respondent's drinks with mephedrone and had agreed to co-operate with the Respondent and the Respondent's advisers. Since both the Respondent and Mr Henderson claimed not to have known at this point that Shake n Vac was mephedrone the immediate connection of the claimed spiking of the drinks with Shake n Vac on 19 and 20 February and the positive test for mephedrone was and remains unexplained.

57. Mr Henderson was pressed at the Hearing by the Tribunal, to explain why he had not told the Respondent that he had purchased the Shake n Vac, which Mr Henderson believed to be a "legal high", and why he clandestinely added it to the Respondent's drink on two occasions. Mr Henderson was unable to offer any explanation as to why he had not disclosed that he had purchased the Shake n Vac or why he had added it to the Respondent's drink without telling the Respondent what he was doing. Further, Mr Henderson was unable to explain why, after having added it to the Respondent's drink, and believing that there were no legal issues with him having done so, that he did not tell the Respondent on 19 or 20 February that he had so added it. Further, Mr Henderson was unable to explain what had happened to the one gram of Shake n Vac that he had not added to either his own drinks or the Respondent's drinks. Mr Henderson acknowledged that the price of the drug had been not insignificant but despite this Mr Henderson could give no

account as to what had happened to the "missing" gram of Shake n Vac that he had purchased. All he could or would say was that he no longer had it in his possession at the "end of the night."

58. Mr Henderson confirmed that since the Provisional Suspension of the Respondent he had remained a close friend of the Respondent and that they had been out socially since then.

59. Mr Murray Tresedar gave evidence that he had been the Head Coach of the Great Britain Wheelchair Basketball squad since 2007. He had a long background in the sport and had been a coach for some 35 years. He had coached both able bodied and athletes with a disability. This had included coaching World Championship teams in Australia.

60. He had known the Respondent since 2008. The Respondent was six foot five inches and had an Army background. Discipline was one of the keys to success in the sport and the Respondent displayed considerable discipline.

61. The Respondent was a member of the Word Class Development Programme and was being actively considered for inclusion in the 2012 Paralympic squad. The Respondent had developed sufficiently during 2009 to be taken on two international tours to Israel and to Australia. Development was very much a "work in progress" with the Respondent but he was developing and his height was a major advantage.

62. The Respondent had been identified as part of the key talent identification programme and had demonstrated quick improvement and development. He had worked extremely hard to progress within the squad. Discipline is very much part of the ethos that Mr Tresedar was endeavouring to instil within the squad and he considered the Respondent one of the most disciplined squad members. The Respondent was working very hard and had worked very hard to develop rapidly to the standard of play which he now demonstrated. The Respondent had been very committed to developing his physical fitness and his games skills were improving. The Respondent had also been involved in recruiting new athletes into Wheelchair Basketball, as part of rehabilitation programmes and talent identification days.

63. There were a series of active educational steps taken with members of the squad to advise them of the risks of Prohibited Substances and doping control procedures. Extensive training and counselling was given to squad members to ensure that inadvertent positives were not experienced.

64. The Respondent had telephoned Mr Tresedar to make him aware of the positive drug test. The Respondent had immediately told Mr Tresedar that his drink had been spiked by one of his "mates" and Mr Tresedar had accepted the sincerity of the Respondent's explanation.

65. The Respondent had already missed a number of significant matches as a consequence of the Provisional Suspension including the European Championship final for his club. In addition he had now been excluded from the World Championship squad.

F. SUBMISSIONS FOR THE NADO

66. Mr Arthur submitted detailed written submissions on behalf of the NADO. The Respondent having admitted commission of the Anti-Doping Rule Violation the focus of his submissions was on Articles 10.4, 10.5.1 and 10.5.2 of the Anti-Doping Rules.

67. Mr Arthur accepted, as did Ms Holmes for the Respondent, that the logical sequence in considering Articles 10.4 and 10.5 was to begin with the consideration of 10.5.1 and then move on to consideration of 10.4 and concluding, if appropriate with consideration of 10.5.2.

68. Notwithstanding that no evidence had been led by the Respondent to establish that it was the case Mr Arthur accepted, on behalf of the NADO, that Shake n Vac was a "trade" name for mephedrone and that mephedrone was legally available, in the form of Shake n Vac, for purchase and consumption in the Andover area in February 2010.

69. Article 8.3.2 of the Anti-Doping Rules provides that where those Rules place a burden or presumption on a person charged with an Anti-Doping Rule Violation to establish specified facts or circumstances then the applicable standard of proof is on balance of probabilities, except where a higher standard of proof is required by Article 10.4.

70. He submitted that whether the Respondent sought to reduce or eliminate the otherwise applicable sanction on the basis of Article 10.4 and/or Article 10.5 that the Respondent was required "on the balance of probabilities" to establish how 4-methylmethcathinone entered his body/system. Mr Arthur described this as the threshold showing. He referred to the CAS decisions *Karatentcheva V I T F*, (CAS 2006/A/1032), award dated 3 July 2006, para 117 and *WADA v Stanic and Swiss Olympic Association*, (CAS 2006/A/1130), award dated 4 January 2007, paragraph 39 for the

proposition that this "threshold showing" had to be applied:-

> "...quite strictly, since if the manner in which a substance entered an athlete's system is unknown or unclear it is logically difficult to determine whether the athlete has taken precautions in attempting to prevent such occurrence."

71. On being pressed by the Tribunal on the position of the NADO as regards whether the Respondent had discharged this "threshold showing", he advised that the NADO's position was neutral on the issue and that it was for the Tribunal to determine on the evidence whether on the balance of probabilities the threshold showing had been established by the Respondent. The NADO offered no analysis of the evidence on this issue.

72. Mr Arthur accepted that for the purposes of Article 10.4, if the Respondent established the threshold showing then the Respondent would establish that he had not intended to enhance his sport performance or mask the Use of a performance-enhancing substance. In order to establish the absence of intent to enhance performance the Athlete must, in terms of Article 10.4.2 produce corroborating evidence in addition to his/her word. In this case the corroborating evidence would be the evidence, if accepted as reliable and credible, of Mr Henderson and his explanation as to how and in what circumstances the mephedrone had been covertly added to the Respondent's drinks on the evening and early morning respectively of 19 and 20 February.

73. Mr Arthur submitted that it was not possible, in this case, for the Respondent's plea of no fault or negligence under Article 10.5.1 to be upheld.

74. He drew attention to the commentary to Article 10.5 in the WADA Code 2009 which provides that the no fault or negligence provision is:-

> "...meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases."

75. He referred to the CAS decision in the case of *IRB –v- Keyter* (CAS 2005/A/1067) and in particular paragraphs 6.13 to 6.15 (inclusive). In particular he pointed out that at paragraph 6.14 it is observed that an Athlete, in this case an elite rugby player, knows that he must monitor carefully everything he eats or drinks and at paragraph 6.15 the panel stated that:-

"A CAS panel cannot accept the submission that getting drunk, and possibly not realising and/or remembering what was going on, is an exceptional circumstance excusing an athlete from his/her fault or negligence."

76. He went on to refer to an ITF case involving Burdekin, April 4 2005 where an ITF Independent Anti-Doping Panel stated that it found the Athlete:-

"...significantly at fault on the following respects: first by consuming alcohol to an extent that materially reduced his ability to police his situation and the conduct of those of whom he kept company."

77. Furthermore he drew the Tribunal's attention to the following commentary in the WADA Code Article 10.5.1:-

"A sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances...(c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink)."

78. The NADO's position was that in the circumstances of this case there was an absence of due care by the Respondent on 19 and 20 February in that he did not take care to ensure his drinks were not spiked since he left them unattended and that Mr Henderson was an associate of the Respondent. Accordingly this could not be one of the exceptional cases in which there was no fault or negligence.

79. Mr Arthur submitted that if the Respondent was able to establish the threshold showing that the grounds for reduction in sanction pursuant to Article 10.4 were not satisfied in this case because the Respondent (as per *Keyter*) cannot establish the requisite absence of fault and that a period of two years Ineligibility must be imposed.

G. SUBMISSIONS FOR THE RESPONDENT:

80. Ms Holmes, on behalf of the Respondent, lodged a written skeleton argument which was supplemented by additional oral submissions at the Hearing.

81. She confirmed that the Respondent admitted the charge and that he sought elimination or mitigation of the period of Ineligibility based on an application of Articles 10.5.1, 10.4 and 10.5.2 of the Anti-Doping Rules.

82. She contended that the Respondent had no way of knowing that his drink had been "spiked" with mephedrone nor did he have any reason to suspect that it might be. She submitted that he was the victim of an entirely unpredictable occurrence over which he had no control and that he could not reasonably have known or expected even with the exercise of upmost caution that he had used or had been administered mephedrone.

83. She contended that the two elements required by 10.5.1 i.e that the Respondent bore no fault or negligence for the violation and how the mephedrone entered his body/system had both been established in this case and that accordingly the applicable period of Ineligibility should be eliminated.

84. She disagreed with the submission of Mr Arthur that Article 10.5.1 could not apply in this case. In her submission the comments in the WADA Code had to be read in context. It could not be right that in every circumstance, no matter how unexpected and incapable of planning for, that the administration of a substance by an associate would mean that Article 10.5.1 could not apply. Athletes had to be accorded some degree of freedom to enjoy social events without the wholly unexpected and unanticipated spiking of their drinks or food resulting in the imposition of a period of Ineligibility. In each case the Tribunal had to look at the specific facts of the individual case and consider whether against those facts the Athlete bore any fault or responsibility for what had occurred. In her submission, on the facts of this case, it was clear that the Respondent bore no fault or negligence for what had occurred. He could not possibly have expected that his friend would spike his drink with mephedrone. This is not a case where the Respondent knew that mephedrone was in circulation and/or that his friend, Mr Henderson, would have or would be likely to have mephedrone in his possession. This was a one off event where Mr Henderson had mephedrone for the first time and where he spiked the Respondent's drink without having any reason or explanation for doing so. It was wholly unrealistic to expect a person, such as the Respondent, to take care to have his drinks in his possession at all times when he was at social event so he could be certain that no one spiked his drink in circumstances such as they were spiked by Mr Henderson in this case.

85. Ms Holmes drew the attention of the Tribunal to the CAS advisory opinion *FIFA and WADA* (CAS 2005/C/976 and 986) and in particular paragraphs 73, 74, 78, 80 and 86 and 87.

86. She pointed out that at paragraph 73 sanctioning bodies were reminded "that the endeavours to defeat doping should not lead to unrealistic and impractical expectations that Athletes have come up with." In that same paragraph CAS drew attention to the possibility that certain of the examples listed under referenced to Article 10.5.2 might reasonably be judged to be cases under 10.5.1.

87. Under reference to paragraph 74 of that decision she pointed out that "no fault" was to be taken as meaning that the athlete had fully compiled with the duty of care incumbent upon him.

88. She went on to refer the Tribunal to the decision in *ITF –v- Richard Gasquet* (CAS 2009/A/1926) and *WADA –v- ITF and Richard Gasquet* (CAS 2009/A/1930). In particular she drew the attention of the Tribunal to paragraphs 5.27 to 5.31 (inclusive). In the *Gasquet* case it was established that cocaine had entered the body of the Athlete as a consequence of him kissing a young lady who had previously taken cocaine without his knowledge. At paragraph 5.29 it is made clear that given the established basis upon which the cocaine had entered the body of the Athlete, for example that the place that the Athlete had gone was notorious for the use of illegal recreational drugs was irrelevant as was the allegation that the Athlete had used a lack of caution in drinking apple juice from open bottles.

89. The CAS panel concluded that it could not find that the player had not exercised upmost caution when he met the lady in an unsuspicious environment, in this case an Italian restaurant. Further it held that the player could not have known that she might inadvertently cause him to be administered cocaine if he were to kiss her, given that he did not know the young lady's cocaine history, had not seen her taking cocaine and had no reason to think that she might have done so. Furthermore he was not in a position to know that it was medically possible that he could become contaminated with cocaine by kissing someone who had previously ingested cocaine.

90. Ms Holmes submitted the Tribunal should find it established that the Prohibited Substance entered in the Respondent's body/system by the mechanism of his drinks having been spiked by Mr Henderson on 19 and 20 February in the way described by Mr Henderson and without the Respondent's knowledge on the basis of the following:-

    a. The purchase and use of mephedrone by Mr Henderson was, by Mr Henderson's

evidence, a one off event not known to the Respondent.

b. The Respondent had been selected at random.

c. There was a perfect storm of misfortune and a confluence of factors.

d. Both the Respondent and Mr Henderson had consumed an appreciable amount of alcohol.

e. It was not an exceptional social night out.

f. The NADO was neutral on the threshold issue.

g. The evidence of Mr Henderson was credible and unambiguous as to what had occurred.

h. Mr Henderson had no reason to be untruthful about the events.

H. DISCUSSION :

91. Article 24.2 of the WADA Code 2009 provides that the commentary on the Code shall be used to interpret the Code.

92. Article 1.5.4 of the Anti-Doping Rules provides that they shall be interpreted in a manner which is consistent with the WADA Code 2009 and that comments annotating various provisions of the Code shall be used to assist an understanding on interpretation of the Anti-Doping Rules.

93. Article 1.3.1 of the Anti-Doping Rules identifies the core responsibilities of each Athlete. Article 1.3.1 (b) (i) requires an Athlete to comply with the Anti-Doping Rules and in particular to take "full responsibility for what he/she ingests and uses."

94. Article 2.2.1 of the Anti-Doping Rules imposes a personal duty on each Athlete "to ensure that no Prohibited Substance enters his/her body." The same article goes on to make clear that it is each Athlete's responsibility for any Prohibited Substance found in his/her Sample and that it is not necessary for intent, fault, negligence or knowing Use to be established in order for an Anti-Doping Violation under Article 2.1 to be constituted. Articles 10.4 and 10.5.1 and 10.5.2 are therefore concerned with the elimination or reduction in sanction not with whether or not Anti-Doping Rule

Violation has been committed.

95. By Article 8.3.2 of the Anti-Doping Rules the standard of proof to be applied in considering whether the Respondent has discharged the burden of proving how the Prohibited Substance entered his/her body/system which was admitted to have been present in the Sample is proof on the balance of probabilities. If the Respondent cannot establish, on the balance of probabilities, how the Prohibited Substance entered his/her body/system then he cannot succeed in eliminating the otherwise minimum period of Ineligibility by Article 10.5.1 or reducing the otherwise minimum period of Ineligibility by application of Articles 10.4 or 10.5.2.

96. In the case of *WADA –v- International Federation of Associated Wrestling Styles, Maria Stadnyik and Azerbaijan Wrestling Federation* (CAS 2007/A/1399) a CAS Arbitral Panel considered a case in which it was claimed that the Athlete, Maria Stadnyik, had her drink "spiked" with a diuretic by a fellow competitor. At paragraph 97 of the *Stadnyik* decision the Panel records that "How a Prohibited Substance entered an Athlete's system is a fundamental precondition to the defence of no significant fault or negligence". In so doing the arbitral panel cites the decision in *WADA –v- Stanic and Swiss Olympic* (CAS 2006/A/1130) at paragraph 39. The *Stadnyik* decision, which is concerned with Articles 10.5.1 and 10.5.2, pre-dates the WADA Code 2009 and the introduction of Article 10.4 but the same fundamental precondition applies to cases where the athlete seeks to invoke Article 10.4.

97. The Panel then goes on to narrate the "alleged facts" which it finds, in that case, where "rather improbable". At paragraph 107 the arbitral panel concludes that it was "improbable that *Stadnyik's* drinking water was spiked with furesemide by Ms Tkhorovska as alleged."

98. In the present case the primary evidence upon which the Respondent relies in order to establish how the Prohibited Substance entered his body/system is the evidence of Mr Henderson. The Respondent's evidence is that he does not know how the Prohibited Substance entered his system other than what he has been told by Mr Henderson. The reliability and credibility of Mr Henderson's evidence is therefore of crucial importance in considering whether the Respondent has proved, on the balance of probabilities, how the Prohibited Substance entered the Respondent's body/system.

99. The Tribunal did not consider the evidence of Mr Henderson to be reliable and credible for each and all of the following reasons:-

(a) Mr Henderson asserted that he was "drunk" by the time that he arrived at the Redbridge public house somewhere around 11pm on the evening of 19 February. However this did not seem to the Tribunal to be consistent with the evidence of the quantity of alcohol that had been consumed. Mr Henderson's evidence was that he had two pints of beer to drink in the early evening after he had finished work i.e. somewhere between 4pm and 6.30pm. He had then shared a half bottle of vodka with the Respondent and the Respondent's partner in the period from around 7.30pm until 10.30pm. On the evidence neither Mr Henderson nor the Respondent were strangers to the consumption of significant quantities of alcohol on a social evening. The quantity of alcohol consumed by Mr Henderson was not consistent with him being drunk by the time he got to the Redbridge public house and we did not believe him when he said that he was drunk by that time.

(b) There was a dichotomy in Mr Henderson's evidence of the subject of his level of intoxication. On the one hand he claimed to be so drunk as to take the extraordinary step of spiking his close friend's drinks on two occasions and on the other hand claimed to be sufficiently sober to have a clear recollection of the events of the evening such as to make him a reliable and credible witness as to what had occurred. It appeared to the Tribunal that he [Mr Henderson] was prepared to assert intoxication as a reason for being unable to answer awkward questions, for example about his reasons for his actions in spiking the drinks of the Respondent, and relative sobriety when attempting to bolster the reliability of his evidence by being able to recount details of the claimed events. The Tribunal, taking into account Mr Henderson's relatively limited consumption of alcohol, his apparently clear recollection of events and his ability to play cards for some 2½ hours on returning to the Respondent's home concluded that the effects of alcohol did not materially effect the actions and responsibilities of Mr Henderson on 19 and 20 February.

(c) Mr Henderson claimed not to know that Shake n Vac was mephedrone. He claimed that he had been told of the existence of a substance called Shake n Vac by friends and had been told where he could purchase it. Despite this claimed lack of knowledge of its content or effects he had gone to the shop called "Roots", which he had not visited before, had purchased two grams of the substance at a price of £50, which he acknowledged is a not insignificant sum and left with two one gram sachets. We were required to believe that he would purchase this quantity of a drug at not insignificant cost without knowing anything or making any enquiries about the correct dose to take or how best to take the

drug. We did not consider this to be credible.

(d) Having then spent this not insignificant sum of money on what he correctly (at the time) understood to be a drug which it was lawful to consume he then took it to the Respondent's home and claimed to have told the Respondent nothing about the purchase. He was either the Respondent's best friend or certainly a very close friend and we did not regard it as credible that he would not have told the Respondent that he had purchased this drug which he believed to be legal. There was no reason for him to be clandestine about the subject. He further claimed that he did not know there was any significance in the drug so far as the sporting activities of the Respondent were concerned so he had no reason not to tell the Respondent and had no reason not to take the drug himself while at the Respondent's home. Further he would have had no reason not to suggest to the Respondent that the Respondent also try the drug.

(e) There is a stark contradiction in the evidence between the Respondent and Mr Henderson as regards the amount of alcohol consumed by the Respondent at the Redbridge. According to the Respondent he had three pints of Stella each topped off with a single measure of vodka. According to Mr Henderson the Respondent only had one pint of Stella with vodka. According to the Respondent three rounds were purchased one by him, one by his partner and one by Mr Henderson. We found this contradiction in the evidence to be significant in judging the reliability and credibility of Mr Henderson's evidence.

(f) Mr Henderson's evidence was that he administered a quarter of a gram or thereabouts to the Respondent's drink whilst the Respondent was at the toilet in the Redbridge and administered approximately the same quantity to his own drink at the same time. He was unable to proffer any explanation as to why he had done this. We found that this complete inability to provide an explanation for his actions to be significantly damaging to Mr Henderson's reliability and credibility. According to Mr Henderson the Respondent was a good friend of his and he had never done anything like this before or since. We did not believe that a person who had taken such actions in such circumstances would not be able to offer any explanation, no matter how objectively unjustifiable or intelligible, for his actions.

(g) We further regarded it as incredible that he would have spiked the Respondent's drinks and not told the Respondent at some point shortly afterwards that he had done so. It

should be borne in mind that this was not an illegal substance and he [Mr Henderson] had no reason to keep his actions secret.

(h) Mr Henderson claimed to have had no idea as to the appropriate quantity of Shake n Vac to add to his and the Respondent's drinks. We found this not to be credible. Mr Henderson could offer no explanation as to why he selected the amount of a quarter of one sachet i.e. a quarter of a gram to add. Why not half a sachet to each of their drinks? Why not one sachet to each of their drinks? He could offer no explanation, intelligible or otherwise, as to why he selected a quarter of a sachet i.e. quarter of a gram, for each of their drinks. The same applies to the addition of a further quarter gram to each of their drinks in the Propaganda. For all he knew, on his evidence, a quarter of a gram might lead to an overdose.

(i) We also did not regard as credible the evidence of Mr Henderson that he could not explain what had happened to the remaining one sachet i.e. one gram of Shake n Vac which had cost him £25. He enjoyed, he claimed, an ability to be precise in his evidence about certain aspects of the events where it fitted with the version of events advanced by him but, on the other hand an unexplained and unconvincing inability to answer even the most straightforward questions where the questions went beyond that version.

100. Whilst it does not bear directly on the reliability and credibility of Mr Henderson's evidence the Tribunal would have expected to have received evidence from the Respondent's partner as to her recollection of the events of 19 and 20 February when she was out socialising with the Respondent and Mr Henderson. We do not know whether she would have been able to give any direct evidence as to the claimed spiking of the drinks of the Respondent by Mr Henderson but she would, in any event, have been in a position to give evidence as to the levels of intoxication of her two accompaniers at different stages in the evening, the extent to which the Respondent left his drinks unattended and the state of her knowledge as to the claimed purchase of Shake n Vac by Mr Henderson. Even if there was some reason why she could not attend the hearing there was no reason why her evidence could not have been given in the form of a signed statement or affidavit

101. In respect that the Tribunal did not find the evidence of Mr Henderson to be reliable and credible the Tribunal did not find that it was probable that Mr Henderson spiked the drinks of the Respondent as claimed by him. It follows that the Tribunal did not find that the Respondent had

established, on the balance of probabilities, that the 4-methylmethcathinone in Sample A1089367 had entered his body/system through the mechanism of drinks spiked with mephedrone by Mr Henderson on 19 and 20 February. Accordingly none of Articles 10.4, 10.5.1 or 10.5.2 applies in this case.

102. Accordingly, the period of Ineligibility to be imposed in this case is two years in accordance with Article 10.2 in respect that none of the conditions for eliminating or reducing the period of Ineligibility have been met. The period of Ineligibility commences from the date of commencement of the Provisional Suspension on 26 March 2010 and ends on 25 March 2012, both dates inclusive.

103. Had the Tribunal found that the Respondent had established that the 4-methylmethcathinone had entered his body/system by the means claimed by him and described by Mr Henderson, then we would have found, for the purposes of Article 10.4.1 of the Anti-Doping Rules, that the 4-methylmethcathinone had not been intended to enhance the Respondent's sport performance or mask the Use of a performance enhancing substance. We would have so found on the basis of the evidence of the Respondent and, under reference to Article 10.4.2, on the hypothesis that Mr Henderson's evidence was reliable and credible, the corroborating evidence of Mr Henderson. That would have been so established to the comfortable satisfaction of the Tribunal in accordance with Article 10.4.2.

104. On that basis we would have found that the Respondent had been at significant fault in the circumstances. Accordingly, a finding of no fault or negligence for the purposes of Article 10.5.1 would not have been made. The Respondent was an international Athlete who would or should have been aware of the risks of leaving drinks unattended in public places. The commentary on the Code and the CAS decisions referred to make it clear that Athletes bear a significant level of responsibility for taking care to ensure that they do not inadvertently ingest Prohibited Substances. Athletes who are liable to be Tested must take care of their food and drink in public places so that they are able to discharge the duty to take care incumbent upon them. In this case the Respondent had been careless of his drinks. He had consumed a significant quantity of alcohol and repeatedly left his drinks unattended. He readily acknowledged that he had "mingled" throughout the course of the evening leaving his drink behind him whilst he socialised. He had allowed Mr Henderson, an associate, and others ready and repeated access to his drinks. Acting in this way does not discharge the high degree of responsibility incumbent on Athletes. In such circumstances we would have imposed a period of Ineligibility of 12 months in substitution for the

period of two years by application of Article 10.4.1 of the Anti-Doping Rules. In such circumstances the Tribunal would not have required to make a determination for the purposes of Article 10.5.2.

I. COSTS:

105. No Application was made by either party in relation to costs and no order as to costs is made.

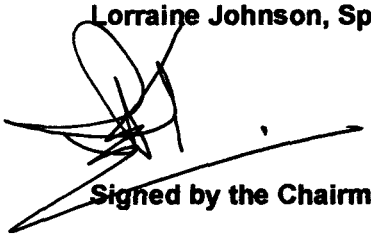
J. RIGHTS OF APPEAL

106. In accordance with Article 13.4.2(b) of the Anti-Doping Rules the parties listed at Article 13.4.1(a) to (h) have the right to appeal against this decision within 21 days from receipt of a copy of this decision to an NADP Appeal Tribunal. The appeal procedures are set out in Article 13.7 of the Anti-Doping Rules and Article 12 of the NADP Rules.

Rod McKenzie, Chairman

Carole Billington-Wood, Specialist Member

Lorraine Johnson, Specialist Member



Signed by the Chairman on behalf of the Tribunal on 4 June 2010