NATIONAL ANTI-DOPING PANEL

Before:

Christopher Quinlan

BETWEEN:

British Bobsleigh and Skeleton Association *National Governing Body*

-and-

Peter Howe *Respondent*

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE 2008 ANTI-DOPING RULES OF THE BRITISH BOBSLEIGH & SKELETON ASSOCIATION AGAINST PETER HOWE

DECISION OF THE ANTI-DOPING TRIBUNAL

Introduction

1. I have been appointed to hear and determine a charge brought against Peter Howe ("the athlete") that he committed a doping offence in that on 24 September 2008 he refused without compelling justification to provide a urine sample for testing when requested to do so by a duly authorised UK Sport Doping Control Officer ("DCO").

2. The British Bobsleigh and Skeleton Association ('BBSA') adopted the UK Anti-Doping Rules following a resolution passed at a Board Meeting held on 9 February 2009. That was subsequent to the date of the alleged doping offence.

The effect of that resolution was that those Rules ("the 2009 Rules") came into force on 1 January 2009. Rule 1.6.1a of those Rules states that they do not apply retrospectively provided

> Any case pending prior to the Effective Date, or brought after the Effective Date but based on an anti-doping rule violation that occurred prior to the Effective Date, shall be governed by the rules in force at the time of the anti-doping rule violation, subject to any application of the principle of lex mitior by the anti-doping tribunal hearing the case.

3. Accordingly, I established with the parties that I had to decide this case under the 2008 British Bobsleigh Association ('BBA'[1]) Anti-Doping Rules ('the Rules'). That application is subject to the principle of lex mitior. The relevant procedural rules are the 2008 NADP Rules; the 2009 NADP Rules govern cases after 1 January 2009.

4. Both parties agreed in writing to accept the jurisdiction of National Anti-Doping Panel ('NADP'). I was appointed by the President of the NADP as the sole arbitrator for this case under 2008 NADP Rule 5.1. On 3 April 2009 I issued various written procedural directions. An oral hearing was held on 20 April 2009. The hearing was attended by the following: the athlete, Stephen Spence Director of the BBSA, Stephen Watkins NADP Case Officer and as observers under Article 8.3.2 of the Rules, Tony Josiah and Kyle Barber of UK Sport.

5. This document constitutes my final reasoned decision, reached after due consideration of the evidence heard and the submissions made by the parties attending at the hearing.

[1] As it then was

The Background

6. The athlete is thirty years of age and a Royal Marine physical training instructor. He is a member of the BBSA and subject to the (anti-doping) Rules. He remains so unless and until he is deemed by the BBSA to have retired from the sport (Article 1.3.3). Article 5.2.1 of the Rules provides

> All Athletes who are subject to these Rules must make themselves available for and must submit to Doping Control (urine and/or blood) at any time (whether In-Competition or Out-of-Competition, with notice or with No Advance Notice) pursuant to these Rules, whether in the UK or overseas.

7. Article 5.4 of the Rules provides

> 5.4 Out-of-Competition Testing
> 5.4.1 In addition to the general Article 5.2.1 obligation on all Athletes who are subject to these Rules to submit to Testing, including Out-of-Competition Testing:
> a. FIBT shall establish a pool (the FIBT International Registered Testing Pool) of Athletes who are required to provide up-to-date whereabouts information to FIBT and to make themselves available for Testing at such whereabouts in accordance with its rules; and
> b. UK Sport, in consultation with BBA, shall establish, and may revise from time to time, a pool of Athletes subject to these Rules (National Registered Testing Pool) who are required to provide up-to-date whereabouts information to UK Sport and to make themselves available for Testing at such whereabouts in accordance with Article 5.5 of these Rules. An Athlete subject to these Rules may be included in the National Registered Testing Pool notwithstanding that he/she is also included in the FIBT International Registered Testing Pool;
>
> and the failure by an Athlete in such pool(s) to satisfy such filing requirements and/or to be available for Testing at such whereabouts according to the applicable rules may be relied upon as the basis for the bringing of proceedings against the Athlete for breach of Article 2.4 of these Rules.

> 5.4.2 BBA or UK Sport will notify an Athlete in writing of his/her inclusion in the National Registered Testing Pool.

8. In 2007 the athlete was a member of the Great Britain Bobsleigh Team. He was included in the BBA National Registered Testing Pool ("NRTP"). Article 5.5 imposes additional obligations on athletes in the NRTP. By virtue of his being included in the NRTP he was required to file quarterly reports with UK Sport specifying his whereabouts in accordance with Article 5.5.3 of the Rules.

9. In an Out-of-Competition test on 24 October 2007, a UK Sport Doping Control Officer ("DCO") collected a sample from the athlete at his home. Analysis of that sample revealed the presence of a prohibited substance (3-hydroxystanozolol). Subsequently he admitted an anti-doping charge contrary to Article 2.1 of the BBA Anti-Doping Rules. An Anti-Doping Tribunal convened under those Rules declared him ineligible for a period of two years from 15 November 2007.

10. Article 10.10.1 addresses his status during that period of ineligibility and provides

> As a condition of regaining eligibility at the end of a specified period of Ineligibility, an Athlete must, during any period of Provisional Suspension or Ineligibility, make him/herself available for Out-of-Competition Testing by BBA, UK Sport and any other Anti-Doping Organisation having Testing jurisdiction over him/her and must, if requested, provide current and accurate whereabouts information as provided in

11. That obligation endures for the period of ineligibility unless and until the athlete retires from the sport of bobsleigh or skeleton bob. Peter Howe confirmed that he has never retired from the sport. Accordingly, by virtue of Articles 5.2.1, 5.4 and 10.10.1 of the Rules he fell within the BBSA's jurisdiction for Out-of Competition testing.

The Doping Offence

12. Article 2.3 of the Rules provides that a doping offence shall be constituted by:

> 'Refusing or failing, without compelling justification, to submit to Sample collection after notification, as authorised in these Rules or other applicable anti-doping rules, or otherwise evading Sample collection.'

13. Article 8.5.1 of the Rules provides

> BBA shall have the burden of establishing that the Respondent has committed a Doping Offence. The standard of proof shall be whether BBA has established the Respondent's commission of a Doping Offence to the comfortable satisfaction of the Anti-Doping Tribunal, bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

14. Article 8.5.2 of the Rules provides

> Where these Rules place the burden of proof upon the Respondent to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

The Facts

15. At 05.35 on 24 September 2008 William Sutherland a UK Sport Doping Control Officer (the 'DCO'), attended the athlete's home in Taunton to obtain an Out-of-Competition sample. According to the DCO's report (the content of which the athlete accepted) the athlete refused to proved a sample. He said, "I can't do the test as I have to be in work at 6'. When informed that this refusal may be regarded by his National Governing Body as an Anti-Doping Rule violation he repeated, "yes I have to go to work at 6". He signed the following entry in the DCO's report: "my choice not to test as rushing off to work".

16. Mr Howe did not dispute that he failed to provide a sample. The burden is upon him to satisfy me on the balance of probabilities that there was a compelling justification for his refusal. That is the primary issue I have to decide.

The Athlete's Case

17. The athlete completed a Notice of Charge indicating that he wished to deny the doping offence. In that Notice of Charge he asserted the following reason: 'I can provide evidence that I was required that morning to be at work early that morning and I have attached a document from my troop report saying I was on Dartmoor early that morning...'. He signed and dated the Notice of Charge 6 February 2009. He produced to the BBSA and at the hearing before me a copy of his Royal Marine troop's duty roster for the week including 24 September 2008.

18. He said he had to be at on duty at the Royal Marine base at Oakhampton ideally at 06.30 but no later than 06.45 that morning. He was required to take a physical training session for his troop of trainees, which session was the first of the day and due to commence at 06.55. Only he could take it. He had to drive from his home in Taunton to Oakhampton, a journey (at that time of the day) of approximately forty-five to fifty minutes by car. He said he was unable (had he wanted to) to contact anyone who "could give [me] permission to miss the period or turn up late". He produced a troop roster; it did not show the start or end time of that session, nor that he was assigned to the troop.

19. He did not comply with my procedural directions. Before me he said he had been unable to obtain evidence to corroborate his duties on the day in question. Given time he contacted a [redacted] whom I heard by telephone conference call. He confirmed the nature of the athlete's duties and that they commenced at 06.55 on 24 September 2008.

20. I gave him liberty to file any further written evidence in support of that part of his case by 5 pm on 24 April 2009. On 23 April 2009 he informed Stephen Watkins by telephone that he could not obtain such evidence within that time. Such evidence was not received. However, it would not have advanced his case for I accept the evidence that he had duties with the Royal Marines on the morning of 24 September 2008. I accept that his first duty was a physical training session which commenced at 06.55.

21. He said his period of ineligibility caused him difficulties with the Royal Marines. He was on the verge of being discharged. He was being drug-tested every four months. He believed he was no longer subject to the BBSA's doping regime and had not filed quarterly whereabouts reports (Article 5.5). The failure to submit whereabouts reports is supported by a letter dated 22 July 2008 from Tony Joisah, UK Sport Results Process Manager to Dr Mike Loosemore, BBSA, informing him that the athlete had failed to provide "the necessary whereabouts information by the date stipulated in our warning".

Determination

22. I do not accept that on the facts of this case his Royal Marines duties amount to a compelling justification for his refusal to provide a sample. I am of that view for essentially the following reasons.

23. First, I am not satisfied there was insufficient time for him to provide a sample when asked to do so. He accepted before me that the DCO woke him up at approximately 05.35. He was occupied with the DCO, answering questions and assisting in completing the requisite report until at least 05.46. Thereafter, he did not leave his home for Oakhampton until (on his account) 05.50/05.55. He was not on duty until 06.55. On his own timings he had approximately fifteen to twenty minutes in which to provide a urine sample. If he left for work at 06.05 (allowing fifty minutes to travel to work) he would have had thirty minutes. When

asked he said the last time he provided a urine sample the process took "about one hour" but that was because he had used the lavatory shortly before the sample was requested. That was not the case that morning: he was woken from his bed. At the very least there was time for him to provide a sample and then try to get to his base on time. He chose not to.

24. Further, the ostensible explanation - he could not or did not want to be late for duty- does not bear scrutiny. Three matters emerged when he was questioned which undermine that explanation. First, he said he did not supply a sample because he did not know he was still subject to the BBSA doping control regime. That is not the same as not providing a sample because he was short of time. His claimed ignorance that he was subject to Out-of-Competition doping control does not avail him. Under Article 1.3 of the Rules it is the athlete's responsibility to comply and acquaint himself with all of the provisions of the Rules. In any event, the DCO told him that his refusal "may be regarded" by his National Governing Body as an anti-doping violation.

25. Second, I do not accept that he could not have attempted to contact someone at his base and explain the situation, before or after providing the sample. He agreed with me that had he (for example) been unwell, been delayed by transport problems or for any other reason beyond his control, some level of cover might have been arranged or the physical training session cancelled. However, he admitted that he did not want to inform his Commanding Officer because of the "hassle" (his word) caused by his previous positive finding. That he did not want to inform his employer is not the same as saying he had insufficient time. In my judgment it is not a compelling reason for refusing to provide a sample.

26. Finally, he said this: "If I'd known of the implications and everything, what it would have caused, in hindsight I probably would have tested just to save all the aggro. It wasn't something that I was interested in doing to be honest". It is plain

to me from that observation that he had sufficient time and chose not to provide the required sample.

27. It follows that the athlete has failed to satisfy me that there was any compelling justification for his refusing to provide a urine sample. Accordingly, I find the athlete breached Article 2.3 of the Rules and the doping offence is thus established.

Ineligibility

28. Article 10.4 of the Rules provides that where an athlete is found to have committed a doping offence under Article 2.3 of those Rules, and, as here, such offence is the athlete's second doping offence, the Tribunal must (subject to Article 10.5.3) impose a period of lifetime ineligibility.

29. However, application of the Rules is subject to "any application of the principle of lex mitior" (Article 1.6 of the 2009 Rules): if since the commission of the offence the relevant law has been amended the less severe law should be applied. The 2009 Rules contain sanctions, which potentially are less severe. Accordingly, I sought and received written submissions from the parties on the application of that part of the 2009 Rules.

30. Mr Spence on behalf of the BBSA did not 'take issue' with my provisional view that the 2009 Rules should apply in this case. The athlete did not specifically address the issue but since it is to his (potential) advantage I would not expect him to dissent. The ineligibility sanctions as provided by the 2009 Rules will apply in this case.

31. Under Article 10.7 of the 2009 Rules the appropriate period of ineligibility is eight years to life if the first and the second anti-doping violations are both

standard offences. For the purposes of those Rules, the term "standard" means an anti-doping violation which "was or should be sanctioned by the standard sanction of two years under Article 10.2 or 10.3.1". On the basis of what I know of his first anti-doping violation I treat it as a standard offence.

32. I turn to the present (second) anti-doping violation. Under Article 2.3 of the 2009 Rules it is an offence to refuse or fail without compelling justification to provide a sample. The standard sanction under Article 10.3.1 is two years ineligibility, unless the conditions for eliminating or reducing the period (Article 10.5) or for increasing the period (Article 10.6) are met.

33. Article 10.5.1 does not apply in this case. Mr Spence recognised that the athlete might argue 'that in the light of the evidence given, no significant fault or negligence arose on his part' (Article 10.5.2). He "acknowledged" on behalf of the BBSA that 'a refusal might occur without compelling justification yet at the same time no significant fault or negligence on the part of the athlete concerned'.

34. The athlete did not specifically seek to rely upon Article 10.5.2. In his written submissions he repeated part of his case before me, namely that when he was declared ineligible he was told that he was "no longer part of the team", was not told that he had to retire from the sport and therefore did not know or believe that he was still subject to the anti-doping regime.

35. Article 10.5.1 (no fault of negligence) does not apply in this case. On my factual findings, the conditions for reducing (Article 10.5.2) the period are not met.

36. Article 10.6 of the 2009 Rules provides for the consequences of the presence of aggravating circumstances but does not attempt to define them. The derivation is Article 10.6 of the World Anti-Doping Code 2009. The commentary to that Article provides what are described as "examples of aggravating circumstances which may justify the increase the period of ineligibility". Those examples are expressly said not to be "exclusive".

37. For the reasons set out in paragraph 34 above the athlete invited me not to conclude the appropriate period of ineligibility was an "aggravated sanction". Mr Spence submitted that the BBSA "would not seek to argue that facts exist in this particular allegation that are capable of amounting to aggravating circumstances". He made the point that the mere fact of it being his second anti-doping violation is not *of itself* capable of being an "aggravating circumstance".

38. I agree with the submission that repetition of itself cannot be an "aggravating circumstance" within Article 10.6 of the 2009 Rules. The *mere* fact of repetition is reflected by the increased sanctions for a second violation. The circumstance must relate to and aggravate the violation and be something other than a second offence. The BBSA submits that no such feature is present in this case. I agree.

39. Therefore, I find Article 10.6 does not apply and I treat the second anti-doping violation as a "standard sanction" violation. This being the athlete's second anti-doping violation the period of ineligibility is eight years to life. It is a range, with a starting point of eight years (for the least serious violation to which the sanction applies) up to and including life (for the most serious). There is no guidance in the 2009 Rules as to how to approach imposition of a sanction within the applicable range. The commentary to Article 10.7 of the World Anti-Doping Code 2009 states: "The Athlete's or other Person's degree of fault shall be the criterion considered in assessing a period of ineligibility within the applicable range". Determining the appropriate period of ineligibility involves an assessment of the athlete's culpability.

40. The athlete's degree of fault: he refused to provide a sample. He did so without compelling justification. He did so whilst subject to and during the currency of a period of ineligibility. One would legitimately expect an athlete in that situation to do all he possibly can to comply with the anti-doping regime. He did not; he flagrantly breached it. I consider that justifies the imposition of a period of

ineligibility longer than the starting point of eight years. In light of the factors I have identified I assess that period to be 10 years.

41. Accordingly, for the purposes of Article 10.7 of the 2009 Rules I determine the appropriate period of ineligibility for his second anti-doping violation to be ten years. I note that under Article 10.4 of the (2008) Rules the relevant period of ineligibility is life.

42. Accordingly, the period of ineligibility is ten years. It will run from the date of this decision, namely 4 May 2009.

43. The provisions of Article 9 (Disqualification) do not apply.

Right of Appeal

44. In accordance with Article 12 of the 2008 NADP Rules the athlete may appeal against this decision by lodging a Notice of Appeal within 14 days of receipt of the decision.

Summary

45. For the reasons given above, I make the following decision:

    a. A doping offence contrary to Article 2.3 of the Rules has been established;
    b. Under Article 10.7 of the 2009 Rules I impose a period of ineligibility of ten years; and
    c. Under Article 10.9 of the 2009 Rules the period of ineligibility shall commence on 4 May 2009

Christopher Quinlan
Sole Arbitrator for and on behalf
of the National Anti Doping Panel

4 May 2009