NATIONAL ANTI-DOPING PANEL

Before:
William Norris QC (Chair)
Carole Billington-Wood
Dr Barry O'Driscoll

BETWEEN:

UK ANTI-DOPING (NATIONAL ANTI-DOPING ORGANISATION)

-and-

MR MARCEL SIX (ATHLETE)

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF BRITISH CYCLING FEDERATION ("BCF")

DECISION OF THE ANTI-DOPING TRIBUNAL

Introduction

1. This is the unanimous decision of the National Anti-Doping Panel in respect of the hearing of a charge under the British Cycling Federation ("BCF") Anti-Doping Rules.

2. The cyclist in question is Marcel Six (hereafter referred to as "the Athlete"). He is now aged 26 (date of birth 27 November 1985) and competes in competitions sanctioned by and staged under the rules of the BCF. He does so as an amateur but we do not regard that factor as having any relevance to the interpretation and application of those rules.

3. The charge against him was set out in the letter of 27th July 2012 from UK Anti-Doping ("UKAD"). It alleges that, on 31st May 2012, he was "*requested to provide a urine sample for doping control purposes, in-competition whilst competing in the BCF Halfords Tour Race Series at Canary Wharf in London*".

4. He is alleged to have failed to comply with that request, an allegation which he admits.

5. Nevertheless, the Athlete contends that he should be exonerated or excused the whole or part of any sanction because of his reasons for refusing that test which are said to constitute 'compelling justification' for that refusal (a defence under Article 2.3 of the UK Anti-Doping Rules) or, alternatively, constitute 'no significant fault or negligence' under Article 10.5.2 so that the period of ineligibility can be reduced.

6. We return to those reasons and the issues that they raise in greater detail below.

Jurisdiction / Representation / Evidence

7. UKAD was represented by Mr Richard Redman. The Athlete was represented by Mr Nicholas Cotter of Counsel[1].

8. As the informed reader will know well, UKAD is the National Anti-Doping Organisation for the UK and as such is responsible for conducting and managing the results of doping tests conducted under the rules of the BCF, which is the national governing body for the sport of cycling in this country.

[1] It should be noted that Mr Cotter and those lawyers who acted on Mr Six's behalf did so "*pro bono*". This reflects considerable credit upon them, We have borne in mind that the Athlete's limited financial resources had the potential to affect the presentation of his case, at least as regards expert evidence that might otherwise have been adduced in relation to the reliability (or otherwise) of the timings on phone and / or text records. However, as will be apparent from the facts found, we consider that the Athlete has suffered no prejudice because we have, at least in general, accepted that the timings that are apparent in our documentation cannot be relied upon as precisely accurate.

9. The Athlete is subject to those rules as he competes in competitions sanctioned by and staged under them and during the 2012 cycling season he was a participant in cycling events for the Metaltek Scott Cycling Team that competed in the Halfords Tour Series which is regarded as the premier cycling road-race series in the UK.

10. The BCF has adopted the UK Anti-Doping Rules which appear in our bundle at pp5-76. Article 1.2.1 provides (inter alia) that the Rules apply to all competing athletes and to those who are, like the athlete in question, licensed members of the BCF.

11. The competition at Canary Wharf was one selected for in-competition doping control. Those tested included the first three finishers and certain others selected at random from the first 12 finishers: the Athlete, who finished eleventh, was one of those selected for testing in accordance with that procedure.

12. The Doping Control Officer in question was Keith D'Wan, who gave oral evidence in accordance with his Witness Statement of August 2012. He took us through the procedure as he conducted it and explained the forms that he completed in respect of the Athlete's notification of testing, which appear at pages 109 and 120 of the bundle.

13. Additional relevant documents produced by UKAD include the DCO Report Form (pages 111 to 114) as well as details of the circuit which are to be found at pages 107 to 108, and an interview conducted by Ms McLean and Mr Jackson of UKAD with the Athlete on 18th June 2012.

14. Essentially, the material parts of Mr D'Wan's evidence and of the later interview are unchallenged.

15. Apart from the oral evidence of Mr D'Wan, we also heard oral evidence from the Athlete, who had provided a Witness Statement, and from his wife, Chevone Six[2], who gave evidence in accordance with their Witness Statements. They sought to explain the exchanges between them by phone and / or text which are recorded at pages 124[3] and page 125[4]. Texts apparently received by the Athlete from his wife are set out at page 126 and should be taken as incorporated in full into this decision.

16. In addition to the oral evidence, we were shown a Statement from a Nurse Practitioner[5] which confirmed that Ms Six had indeed been unwell with "*ongoing mood and anxiety-related symptoms*", symptoms which were "*consistently worse at times when she is alone*" so that she "*relies heavily on her husband / partner*" so that it is "*fair to suspect that her symptoms may deteriorate should her husband be asked to work away from home*".

17. We also read what we will refer to shortly as testimonials from Gavin Bench, Andy Swain and Paul Williams.

The Key Issues to Decide

18. As Mr Redman explained on behalf of UKAD (as to which see paragraph 12 of his Written Submission), the relevant Anti-Doping Rule of the BCF was:

> *"2.3 Refusing or failing without compelling justification to submit to Sample collection after notification of testing as authorised in these Rules or under the Code or otherwise evading Sample collection."*

[2] Also referred to as Chevone Delany
[3] In respect of Ms Six's telephone
[4] The Athlete's own phone
[5] Mr Peach – letter 7th September 2012 – page 127

19. This provision mirrors Article 2.3 of the World Anti-Doping Agency ("WADA") Code. The commentary to that Code includes the following passage:

> *"...a violation of '*refusing or failing to submit to Sample collection*' may be based on either intentional or negligent conduct of the Athlete, while '*evading*' Sample collection contemplates intentional conduct by the Athlete*."

20. Article 2.3 appears in the UK Anti-Doping Rules and is to be found at paragraph 15 of our bundle.

21. As we have noted, the first issue, therefore, was whether or not the Athlete had demonstrated that there was a "*compelling justification*" for his refusal to take the test, as admittedly he did so refuse. That is an issue in respect of which the burden of proof falls upon the Athlete: hence we thought it appropriate to give Mr Cotter the last word in closing submissions, although we all agreed that it was appropriate for Mr Redman to open the case and to call his evidence first.

22. The second issue raises a related issue under the Rules and for these purposes we should identify the following provisions of Article 10:

> ***"10.3 Imposition of a Period of Ineligibility for Other Anti-Doping Rule Violations.***
>
> *10.3.1 For an Anti-Doping Rule Violation under Article 2.3 (refusing or failing to submit to or otherwise evading Sample collection) or Article 2.5 (Tampering or Attempting to Tamper with Doping Control) that is the Participant's first violation, a period of Ineligibility of two years shall be imposed, unless the conditions for eliminating or reducing the*

period of Ineligibility (as specified in Article 10.5) or for increasing the period of Ineligibility (as specified in Article 10.6) are met."

"10.5 Elimination or Reduction of the Period of Ineligibility Based on Exceptional Circumstances

...

10.5.2 Reduction of period of Ineligibility based on No Significant Fault or Negligence:

If a Participant establishes in an individual case that he or she bears No Significant Fault or Negligence for the Anti-Doping Rule Violation charged, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than 8 years. When the Anti-Doping Rule Violation charged is an Article 2.1 violation (Presence of a Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the Prohibited Substance entered his / her system in order to have the period of Ineligibility reduced."

23. As will be apparent from later in this decision, we were considerably exercised as to whether (at least in the context of a refusal under Article 2.3 / 10.3.1) there is any real distinction between "*compelling*

justification" such as might provide a complete defence to a charge of refusal and the athlete's establishing[6] that in the individual case he had bore "*no significant fault or negligence*".

24. As will be apparent, we have drawn a distinction between the two separate provisions on the facts of this case and did so because both parties to the appeal agreed that each required our separate decision whereas it might have been open to UKAD (for example) to have argued that the Article 10.5.2 qualification had no application to a case of refusal such as the present (as opposed to a case where the athlete was found to have a prohibited substance in his system). We did not think it right to advance such an alternative approach in the light of the position of both parties to the hearing.

25. However, the validity of any such distinction can certainly arise for submission and further argument in another case and, in any case will necessarily be very much dependent on the particulars facts found. It follows that we regard the present case as a very rare example of one in which we find there has been no compelling justification demonstrated but we nevertheless find the Claimant to be without ***significant*** fault or negligence. In emphasising the peculiar or particular nature of the present case, we repeat that the value of the present case as a precedent should be very limited indeed.

The Facts Found

26. The material facts of the proposed test and of the Athlete's response are recorded in the Anti-Doping Report Form at pp109-110 and in Mr D'Wan's Statement. It is clear from what Mr D'Wan says that:

(i) He identified himself to the Athlete and asked him to take a test at 20.20hrs.

[6] Again, the burden being on the Athlete

(ii) The Athlete's response was unusual: Mr D'Wan immediately interpreted "*his demeanour as being frustrated, angry and upset*". It is logical to surmise that concern for his family's predicament was the material cause of his apparent demeanour.

(iii) A few moments later he said that he was not taking the test. He explained that his "*wife and kids (were) waiting*" for him and that he had "*got to get home*". He also explained that he had been "*tested recently*" and was not "*taking it again*". Mr D'Wan told him to calm down but that he needed to take the test.

27. During this period, Mr D'Wan was not aware of the Athlete having received any text messages or otherwise of having inspected his phone but he very fairly does not challenge the Athlete's evidence which is to the effect that he knew there was a problem before Mr D'Wan spoke to him.

28. Mr D'Wan then followed the Athlete, who went to the underground car park. Mr D'Wan repeated his request that the Athlete take the test and the Athlete himself continued to refuse to do so – at least if that meant a delay in him getting home. As Mr Cotter put it in submissions on the Athlete's behalf, the continuing pressure on him from home over this period gradually built up – in his words, a 'Drip, Drip' effect.

29. Before the Athlete departed, Mr D'Wan completed the form at page 109 / 110. As we have already observed, it recorded that the request was made at 20.20hrs and the Athlete signed the acknowledgement that a "*refusal or failure to comply with this request to provide a urine sample may constitute an Anti-Doping Rule violation*".[7] The Athlete himself wrote under "*Athlete Comments*" the

[7] Though Mr D'Wan was not sure that he actually read out the contents of that box and we accept that the Athlete may have signed it without paying particular attention to it

following: "*...wife with kids who are extremely ill and I need to be there.*" and that he signed. Mr D'Wan then signed the document at 20.30hrs.

30. The factual issues that we need to decide are:

(i) The stage at which the Athlete told his wife that he was going to race and her reaction to that news;

(ii) When it was that she told him that the children were ill and / or that they were locked out of the house; and

(iii) At what stage the Athlete had grounds to think that his absence was serious and his presence was urgently required with his wife as opposed to completing the doping test.

31. It is possible to conduct a forensic analysis of the phone records and text messages insofar as they appear at pages 124 – 125 and 126. We are, however, reluctant to do so because of what appears to be an acceptance that the actual times in those messages cannot be relied upon[8]. If the times were absolutely reliable then, clearly, the first text message that informed the Athlete that his wife had been locked out was at 20:26hrs, some six minutes after he had been notified of the requirement that he should take a test by Mr D'Wan.

32. We find the following on the basis of the oral and written evidence:

[8] We heed Mr Cotter's caution about the extent to which times in text or phone records may be precisely correct – at least in the absence of any expert opinion.

(i) The Athlete had not expected to be racing that day and had made none of the domestic arrangements that he should have done. When – at a late stage – he was asked to race, he agreed to do so to avoid letting down his team.

(ii) Some time before the race began, and probably at around 17.15hrs, the Athlete received a telephone call from his wife telling him that the children were not well: she sounded very panicky[9].

(iii) During the period of the race, Mrs Six did try to "*contact him many times*"[10]. We understood that not every message would be recorded on page 124.

(iv) The Athlete read the messages which are recorded at page 126 as having been sent at 20:26 *after* his race but before Mr D'Wan spoke to him. This important evidence is, effectively, not challenged by UKAD.

(v) Mrs Six made further attempts to call him between 20:24 and 20:29. Assuming that those timings are anywhere near accurate: this must have been whilst Mr D'Wan was trying to persuade the Athlete to take the test. We accept that in one of those calls (perhaps the 17 second call at 20:25) the Athlete actually spoke to his wife on the phone, as confirmed by Mr D'Wan, which told him that she was "*extremely upset and stressed out*" and that their son was ill.[11]

[9] See paragraph 11 at page 116: this could be the telephone call at 17:14 on page 125, but that is not entirely consistent with the Anodyne message at 19:03 on page 126 which might be consistent with a voicemail message at 19:02 – see page 125.
[10] See paragraph 12 of her Witness Statement at page 122.
[11] See paragraph 29 on page 119: see also paragraph 12 of Mrs Six's Statement at page 122.

33. As Ms Six explained to us, the amount of time that the Athlete spent cycling was something of a bone of contention between them: quite apart from her own medical worries, she was concerned about the children and about her own job, which she felt should have come first. That, we accept, sets the context for the Athlete deciding to decline the test once he had been told (before Mr D'Wan spoke to him) that his wife was "*locked out*"[12].

34. What happened thereafter, including the telephone call that Mr D'Wan witnessed in the car park, served only to fortify the Athlete in his resolve to go home rather than take the test. Nevertheless, it says something about his motivation that he did (albeit unrealistically) suggest that testers might carry out the test at home that day or the following day[13].

Compelling Justification: Conclusions

35. Honourable though the Athlete's motives may have been, we have no hesitation in finding that his refusal was not based on any compelling justification. To be blunt, even if he agreed to race only at the last minute and under pressure, the fact of the matter is that, if he had time to compete in a cycle race, he had to make time to take the test. If, as was the later the case, he wished to put his family first, then the time to do that was before he agreed to race rather than when he came to be tested.

36. Mr Cotter addressed submissions to us on the approach that we should take to "*compelling justification*" under Article 2.3 of the BCF Anti-Doping Rules / UK Anti-Doping Rules / WADA Code.

37. We considered the case of *Nathan Jones v The Welsh Rugby Union Limited*, a National Anti-Doping Panel decision which is at page 144ff of our papers. We agree with the majority in that case that the

[12] As per the text of 20:26 at page 126.
[13] See page 105: a test was in fact carried out the following day which proved negative.

expression "*compelling justification*" suggests a reason that is truly exceptional or unavoidable[14]. Although all cases are different, we also bear in mind the dissenting view in the *Jones* case expressed in paragraph 75, but as the dissenting opinion recognises, the judgement of what is or is not "*truly exceptional*" has to be very much informed by the particular facts of the case.

38. As we say, the Athlete's situation here was avoidable. He chose to race and, having chosen to race, he should have been prepared to take the test. To that extent, the problem was of his own making and whilst his decision to put his family before his obligations as an athlete may be commendable and humane, his motives do not, in our view, constitute a defence on the basis of Article 2.3.

Elimination / Reduction Based on Exceptional Circumstances

39. As we have already recorded, the question we have to decide is whether the Athlete has established that we can and should depart from the requirements of Article 10.3.1 on the basis that he bears "*no significant fault or negligence*" as provided by Article 10.5.2.

40. We have not found this an easy issue to resolve. Clearly, Article 10.5.2 is more readily understood and applied in the context of an athlete who has been tested and found to have a prohibited substance in his system, the presence of which he then seeks to explain on the basis that he bears no fault and has not been negligent. As we have already recognised, it might have been argued that the article in question (10.5.2) simply has no application whatsoever to a charge under Article 2.3.

[14] See paragraph 57ff. It may be of significance and is certainly of interest that the alternative approach based on Art. 10.5.2 was not one argued in that case. Nor is there any significant text or commentary in the WADA Code – see p 56ff of the 2009 Edition.

41. However, Mr Redman, on behalf of UKAD, both in his written and oral submissions, has acknowledged that the provision may also apply to a charge under Article 2.3[15].

42. Since both parties agree that Article 10.5 can arise in the context of a refusal we do not feel that it is appropriate for the panel unilaterally to take a different view. However, once Article 10.5.2 is acknowledged to have potential application to the present case, we need to decide what it means and to give it some meaning.

43. That requires us, we consider, to apply a purposive interpretation because if the provision is to have any meaning, it must apply to a different set of circumstances from those which would otherwise have established "*compelling justification*".

44. Adopting such a purposive approach to interpretation[16], we attach critical importance to the word "*significant*" in qualification of the noun "*fault*".

45. As we have said already, our decision here is very much one upon the facts of the particular case. We doubt that our approach can possibly translate to another case since we do regard the present facts as exceptional.

46. In short, our decision on this finely balanced issue is that the Claimant has established that his clear motivation was to go urgently to the aid of his family whom he believed to be in significant distress with the potential for harm to the health of his wife and possibly also his children. Putting his family first in this way was not, as we have already held, compelling justification, but accepting his motivation as we do, we are able to say that he has behaved without ***significant*** fault.

[15] See particularly paragraphs 34ff of his Written Submission.
[16] Consistently with the decision of the International Rugby Board in the *Nelo Lui* case and the decision of the New Zealand Sports Disputes Tribunal in the *Tawera* case – see page 239 of our bundle

47. For that reason we are able to reduce the period of Ineligibility of two years which would otherwise arise under Article 10.3.1.

Sanction

48. Because of the importance of testing, upon which – as every athlete should recognise – the opportunity to compete in drug free sport depends, we shall not reduce that period of eligibility substantially below the two year period that otherwise must be imposed under Article 10.3.1. Instead, we rule that the sanction shall be 18 months from the date upon which this decision is communicated to the parties[17].

Costs

49. We are provisionally of the view that each party should bear its own costs: if either party wishes to make submissions to a different effect, they should notify the NADP Secretariat within five working days of receipt of this decision.

Further Appeal

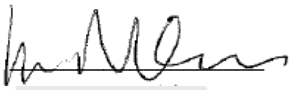
50. We draw the parties' attention to Article 13 of the NADP Rules and Article 13.6 of the UK ADR concerning appeal rights.

[17] We note that the Athlete has continued to compete since the incident in question and last did so in late August this year.

Addendum

51. After we had delivered our decision on this matter and sent it to the parties on 28th September 2012, UKAD realised that it had omitted to ask us to make any order in relation to Mr Six's in-competition results on 31st May 2012. Article 9.1 mandates that such disqualification is 'automatic'.

52. On 16th October, we were asked to deal with that matter. We invited Mr Six's representatives to offer any reason why we should not make that order and, sensibly, they did not oppose it. We therefore order that Mr Six be disqualified from the competition in question in accordance with Article 9.1.



William Norris QC

Carole Billington-Wood

Dr Barry O'Driscoll

25 October 2012

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