Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2008/A/1511 O'Hara v/ WADA & UEFA

ARBITRAL AWARD

Pronounced by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President:	Mr Ercus **Stewart SC**, Barrister, Dublin, Ireland
Arbitrators:	The Hon. Michael **Beloff QC**, Barrister, London, England Prof. Dr Ulrich **Haas**, Professor, Zurich, Switzerland
Ad hoc Clerk:	Mr Fabrizio **La Spada**, Attorney-at-law, Geneva, Switzerland

in the arbitration between

Mr Jamie O'Hara, Essex, England

Represented by Mr Selwyn L. **Tash** and Mr James **Sturman QC**, London, England

as Appellant

and

World Anti-Doping Agency (WADA), Montreal, Canada

as First Respondent

and

UEFA, Nyon, Switzerland

Represented by Mr Jean-Samuel **Leuba** and Mr Robert **Fox**, Lausanne, Switzerland

as Second Respondent

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I. FACTUAL BACKGROUND

1.1 Parties

1. Mr Jamie O'Hara ("the Appellant" or "the Player") is a professional football player. He is under contract to Tottenham Hotspur FC ("the Club"), which plays in the English Premier League.

2. The World Anti-Doping Agency ("the First Respondent" or "WADA") is a Swiss private law Foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA is an international independent organization created in 1999 to promote, coordinate, and monitor the fight against doping in sport in all its forms.

3. UEFA, the Union of European Football Asscciations, is the governing body of football on the continent of Europe.

1.2 Facts

4. The details set out below are a summary of the main relevant facts, as established by the Panel on the basis of the written submissions of the parties, the evidence produced, and the hearing held on 7 July 2008. Additional facts may be set out, where relevant, in connection with the legal discussion (below, section 4).

5. The Player has suffered from severe acne and urticaria for several years. This condition required medical treatment, including a prescription of Roaccutine.

6. In March 2007, the Player was sent by the Club's doctor, Dr Kalpesh Parmar, to see a consultant dermatologist, Dr David G. Paige. Dr Paige prescribed a course of prednisolone. Before taking this medication, the Player requested a standard Therapeutic Use Exemption ("TUE"), which was granted by UEFA.

7. Before pre-season training for the 2007/2008 season, the Player stopped his treatment.

8. In December 2007, the Player's condition deteriorated.

9. On 29 December 2007, the Player went to see Dr Parmar, who instructed him to return home and rest. During the day, the Player's condition further deteriorated and he was driven to the local hospital by his family.

10. At the hospital, the Player was given an intravenous injection of hydrocortisone and, upon his discharge, was prescribed a 3-day course of prednisolone. He took this treatment, which was completed on 1 January 2008.

11. On 31 December 2007, Dr Parmar filed an application for a TUE to the UEFA TUE Commission.

12. On 2 January 2008, UEFA acknowledged receipt of the application and requested additional information. UEFA's email also mentions that *"as long as the player has not received a positive decision from the UEFA TUE Committee for the treatment mentioned in the TUE, it is the player's own risk to participate to any match without any valid TUE and therefore being tested positive"*. Dr Parmar provided the requested information by return.

13. On the same day, UEFA informed Dr Parmar that UEFA's offices were officially closed from 22 December 2007 to 6 January 2008 included and that a decision on the application would not be made before 7 January 2008.

14. On 4 January 2008, UEFA requested additional information and documentation concerning the application and the Player's treatment. This information and documentation was provided on 7 January 2008.

15. On 8 January 2008, the UEFA TUE Committee refused to grant the retroactive TUE. The UEFA TUE Committee, by letter signed by its President Dr Jacques Lienard, stated the following:

> *"The UEFA TUE Review Committee resolved:*
>
> *to refuse the TUE certificate for the oral intake of prednisolone 30 mg for 3 days.*
>
> *The UEFA TUE Committee considers that all the criteria required for granting a Therapeutic Use Exemption have not been fulfilled:*
>
> *TUE WADA International Standard 4.2*
>
> - *There is no medical evidence that the player would experience a significant impairment to health if the Prohibited Substance were to be withheld in the course of treating an acute or chronic condition.*
> - *The Committee considers that there is no medical justification to the use of corticosteroids by systemic routes after the intravenous injection of hydrocortisone.*
>
> *TUE WADA International Standard 4.4*

- *Reasonable therapeutic alternatives to the use of the otherwise Prohibited Substance should be considered to treat the condition.*

TUE WADA International Standard 4.7

- *An application for a TUE will not be considered for retroactive approval if the treatment is not an emergency treatment."*

16. On 29 January 2008, the Player applied to WADA to review the decision issued by the UEFA TUE Committee. The Player filed additional documentation with this application, including an expert report issued by Dr Manolis Gavalas. In his report, Dr Gavalas states the following:

> *"I have absolutely no doubt in my mind that the inclusion of prednisolone in Mr O'Hara's discharge medication was clinically indicated and absolutely warranted. We train all emergency personnel in the United Kingdom to offer prednisolone for two to three days upon discharge following treatment of allergic reactions and anaphylaxis. I am pleased and satisfied that this advice was correctly applied in this case and I strongly disagree with Dr Lienard's conclusions.*
>
> *I do not believe that there were other therapeutic alternatives to the hospital doctor who managed at the time Mr O'Hara and as previously stated I support fully the use of steroids for 2-3 days upon discharge."*

17. By decision dated 29 February 2008 ("the Decision"), the WADA TUE Committee rejected the Player's application. It stated the following:

> *"i. Although the initial 200mg of hydrocortisone was justified and within the scope of a retroactive TUE, the prednisolone was not directly prescribed as emergency situation treatment but as a precaution to prevent new crisis and therefore criteria 4.2 of the International Standard was not met;*
>
> *ii. The prednisolone was prescribed to enable Mr O'Hara to come back to competition more quickly and therefore gave him an advantage to play which is contrary to criteria 4.3;*
>
> *iii. Furthermore, rest had not been considered as an alternative to the prednisolone.*

18. The Decision was received by the Player on 4 March 2008.

19. On 14 March 2008, the Player appealed the Decision by filing a statement of appeal with CAS.

2. SUMMARY OF THE ARBITRAL PROCEEDINGS

20. On 14 March 2008, the Player filed a Statement of Appeal with CAS, together with supporting exhibits. The Statement of Appeal does not specifically include prayers for relief, but states the following: *"I am the Solicitor for Tottenham Hotspur Football Club (Club) and write to appeal*

against the decision made by the WADA TUEC of Friday 29 February to refuse Jamie O'Hara (O'Hara), a player of the Club, a Therapeutic Use Exemption (TUE) for the oral intake of prednisolone". The Appellant appointed The Hon. Michael Beloff QC as arbitrator.

21. Additional exhibits were filed on 17 March 2008.

22. On 25 March 2008, the Player filed an Appeal Brief, together with supporting exhibits. In the Appeal Brief, the Appellant made the following prayers for relief:

> *"Thus, on a full review of the facts and the law applicable in this case, we respectfully submit that the CAS should quash the decision of UEFA and WADA TUEC's and replace it with a decision granting a retroactive TUE for the hydrocortisone and the prednisolone."*

23. On 25 March 2008, the First Respondent wrote to the CAS as follows:

> *"The original decision rendered by UEFA was reviewed by WADA TUE Committee upon the athlete's request. WADA TUE Committee confirmed the initial decision rendered by UEFA TUE Committee.*
>
> *We inform you that WADA does not presently intend to take an active role in this appeal. We consider that UEFA will fully and properly defend the case, and should they require any expert witness that they might approach us for such assistance."*

24. On 28 March 2008, the Second Respondent appointed Professor Dr Ulrich Haas as arbitrator.

25. On 10 April 2008, the English Football Federation ("the FA") wrote to the CAS as follows, and requested that any relevant documentation and submission generated in the course of the appeal be copied to it:

> *"As Mr O'Hara is a player for Tottenham Hotspur FC in the English Premier League, he is subject to the jurisdiction of The Football Association and the terms of our Doping Control Regulation. Indeed, he is presently charged with a breach of the FA's Doping Control Regulation in relation to this use of prednisolone. That charge has been temporarily suspended pending the consideration of Mr O'Hara's appeal by CAS, as CAS's decision may affect whether or not The Football Association charge continues."*

26. The Parties and the CAS agreed to provide the FA with relevant documentation and submissions concerning the appeal procedure.

27. On 15 April 2008, the Second Respondent filed an Answer, together with supporting exhibits. In its submission, the Second Respondent made the following prayers for relief:

> *"I UEFA requests that the CAS reject the appeal of Jamie O'Hara and confirm the decisions rendered both by UEFA TUE Committee and WADA TUE Committee.*

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II UEFA requests that Jamie O'Hara be ordered to pay participation in UEFA legal fees.

III UEFA requests that Jamie O'Hara be ordered to pay the arbitration fees borne by UEFA in a proportion to be determined by CAS."

28. On 21 April 2008, the Appellant filed a request for an oral hearing.

29. On 24 April 2008, the Second Respondent wrote to the CAS and stated that it considered that a hearing had to be held in this matter.

30. On 2 May 2008, the Appellant filed a request to adduce further evidence under Rule R56 of the Code of Sports-Related Arbitration ("the Code"), as well as a witness statement and exhibit of Mr Gustavo Poyet, assistant manager of the Club.

31. On 8 May 2008, the CAS sent a notice of formation of the Panel to the parties and informed them that the President of the Panel was Mr Erous Stewart SC.

32. On 15 May 2008, the Second Respondent opposed the Appellant's request to adduce additional evidence. In response to this submission, the Appellant filed a Note to the Court on 19 May 2008.

33. By letter dated 29 May 2008, the First Respondent confirmed to the CAS that it would not take part in nor be represented at the hearing that would be held in this matter.

34. On 17 June 2008, the Appellant filed a further written submission and on 25 June 2008 the Second Respondent filed a further written submission, with exhibits.

35. On 2 July 2008, both the Appellant and the Second Respondent filed a reply to the further written submissions, with exhibits.

36. In the course of the proceedings, the parties have filed the following witness statements and medical reports: (1) The Appellant has filed a witness statement by himself, a witness statement by Mr Gustavo Poyet assistant manager of the Club, and medical reports from Mr Manolis Gavalas and Professor Vivian James; (2) the Second Respondent has filed witness statements by Dr Jacques Lienard, Chairman of the UEFA TUE Committee, Ms Caroline Thom, Anti-Doping Manager of UEFA, Dr François Pralong and Dr Peter Jenoure.

37. The Panel held a hearing on 7 July 2008 at the CAS premises in Lausanne. All the members of the Panel were present. In addition, the Appellant and his counsel, as well as counsel for the Second Respondent and expert witnesses attended the hearing.

38. Each party had the opportunity to examine the witnesses and to present its case, and the Panel heard detailed submissions from the Appellant and the Second Respondent. After the parties' final arguments, the Panel closed the hearing.

39. After the hearing, the Panel deliberated and now issues the present award.

3. POSITION OF THE PARTIES

40. The positions of the parties may be summarized as follows.

3.1 The Appellant

41. As to the CAS' powers on appeal, the Appellant submits that the CAS has full power to review the facts and the law in deciding the appeal, and is not bound by any previous evidence or arguments submitted to UEFA or to WADA. In addition, according to the Appellant, there is nothing in the CAS Statutes that restricts, prohibits or otherwise precludes the advancement of any submission or evidence that was not placed before the previous decision makers.

42. As to the merits of the appeal, the Appellant bases his appeal on five different grounds.

43. First, the Appellant considers that the definition of *"emergency treatment or treatment for an acute medical condition"* must be given as wide a meaning as is consistent with the anti-doping scheme. According to the Appellant, where an athlete honestly and reasonably believes that a particular prescribed substance or method is required as emergency treatment or treatment of an acute medical condition, he should not subsequently have that judgment criticised upon an application for a retroactive TUE. The Appellant submits that this broad interpretation is justified in the health interests of athletes.

44. Second, the Appellant points out that there is no definition of *"emergency treatment or treatment for an acute medical condition"* in criteria 4.7 of the International Standard and that it is artificial in this case to divide the necessity for the prednisolone from the hydrocortisone. According to the Appellant, the prednisolone was a continuing part of the Player's treatment for an acute medical condition. In addition, the Appellant submits that where standard medical practice is to prescribe a particular substance as part of the treatment of an emergency or acute medical condition, then the treatment can genuinely be described as *"emergency treatment"* even if, technically, the immediate threat to life or health is obviated.

45. Third, it was impossible in the present case for an application for a TUE to be considered prior to the *"doping control"*. The Appellant submits that the process by which an athlete applies for a retroactive TUE necessarily falls into the definition of doping control, as it is an admission by the athlete that a prohibited substance has been taken that would otherwise require a standard TUE under the International Standard. According to the Appellant, if this interpretation is correct, then there clearly were *"exceptional circumstances"* in the matter at hand that meant that there was insufficient time or opportunity for Mr O'Hara to make, or for the UEFA TUE Committee to consider, his theoretical application for a standard TUE.

46. Fourth, the Respondents were wrong on the facts to refuse a retroactive TUE. According to the Appellant, one or other of the criteria of set out in criteria 4.7 were satisfied and it is odd to suggest that the criteria 4.2 was not met when the Player had previously applied for, and been granted, at least one TUE in respect of prednisolone treatment in March 2007. In addition, the Appellant submits that rest is not a therapeutic alternative to medical treatment. It admits that, in certain circumstances, rest can be considered a *"reasonable alternative therapy"*, but considers that WADA did not explain in its decision why it considered rest to be such an alternative on the facts of this case. Finally, the Appellant considers that the earlier return to sport than would otherwise have been achieved without the prednisolone cannot amount to an *"enhancement of performance other than that which might be anticipated by a return to a state of normal health"*.

47. Fifth, assuming a retroactive TUE was correctly refused, then the Player bears no fault, because he honestly and reasonably believed (on the basis of medical advice) that he would fall into an exception for doping offences. He therefore did not commit a doping offence in the first place.

48. In its submission of 17 June 2008, the Appellant addressed certain disputed facts. It also submitted that the CAS precedent cited by the Second Respondent to challenge the CAS' ability to take into account new evidence (Franck Bouyer v/ UCI & WADA, CAS 2004/A/769 – the "Bouyer case") was not applicable in the present case. It stressed that it was the medical staff that treated the Player that could determine whether the medical condition was to be treated as an *"emergency"*, and that the Player had no say in the treatment he received. According to the Appellant, there is no doubt that the prescription of prednisolone was part of the emergency treatment. Further, the Appellant accepted that the issue of the absence of fault of the Player is not for the CAS Panel to decide. Finally, the Appellant cited CAS precedent, in which a Panel had addressed the issue of what was to be considered as a legitimate medical treatment.

49. In its submission of 2 July 2008, the Appellant repeated that the evidence it had already filed, in particular the statements of Prof. James and Mr Gavalas, had to be taken into consideration. It also repeated its submission that the prescription of prednisolone was part of the emergency treatment and that the Player was not given a choice not to take the medication.

3.2 The Second Respondent

50. As a preliminary matter, the Second Respondent raised the two following issues:

- According to the Bouyer case, the Panel is not competent to take into account new elements of fact and the matter should be examined only on the basis of the documents produced to the UEFA TUE Committee.
- There are only two documents on record written by people who have examined the Player during his stay at the hospital on 29 December 2007. The Club's doctor, Dr Parmar, did not see the Player while he was at the hospital. According to the Second Respondent, there is a huge discrepancy between these documents and the subsequent explanations given by Dr Parmar in support of the application made to the UEFA TUE Committee.

51. Concerning the Appellants five grounds of appeal, the Second Respondent answers as follows.

52. First, the criteria of *"emergency treatment or treatment for an acute medical condition"* is established by the bodies of the TUE Committees which have to examine the TUE application filed by the Player. It is not for the Player to define what may or may not be considered as an emergency. In this respect, the Second Respondent points out that the comments to criteria 4.7 state that *"medical emergencies or acute medical situations requiring administration of an otherwise Prohibited Substance or Prohibited Method before the application for a TUE can be made, are uncommon"*. According to the Second Respondent, the determination of the existence of an emergency usually lies with the medical staff called upon to treat a medical situation; to consider that the honest and reasonable belief of a player is the standard by which to measure the existence of such an emergency would open the door to abuse.

53. Second, the Second Respondent submits that the procedure consisting in granting a retroactive TUE must remain exceptional. According to article 4.2 of the International Standard, a TUE

may be granted if the Player were to experience a significant impairment to health if the Prohibited Substance or Prohibited Method were to be withheld in the course of treating an acute or chronic medical condition. However, in the present case and as stated in the Decision, the further oral treatment of prednisolone was not directly part of the emergency situation, but was prescribed as a precaution to prevent potential risk of a new crisis. In this respect, the Second Respondent contends that even had the prednisolone been withheld, the Player would not have experienced significant impairment to his health.

54. Third, the Second Respondent stresses that the application for a retroactive TUE was made on 31 December 2007, while the events justifying such request took place on 29 December 2007. According to the Second Respondent, there is no clear explanation for this two-day delay and the submission that it was impossible to apply for a standard TUE is not substantiated by any clear evidence. In this respect, the Second Respondent submits that the notion of exceptional circumstances outlined in article 4.7 of the International Standard can only be interpreted in the light of an emergency, in the sense that it must flow from the medical emergency of the situation that there is no time to materially file an application and wait for the decision on the standard TUE. In the present case, the Second Respondent contends, there is no evidence that the TUE Committee could not have decided on a standard TUE had the request been made upon the discharge of the Appellant, nor is there evidence that the Appellant could not have waited for a standard TUE before taking the prednisolone.

55. Fourth, the Second Respondent submits that the Player's condition was not as bad as that which was suggested by Dr Parmar in the application. According to the Second Respondent, the prescription for oral prednisolone was only made to avoid a relapse; if the risk of relapse had been prevalent, the hospital would have kept the Player for observation and treatment. Hence, in light of the requirements of Article 4.2 of the International Standard, the Second Respondent contends that the Appellant would not have experienced a significant impairment to his health if the prednisolone had been withheld.

56. Fifth, the Second Respondent considers that the Appellant's last argument is irrelevant in the context of the present appeal. According to the Second Respondent, such argument may be made in the course of any disciplinary action that may be directed against the Player, but is outside the jurisdiction of the CAS as respects the matter at hand.

57. As to costs, the Second Respondent submits that, as it should prevail on the merits, the Appellant should be ordered to bear all costs of this arbitration, as well as to contribute to the legal and other costs incurred by the Second Respondent.

58. In its submission of 25 June 2008, the Second Respondent repeated that the reasoning in the Bouyer case was applicable and prevented the CAS from examining new evidence produced by the Appellant. In this respect, the Second Respondent also relied on Article 62 para. 6 of the UEFA Statutes. In addition, UEFA stressed that the hospital documents on record show that the Player's condition did not appear as dire as the description provided by the Club's doctor and that this condition did not warrant the prescription of oral prednisolone. Finally, the Second Respondent contended that other treatments which would have been admissible under the anti-doping regulations could have been provided instead of prednisolone.

59. In its submission of 2 July 2008, the Second Respondent repeated its position. It also stressed that as a professional sportsman, the Player could not simply rely on the fact that his local hospital gave him treatment under specific circumstances as automatically making such treatment acceptable under anti-doping regulations.

4. LEGAL DISCUSSION

4.1 CAS Jurisdiction

60. Article 62 para. 1 of the UEFA Statutes reads as follows:

> *"Any decision taken by a UEFA organ may be disputed exclusively before the CAS in its capacity as an appeals arbitration body, to the exclusion of any ordinary court or any other court of arbitration."*

61. In addition, Article 18.01 of the UEFA Anti-Doping Regulations states the following:

> *"In case of litigation resulting from or in relation to these regulations, the provisions regarding the Court of Arbitration for Sport (CAS) laid down in the UEFA Statutes apply."*

62. Further, Article 13.2.1 of the WADA Anti-Doping Code provides that decisions regarding anti-doping rules violations *"in cases arising from competition in an International Event or in cases involving International-Level Athletes [...] may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court"*.

63. The parties confirmed the jurisdiction of CAS by signing the Procedural Order of 3 July 2008.

64. It follows that CAS has jurisdiction to decide on the present dispute.

4.2 Applicable law

65. As the seat of CAS is in Switzerland, this arbitration is subject to the rules of Swiss private international law ("LDIP") governing international arbitration. According to Article 187(1) LDIP, the arbitral tribunal decides in accordance with the law chosen by the parties or, in the absence of any such choice, in accordance with the rules with which the case has the closest connection. Although the parties have not expressly chosen any specific law, there is, in cases of appeals against decisions issued by FIFA, an indirect choice of law, in accordance with Article R58 of the Code and Article 60(2) of the FIFA Statutes. Such indirect choice of law is valid under Swiss private international law rules.

66. According to Article R58 of the Code,

> *"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to*

the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

67. In accordance with this provision, and with Article 64 of the UEFA Statutes, the Panel shall apply Swiss law, as well as the provisions of the UEFA and WADA Regulations, in particular the WADA International Standards for Therapeutic Use Exemptions (the "International Standards").

4.3 Preliminary question

68. In its Appeal Brief, the Appellant submitted that in accordance with Article R57 of the CAS Statutes, the CAS has full power to review the facts and the law in deciding the appeal and is not bound by previous evidence or argument submitted to UEFA or WADA. The Appellant acknowledged that in the Bouyer case, the CAS stated that it was in principle inadmissible for an athlete to ask the CAS to rule on facts and evidence that were not produced before the competent TUE Committee with the application for a TUE. However, the Appellant contends that the additional evidence it has produced in the course of these proceedings, in particular the medical reports, did not introduce any new facts, but only deal with the correct interpretation of the notion of *"emergency treatment"*.

69. On this issue, the Second Respondent submitted that the Panel must apply the Bouyer precedent and, as a consequence, is not competent to take into account new elements and facts. Therefore, the appeal should only be examined by the Panel based on documents produced to the UEFA TUE Committee.

70. The Panel considers that the additional evidence produced by the parties, in particular the witness statements and medical reports, is admissible.

71. First, the Panel notes that both the Appellant and the Second Respondent have produced, and relied upon, additional evidence, notably in the form of witness statements and/or medical reports.

72. Second, the Panel agrees with the Appellant that the witness statements and medical reports that have been produced by both parties do not contain new allegations of fact or address new issues of fact, but interpret, from a medical point of view, the facts that were submitted to the UEFA and WADA TUE Committees. The Panel considers that they are appropriate means to

clarify technical issues related to interpretation of the medical concepts set out in the International Standards.

73. Third, in the Panel's opinion and based on the foregoing, taking into account the statements and medical reports produced by the parties will not have as a consequence, alluded in the Bouyer case, that the medically inexpert Panel will substitute its own view for that of the competent TUE Committee. On the contrary, these documents and the information contained therein may assist the Panel in determining whether the Respondents correctly applied Article 4 of the International Standards, on the basis of the facts that were submitted to them with the application for a TUE.

4.4 Merits

74. Article 4.0 of the WADA International Standards for Therapeutic Use Exemptions reads as follows:

> *"4. 0 **Criteria for Granting a Therapeutic Use Exemption***
>
> *A Therapeutic Use (TUE) may be granted to an Athlete permitting the use of a Prohibited Substance or Prohibited Method contained in the Prohibited List. An application for a TUE will be reviewed by a Therapeutic Use Exemption Committee (TUEC). The TUEC will be appointed by an Anti-Doping Organization. An exemption will be granted only in strict accordance with the following criteria.*
>
> *4.1 The Athlete should submit an application for a TUE no less than 21 days before participating in an Event.*
>
> *4.2 The Athlete would experience a significant impairment to health if the Prohibited Substance or Prohibited Method were to be withheld in the course of treating an acute or chronic medical condition.*
>
> *4.3 The therapeutic use of the Prohibited Substance or Prohibited Method would produce no additional enhancement of performance other than that which might be anticipated by a return to a state of normal health following the treatment of a legitimate medical condition. The use of any Prohibited Substance or Prohibited Method to increase "low-normal" levels of any endogenous hormone is not considered an acceptable therapeutic intervention.*
>
> *4.4 There is no reasonable therapeutic alternative to the use of the otherwise Prohibited Substance or Prohibited Method.*
>
> *4.5 The necessity for the use of the otherwise Prohibited Substance or Prohibited Method cannot be a consequence, wholly or in part, of prior non-therapeutic use of any substance from the Prohibited List.*
>
> *4.6 The TUE will be cancelled by the granting body, if*

a. The Athlete does not promptly comply with any requirements or conditions imposed by the Anti-Doping Organization granting the exemption.

b. The term for which the TUE was granted has expired.

c. The Athlete is advised that the TUE has been withdrawn by the Anti-Doping Organization.

4.7 An application for a TUE will not be considered for retroactive approval except in cases where:

a. Emergency treatment or treatment of an acute medical condition was necessary, or

b. Due to exceptional circumstances, there was insufficient time or opportunity for an applicant to submit, or a TUEC to consider, an application prior to Doping Control."

75. In the present case, the Second Respondent disputes fulfilment of the following conditions is disputed:

- Article 4.2: Would the Player have suffered a significant impairment to health if prednisolone had been withheld in the course of treating his condition?
- Article 4.4: Was there a reasonable therapeutic alternative to the use of prednisolone in connection with the Player's condition?
- Article 4.7: Was emergency treatment or treatment of an acute medical condition necessary or were there exceptional circumstances due to which there was insufficient time or opportunity for the Player to submit, or a TUEC to consider, an application prior to Doping Control?

76. The Panel will first examine the condition related to Article 4.7 (below, section 4.4.1), then the conditions related to Article 4.2 (below, section 4.4.2) and 4.4 (below, section 4.4.3).

4.4.1 Emergency treatment or treatment of an acute medical condition

77. In its decision of 8 January 2008, the UEFA TUE Committee stated the following in respect of Article 4.7 of the International Standards:

"An application for a TUE will not be considered for retroactive approval if the treatment was not an emergency treatment."

78. In its decision of 29 February 2008, the WADA TUE Committee stated the following:

> *"Considering that the further oral treatment by Prednisolone was not directly part of an emergency situation treatment but a precaution to prevent potential risk of new crisis, it appears therefore that criteria 4.2 of the International Standard for TUE is not fulfilled."*

79. As set out above in further detail, the Appellant submits that the prescription of prednisolone was part of an emergency treatment of an acute medical condition, which included both the administration of intravenous hydrocortisone and the prescription of prednisolone to prevent a relapse.

80. The Second Respondent, although it admits that it was appropriate to give hydrocortisone to address the Player's acute medical condition, contends that the Player was not in a situation of emergency after his condition had ameliorated as a result of the intravenous medication. Therefore, according to the Second Respondent, there was no emergency nor acute medical condition anymore at the time the prednisolone was prescribed.

81. The burden is on the Appellant to prove, on the balance of probabilities, that the conditions that must be met to grant the TUE are fulfilled. In this respect, both parties have produced witness reports from medical professionals, in support of their position.

82. On this issue, Mr Gavalas stated the following:

> *"I have absolutely no doubt in my mind that the inclusion of Prednisolone in Mr O'Hara's discharge medication was clinically indicated and absolutely warranted. We train all emergency personnel in the United Kingdom to offer Prednisolone for two to three days upon discharge following treatment of allergic reactions and anaphylaxis. I am pleased and satisfied that this advice was correctly applied in this case and I strongly disagree with Dr Lienard's conclusions.*
>
> *[...] I believe the use of steroids is important as it can reduce the chances of the development of a biphasic Anaphylaxis which is can be a more serious relapse of an allergic phenomenon seen in 15-20 % of patients after the initial allergic reaction."*

83. In his second statement, Mr Gavalas added:

> *"I am frankly surprised that there seems to be an inexplicable unwillingness to accept that administration of oral Prednisolone is part if the emergency regime administered to patients with acute allergic reactions and anaphylaxis. It is standard practice in this country and indeed I am, as an expert in this field, teaching and training others to administer Prednisolone for three days as this is an important step in preventing secondary allergic reactions which are often more serious than the initial attacks."*

84. Prof. James stated the following:

> *"7 Prednisolone is a corticosteroid with pharmacological activity which is similar to that of hydrocortisone. The reason for prescribing this drug is given by the treating doctor, Dr Kalliyanda, who states in a letter to Miss Thom, dated 4 January 2008, that Mr*

O'Hara was discharged with oral steroids for 3 days to reduce the reaction and to prevent recurrence'.

8 It is entirely clear therefore that the oral steroids were given as a continuation of, and a part of the emergency treatment.

9 One of the reasons given in the Decision for declining to reverse the earlier decision not to issue a TUE certificate is

'...further oral treatment by prednisolone was not directly part of the emergency situation treatment but a precaution to prevent potential risk of a new crisis, it appears therefore that criteria 4.2 of the International Standard for TUE is not fulfilled.'

10 This view seems to misinterpret the purpose of administering the steroid for the following three days, which was to continue the anti-inflammatory effect of the hydrocortisone, and to prevent a relapse. The appears to me to be clearly part of the initial emergency treatment, and withholding prednisolone treatment might have put the athlete at risk of relapse and consequent impairment to his health. Hence Criterion 4.2 of the code in my view is fully met."

85. On this issue, Dr Lienard provided the following statement:

"The administration through intravenous injection of 200mg HYDROCORTISONE is not questioned. However, the prescription of an oral treatment during three days brings one to conclude that taking corticoids for treatment and to play is a performance enhancing factor.

Oral treatment is presented as a precaution to avoid a new crisis.

[...]

4) No one questions the fact that the player's health is a priority, which justifies the intravenous treatment for an acute condition to obtain a clinical result and to avoid an immediate aggravation of the situation.

5) The continuation of the treatment which could have an ergogenic effect is not compatible with the practice of a sport in conformity with the regulations."

86. Dr Pralong stated as follows:

"[...] my opinion is that while the intravenous administration of cortisone was necessary in light of the allergic reaction, the pursuit of oral cortisone based treatment was not necessary. In light of the fact that Mr O'Hara is a sportsman, alternative treatment with non prohibited medication could have been administered without jeopardizing his health, while remaining within the limits of what is admissible in regards of anti-doping regulations. First of all, he could have been prescribed antihistamines to avoid scratching and irritation. This alternative treatment would have perfectly fulfilled the same objective as the prescribed Prednisolone without putting the player at risk of violating anti-doping regulations.

In any event, he was not in a situation of an emergency or an acute medical condition which absolutely required the 3 day prescription of Prednisolone."

87. Finally, Dr Jenoure produced the following statement:

> *"If the initial medical circumstances can justify the initial intravenous infusion of Hydrocortisone, the oral Prednisolone was not part of the direct emergency situation treatment any more and cannot fall under the category of situations which could justify a retroactive TUE. This is a precautionary treatment to prevent the potential risk of a new crisis and therefore the criteria of 4.2 of the International Standard for the TUE were not fulfilled. I believe that alternative medical measures were at the disposal of the doctors knowing the professional status of their patient.*
>
> *In any event, after his dismissal of the hospital, he was not any longer in a situation of emergency or of acute medical condition which absolutely required the 3 day prescription of Prednisolone."*

88. All experts agree that the administration of intravenous hydrocortisone was appropriate and can be considered to be a treatment responding to an emergency or an acute medical condition under the meaning of Article 4.2 of the International Standards. This also reflects in the decision issued by the WADA TUE Committee on 29 February 2008, in which the Committee stated: *"Considering that the initial medical circumstances would seem to justify the initial intravenous infusion of Hydrocortisone 200mg which is in the scope of a retroactive TUE".* This is also undisputed by the Second Respondent (see, e.g., Answer, p. 9).

89. There also appears to be consensus between the medical experts on the fact that it was appropriate to follow up the intravenous injection with a subsequent, precautionary treatment, in order to prevent a relapse and avoid scratching and irritation.

90. However, the experts disagree on the two following issues: (1) was the prescription of prednisolone part of the emergency treatment? And (2) were there alternatives to prednisolone?

91. The Panel will examine the second issue under Section 4.4.3 below.

92. Concerning the first point in disagreement, the Panel considers that, based on the evidence on record, in particular the medical opinions produced by the parties and referred to above, the Appellant has met his burden of proving that the prescription of prednisolone was part of a treatment designed to address an acute medical condition.

93. The Panel agrees with the Second Respondent that, at the time the prednisolone was prescribed to the Player, upon his discharge from the hospital, the initial emergency had disappeared, as a result of the administration of intravenous hydrocortisone. However, it is undisputed that the prescription of prednisolone was intended to prevent a relapse of the acute medical condition. In this respect, Mr Gavalas confirmed in his first report that *"the use of steroids is important as it can reduce the chances of the development of biphasic Anaphylaxis which is can be a more serious relapse of an allergic phenomenon seen in 15-20% of patients after the initial allergic*

reaction". He also added in his second report that *"It is standard practice in this country and indeed I am, as an expert in this field, teaching and training others to administer Prednisolone for three days as this is an important step in preventing secondary allergic reactions which are often more serious than the initial attacks."*

94. Prof. James also confirmed that it was *"entirely clear therefore that the oral steroids were given as a continuation of, and a part of the emergency treatment".*

95. The Panel could not sensibly go behind the opinion of the physicians who were presented with the Player's medical condition and who had to determine what treatment was to be administered to address such condition in the absence of any exceptional circumstances which might entitle them to do. Moreover, in the present case, the Panel is satisfied, based in particular on the evidence presented by Mr Gavalas, that the prescription of prednisolone was not a separate treatment, but was part of the same two-step medication that was prescribed to the Player to treat his acute medical condition (including a relapse, which could have been more serious).

96. In the Panel's opinion, the prescription of a substance in order to prevent a relapse of an acute condition, in accordance with standard practice at UK hospitals, must be considered to be an integral part of the treatment designed to address the initial condition which, in this case, was undisputedly an acute medical condition.

97. As a consequence, the Panel considers that the condition set out in Article 4.7 of the International Standards is met and that the Appellant could apply for a retroactive TUE.

4.4.2 <u>Significant impairment to health</u>

98. In its decision of 8 January 2008, the UEFA TUE Committee stated the following in respect of Article 4.2 of the International Standards:

> *"There is no medical evidence that the player would have experienced a significant impairment to health if the Prohibited Substance were to be withdrawn in the course of treating an acute or chronic condition.*
>
> *The Committee considers that there is not medical justification to the use of corticosteroids by systemic routes after the intravenous injection of hydrocortisone."*

99. In its decision of 29 February 2008, the WADA TUE Committee stated the following:

> *"Considering that the further oral treatment by Prednisolone was not directly part of an emergency situation treatment but a precaution to prevent potential risk of new crisis, it appears therefore that criteria 4.2 of the International Standard for TUE is not fulfilled."*

100. The Appellant submits that the prescription of prednisolone was a continuing part of the treatment for an acute medical condition.

101. The Second Respondent contends that the further oral treatment of prednisolone was not directly part of the emergency situation, but was prescribed as a precaution to prevent potential risk of a new crisis. In this respect, the Second Respondent considers that the Player would not have experienced significant impairment to his health had the prednisolone been withheld.

102. As set out above, the Panel considers that the prescription of prednisolone was part of the global treatment administered to the Player in order to address an acute medical condition. In addition, it is undisputed that prednisolone was prescribed to prevent a relapse of the acute medical condition.

103. In this respect, Mr Gavalas clearly stated that he believed *"the use of steroids* [was] *important as it can reduce the chances of the development of a biphasic Anaphylaxis which is can be a more serious relapse of an allergic phenomenon seen in 15-20 % of patients after the initial allergic reaction"*. Prof James also stated that the purpose of administering prednisolone *"was to continue the anti-inflammatory effect of the hydrocortisone, and to prevent a relapse. The appears to me to be clearly part of the initial emergency treatment, and withholding prednisolone treatment might have put the athlete at risk of relapse and consequent impairment to his health. Hence Criterion 4.2 of the code in my view is fully met"*.

104. Based on this evidence, the Panel considers that the prescription of prednisolone was necessary, from a medical point of view, to prevent a relapse which could have been more serious that the original medical condition. Taking into account the fact that the original condition was an acute condition, which is undisputed, the Panel considers that the Player could have suffered a significant impairment to health if prednisolone had not bee presoribed.

4.4.3 Reasonable therapeutic alternative

105. In its decision of 8 January 2008, the UEFA TUE Committee stated the following in respect of Article 4.4 of the International Standards:

> *"Reasonable therapeutic alternatives to the use of the otherwise Prohibited Substance should be considered to treat the condition."*

106. In its decision of 29 February 2008, the WADA TUE Committee stated the following:

> *"Considering that the oral Prednisolone was in capacity to help the athlete to come back to the competition more quickly, which is clearly not the intention of a medical treatment*

and to give him an advantage to play, which is opposed to criteria 4.3 of the TUE Standard, while other medical attitude could have been considered, in particular rest."

107. On the issue of possible alternatives to prednisolone, Mr Gavalas stated the following:

"I do not believe that there were other therapeutic alternatives to the hospital doctor who managed at the time Mr O'Hara and as previously stated I support fully the use of steroids for 2-3 days upon discharge."

108. In his report, Prof. James states as follows:

"The Decision also states that 'other medical attitude could have been considered in particular, rest'. Again, this is to misunderstand the purpose of the medication which is to maintain the anti-inflammatory effect and to safeguard against a relapse, for which rest as an alternative would have been inappropriate and ineffective."

109. On this issue, Dr Pralong's statement reads as follows:

"In light of the fact that Mr O'Hara is a sportsman, alternative treatment with non prohibited medication could have been administered without jeopardizing his health, while remaining within the limits of what is admissible in regards of the anti-doping regulations. First of all, he could have been prescribed antihistamines to avoid scratching and irritation. This alternative treatment would have perfectly fulfilled the same objective as the prescribed Prednisolone without putting the player at risk of violating anti-doping regulations."

110. Dr Jenoure stated the following:

"I believe that alternative medical measures were at the disposal of the doctors knowing the professional status of their patient."

111. During the hearing, the parties and the witnesses agreed that rest could not be considered as a reasonable therapeutic alternative. However, they addressed the issue whether antihistamines could have been a reasonable therapeutic alternative to prednisolone, with the Appellant and Mr Gavalas in particular submitting that they could not, and the Second Respondent and Dr Pralong in particular contending that they could.

112. The Panel is not in a position to determine, from a medical standpoint, whether the doctors who treated the Player should or could have prescribed antihistamines instead of prednisolone. However, the Panel considers that from a legal point of view and based on the evidence on record, the Appellant has met his burden of proving on the balance of probabilities that, in the circumstances of the case, there were no reasonable therapeutic alternatives to prednisolone. This ruling is based on the following:

- Mr Gavalas stated clearly, both in his report and during the hearing, that he considered there were no reasonable therapeutic alternatives and that, in particular, antihistamines were not an alternative to prednisolone to prevent a relapse.

- Dr Pralong stated in his report that the Player could have been prescribed antihistamines to avoid scratching and irritation. However, the report does not mention that antihistamines would be appropriate to prevent a relapse of the Player's initial medical condition.

- During the hearing, Mr Gavalas and Dr Pralong were of opposing views on the issue. However, the Panel considers that Mr Gavalas' opinion should be given preponderant weight, based on his position in the United Kingdom medical field and his publication of national guidelines used in Accident & Emergency Departments in the United Kingdom.

113. The Panel therefore rules that the condition set out in Article 4.4. of the International Standards is fulfilled, as are the conditions set out in Articles 4.2 and 4.7 of the International Standards (see above, para. 98 and 105).

5. COSTS

114. Article R64.4 of the Code provides that at the end of the proceedings, the Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties. Article R64.5 of the Code further states that the arbitral award shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them.

115. The Panel has reviewed all the circumstances of the case, including the outcome of the proceedings, and rules that, since the Appellant fully prevailed in the arbitration, the costs of the arbitration, to be determined and served on the parties by the CAS Court Office, shall be borne by the Second Respondent.

116. Furthermore, as a general rule, the award grants the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings. Having taken into account the outcome of the arbitration and the conduct and financial resources of the parties, as required by Article R64.3 of the Code, and in the light of all of the circumstances of the case, the Panel is of the view that the Second Respondent shall pay to the Appellant an amount of CHF 3,000.00 as contribution to the Appellant's costs incurred in relation to the proceedings.

Tribunal Arbitral du Sport
Court of Arbitration for Sport

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The decision issued on 8 January 2008 by the UEFA TUE Committee and the decision issued on 29 February 2008 by the WADA TUE Committee are set aside.

2. Mr Jamie O'Hara is granted a retroactive TUE for the use of Prednisolone between 29 December 2007 and 1 January 2008.

3. The costs of the arbitration, to be determined and served on the parties by the CAS Court Office, shall be borne by UEFA.

4. UEFA shall pay to Mr Jamie O'Hara an amount of CHF 3,000.00 (Three Thousand Swiss Francs) as contribution to costs incurred in connection with this arbitration.

5. Each party shall otherwise bear its own legal costs and all other expenses incurred in connection with this arbitration.

6. All other prayers for relief are dismissed.

Issued in Lausanne, on 21 October 2008

THE COURT OF ARBITRATION FOR SPORT

Chairman of the Panel

Ercus Stewart SC