

NATIONAL ANTI-DOPING TRIBUNAL

Before:

Rod McKenzie (Chair)

Dr Michael Irani

Blondel Thompson

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING
REGULATIONS OF THE SCOTTISH FOOTBALL ASSOCIATION 2014-2015**

B E T W E E N:

UK Anti-Doping

("UKAD")

- and -

Mr Jordan McMillan

("Athlete")

DECISION OF THE ANTI-DOPING TRIBUNAL ("THE TRIBUNAL")

Introduction

- 1 This is the unanimous decision of the Tribunal in an arbitration of an alleged Anti-Doping Rule Violation ("ADRV") brought by UKAD under the Anti-Doping Regulations of The Scottish Football Association ("Scottish FA") 2014-2015 ("ADR"). Capitalised words and phrases not defined in this Decision have their respective meanings provided in the ADR and WADA Code 2009. Except where otherwise stated, references to Articles are to articles of the ADR.

- 2 The person against whom the charged ADRV ("Charge") is brought is Jordan McMillan ("the Athlete").
- 3 The Athlete is a professional footballer registered, at the time of the relevant Sample Collection Session with Partick Thistle Football Club at the Scottish FA. By virtue of his registration with the Scottish FA he is subject to the ADR and has submitted to the jurisdiction of the NADP in the determination of Charges brought under the ADR. None of these matters were the subject of any dispute by the Athlete during the course of the proceedings with which this Decision is concerned.
- 4 The Charge against the Athlete was set out in a letter dated 18 December 2014 from UKAD which constituted a Notice of Charge for the purposes of ADR 5.1. That letter stated *inter alia*:

"2 Facts

- 2.1 *On 3 December 2014, a Doping Control Officer "DCO" collected a urine sample from you during an In-Competition test after the match between Glasgow Celtic and Partick Thistle. Assisted by the DCO you split the sample into two separate bottles which were given reference numbers A1118153 ("the A Sample") and B1118153 ("The B Sample").*
- 2.2 *Both samples were transported to the World Anti-Doping Agency ("WADA") accredited laboratory in London, the Drug Control Centre, Kings College London ("the Laboratory"). The Laboratory analysed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories. Analysis of the Sample returned an Adverse Analytical Finding for benzoylecgonine (a metabolite of cocaine).*
- 2.3 *Benzoylecgonine is classified as a Non-Specified Stimulant under section S6a of the WADA 2014 Prohibited List. It is a Prohibited Substance.*

2.4 *According to our records, you do not have a Therapeutic Use Exemption (TUE) to justify the presence of benzoylecgonine in your system.*

3. Charges

3.1 *The Adverse Analytical Finding has been reviewed (in accordance with ADR Article 7.2) and it has been determined that you have a case to answer for a violation of ADR Article 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample).*

3.2 *You are hereby formally charged with the commission of an Anti-Doping Rule Violation, namely the Presence of benzoylecgonine in a Sample provided by you on 3 December 2014, numbered A1118153, in violation of ADR Article 2.1."*

5 With effect from 18 December 2014 the Athlete was provisionally suspended from participation in all competitions, events or other activities whether organised, convened, authorised or recognised by the Scottish FA until the matter had been resolved. The Athlete was also prohibited from such activities in any other sport compliant with World Anti-Doping Code – compliant rules.

6 The Athlete was offered the opportunity of having his B Sample Analytically Tested but did not take up that opportunity.

7 All references to acceptances, acknowledgements and the like in this Decision at the Hearing and at any Hearing on Directions were in the case of the Athlete through his solicitor and in the case of UKAD through its solicitor.

8 By letter dated 30 December 2014 the Athlete's Licensed Player's Agent, Mr Tony Asghar, wrote to UK Anti Doping advising *inter alia* as follows:

"We confirm our client's acceptance of the accuracy of the test result, however he strongly denies that he had any knowledge of its ingestion nor having any intent to ingest such a substance at any time."

- 9 The letter went on to advise that on 30 November 2014 the Athlete had attended at the home of his partner's parents and had there consumed alcohol. It was alleged that there was also present on that occasion a Mr Sean Malloy who had, it was alleged, been consuming cocaine as a recreational substance but that such consumption on 30 November 2014 was unknown to the Athlete. The letter went on to advise:

"He is a known friend of the family (Not to Jordan) but little was known about his cocaine addiction.

Mr. Malloy concealed his consumption of the drug by pouring it into his own drink as he was preparing the drinks for a number of the party including Jordan McMillan.

Unfortunately the drink that had been mixed with cocaine was given to our client which he then consumed. He was oblivious to the fact that it contained any other substance and thought nothing of it."

- 10 The 30 December 2014 letter was accompanied by a handwritten statement, which was said to have been signed by Mr Malloy, dated 30 December 2014 and which, the letter advised, had been taken by Mr Nigel Scullion, a solicitor acting for Revolution Sports Management Limited, the company operated by Mr Asghar.
- 11 In the statement of 30 December 2014, which was said to have been signed by Mr Malloy, it was asserted *inter alia* as follows:

"That on Sunday 30th November 2014 I was in the company of Edward Mair, Jordan McMillan and a n. other at Edwards parents house 58 Menzies Road, Balornock Glasgow G21 3LY.

Earlier that day I had been out drinking and consuming cocaine. I have issues with both

I popped into see Edward and his family and we shared a few drinks. I think it was vodka ginger beer and lime. As I have known Edward and his family for all my life I chose to take the cocaine by pouring it into my drink. They did not know that I was taking it.

I could do this as it was me that was preparing the drinks before handing them out for consumption.

Unfortunately I have given the wrong glass to Jordan who has went on to consume the drink, intended for me, with the cocaine in it.

He wouldnt have known anything about it or even have any reason to suspect that his drink contained anything other than alcohol.

It wasnt until a few days later that Edward mentioned that Jordan had failed a drug test and had tested positive for cocaine that I realised what had happened – I had given him my drink.

I admitted to Jordan and his family that I had made a huge mistake and that him failing his drug test was due to my actions and there for my fault.”

- 12 By letter dated 6 January 2015 UKAD requested that the National Anti-Doping Panel convene an Anti-Doping Tribunal to determine the Charge against the Athlete.
- 13 The Chair convened a Hearing on Directions which took place by conference call on 16 January 2015. At the Hearing on Directions the Athlete was represented by Mr Scullion and UKAD was represented by Ms Stacey Shevill, a solicitor with UKAD.

- 14 Parties agreed that the relevant NADP Procedural Rules for the Arbitration were the 2015 Rules and that the relevant Anti-Doping Rules (ADR) were the Scottish FA Anti-Doping Regulations 2014-2015 (ADR). It was also agreed that the relevant edition of the WADA Code was the 2009 Code.
- 15 Further, at the Hearing on Directions, Mr Scullion acknowledged on behalf of the Athlete that the Athlete had committed the ADRV Charged in paragraph 3.2 of the 18 December 2014 letter from UKAD to the Athlete viz the Presence of benzoylecgonine in a Sample provided by the Athlete on 3 December 2014. Mr Scullion went on to advise that the Athlete would seek to establish that he bore No Fault or Negligence failing which No Significant Fault or Negligence for that ADRV and that, in accordance with ADR 10.5.1 or ADR 10.5.2, that there should be an Elimination or Reduction respectively of the Period of Ineligibility based on Exceptional Circumstances.
- 16 A procedure was agreed on for the lodging of written statements of witnesses, skeleton arguments etc. and initially a hearing was scheduled to take place on 25 February 2015.
- 17 It subsequently proved not to be possible to hold a hearing on that date and after further procedure a date for a hearing was assigned to take place on 27 March 2015 in Glasgow ("the Hearing").
- 18 Prior to the Hearing, UKAD lodged a skeleton argument dated 20 February 2015 together with a copy of an Arbitral ICAS decision in the case of *WADA v FILA & Stadnyk* CAS/2007/A/1399, an NADP decision in a case *UK Anti-Doping v Simon Gibbs* dated 4 June 2010 and the CAS Decision on the same matter, reference CASE/2010/A/2230 and a further NADP Decision in a case *UKAD v Mr Kenneth Anderson* dated 15 May 2013. UKAD also lodged written statements from a Mr Nick Iliffe of UKAD together with a form setting out a note of information said to have been received by him and a written statement of Mr Andrew McKinlay, the Director of Football Governance and Regulation of the Scottish FA dated 13 February 2015 together with a note setting out external information said to have been received and a handwritten note of a discussion. At the request of the Chair,

UKAD also lodged the relevant Kings College London Drug Control Centre Analytical Report in respect of the A Sample given by the Athlete dated 18 December 2014.

- 19 Mr Scullion on behalf of the Athlete lodged a skeleton argument dated 23 February 2015 together with written statements of the Athlete, the Athlete's partner Ms Elaine Maher, Ms Maher's brother, Mr Edward Maher Junior and a typed version of what was said to be the handwritten signed statement of 30 December 2014 given by Mr Malloy. In fact, the typed up version was not an accurate transcript of the signed original and the Tribunal accordingly proceeded on the basis of the signed handwritten original. Mr Scullion also lodged statements given by Mr Billy Dodds, who had been the Assistant Manager at Queen of the South when the Athlete had been a player there and Mr Alan Archibald the Manager of Partick Thistle. In the case of Mr Archibald, there were two statements: the first a brief statement and the second a longer statement of 26 March 2015. The statements of Mr Dodds and the short statement of Mr Archibald related to the character of the Athlete. The longer statement of Mr Archibald related to the events which had led to Mr McMillan being listed on the team sheet for the match against Celtic FC on 3 December 2014.
- 20 None of Mr Iliffe, Mr McKinlay, Mr Dodds or Mr Archibald gave oral evidence, it being agreed by parties that their evidence could be treated as having been given in the form of their respective statements.
- 21 Mr Scullion also lodged the death certificate of the Athlete's deceased brother who died on 7 June 1998. Mr Scullion also made reference to, and the Tribunal was provided with a copy of, the decision of a RFU Anti-Doping Panel in the case of the *RFU v Harry Allen* dated 18 June 2014.
- 22 The arbitral Tribunal also had available a copy of the WADA Code 2009 including the commentary on Articles 10.5.1 and 10.5.2.
- 23 In addition to the documentation referred to above, there was also produced by UKAD a copy of the Doping Control Form signed by the DCO and by the Athlete

on the occasion of the Sample Collection Session on 3 December 2014 together with the ADAMS Test Report Form recording the Adverse Analytical Finding in relation to the Athlete's A Sample dated 7 December 2014 which was the subject of the Notice of Charge of 18 December 2014.

- 24 In the Declaration of Medication section of the Doping Control Form, (Box 26) which is intended to be completed by the Athlete declaring any medication and supplements taken by the Athlete in the last seven days prior to Sample Collection, there was stated "sudafed/penicillin. Didophac-Co Codomol 5 to 7 days".
- 25 In the Other Comments box it is stated that Box 26, i.e. the Declaration of Medication section of the form, was: "filled in by Club Doctor".
- 26 In Box 27 of the Doping Control form when opportunity is given for the Athlete to insert his comments, it is stated "Chest infection week ago".
- 27 Present at the Hearing were the Athlete, Ms Maher and Mr Malloy, each of whom gave oral evidence. Mr Edward Maher Junior, Ms Maher's brother, also gave oral evidence by telephone, as agreed by the parties. UKAD was represented by Mr Graham Arthur, assisted by Ms Shevill. Mr Scullion represented the Athlete and Mr Asghar was also present. Attending on behalf of the Scottish FA was Mr McKinlay. Ms Joanna Parry of the NADP Secretariat also attended. Also attending taking notes was Ms Emma Jeffrey, a Legal Trainee employed by the Chair's legal firm. Ms Jeffrey attended with the agreement of parties.
- 28 At the commencement of the Hearing the Chair identified all persons present and confirmed that all members of the Tribunal and those representing the parties had copies of all items of lodged documentation. The Chair went on to explain that at the Hearing on Directions, the Athlete had admitted commission of the ADRV set out at paragraph 3.2 of the letter of 10 December 2014. Mr Scullion confirmed that such remained the Athlete's position. Mr Scullion also confirmed that it remained the Athlete's intention to seek to establish that Exceptional Circumstances were present for the purposes of ADRV ADR 10.5.1, failing which

10.5.2 and that the Athlete would seek to present evidence and argue at a hearing that the Athlete, in fact, bore No Fault or Negligence failing which No Significant Fault or Negligence for the commission of the ADRV which he accepted having committed. Mr Scullion accepted that in order for either of ADR 10.5.1 or 10.5.2 to apply, it was for the Athlete to "establish how the Prohibited Substance entered his system in order for the Period of Ineligibility otherwise applicable to be Eliminated in terms of ADR 10.5.1 or for the Period of Ineligibility to be Reduced for the purposes of ADR 10.5.2. Parties were in agreement that the applicable standard of proof in order for the Athlete to so establish was proof by the balance of probability in accordance with ADR 8.3.2.

29 The Tribunal fully took into account all of the documentary evidence provided, the written statements, the oral evidence of the Athlete, Ms Maher, Mr Maher Junior and Mr Malloy, the case decisions referred to, the skeleton and oral submissions of Mr Arthur and Mr Scullion as well as the provisions of the WADA Code, including commentary and ADR to which it was referred in making its decision. The Tribunal refers in this Decision only to the evidence, submissions and materials which are considered to be necessary in order to explain the Tribunal's reasoning and conclusions.

30 At the commencement of the Hearing, each of Mr Arthur and Mr Scullion confirmed that they had no preliminary issues with respect to the jurisdiction or composition of the NADP Arbitral Tribunal appointed to determine these matters or to the application of the Scottish FA Anti-Doping Rules 2014-2015.

Witness Evidence

Nick Iliffe

31 Mr Iliffe's evidence was to the effect that he was employed as an Intelligence Coordinator by UKAD. UKAD uses a service provided by Crimestoppers. This service transmits anonymous material obtained by Crimestoppers which might concern any aspect of Anti-Doping. He advised that on 31 March 2014, UKAD received the following information from Crimestoppers:

"Jordan McMillan, who plays football for Partick Thistle and lives in the Balornock area of Glasgow, is taking cocaine on a regular basis, mostly socially at weekends.

McMillan was born in 1988.

It is believed he is being supplied by local dealers in the pubs he frequents."

32 Mr Iliffe advised that on 2 May 2014 he sent an email to a Mr Simpson at the Scottish FA who at that point was the designated contact for UKAD at that organisation. The purpose of this email was to pass on the information that had been obtained from Crimestoppers. This information was contained in the Information Form which accompanied his statement.

33 On 13 September 2014, Mr Iliffe advised that further information was received from UKAD from Crimestoppers to the following effect:

"Jordan McMillan, who lives in Auchainairn Road, Glasgow is using cocaine whilst playing football. He plays for Partick Thistle in Glasgow in the Scottish Premiership. He has recently used cocaine and brags that he passes his drugs tests".

34 On this second occasion the information was not passed on to the Scottish FA and Mr Iliffe advised that it was actioned internally.

Mr McKinlay

35 Mr McKinlay advised in his written statement that he is the Director of Football Governance and Regulation at the Scottish FA and that his colleague Mr Simpson had received an email from UKAD on 2 May 2014. At that point Mr Simpson was the designated contact person with UKAD, a role which Mr McKinlay has since taken over. Mr Iliffe's email had been shared with Mr McKinlay. Mr McKinlay confirmed that Mr McMillan was a registered player at the Scottish FA with Partick

Thistle FC, had noted the information and realised it was of concern to the Scottish FA.

36 On 9 May 2014 Mr McKinlay made a telephone call to a Mr Ian Maxwell, the Managing Director of Partick Thistle FC, and advised Mr Maxwell that information had been obtained concerning one of his players using cocaine. He advised Mr Maxwell that the Player concerned was the Athlete.

37 Following discussion with Mr Maxwell, Mr McKinlay advised Professor Stewart Hillis who was at that time the Scottish FA's Honorary Medical Adviser of the information. Professor Hillis has since passed on. He understands that Professor Hillis spoke to Dr Alan Robertson, the Partick Thistle FC club doctor about the information. The handwritten note which accompanied his statement is a note of the conversation that Mr McKinlay had with Professor Hillis regarding this matter.

The Athlete

38 The Athlete gave evidence that his date of birth was 16 October 1988, that he was a professional footballer and had been so since the age of 16. He was last employed by Partick Thistle FC. He advised that he had been ill during about the two to three weeks leading up to the scheduled fixture between Partick Thistle FC and Celtic FC on 3 December 2014. He had received medical treatment, including medication, for a chest infection. He also had a longer standing knee injury which was being treated. He had not intended playing in the match on 3 December and had not been out of his house for a number of days prior to 30 November 2014.

39 On 3 December 2014 he had received a text from the Assistant Manager, Mr Scott Paterson asking him to call the manager Mr Archibald. He did so and was asked if he could play in the match that evening. He advised that he would be unable to play in the match having been ill. He was then asked, in a later exchange, if he could be involved at all as there had been several call offs. He told Mr Archibald that he could attend but could not take the field of play. He advised he felt he had a duty to help the club. The call with the manager was at approximately 2pm and the game was scheduled for 8pm. He went to Patrick

Thistle's stadium at 5pm to get the team bus to Celtic Park. He was listed as a substitute, was present for the whole match but did not take the field of play.

40 He was asked to take a "drug test" immediately after the match. He had no issue with doing so and he described to the team doctor all the medication he had been taking. He had some concern that the medication he had been taking for his ill health could affect the drug test and the team doctor wrote down the medication on the Sample Collection form. Following this match, he played in one further match for Partick Thistle FC.

41 He first learned the result of the Sample Collection and its Analytical Testing on 18 December 2014 when he received a telephone call from the Scottish FA. The call advised that his Sample was found to contain a metabolite of cocaine. He received the 18 December letter on 19 December from UK Anti-Doping. He was shocked that what he understood to be a "banned substance" had been found in his system and that the substance was a derivative of cocaine. He advised that he had never taken cocaine; that drugs repulsed him, that he was totally against drugs and that his brother, whose death certificate was produced, had died as a consequence of a drug overdose. The death certificate of his brother, Craig McMillan, confirmed the cause of death as being:

"1a. Acute preliminary oedema and congestion Ib. Temazepam and Morphine intoxication"

42 The Athlete advised that he had been made aware of the anonymous information received from Crimestoppers to the effect that he used cocaine and considered that it was likely that this information had been provided as part of a malicious attempt to damage his character. He advised that he is involved in a custody battle with his ex partner regarding his daughter and ascribes the call to that dispute.

43 After the call from the Scottish FA on 18 December 2014, he contacted his partner Ms Maher and asked her to come home. He was in the house at the time resting up and he also advised his solicitor Mr Scullion and his agent Mr Asghar.

He was called to a meeting at his Club and was suspended by the Club until further notice.

- 44 Prior to the Celtic FC match on 3 December 2014, he advised that the last time he had been out socially was on 30 November 2014. He had been in the house for a week and a half unwell prior to that date and had decided to go to a local pub as he was feeling somewhat better and he wanted to watch a match involving Rangers FC which would be televised that day. It was a 12.45pm kick off and they were playing Kilmarnock FC in the Scottish Cup. He went to the pub, the Campsie Bar, at around 12.30pm. The pub was quiet and he had a couple of pints of "lager tops". This is a pint of lager topped off with about an inch of lemonade.
- 45 Whilst he was present at the pub a telephone call came in on his mobile phone from Mr Edward Maher Junior, the brother of his partner, asking him to go round to his and his partner's parents' house to watch the match. Their house was on Menzies Road in Balornock, Glasgow. He went there for around 1.10pm and took a taxi to get there. He was met downstairs in the house by his partner's parents, Josephine and Edward Maher Senior and he chatted to them for a few minutes and was then called upstairs to the bedroom of Edward Maher Junior. Edward Maher Junior had shouted to him to come upstairs and to bring a glass. He got a glass from the kitchen and went upstairs. It was an IKEA half pint tumbler which was the same type of glass that was used uniformly within the house.
- 46 When he went upstairs, he went into the bedroom of Edward Maher Junior and there he saw Sean Malloy. Sean Malloy was known to the Athlete as being a good friend of Edward Maher Junior, although he was not a particular friend of the Athlete, and the Athlete was not surprised to see him although he had not known he was going to be there. The Athlete had known Sean Malloy for about ten years and had been in his company from time to time, generally in pubs and within a group. Mr Malloy lives nearby and went to school with Edward Maher Junior. The Athlete had no reason to think that Mr Malloy was a cocaine user.

47 Mr Maher Junior has a small bedroom which is furnished with a double bed, a chest of drawers to the right hand corner of the bed, a window in the middle at the bottom of the bed and a television at the left hand corner at the bottom of the bed. There are no chairs in the room. Edward Maher Junior and Mr Malloy were sitting on the bed and he, the Athlete, sat at the bottom of the bed. When he arrived, Edward Maher Junior and Mr Malloy were already drinking vodka, ginger beer and lime. Mr Malloy asked the Athlete if he wanted a drink and he said yes. The Athlete asserted that Mr Malloy prepared this first drink on top of the chest of drawers. At the same time, Mr Malloy prepared a drink for himself. The Athlete had two or three drinks whilst he was watching the match which was on the television in the room. The three glasses in use in the room, one for each of the Athlete, Mr Maher Junior and Mr Malloy, were all of the same type from IKEA. Nothing occurred whilst he was in the bedroom to cause the Athlete to think that his drink had been interfered with.

48 After watching the match on the television the Athlete left and went back to the Campsie Bar where he had been in previously. This was between 3pm and 3.30pm and at that time he was feeling no ill effects. He stayed at the Campsie Bar for about an hour or so and then telephoned Ms Maher to pick him up as he had begun to feel unwell and considered that he might have "overdone it". Ms Maher picked up the Athlete and he was home at between 4.30pm and 5pm. He had one or two further lager tops in the Campsie Bar from the time of his arrival between 3pm and 3.30pm and his leaving at around 4.30pm. He had not detected any particular feelings of note whilst at the house of his partner's parents or on arrival at the Campsie Bar. In particular, he had not felt anything which he would have regarded as being an unexplained "high" nor had his mouth become numb at any time.

49 On being advised of the "failed drug test", he had told his partner not to disclose it to anyone but despite this, he received a telephone call from Edward Maher Junior about two or three days later. Edward Maher Junior told him that he had spoken to Mr Malloy about the failed drug test. Mr Maher Junior had been told of it by the Athlete's partner. Mr Maher Junior told him that Mr Malloy had told Mr Maher Junior that he, Mr Malloy, had been trying to "do some cocaine" in the

house on 30 November 2014 without he, Mr Maher Junior, or the Athlete knowing he was doing so. He, Mr Malloy, had mixed the cocaine into his drink, intending to take it in that way, and he, Mr Malloy, had since concluded that he must have put it in the Athlete's drink by accident.

50 The Athlete advised that he had no other explanation to offer as to why cocaine or its metabolite was in his system on 3 December 2014. He acknowledged that he had been feeling ill much later in the afternoon of 30 November but that had been some considerable time after he had left the house of the parents of his partner and when he was back at the Campsie Bar.

51 The Athlete explained that he had taken no steps to persuade Mr Malloy to come forward or induce him into doing so. He had been left in a terrible position because of what had happened. Other than the "confession" of Mr Malloy, he had no explanation as to how the cocaine had entered his system. He had thought he was in a safe environment in the house of his partner's parents and when he accepted the drinks up in the bedroom of Mr Maher Junior, he had no reason to think that anyone in the house was taking cocaine or any other illegal drug.

52 He observed that if he had taken cocaine, he could easily have avoided any possibility of a drug test by simply declining to attend in any capacity at the Celtic match on 3 December. He had been ill for some two weeks and was not physically able to play football on that day.

53 In answer to questions from Mr Arthur, he advised that he had seen no indication on the part of Mr Malloy, when he was present in the bedroom that Mr Malloy was on any kind of drugs. He did not seem to be behaving oddly and, in fact, did not appear to be drunk. Mr Malloy was not someone with whom he socialised a great deal and he could not comment in any detail on Mr Malloy's usual behaviour.

54 The Athlete told Dr Irani that he had been tested some two to three times previously. He acknowledged that he had been taking Co-Codomol and he did not give any thought to any side effects of taking this drug and the others he was taking as discussed on the Sample Collection Form and drinking alcohol. He

advised that at no time did his mouth feel numb and he did not taste anything odd in the vodka, ginger beer and lime that was given to him.

55 In answer to Ms Thompson's questions, he advised that the drinks were being prepared on the chest of drawers in the bedroom. He was watching the football and did not watch the drinks being prepared. The drinks he was handed were "cloudy" but that is how vodka, ginger beer and lime looks and he did not notice any difference in the taste of the drinks with which he was supplied and how such a cocktail generally tasted. When he was there, Mr Malloy had made him two drinks and Mr Maher Junior had made him one. He confirmed that he did not feel any effect of any description in the period after ingestion from the consumption of the drinks that he was given in the bedroom.

56 In answer to questions from the Chair, he advised there is a toilet upstairs in Mr Maher Junior's parents' home. He, the Athlete, could not remember using it himself that day and he did not remember if Mr Malloy had used it.

57 In his written statement the Athlete stated:

"I may have been negligent in accepting a drink from a person who I hardly know but it was in a safe environment, my partner's parent's house. No-one there, as far as I knew, was taking drugs."

Elaine Maher

58 In her oral evidence Ms Maher confirmed that she was the Athlete's partner and that she had five children, one of whom was the Athlete's. She had been together with the Athlete for over three years and had never known the Athlete to be a cocaine user. Had she suspected he was, then she would never have accepted this in her house where her children resided. When the Athlete failed the drug test, it had come as a shock to her.

59 She confirmed the Athlete had had a chest infection for about two weeks prior to the Celtic FC match on 3 December 2014. He had been quite ill during this period

and had remained in the house. The Athlete had gone to the Campsie Bar on 30 November 2014 to watch the Rangers FC match which was on the television. She had spoken to him later, by mobile telephone, and learned that he was going to her parents' house. She then spoke to him a "couple" of further times on the phone when he was in her parent's house and seemed to be fine.

60 She understood that the Athlete had later gone back to the Campsie Bar and had phoned her from there to pick him up. She advised that by that time he had told her he was not feeling well and when she picked him up he looked ill and she thought he might have "overdone it". He told her at that time that he was feeling "horrendous again". That night the Athlete had been agitated and said that he had not felt "right". She thought his mood was different and this had continued into the Monday immediately following. He gave every appearance of having returned to the prior symptoms of illness that had been present in the period prior to 30 November.

61 She confirmed the events of 3 December 2014 as spoken to by the Athlete and advised that when she picked the Athlete up after the Celtic match, he had told her that he had had a drug test but had thought nothing of it.

62 On 18 December 2014, the Athlete had telephoned her and advised her that he had been told by the Scottish FA that he had failed the drug test and he had sounded like he was crying. He told her that cocaine had been found in his system and he had said that it must have been a mistake. She confirmed that the Athlete had told her to tell no-one about that failed drug test but that in fact she had told her brother Edward Maher Junior although she had told him that he must discuss it with no-one.

63 A "couple" of days later, her brother had telephoned her and said that he had spoken to Mr Malloy about the failed drugs test and that Mr Malloy had said that he had "fucked up" and put drugs in his, Mr Malloy's drink, but had then given the drink to the Athlete.

64 In response to questions from the Chair, Ms Maher advised that she had not known that Mr Malloy used cocaine.

Sean Malloy

65 Prior to commencing his oral evidence, Mr Malloy was advised by the Chair that he did not have to answer any question the answer to which might incriminate or tend to incriminate him.

66 Sean Malloy in his oral evidence advised that he had been at Mr Maher Junior's parents' house with Edward Maher Junior and the Athlete on 30 November 2014. Earlier that day, in the early hours of the morning, he had been out drinking and taking cocaine. He was drinking vodka, ginger beer and lime in Edward Maher Junior's bedroom and he had one and a half grams of cocaine with him. It was in a "butcher's bag". He advised that neither Edward Maher Junior nor the Athlete, who had arrived at the house after he had arrived, knew that he had the cocaine, nor did anyone else in Edward Maher Junior's parents' house. He advised that he decided to take the cocaine during the course of the Rangers match after the Athlete had arrived and when he was in the bedroom along with Edward Maher Junior and the Athlete. He decided to put half of the cocaine in his drink so that no-one else in the room would know he was taking it. He advised that he did not want to go into the toilet as this might have been noticed. He also advised that he was the person preparing the drink.

67 He advised that some time later he had been told by Edward Maher Junior that the Athlete had failed a drug test. It was about two or three days after being told of the failed drug test that he had told Edward Maher Junior that he, Mr Malloy, must have got the drinks mixed up and had given the wrong one, containing the cocaine, to the Athlete in error in the bedroom on 30 November 2014.

68 Mr Malloy, in his oral evidence, as opposed to what was stated in his signed statement, advised that, in fact, he had come to believe, he described it as "known" on the afternoon of 30 November 2014, that he had given the Athlete a drink containing three quarters of a gram of cocaine. He claimed he had realised

that he had done so because he did not experience any narcotic effect from the drink that he had drunk and that he, Mr Malloy, does cocaine a lot and would have known if he was 'high' (not Mr Malloy's word but his meaning) on cocaine. He had realised about half an hour after giving a drink, which he, Mr Malloy, had mixed when he was at the same time mixing one for himself containing three quarters of a gram of cocaine, to the Athlete that he, Mr Malloy was not experiencing any narcotic effects from the cocaine which he understood, because he believed until that point he had put it there, was in the drink which he had retained for his own consumption and consumed. He, Mr Malloy, at that point reasoned that because he was not experiencing the anticipated narcotic effect from the cocaine he believed he had consumed in the drink he had mixed for himself that he must, in fact, have, in error, given the drink intended for himself which contained the cocaine, to the Athlete and which the Athlete had consumed and the he, Mr Malloy, had, again in error, retained and consumed the drink intended for the Athlete which did not contain any cocaine. He told us that from the point of him forming the belief of the error which resulted in the drink containing the cocaine being given to the Athlete that he had kept a watch on the Athlete. However, despite watching closely at no point did he detect any behaviour, mood, manner, words or display of physical response on the part of the Athlete which might indicate the Athlete was experiencing the narcotic effect of consuming three quarters of a gram of cocaine. In effect there was no indication that the Athlete had consumed cocaine. Mr Malloy advised that he did not always have a numb mouth after drinking cocaine and alcohol.

69 He had agreed, he said, to go to Mr Scullion's office to give a statement because he thought it was his fault. He had nothing to gain from giving the statement to Mr Scullion and knew that he was putting himself "in the firing line" by doing so.

70 In answer to questions from Mr Arthur, Mr Malloy claimed that when Mr Maher Junior told him that the Athlete had failed a drug test, that he had known that it was because he, Mr Malloy, must have given the Athlete the wrong drink. He did not own up to it immediately but thought about it and then told Mr Maher Junior about it two or three days later. He went on to advise Mr Arthur that he, Mr Malloy, and Mr Maher Junior had already been drinking before the Athlete arrived

and that he, Mr Malloy, had prepared the drinks when the Athlete first came in. However, it was not the first drink he prepared for the Athlete that came to believe contained the cocaine; it was a later one. He, Mr Malloy, had put the cocaine in first, then the vodka, then the ginger beer mixer and lime. He put the cocaine in the drink intended for himself because it was "easier". He thought it might have made it look obvious if he had gone to the toilet and he knew there were children in the house.

71 On being asked why, when he signed the statement on 30 December 2014, he had not told Mr Scullion that he, Mr Malloy, had "known" on 30 November 2014 that he had given the Athlete a drink containing cocaine but rather suggested that he had only realised that on being told by Mr Maher Junior that the Athlete had tested positive, he advised that he had not wanted to "incriminate myself".

72 In answer to questions from Ms Thompson, Mr Malloy advised that he had been in Edward Maher Junior's bedroom sitting on the bed. This was also where Edward Maher Junior was sitting because there was nowhere else in the room to sit. When the Athlete came in, he also sat on the bed. When the Athlete had first come in, contrary to what had been said previously, Mr Malloy asserted it was Edward Maher Junior who had first made the Athlete a drink. Sometime later, Edward Maher Junior still had a full drink, so he, Mr Malloy, offered to make one for the Athlete whose glass was empty by that time. The Athlete had said yes and it was at that point that he believed that he, Mr Malloy, had got the drinks mixed up. He was talking and pouring at the same time. He described his back being to Mr Maher Junior and to the Athlete who were both sitting on the bed and to him, Mr Malloy, turning round and passing a drink to the Athlete. Mr Malloy believes that he must have picked up the wrong drink and given it to the Athlete. It was only when he, Mr Malloy, had not felt any effects from the cocaine that he had first 'known' he had given the glass containing the cocaine to the Athlete. He acknowledged that by the time the match had finished, he would have been drunk but he was not high.

73 In answer to questions from Dr Irani, Mr Malloy advised that the drinks that he poured were about four times a usual pub measure. That is, the alcohol

component of each drink would consist of about four times the amount of spirit that would be provided in a standard 1/5 gill measure of spirit in a Scottish public house.

- 74 In answer to questions from the Chair, he advised that he had the cocaine in the corner of a plastic bag in his pocket. He had put about half of the cocaine he had, that would have been about three quarters of a gram, in the glass. He had only made one drink with cocaine in it. He declined to say how much the cocaine had cost. He claimed that he had hoped that the Athlete would not notice that he had been given cocaine. The Athlete had been drinking alcohol but he seemed normal.

Edward Maher Junior

- 75 Mr Maher Junior confirmed that he was the brother of the Athlete's partner and that he had known the Athlete for some 15 to 16 years. He had invited the Athlete to his house on 30 November 2014 to watch the Rangers FC match as he knew the Athlete had been ill and thought that he might want some company. He made the invitation by telephone call to the Athlete's mobile telephone. At the time, the Athlete told him that he was at the Campsie Bar.
- 76 When he made the invitation his friend, Mr Malloy, was already with him at his parent's house and was having a few drinks. He and Mr Malloy had already had a few drinks by the time the Athlete arrived. They were drinking vodka, ginger beer and lime in IKEA glass tumblers. The tumblers were all the same. The Athlete brought the same type of tumbler when he arrived. The three were together in Mr Maher Junior's bedroom. There is a television in one corner and a chest of drawers in the other. The drinks were being prepared on top of the chest of drawers. It was the only flat surface in the room. Turns were taken between he and Mr Malloy in making drinks as they watched the match. At the time, Mr Maher Junior had no reason to think that Mr Malloy was taking or intended to take cocaine.

- 77 After the match the Athlete had left and had gone back, as he, Mr Maher Junior understood it, to the Campsie Bar. Mr Maher Junior had noticed nothing unusual in the behaviour of the Athlete whilst in this presence on 30 November 2014.
- 78 About two weeks later, his sister telephoned him and told him that the Athlete had failed a drugs test and that cocaine had been found in his system. He, Mr Maher Junior, knew that the Athlete did not take cocaine and was shocked by what he was told regarding the drugs test. His sister told him not to mention the failed drug test to anyone else, but about two days later, he met Mr Malloy and told him that the Athlete had failed the drug test. At that time Mr Malloy had said nothing concerning the events of 30 November 2014.
- 79 About a further two days later Mr Malloy had come round to his, Mr Maher Junior's parents', house and kept saying that "he had fucked up" and that he, Mr Malloy, had done it. Mr Maher Junior had asked Mr Malloy what he was talking about and Mr Malloy told him that he, Mr Malloy, had put cocaine in a drink meant for himself, Mr Malloy, but that the Athlete must have somehow got this glass as he, Mr Malloy, had not felt a 'dunt' from his, Mr Malloy's, drink. A 'dunt' was explained to be a 'hit' or 'rush' i.e. the first experience of narcotic effect, of getting 'high'. Mr Malloy told him that he had decided to take the cocaine in this way i.e. mixed in a drink, because he did not want Mr Maher Junior or the Athlete, or indeed anyone else in Mr Maher Junior's parents' house, to know that he was taking cocaine.
- 80 Mr Maher Junior advised that the Athlete would have had no reason to suspect that Mr Malloy was taking cocaine as he does not know Mr Malloy well and there was nothing in the house to indicate that Mr Malloy was using cocaine that day. The Athlete would have had no reason to believe that Mr Malloy was a drug taker generally. In Mr Maher Junior's opinion, there was no reason for Mr Malloy to make up this story as he is just putting himself "in the firing line".
- 81 Mr Maher Junior advised Mr Arthur in response to questions that although he could not remember Mr Malloy specifically using the bathroom on 30 November in

his parents' house, he thinks that he must have done so given the length of time he was present in the house that day.

82 In response to Dr Irani's questions, Mr Maher Junior could see nothing unusual in the Athlete's behaviour on 30 November 2014. He described the Athlete as 'no more daft than usual'.

83 In response to questions from the Chair, Mr Maher Junior acknowledged that Mr Malloy was one of his best friends and that he, Mr Maher Junior, knows that Mr Malloy uses cocaine. He knew that Mr Malloy had started using cocaine when he was about 18 years old although he, Mr Maher Junior, had not personally seen him taking it. He, Mr Maher Junior, had seen Mr Malloy giving drinks to the Athlete but it had never occurred to him that Mr Malloy had put cocaine in any drink that he had given to the Athlete that day. He, Mr Maher Junior, had not regarded this as in any way a risky situation for the Athlete. He, Mr Maher Junior, could be drug tested at any time because of the nature of his work which is 'off shore' and he had not felt in any way at risk taking drinks mixed by Mr Malloy.

Billy Dodds

84 In his written statement, Mr Dodds advises that he had worked with the Athlete for about six months when he, Mr Dodds, the Assistant Manager at Queen of the South thought that the Athlete was one of the best professionals that he had worked with and the Athlete was always presented well and was picked up almost every day to go to training by Mr Dodds. The Athlete was a very good professional who was keen on training and had a real desire to do extra training. He, the Athlete, looked after his body and the Athlete was always striving to be as fit as he possibly could. The Athlete was described by him as being "a man's man, a leader, a top listener and a good organiser. Very well respected by his peers and would always sort out any problems on the pitch."

Alan Archibald

- 85 In his initial short statement, Mr Archibald who is the Manager at Partick Thistle, advised that he has known the Athlete since March 2013 and that he had been reliable both on and off the pitch and had fitted in well with his team mates in the dressing room. He was always a good trainer and was a valuable member of the first team squad providing an element of seniority and leadership at the Club.
- 86 In his second longer statement, Mr Archibald confirmed that the Athlete had been absent from the Club for about ten days prior to the Celtic FC match on 3 December 2014. At the time, the Athlete also had a recurring knee problem and was receiving some medical treatment. The Athlete was not expected to be fit for the match on 3 December 2014 but there were unforeseen circumstances with other players and that therefore an approach was made to the Athlete to enquire as to the possibility of him playing on 3 December 2014. Due to his illness and the knee issue, the Athlete said that he was unable to play but because of the lack of available personnel, the Athlete had agreed to be on the substitute bench although it was known that he could take no active part in the game because of his medical issues.
- 87 The Club had been greatly appreciative of the Athlete doing so, although in hindsight, Mr Archibald regretted putting the Athlete in this position because he had never intended to have him enter the field of play and it was only because he was on the substitute's list that he had been required to undergo the "dope test" that resulted in the Anti-Doping Rule Violation.

Submissions

Mr Arthur

- 88 Since the Athlete had been provisionally suspended since 18 December 2014, UKAD had accepted that pursuant to ADR 10.9, any period of ineligibility should run from that date.

- 89 Mr Arthur submitted that in cases of Presence of a Prohibited Substance in a Sample, there is a presumption that the Substance, in this case cocaine, was ingested deliberately and that presumption justifies the automatic two year Period of Ineligibility specified in ADR 10.2.
- 90 In order to rebut that assumption, the Athlete is required to establish that it was not his fault that the cocaine entered his system or if he was at fault then his fault was not significant. The first stage is for the Athlete to establish, on the balance of probabilities, how the cocaine entered his system and there are numerous CAS decisions which underpin this proposition, see for example *Stadnyk supra* paragraph 97.
- 91 In essence, the Athlete's explanation is one of 'spiking'. However, in order to establish this, it is not sufficient for the Athlete to simply deny that he had deliberately ingested cocaine and advance the theory that because he did not do so deliberately, it must have been consumed inadvertently by way of spiking. Rather, the Athlete must establish that the spiking took place.
- 92 Mr Arthur referred to the decision in *Gibbs supra* where Mr Gibbs had claimed that Methadone, a Prohibited Substance, had been deliberately been put into a drink by his friend without his knowledge. The friend had appeared at the initial Tribunal hearing and had given evidence to that effect. The Panel had noted at paragraph 98 that "the reliability and credibility" of the friend's evidence was of "crucial importance" but the Panel had decided for a number of reasons that the friend's evidence was not reliable and credible and it had rejected the explanation. See *Gibbs* paragraphs 99-101.
- 93 In the submission of Mr Arthur, corroborative evidence is of crucial importance in any spiking case. He suggested that a simple denial of deliberate ingestion will never be sufficient and he relied on the decision of the single CAS Arbitrator in the *Gibbs* case at the CAS decision paragraph 11.12. In that case, the single CAS Arbitrator stated:

"To permit an Athlete to establish how a substance came to be present in his body by little more than denial that he took it would undermine the objectives of the Code and the Rules."

- 94 Mr Arthur also referred to the NADP Arbitral Tribunal Decision in *Anderson supra* where a boxer had alleged that amphetamine found in a post fight Sample had been put into his coffee by his estranged partner. The arbitral Tribunal had found that various aspects of the spiking claim were implausible and that there was no independent and objective corroboration of the alleged "spiker's" confession. The person alleged to have spiked the coffee on that occasion did not herself give evidence and crucial evidence that was said to exist by way of a text message was no longer available in circumstances which the arbitral Tribunal did not find satisfactory. The Arbitral Tribunal had come to the conclusion that the Athlete had not discharged the requirement to show how the Prohibited Substance had entered the Athlete's system although it did not rule out the possibility that it had happened in the way that the Athlete had suggested, see *Anderson* paragraph 45.7.
- 95 Mr Arthur reviewed the evidence given by the witnesses and in this case submitted that the evidence advanced by the Athlete for how the substance came to enter his system in this case turned on the evidence of Mr Malloy which was not sufficiently reliable and credible as regards the ingestion of cocaine by the Athlete and, he submitted the evidence was inadequate looked on as a whole to discharge the onus on the Athlete to show how the cocaine entered his body.
- 96 Turning to the application of ADR 10.5.1 it was UKAD's position that in this case there could be no possibility of the Athlete being held to have had No Fault or Negligence. ADR 10.5.1 can only be applied in circumstances where an Athlete had used "utmost caution" to avoid ingesting a Prohibited Substance, whether intentionally or inadvertently. This was an exceptionally high standard which was required to be established by an Athlete for ADR 10.5.1 to apply. As the commentary to Code Article 10.5 provided:

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

97 As regards the status of the commentary, Mr Arthur relied on *Anderson* paragraphs 4.17-4.18.

98 With respect to ADR 10.5.2, Mr Arthur submitted that if it was held that the Athlete had established how the cocaine entered his system by reference to the evidence of what had happened on 30 November 2014, then UKAD would not dispute that in the circumstances the Panel would have discretion to accept that the Athlete in this case bore No Significant Fault or Negligence and to reduce the standard Period of Ineligibility from two years to one year.

Mr Scullion

99 Mr Scullion in his submissions began by reviewing in detail the evidence of what had occurred, particularly on 30 December 2014, by reference to the detailed material contained in the written statements of the Athlete's witnesses and in the oral evidence given. He relied in particular on the evidence of Mr Malloy, including the signed handwritten statement and his oral evidence, drawing attention to the consideration that Mr Malloy had no reason or advantage in coming forward. That he was exposing himself to risk of action against him by making the admission that he had possession of cocaine in the house of Mr Maher Junior's parents on the day in question and that had put some in a drink intending to take the same. He also drew attention to Mr Malloy's admission of being a habitual cocaine user. He relied strongly on the contention that Mr Malloy's evidence should be regarded as credible because of the absence of any reason on his part to provide false testimony on the issue. Mr Scullion submitted that if Mr Malloy's evidence was accepted, then there was ample material from which the Tribunal could reach the

conclusion that Mr McMillan had discharged the onus on him to establish on the balance of probabilities how the Prohibited Substance entered his system.

100 The Tribunal ought, in addition, to attach weight to the consideration that, in support of the Athlete's credible evidence that he had never knowingly ingested cocaine, he was supported by the evidence of his partner and Mr Maher Junior and those persons who had given evidence and who were involved in the game. There was also the significant consideration that the Athlete had not needed to take part in the match on 3 December 2014 at all and to expose himself to the risk of having to take part in a drug test. If the Athlete had had the slightest concern about a possible positive drug test because he had taken cocaine, then he could easily have simply declined to take any part whatsoever in the 3 December 2014 match and in that way would never have placed himself at any risk of a positive drug test.

101 The Athlete had been entitled to regard Mr Maher's parents' house as a safe place where it would be open to an Athlete to lower his natural guard and to accept drinks prepared for him. There was no reason for the Athlete to have any anticipation that anyone was using cocaine and there was no evidence that the Athlete knew anything about Mr Malloy's previous history with cocaine. Everyone in the bedroom was drinking vodka, ginger beer and lime, there were no other drinks consumed and there was no indication that cocaine was present or being used.

102 There was clear evidence, submitted Mr Scullion, that Mr Malloy had deliberately concealed the cocaine taken from Mr Maher Junior and from the Athlete and the evidence as to how the drink with the cocaine could have come to have been consumed by the Athlete was persuasive and should be accepted as discharging the onus on the Athlete to establish how the cocaine entered his system.

103 In the circumstances, asserted Mr Scullion, Mr Malloy's evidence was credible and reliable and it was open to the arbitral Tribunal to exercise its discretion to apply both ADR 10.5.1 or 10.5.2 in the circumstances.

104 Mr Scullion argued that the Athlete had exercised utmost caution and that there was no reasonable foreseeability so far as the Athlete was concerned that a drink prepared by Mr Malloy for the Athlete would be contaminated with cocaine or any other Prohibited Substance. Whilst Mr Scullion acknowledged the content of the commentary to the Code with respect to Articles 10.5.1 and 10.5.2, he submitted that it should not be regarded as having the same standing as the Code and should be treated with caution. If the Tribunal is unable to find that there was no fault or negligence on the part of the Athlete, then it should find that he bore No Significant Fault or Negligence and should reduce the Period of Ineligibility to one year.

Discussion

105 ADR 1.3.1 requires that an Athlete when complying with the ADR takes ".....full responsibility for what he/she ingests...." It is the personal duty of every athlete per ADR 2.2.1 "to ensure that no Prohibited Substance enters his/her body" and that it is not necessary for intent, fault, negligence or known Use to be established for an ADRV to be constituted.

106 In paragraph 97 of *Stadnyk supra* the CAS Arbitral Panel records that:

"how a prohibited substance entered an athlete's system is a fundamental precondition to the defence of "no significant fault or negligence"".

107 As in the *Gibbs* case, the primary evidence relied upon by the Athlete to establish how the Prohibited Substance entered his body/system is the evidence of the person who claims to have been responsible for spiking the drink which is said to have contained the Prohibited Substance. None of the other witnesses, the Athlete, Ms Maher or Mr Maher Junior were able to give any direct evidence regarding this matter. The Athlete claimed to have had no awareness of the use of cocaine by Mr Malloy at the relevant time and in the case of the Athlete and Mr Maher Junior, whilst they were both present in the room when the alleged contamination of the drink is said to have taken place. Both assert a complete

lack of knowledge of it occurring. Not only do they assert no knowledge of the event of alleged contamination, the Athlete asserts having felt no effect from the alleged contamination and Mr Maher Junior does not report any behaviour by the Athlete at the relevant time which would indicate his having taken a powerful narcotic drug. The same is true of Mr Malloy who asserts that he saw no indication of narcotic effects on the Athlete by cocaine. Dr Irani, a Consultant Physician, was able to confirm that three quarters of a gram of cocaine is a significant dose of a powerful narcotic which, if taken orally with alcohol, would have significant and patent narcotic effects shortly after ingestion and which would be expected to cause numbness in the mouth and throat. As well as being a powerful narcotic, cocaine is also a powerful local anaesthetic.

108 The Athlete gave evidence that he felt unwell, but this was much later at between 4pm and 4.30pm, long after the drink alleged to have contained the cocaine was said to have been consumed. Mr Malloy, a long standing cocaine user, said that he would expect to notice the effects of taking cocaine within 30 minutes of ingestion. Further, Dr Irani explained, that effects from oral consumption of the described quantity of cocaine would have been felt shortly after consumption, within 30 minutes, and the Athlete feeling unwell between 4pm and 4.30pm could not be explained by him having orally consumed cocaine a considerable time previously. The same applies to any feelings of unwellness on the part of the Athlete that evening and into the following morning. The consumption of significant quantities of alcohol by the Athlete, four pints of lager tops and about 12 standard measures of vodka, immediately after a period of significant illness and when he was consuming antibiotics, Co-Codomol and other medication are entirely consistent with the Athlete feeling unwell from around 4pm or 4.30pm onwards on 30 November 2014.

109 The Tribunal disagreed with Mr Arthur's submission that corroborating evidence is required to establish on the balance of probability how a Prohibited Substance entered the body/system of an Athlete for the purposes of ADR 10.5.1 or 10.5.2. Evidence from one source would be sufficient provided it was considered reliable and credible.

110 The Tribunal did not consider the evidence of Mr Malloy to be reliable and credible as regards how the Prohibited Substance entered the system of the Athlete for each and all of the following reasons (a) to (c) inclusive:

- (a) Mr Malloy was unable to give what the Tribunal regarded as being a plausible and coherent explanation as to how it was that the Athlete could have been inadvertently given a drink by him containing three quarters of a gram of cocaine. As Mr Malloy explained it, he was, at the time, deliberately being careful to obscure from the view of the Athlete and Mr Maher Junior the mixing of the cocaine into the glass which Mr Malloy intended to himself consume mixed with vodka, ginger beer and lime. Mr Malloy was, as he explained it, using his body to shield what he was doing from the view of Mr Maher Junior and the Athlete. He was at the time only making up two drinks i.e. one for the Athlete and one for himself. He was unable to plausibly explain how, in that circumstance, he would come to give the drink containing the cocaine to the Athlete rather than the drink not containing the cocaine. Since he was being so careful to shield what he was doing from the Athlete and Mr Maher Junior, he would be more likely rather than less likely to be aware which glass contained the cocaine and which did not. The Tribunal considered that there was no reliable and credible evidence that the wrong glass, i.e. one containing the cocaine, had in fact been given to the Athlete. The Tribunal considered that it was inherently unlikely that in the circumstance, as postulated by Mr Malloy, the Athlete would have been given the wrong glass. It should be noted that Mr Malloy did not in fact recall giving the Athlete the wrong glass, at the time he thought he had given the Athlete the correct glass i.e. the one not containing the cocaine. The Tribunal's conclusion in this respect i.e. that there was no such plausible and coherent explanation, was supported by the Athlete having failed to experience or demonstrate, as spoken to by the Athlete (experience) and Mr Malloy and Mr Maher Junior (demonstrate) any narcotic or anaesthetic effects from the substantial quantity of cocaine he is claimed to have consumed by unknowing oral ingestion of cocaine in a drink prepared by Mr Malloy on 30 November 2014.

- (b) The Tribunal regarded as not credible Mr Malloy's explanation as to why he had not gone to the toilet in the house to take the cocaine. Given the quantity of alcohol which had been consumed, it would have been surprising if Mr Malloy had not needed to use the toilet at some point. There would have been nothing suspicious in him doing so. In going to the toilet which was, with the bedroom, upstairs, he would have been assured of privacy and would have been far less likely to have his cocaine consumption by the usual means of 'snorting' identified by anyone in the bedroom as opposed to him trying to shield from two persons in a small bedroom the mixing of cocaine in a drink which was his proffered explanation. The Tribunal considered, in the circumstances, it was much more likely that Mr Malloy would have gone to the toilet to take cocaine by snorting it rather than to do so in the way described by him in his evidence.
- (c) The Tribunal regarded as not credible Mr Malloy's explanation for the differing versions that he had provided about how he came to believe that he had erroneously given the Athlete cocaine in a drink which had been intended for Mr Malloy. When speaking to Mr Maher Junior and when signing his statement before Mr Scullion, Mr Malloy had asserted that he had only realised that he had inadvertently given the Athlete cocaine following consideration of the position after being advised of the Athlete's failed drug test by Mr Maher Junior in the days following 18 December 2014. However, during his oral evidence, his position on this important subject was very different. His position in oral evidence was that he had realised on the afternoon of 30 November, within 30 minutes of allegedly giving the relevant drink to the Athlete, that he, Mr Malloy, had given the Athlete a glass containing three quarters of a gram of cocaine because he, Mr Malloy, had not felt the familiar narcotic effects of the drug. The Tribunal did not regard as credible his suggestion that he had somehow not wanted to "incriminate himself" by admitting his 'knowledge' of the position on 30 November when he had gone to Mr Maher Junior's parents' house some two days after being told about the failed drug test and when

he had signed the statement before Mr Scullion. Mr Malloy's explanation for his change of position on this issue seemed, to the Tribunal, to defy common sense. What was incriminating was his possession of cocaine and his putting that cocaine in a glass intended for human consumption on 30 November 2014. He was already admitting to everything that was incriminating.

111 Further, the circumstances in which the drink alleged to have contained the cocaine was handed over to the Athlete as described by the Athlete, Mr Malloy and Mr Maher Junior in their oral evidence is, to some extent, inconsistent with the circumstances described in Mr Malloy's statement signed by him on 30 December 2014. Mr Malloy describes the "company" in the house that day, as including Edward Maher Junior, the Athlete "a.n. other" and himself. However, in oral evidence, all of the testimony was to the effect that there were only three persons present at all material times in the bedroom in Edward Maher Junior's parent's house. Mr Malloy did not explain who had been "a n. other". There is no mention of the incident having occurred in Mr Maher Junior's bedroom in the signed statement and Mr Malloy, in the context of mixing the cocaine into his own drink, states that he could do this without being seen by the others present "as it was me that was preparing the drinks before handing them out for consumption." In his oral evidence to the Tribunal, he described mixing the cocaine with his drink at a time when he was only mixing one other drink, not containing cocaine, and that being intended for the Athlete. With such a simple set of alleged facts it is difficult to understand and it was not explained to the Tribunal why significant inconsistencies of this nature should exist between his signed statement and his oral evidence. Each and all of these considerations bore adversely on the reliability of Mr Malloy's evidence.

112 Since the Athlete's explanation as to the method by which the cocaine came to enter his system depends on the evidence of Mr Malloy and since the Tribunal did not regard Mr Malloy's evidence as being reliable and credible for the reasons stated, the Tribunal did not find on the balance of probability that Mr Malloy included cocaine in a drink which he mixed for himself and which he instead gave to the Athlete and which the Athlete ingested on 30 November 2014. It follows, in

the absence of any other proffered explanation, that the Tribunal did not find that the Athlete had established, on the balance of probability, how the metabolite of cocaine found in his A Sample had entered his body/system through the mechanism of a drink spiked with cocaine by Mr Malloy on 30 November 2014. Accordingly, neither of ADR 10.5.1 nor ADR 10.5.2 applies in this case.

- 113 The Period of Ineligibility imposed in this case is therefore two years in accordance with Article 10.2, there being none of the conditions applying which are capable of Eliminating or Reducing the mandatory Period of Ineligibility of two years. The Athlete's Period of Ineligibility commences from the date of commencement of his Provisional Suspension on 18 December 2014 and ends on 17 December 2016, both dates inclusive.
- 114 Had the Tribunal found it established that the Prohibited Substance had entered the Athlete's system on 30 November 2014 by the mechanism advanced by the Athlete and based primarily on the evidence of Mr Malloy, then the Tribunal would not have found that the Athlete had no Fault in the circumstances. Accordingly, a finding of No Fault or Negligence for the purposes of Article 10.5.1 would not have been made. The Athlete is responsible for what he ingests and he took insufficient care to ensure that the alcoholic drinks that he was consuming on 30 November 2014 were being prepared and delivered to him in a manner which eliminated all reasonable risks of contamination. It was common ground that the Athlete was not well acquainted with Mr Malloy and yet he allowed Mr Malloy to prepare drinks for him without regard to what Mr Malloy was doing. He, the Athlete, was taking prescription drugs and significant quantities of alcohol such as to be likely to result in a level of intoxication. Mr Malloy had been drinking himself and there was a risk that he was intoxicated by alcohol. The Code Commentary and previous CAS Decisions make it clear that Athletes have significant responsibility to ensure that they do not inadvertently ingest Prohibited Substances. It is the duty of Athletes to take care of their food and drink so that they are able to discharge the duty incumbent upon them. In this case, the Athlete had been insufficiently careful in that regard. He effectively acknowledged such in his written statement.

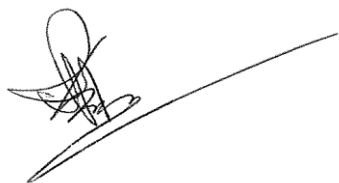
- 115 However, the Tribunal would have held that, in the circumstances, the Athlete bore No Significant Fault or Negligence since whilst he did not take all care that he ought to have taken in the circumstances, there is no evidence that he had any cause to believe that he was at any particular risk of being provided with a drink contaminated with cocaine or another Prohibited Substance. In the circumstances the Tribunal would have held that ADR 10.5.2 applied and would have reduced the Period of Ineligibility to one year from the date of commencement of the Provisional Suspension.
- 116 In making its determinations, the Tribunal attached no weight to the anonymous allegations reported to UKAD regarding the Athlete's alleged consumption of cocaine, the first of which allegations was reported to the Scottish FA. These were anonymous allegations and the Tribunal was provided with no information as regards the context in which the allegations were made and who made them. In such circumstances, it would not be safe for the Tribunal to attach any weight to the allegations when making its factual findings for the purposes of ADR 10.5.1 and ADR 10.5.2.

Costs

- 117 No application was made in relation to costs. If either party wishes to make an application for costs, he/it should notify the NAPD Secretariat in writing within five working days of receipt of this Decision giving reasons why costs should be awarded in his/its favour.

Appeal

- 118 The attention of parties is drawn to NADP Procedure Rules Article 13.4 concerning appeal rights.

A handwritten signature in black ink, appearing to read 'Rod McKenzie', with a long horizontal line extending from the end of the signature.

Rod McKenzie

Dr Michael Irani
Blondel Thompson

21 April 2015





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