

NATIONAL ANTI-DOPING PANEL

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING
RULES OF THE DARTS REGULATORY AUTHORITY**

Before:

David Casement QC (Chairman)

Colin Murdock

Graham Edmunds

B E T W E E N:

MR RICHARD BURNETT

Appellant

- and -

UK ANTI-DOPING

Respondent

FINAL DECISION OF THE NATIONAL ANTI-DOPING APPEAL PANEL

1. This is an appeal by Richard Burnett from the decision of the National Anti-Doping Panel ("the Panel") dated 10 June 2015. The hearing of the appeal took place on 23 September 2015 as a telephone hearing with the consent of the parties given the narrowness of the issues involved. Those in attendance by telephone, as well as the Appeal Panel, were as follows:

Robert Leighton Davies QC, Leading Counsel for Mr Burnett

Richard Burnett

Claire Parry, UK Anti-Doping

Jenefer Lincoln, NADP Secretariat

2. Mr Burnett is a professional darts player who is now 48 years old and who has competed in major tournaments for over 20 years. He is a registered member of the Darts Regulatory Authority.
3. Following an In-Competition Test on 3 November 2014 Mr Burnett's urine sample tested positive for the presence of Benzoylcegonine, a metabolite of cocaine. Mr Burnett was charged with an Anti-Doping Rule Violation (ADRV) by a charge letter dated 21 November 2014. The ADRV consisted of the presence of a Prohibited Substance, namely cocaine contrary to Article 2.1 of the Anti-Doping Rules. The ADRV was admitted by Mr Burnett by way of a letter dated 25 November 2014
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
4. On 2 December 2014 Mr. Burnett's representative sent an email to UKAD with a further response in which he reiterated his acceptance of the ADRV and stated that he "wishes to request the elimination or reduction of the period of ineligibility based on exceptional circumstances under ADR 10.5.1 and/or 10.5.2."
5. A final hearing of the National Anti-Doping Panel was convened on 19 May 2015. The Panel consisted of Mr Mathew Lohn (Chairman), Ms Carole Billington-Wood and

Professor Peter Sever. Given the admission of the ADRV the only matter to be addressed by the Panel was sanction and in particular the Period of Ineligibility. By a written decision dated 10 June 2015 the Panel concluded that it was satisfied as to the Threshold Requirement as to how the cocaine had entered Mr Burnett's body, [REDACTED] Importantly the Panel also considered the evidence [REDACTED] [REDACTED] [REDACTED] and concluded that Mr Burnett held No Significant Fault or Negligence for the ADRV.

6. Having concluded that Mr Burnett held No Significant Fault or Negligence for the ADRV the Panel noted that the Anti-Doping Rules provided for a sanction of a Period of Ineligibility of between one year and two years depending upon the degree of fault. The Panel concluded [REDACTED] that:

"The exceptional circumstances of this case [REDACTED] [REDACTED] has caused the Panel to allow Mr Burnett a small reduction in his period of ineligibility, namely six months. As such, the period of ineligibility imposed on the Athlete is 18 months."

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Grounds of Appeal

10. By Notice of Appeal dated 29 June 2015 Mr Burnett sought to appeal the decision of the Panel on a very narrow basis:

"I base my appeal on the grounds that, while I was very grateful to receive a reduction from the original 2 years to 18 months, this has made no difference to my ability to earn income from professional darts. To explain this further, the ban has been "increased" in length, in effect, to at least 2 years and 2 months, as the PDC qualifying competition takes place in January/February each year. I am unable to compete and earn money until January 2017."

11. Written submissions dated 1 September 2015 have now been filed by Mr Davies QC on behalf of Mr Burnett which clarify the basis of the appeal. We are grateful for the clarity of those written submissions which have been supplemented by equally clear oral submissions. The essence of those, as with the Notice of Appeal, is that Mr Burnett will effectively miss out on the PDC qualifying competition in January/February and therefore he will not be able to earn money until January 2017.
12. By further written submissions dated 10 September 2015 Mr Davies sets out a further basis for the reduction of the Period of Ineligibility, namely the decision in the case of The Football Association v Jake Livermore (10 September 2015). In that case The Football Association Regulatory Commission decided that due to the exceptional nature of the circumstances as therein defined it was not appropriate to impose any Period of Ineligibility on the Athlete. It is argued on behalf of Mr Burnett that the Appeal Panel should draw parallels with the case of Livermore and reduce the Period of Ineligibility in the present case. This formed part of broader oral submissions made before the Appeal Panel namely that there is a lack of consistency in the approach taken by the Panel when compared with previous decisions including decisions of CAS. Those authorities, including Livermore, it was argued, create a presumption that in similar cases [REDACTED]
[REDACTED]
[REDACTED] the Period of Ineligibility should not exceed 12 months.

[REDACTED]

Role of the Appeal Panel

- 14. The role of the Appeal Panel is set out in Rule 13 of the National Anti-Doping Rules 2015. In particular Rule 13.4 provides as follows:

“Standard of Review

13.4.1 Where required in order to do justice (for example to cure procedural errors in the Arbitral Tribunal proceedings), appeal to an Appeal Tribunal pursuant to this Article 13 shall take the form of a rehearing de novo of the issues raised in the proceedings, i.e. the Appeal Tribunal shall hear the matter over again, from the beginning, without being bound in any way by the decision being appealed.

13.4.2 In all other cases, the appeal to an Appeal Tribunal shall not take the form of a de novo hearing but instead shall be limited to a consideration of whether the decision being appealed was erroneous.”

- 15. In his written submissions it was submitted by Mr Davies that the Appeal should proceed as a hearing de novo. That was not how the matter was put in the Appeal Notice or at the directions hearing on 21 July 2015. In the event the Appeal Panel proceeded, as was agreed at the directions hearing, as a telephone hearing expressly on the basis that there would be no witnesses required and it was a narrow point in issue. It must be noted that Mr Davies only became involved in this case shortly prior to the appeal hearing but there was no application to vary the directions order which has stood since 21 July 2015 or any application to adjourn the appeal hearing. In

short in the absence of all of the witnesses and a hearing in person a hearing de novo would not have been possible without an adjournment which was not requested.

16. In any event the Appeal Panel considers there was no proper basis for directing a hearing de novo. There was no suggestion that there were procedural errors or such like to justify a re-hearing. Further, the grounds of appeal were clearly capable of being addressed on the basis of the written evidence and the findings as recorded in the Panel's decision.
17. The Appeal Panel therefore proceeds to consider whether the Panel decision was erroneous [REDACTED] as identified on behalf of Mr Burnett. The Appeal Panel is also mindful that the Panel had the benefit of hearing live testimony. [REDACTED]
[REDACTED] The Panel was therefore better placed than the Appeal Panel to evaluate the [REDACTED] evidence and make factual findings and to resolve any issues concerning the [REDACTED] evidence.

Consequences of the Sanction as a Basis for Appeal

18. The first point raised on behalf of Mr Burnett is that as a result of a Period of Ineligibility of 18 months imposed by the Panel it is in fact, as a result of the timetabling of qualifying competitions which take place in January/February of each year, a ban which effectively lasts for two years and two months. This is because he will miss the January/February 2016 qualifying competitions and will only be able to begin to earn money again from January 2017 onwards. The hardship that this will cause for Mr Burnett is set out in the written submissions.
19. The Appeal Panel does not accept that the consequences of the Period of Ineligibility including the financial or career implications are valid considerations when determining the length of a Period of Ineligibility. The position is very clear from the Code, the commentary to the World Anti-Doping Code and authorities.
20. The commentary to 10.5.1 and 10.5.2 provides as follows

"The purposes of assessing an Athlete's or other Person's fault under Articles 10.5.1 and 10.5.2, the evidence considered must be specific and

relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that the Athlete would lose the opportunity to earn large sums of money during a period of ineligibility or the fact that the Athlete only has a short time left in his career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of ineligibility under this Article."

21. The commentary does not have the authority of the Code itself however it is clear from Article 1.5.4 of the Code that "The comments annotating various provisions of the Code shall be used, where applicable, to assist in the understanding and interpretation of these Rules". The commentary to the Code is particularly salient/useful where the examples it provides are on all fours with the case at hand and any Tribunal would be expected to give substantial weight to the Commentary in such an analogous situation: UKAD v Anderson SR/0000120082 (16 May 2013) paragraph 4.17 – 4.18.
22. It was urged upon the Appeal Panel that if Mr Burnett is unable to compete effectively for two years and two months, because of the sporting calendar, his career will effectively be finished. That very point arose in the case of World Anti-Doping Agency and Vysotskaya CAS 2007/A/1414 in which the CAS panel considered the Respondent's argument that because the average career of a female gymnast is between three and four years, a two year period of ineligibility had a much more significant effect on a gymnast than in sports where careers were traditionally longer. The CAS panel concluded that such an argument was irrelevant: paragraph 83. It is notable that CAS referred to the commentary cited above in support of that conclusion.
23. The Appeal Panel concludes that the sporting calendar is entirely irrelevant for the purposes of determining the Period of Ineligibility and the reduction to that period following a finding of No Significant Fault or Negligence.

Previous cases and lack of consistency

24. As part of his broader submission Mr Davies asked rhetorically if any similar case [REDACTED] had ever resulted in a Period of Ineligibility in excess of 12

months. He referred to Vlasov v ATP Tour Inc CAS 2005/A/873 in which a period of 12 months was imposed and to WADA v USADA & Thompson CAS 2008/A/1490 which carried a period of 12 months. Reference was also made to the case of USADA v Cosby (5 May 2010, American Arbitration Association, 771900054309) in which a two year sanction was reduced to four months.

25. By further written submissions dated 10 September 2015 on behalf of Mr Burnett he sought to rely upon the decision of the Football Association Regulatory Commission in the case of The Football Association v Livermore. Mr Livermore had failed an In-Competition Test when his sample tested positive for a metabolite of cocaine. In that case the Commission held that Mr Livermore should not receive a Period of Ineligibility due to the unique circumstances of that case.
26. A substantial part of the Livermore decision is redacted due to the sensitive and private nature of the medical evidence and circumstances of that case, however the following is clear from the unredacted part. The focus in the case of Livermore was upon the degree of cognitive impairment to Mr Livermore following the tragic death of his son shortly after childbirth and the causative link between that degree of cognitive impairment and the ADRV. The Commission had before it "the clearest evidence" including expert evidence of severe cognitive impairment and the absence of fault on the part of the Athlete.
27. Cases such as these [REDACTED] [REDACTED] are difficult cases that require careful consideration of the [REDACTED] evidence as to the degree of [REDACTED] cognitive impairment, the circumstances of the ADRV and the causative link between the two.
28. The Appeal Panel is clear that [REDACTED] [REDACTED] it is necessary to consider each case on its own individual facts. Reliance upon other cases is unlikely to be informative or helpful in respect of the degree of reduction that should be made to the standard sanction. Cases will vary depending upon the degree of impairment, the cause of that impairment, its effect on the Athlete, the duration and the causative link between the impairment and the ADRV. The lack of assistance to be gained from precedents is underscored by the fact that often cases in this area are redacted or reported in terms so that private and sensitive

information is not published. The Appeal Panel therefore rejects any suggestion that there is a presumption in cases such as this of a Period of Ineligibility not exceeding 12 months. There is no authority in support of any such presumption.

29. Reliance upon the case of Livermore is an example of misplaced reliance upon other cases in this area. Even on the face of the unredacted parts of that decision there are clear differences between the Livermore case and the present:

(1) the starting point is that it was made clear in the Livermore decision that it was not intended to set any precedent and that it was a unique case: paragraph 35. In any event the decision in Livermore is not binding in any way upon another Tribunal or indeed this Appeal Panel;

(2) in Livermore the Commission held, on the basis of the "clearest medical evidence", that the degree of cognitive impairment suffered by the Athlete was severe: paragraph 12. That is in contrast to the present case [REDACTED]

[REDACTED]

(4) the Commission in Livermore concluded on the basis of the totality of the evidence before it that Mr Livermore was in no real sense at fault for the circumstances surrounding the ADRV and the ADRV itself: paragraph 33. There was a clear causal link between the severe cognitive impairment and the ADRV: paragraph 14.4. In contrast, the Panel found that Mr Burnett was to some extent at fault or to use the Panel's expression he was guilty of "contributory negligence" in the commission of the ADRV [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Conclusion

33. The original basis of this appeal was that there would be severe financial consequences for Mr Burnett in the event that the Period of Ineligibility was not reduced from 18 months to 14 months. That is a factor which cannot be taken into consideration when considering the appropriate Period of Ineligibility.
34. The alleged inconsistency between previous cases and the present case is not a sound point. In cases where the Tribunal is concerned with the degree of cognitive impairment and the circumstances surrounding the ADRV each case must be looked at individually. To suggest there is a presumption of a starting point of 12 months in such cases is baseless. A finding of No Significant Fault or Negligence as was the case with Mr Burnett gave the Panel the discretion to reflect the degree of fault within the 12 months to two-year range.
35. Any reliance upon the case of Livermore is entirely misplaced. The facts in that case were unique and in the very rare Circumstances, as therein defined, there was no fault or negligence in any real sense, as the Commission found. There are clear differences between the Livermore case and the present case.
36. The Panel's approach to the exercise was one of careful consideration of the [REDACTED] evidence. The Panel was entitled to come to the view, based on the evidence before it, that there was fault on the part of Mr Burnett and the decision to reduce the Period of Ineligibility to 18 months as opposed to 14 or 12 months cannot be faulted. The position of the Appeal Panel is to decide whether the Panel was in error in so concluding and not whether the Appeal Panel might have arrived at a different conclusion if it was dealing with the matter at first instance. It cannot be said that the Panel made any error in its reasoning or its conclusions.
37. It follows that the Appeal is hereby dismissed.



DAVID CASEMENT QC

Chairman
Signed on behalf of the Appeal Panel.
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