SPORT RESOLUTIONS (UK)

SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/0000120256

NATIONAL ANTI-DOPING PANEL

***Before*:**

Rod McKenzie (Sole Arbitrator)

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF THE CYCLING TIME TRIALS

BETWEEN:

UK Anti-Doping Limited

("Applicant")

- and -

Mr Andrew Hastings

("Respondent")

FINAL DECISION OF THE ARBITRAL TRIBUNAL ("THE TRIBUNAL")

Background

A On 26 October 2015, in terms of section 47 (2)(b) of the Arbitration Act 1996, I made a part award in this arbitration. The part award was notified in an interim decision of the same date. That interim decision, subject to any appeal is, in terms of section 58(1) and 58(2) of the 1996 Act and Rule 13(1) of the National Anti-Doping Panel Procedure Rules 2015, final and binding on the parties of the "claims" determined at paragraphs 79.1 to 79.4 of the interim decision. In relation to those determined claims, I am now *functus*.

B For ease of reference, the terms of that interim decision are set out below at paragraphs 1 to 81 (inclusive). At paragraphs 79.1 and 79.2, I set out the principal determinations in this arbitration, i.e. that the charged ADRV had been established, that the Respondent had not established that the ADRV was not intentional and that the period of Ineligibility imposed on the Respondent is four years.

C There remained and remains for determination only the matters referred to at paragraphs 73 to 78 (inclusive) of the interim decision ("the Outstanding Matters").

D I invited written submissions from parties on the Outstanding Matters and written submissions were received from both the Applicant and the Respondent. Discussion of those written submissions, the Outstanding Matters and my determinations on the Outstanding Matters are set out below from paragraph E.

The Interim Decision

"Introduction

1 This is the interim decision of the Arbitral Tribunal ("the Tribunal") comprising a sole arbitrator convened pursuant to Article 5.1 of the National Anti-Doping Panel Procedural Rules 2015 to determine a charge brought against Mr Andrew Hastings ("the Respondent") for a violation of Article 2.1 of the UK Anti-Doping Rules 2015 ("the Rules") as adopted by Cycling Time Trials ("CTT").

2 CTT is the national governing body for the sport of time trials in England and Wales. On 23 July 2011 the Board of CTT adopted the Rules as the anti-doping rules of CTT ("ADR"). Article 8.1 ADR confers jurisdiction on the National Anti-Doping Panel ("NADP") to determine matters arising under the ADR. The parties raised no objection to the jurisdiction of the NADP or the composition of the Tribunal by a sole arbitrator.

3 CTT organises and authorises time trial events in which individuals can only compete if they are a member of a Club affiliated to CTT. Amongst such events is the 2015 Team Time Trial National Championship ("the Event"), which took place

on 30 May 2015 in Newark, Nottinghamshire. The Respondent who is a member of an affiliated club participated as a competitor in the Event for the Richardson Trek RT team.

4 The Respondent was selected to provide a Sample after finishing second in the Event. A urine Sample was collected from the Respondent In-Competition. No issue arises as to compliance with the requisite Sample collection procedures or the procedures in relation to Analytical Testing of the Sample collected from the Respondent.

5 The Sample was split into A and B Samples, which were transported to the Drug Control Centre at Kings College, London ("the Laboratory"), a WADA accredited laboratory, where the A Sample was subjected to Analytical Testing.

6 The A Sample was Analytically Tested in accordance with the WADA International Standard for Laboratories. That analysis of the A Sample returned an Adverse Analytical Finding ("AAF") for (i) metenolone and (ii) its Metabolite 1-methylene-5a-androstan-3a-ol-17-one, as well as (iii) stanozolol-N-glucuronide (a Metabolite of stanozolol). Metenolone and stanozolol (together with their Metabolites) are listed under S1.1.a of the WADA 2015 Prohibited List and are classified as exogenous Anabolic Androgenic Steroids. As such they are not Specified Substances. The Respondent had no Therapeutic Use Exemption to justify the presence of any of the Prohibited Substances detected in his system. There was no request for, or other reason to, Analytically Test the B Sample since the AAF was not in issue.

7 By letter from the Applicant dated 25 June 2015 the Respondent was charged with a violation of Article 2.1 ADR, *viz* the Presence in the Sample provided by him on 30 May 2015 of the above-specified Prohibited Substances ("the ADRV").

8 In accordance with Article 7.9 ADR the Respondent was provisionally suspended with immediate effect and the charged ADRV was referred to the NADP for determination in accordance with Article 8.1.1 ADR.

9 By letter dated 3 July 2015 the Respondent wrote to the Applicant confirming receipt of the letter of 25 June 2015 and advising that he did not intend to

contest the charge made against him by the Applicant. In effect, he accepted that he had committed the charged ADRV. However he advised that he did wish to make submissions "as to the length of any restriction, the date from which it should commence and the potential application of the *lex mitior* principle". He went on to advise that he did not consider that an oral hearing would be required and was content that the matter be dealt with by "determining matters on the papers".

10 On 8 July 2015 the Respondent sent a further letter to the Applicant providing a more detailed response to the charge asserting that he did not act intentionally in ingesting the Prohibited Substances, which had been detected in his Sample, and reiterating that he wished the matter dealt with without a hearing and on the papers. In the 8 July letter the Respondent provided some information regarding how the Prohibited Substances could have entered his system but more detail was provided later in a statement of 26 August 2015. This detail is set out below.

11 The President of the NADP appointed me to the Tribunal and I convened a directions hearing, which took place by conference call on 24 July 2015. The Respondent attended on the conference call in person and Ms Claire Parry, counsel, represented the Applicant. It was agreed at that hearing that the relevant edition of the WADA Code, which applied in relation to the matter of the ADRV charged, was the WADA Anti-Doping Code 2015, the ADR were the Rules and that the NADP Procedural Rules 2015 applied.

12 The Respondent acknowledged during the hearing that he had committed the ADRV as charged in paragraph 3.2 of the letter from the Applicant to the Respondent of 25 June 2015 with the Presence in his Sample of the Prohibited Substances specified above. The Respondent went on to advise that he would seek to establish that he had not intended to consume the referenced Prohibited Substances, and that in any event he bore No Significant Fault or Negligence for the admitted ADRV with the effect that there should be a reduction in the resulting Period of Ineligibility.

13 Through counsel the Applicant advised that it intended to commission scientific analysis and the Respondent advised that he did not intend to commission any such analysis.

14 The Respondent re-iterated that he wished the arbitration to be dealt with by way of written representations and that he did not wish there to be an oral hearing before a Tribunal. Counsel, on behalf of the Applicant, advised that it agreed to this course of action and on that basis I determined that the arbitration would proceed on the consideration of written representations of parties and on the documents and other materials made available to the Tribunal. I further determined that there would not be an oral hearing unless any further order was made. As matters transpired there was no request for an oral hearing at any stage by either of the parties, and this arbitration was considered and determined on the basis ordered at the directions hearing on 24 July 2015. I set a timetable during discussion at the hearing, confirmed in Directions issued to parties, for the provision of statements, documents and other material as well as written submissions of parties.

15 Subsequently the President of the NADP determined in accordance with NADP Rule 5.1, there being no contrary representations of parties, I should determine this matter sitting alone as a sole arbitrator and that no other members of the NADP would be appointed to the Tribunal. This was notified to parties. There was no objection received from parties.

16 This document constitutes my reasoned interim decision reached after due consideration of all of the written evidence, submissions and arbitral awards placed before me. I have carefully considered all of this material in reaching my decision. Where a matter is determined in terms of the Conclusions part of the Decision set out below, this interim decision constitutes my reasoned final decision.

The Respondent's Position on the ADRV

17 Subsequent to the hearing on directions, the Respondent appointed counsel, Nicholas M Siddall Esq., who prepared a skeleton argument on behalf of the Respondent. This skeleton argument was submitted to the NADP.

18 In that skeleton argument, I was invited to pre-read the letter of 25 June 2015 from the Applicant to the Respondent, the letter from the Respondent to the Applicant of 3 July 2015, the witness statement of the Respondent with accompanying supporting evidence dated 26 August 2015, and a witness statement from a Mr Steve Collins. As matters transpired, no witness statement of Mr Collins was received and it was confirmed to the NADP Secretariat that none would be lodged.

19 The position of the Respondent is summarised as follows in the skeleton:-

- At all relevant times the Respondent was an elite cyclist with a 2014 national ranking of 35. He has no history of prior anti-doping violations.
- He was charged on 25 June 2015 as set out above and was placed under a Provisional Suspension.
- The urine Sample collection took place as set out above on 30 May 2015.
- On 3 July 2015 by letter to the Applicant, the Respondent accepted the Adverse Analytical Finding. By inference the Applicant confirmed his acceptance of the commission of the charges ADRV.
- I am now only concerned with determining the appropriate sanction under the ADR.
- The Respondent argues that; i) his period of ineligibility should be two years from the first violation pursuant to Article 10.2 ADR; ii) the sanction should be backdated to the date of the relevant Sample collection i.e. 30 May 2015 having regard to the Applicant's claimed "prompt" admission of the ADR violation pursuant to Article 10.2.2 ADR; iii) that his period of Provisional Suspension from June 2015 should be included within the period of Ineligibility pursuant to Article 10.9.3 ADR; and iv) that the Respondent should be permitted to return to training no longer than two months prior to the expiry of the period of Ineligibility pursuant to Article 10.12.2 of the WADA Code 2015. The consequence, it is submitted, of these proposed

findings being that the Respondent should be eligible to return to training on 30 March 2017.

- It was contended that the Respondent is not a "drugs-cheat", that he had been candid in his witness statement, of which more details are set out below, and that his breach of ADR had been inadvertent.

- The skeleton went on to accept that, notwithstanding the contention made by the Respondent at the hearing on directions, he now accepted that he had no evidence to contend for an Elimination or Reduction in the Period of Ineligibility pursuant to Article 10.5 ADR and Article 10.5 WADA Code 2015, and that he did not further pursue that matter.

The Respondent's 26 August 2015 Statement

20 The Respondent asserts in his 26 August 2015 statement that:-

- Until 15 February 2015 he had been on holiday at a training camp in preparation for the forthcoming season. This had involved long training hours and on his return he was very tired and run down.

- On 17 February he had gone to the "Monster Gym" for a regular training session but had found himself still very tired, and that he had decided to administer a Vitamin B12 injection to himself.

- He had been a member of that gym since 2005 and had formed a friendship with its owner, a Mr Steve Collins.

- He had purchased Vitamin B12 ampoules delivered 1 November 2014 from Pharmacy Online and that he had had one of these ampoules of Vitamin B12 with him in the gym, which he anticipated he would take after completion of his training session. A delivery note from Pharmacy Online in Australia, AH1, is produced purporting to document the purchase of four such ampoules delivered to the Respondent on 1 November 2014.

- He had additionally purchased syringes, needles and Alcotip pre-injection swabs and that he had a needle and swab with him on 17 February but no syringe as he had "none left".

- He bought these items on eBay and he was unable to provide a receipt for their purchase but he was able to provide a copy of packaging information, AH2, which is indicated to come from packaging for a syringe, a needle and a swab. Copy packaging for one item of each is included in AH2.

- Once he had completed the training session on 17 February he was in the café area drinking a protein shake when he joined a conversation involving Mr Collins and a small group of members. He told those present that he had run out of syringes and he wanted to take a Vitamin B12 injection but was unable to do so because he did not have a syringe. One of the persons present is said to have checked his bag and had a used syringe with him. This person then offered the syringe to the Respondent.

- He examined the syringe visually, we are not told in any detail the extent to which the internal area was visible, and whilst it was clear to him that it had been used the Respondent could not see any blood in it so the Respondent concluded that it had not been used intravenously.

- The Respondent does not know the person who provided him with the syringe as he had not met him before, but since the person knew Mr Collins the Respondent considered that the person was someone that he "could trust".

- His thoughts were focused on the clean needle, which he had brought, and that it did not occur to him that there might be contamination with Prohibited Substances within the syringe.

- He then used the syringe along with his own needle and his own swab to take his Vitamin B12 ampoule that evening, administering the injection at home.

21 He goes on to advise that since receiving the UKAD letter of 25 June 2015, he had researched all of the supplements he had taken and could identify none which could have been contaminated with the Prohibited Substances identified in the AAF. He produced copy documentation marked AH4 asserting that this contains details of the contents of all such supplements taken by him, evidence, he asserts, that none contain Prohibited Substances.

22 In the light of this, which he asserts rules out all supplement contamination, he concludes that the only possible source of the AAF was the used syringe provided to and used by him on 17 February 2015.

23 Based on the above content of his statement the Respondent asks that the Applicant and Tribunal accepts:-

(a) that he is prudent in terms of the provenance of the substances that he allows to enter his body;

(b) that the only sensible conclusion is that the AAF is a result of his use of the contaminated syringe;

(c) that whilst he accepts that he was at fault in using the contaminated syringe, there was no intent on his part to take performance enhancing substances; and

(d) therefore the level of fault was such that it may properly be viewed as not significant.

24 In light of the concession made in the Respondent's skeleton argument that there was no evidential basis for an Elimination or Reduction in the Period of Ineligibility pursuant to Art 10.5 ADR, sub-paragraph (d) above is not further considered.

25 The Respondent's statement concludes with his confirmation that the contents of his statement are true.

Evidence of the Applicant

26 The Applicant provided three witness statements. The first of these was from Mr Paul Ouseley who works within the Legal Directorate of UKAD. His statement deals only with the collection, processing and analysis of the Respondent's Sample and general considerations in relation to those stages. Since no issue arises that there was the referenced AAF and that the charged ADRV was committed and is admitted by the Respondent, it is not necessary to set out in detail the evidence of Mr Ouseley.

27 The second witness statement is from Mr Nick Wojek who is the Head of Science and Medicine at UKAD. He provides evidence on the Prohibited Substances identified in the Respondent's Sample and the effects of such substances on sport performance.

28 In the case of metenolone he advises that this is a substance, which is not produced naturally by the human body but can be administered by intramuscular injection or oral ingestion. He advises that the metabolite of metenolone, which was identified, is one of a generally smaller, less active number of molecules that the body excretes once the administered drug has been broken down. Metenolone is itself a derivative of a steroid hormone which occurs naturally in the body but metenolone has been structurally modified as an Anabolic Androgenic Steroid so as to amplify its tissue building effects, minimise side effects and limit first pass metabolism. He advises that there are some therapeutic uses for metenolone in humans but this issue does not arise in relation to the Respondent. There are no preparations containing metenolone, which are currently licensed for use as a medicine within the UK.

29 Stanozolol is also classified as an exogenous Anabolic Androgenic Steroid and is, along with metenolone, and the metabolites of both, listed under S1.1(a) of the 2015 WADA Prohibited List. He advises that stanozolol is extensively metabolised before it is secreted from the body in urine and that therefore only low concentrations of the parent drug are typically found. However, its metabolites are detectable for a much longer period than the parent drug, which is why most Adverse Analytical Findings reported by WADA are for metabolites of stanozolol rather than stanozolol itself. He goes on to advise that the human body does not

naturally produce stanozolol, which can be administered, by intramuscular injection or oral ingestion.

30 His statement advises that in a similar way to metenolone, stanozolol is also a derivative of a naturally occurring hormone but one which has been modified in order to amplify its anabolic effects, minimise side effects, limit first pass metabolism and increase the period during which the drug remains active in the body. Whilst preparations containing stanozolol have been discontinued in the UK, it has been approved for use in humans therapeutically and production continues outside the UK. However, stanozolol is not currently licensed as a medicine for use in the UK.

31 Mr Wojek goes on to advise that road cycling is both psychologically and physiologically demanding and is an endurance sport. Generally road cyclists are muscular and lean with low body fat levels keeping a high power to weight ratio. This is important for hill climbing and time trialling. Elite level training involves distances of 400 to 1000 kilometres and such training and associated competition causes muscle damage. Faster recovery rates enable the Athlete to train harder after a hard day of racing and will improve an Athlete's ability to recover for further competitions shortly thereafter. This may be advantageous in multi-day stage racing. Anabolic Steroids with properties of metenolone and/or stanozolol could be used to quicken repair of muscle damage and recovery from endurance exercise. He goes on to advise that metenolone and stanozolol have moderate anabolic properties and are desirable for use by an endurance Athlete because they are apt not to increase muscle mass but rather keep weight to a minimum, improving recovery from hard training sessions or competitions. Further, they are appealing as Anabolic Steroids because they do not convert into the female sex hormone oestrogen and are therefore not likely to cause the side effects associated with that hormone.

32 He also advises that "stacking", a term used to describe the use of multiple Prohibited Substances, can take place with different types of Anabolic Steroid being used at the same time. This is done to improve the overall efficacy of each of the steroids, to avoid development of tolerance and the reduction of effectiveness, to enable smaller doses to be used and to use one drug to

counteract the effects of another. He advises that metenolone and stanozolol could be 'stacked' for concurrent intramuscular injection or administered orally.

33 The Applicant's third witness statement is from Professor David Cowan of the Drug Control Centre at Kings College, London. His specialism is in pharmaceuticals generally and pharmaceutical analysis in particular. He has a specific speciality in drug abuse in sport.

34 Professor Cowan considers the claimed facts described by the Respondent in his statement, noting that the proffered time between the claimed use of the used syringe and the Sample being collected is more than 100 days i.e. more than three months. He expresses an opinion on whether the explanation proffered by the Respondent is feasible as an explanation for the presence of the referenced Prohibited Substances in the Sample.

35 For the purposes of his analysis, Professor Cowan assumes that the Respondent was provided with a hypodermic syringe without a needle, the particular device in question being used to contain liquids prior to injection via a hypodermic needle and that the plunger forces the liquid from the device through the needle into the body of the person taking the pharmaceutical product. Typically, such syringes will, he advises, contain slightly more of the liquid to be injected than is required, and any air can be expelled along with some liquid so the correct volume for injection remains. He further advises that the normal use of the syringe results in most of the liquid being expelled through the needle and there would be very little liquid left in the syringe when it is being used by a subsequent user such as is claimed by the Respondent in his statement.

36 Professor Cowan accepts that it is possible that one tenth of one millilitre of the previous volume contained in the syringe might remain as a small volume of liquid, either in the barrel of the syringe or in its neck.

37 Professor Cowan notes that the Laboratory found the presence of metenolone and its main metabolite as well as a metabolite of stanozolol in the urine Sample of Mr Hastings. He advises that injections of metenolone are made up of methenolone, which is then chemically combined with heptanoic acid, which is a

fatty acid, and which works with the metenolone to prolong the duration of the action of the metenolone.

38 He advises that in a medical context a 100 milligram dose of metenolone may be given every two weeks because most of the metenolone will have left the body within that time period. He also advises that there are two strengths of the methenolone enanthate, the combination of methenolone and heptanoic acid, available for injection on the world market comprising 50 milligrams per millilitre and 100 milligrams per millilitre. Looked at from the perspective of affording the maximum benefit to the version of events provided by the Respondent, he proceeds on the assumption that the strength of the metenolone hypothetically present in the contaminated syringe was 100 milligrams per millilitre.

39 Professor Cowan goes on to advise that stanozolol injections do not require further chemical modification and again there are the same two strengths of stanozolol preparations available on the market. Professor Cowan assumes that the strength in the stanozolol postulated as being present in the contaminated syringe was 100 milligrams per millilitre, which is the concentration most advantageous to the Respondent having regard to the basis of his suggested administration of the Prohibited Substances referred to.

40 Finally, for the purposes of his analysis, Professor Cowan assumes that the amount of the methenolone enanthate and stanozolol remaining in the claimed syringe given to the Respondent, which could have been co-injected with Vitamin B12, would have been 10 milligrams of each on the footing that the maximum volume remaining in the syringe after its previous use was one tenth of a millilitre.

41 Professor Cowan advises that stanozolol is metabolised into a number of metabolites and that the particular metabolite found in the urine Sample provided by the Respondent is one that is reported to have the longest detection time. On the basis of the explanation provided by the Respondent involving the injection of what must have been a small amount of stanozolol some 100 days later, the metabolites produced by that injection would have required to be still

in his system in sufficient amounts to be detected when the urine Sample was subject to Analytical Testing at the Laboratory.

42 In Professor Cowan's opinion whilst such a finding of sufficient amounts of such metabolites for detection is scientifically possible, it is highly unlikely. In his opinion a one-off administration of such a small amount of stanozolol would not be sufficient for a Metabolite of it to be detected in a urine Sample collected 100 days later.

43 Furthermore, Professor Cowan advises that he is not aware of any formulation of both metenolone and stanozolol on the market either as a licensed medical preparation or manufactured without appropriate licensing. However, he acknowledges that a previous user of the putative syringe could have 'stacked' both methenolone enanthate and stanozolol preparations together in the same syringe before injection which could have left a residue of both compounds in any remaining volume in the syringe.

44 However, Professor Cowan goes on to advise that the finding of the intact Anabolic Steroid metenolone in the Respondent's Sample would indicate that, in his opinion, the administration of the metenolone was less than three months prior to Sample collection or, alternatively, that a larger dose than is consistent with the Respondent's explanation would need to have been administered. In his opinion, an administration of metenolone one month prior to Sample collection is possible in the light of the findings of the Analytical Testing but two months is unlikely.

45 Professor Cowan concludes that, in his opinion, the explanation provided by the Respondent does not adequately account for the AAF of the Presence of metenolone, a metabolite of metenolone as well as a metabolite of stanozolol in the Sample collected on 30 May 2015.

Respondent's Submissions

46 These are set out in the skeleton argument as follows:-

"(a) The Respondent has considered the evidence submitted by the Applicant. The Respondent has no evidence to contend for an Elimination or Reduction of the Period of Ineligibility based on Exceptional Circumstances pursuant to Art 10.5 ADR or as now more recently set out at 10.5 WADA Code 2015. The Respondent does not pursue that matter further.

(b) The Respondent "promptly" admitted the ADR Violation by accepting the AAF by his letter to the Applicant dated July 3rd 2015.

(c) "Promptly" means to act in a prompt manner i.e. to act without delay. Whether an admission is promptly made is a question of fact. It depends on the circumstances of each individual case. It is not measured simply by time but also by context: UKAD v Edwards (Christopher Quinlan QC as Chairman) at paragraph 39.

(d) In this case, both in terms of time and context, it is submitted that Mr Hastings "promptly" made an admission. He did so within eight days of being informed by UKAD of the AAF. In the meantime no further steps had been taken in relation to the matter by either party. It is submitted that the time taken is sensible and realistic in the light of the Respondent's need to seek advice and also to consider the consequences of a 'ban' upon him.

(e) Accordingly, the Respondent should benefit from his period of Ineligibility being backdated to the date of Sample Collection, May 30th 2015, pursuant to Art 10.9.2 ADR.

(f) The Respondent is also entitled to have his period of Provisional Suspension credited against the total period of Ineligibility to be served pursuant to Art 10.9.3 ADR.

(g) The Respondent is entitled to benefit from the principle of lex mitior pursuant to Art 25.2 of the WADA Code 2015, such that a tribunal deciding a case after the effective date of 1 January 2015 is required to apply the more lenient 2009 Code: UKAD v Warburton and Williams (Christopher Quinlan QC as Chairman) at paragraph 117.

(h) That approach has been more recently applied in the context of permitting a rugby player also being under the ADR to return to training no later than two months before the expiry of his period of Ineligibility pursuant to Art 10.12.2 of the WADA Code 2015: UKAD v Evans (William Norris QC as Chairman) at paragraph 14.4.

(i) In consideration of all of the above the Tribunal is obliged to permit the Respondent to return to training no longer than two months before the expiry of his period of Ineligibility i.e. from 30 March 2017."

Submissions for the Applicant

47 The Applicant put in a detailed written submission dated 11 September 2015. The following summary of that submission excludes reference to matters in relation to which there is no dispute such as jurisdiction and the commission by the Respondent of an ADRV.

48 In responding to the evidence of the Respondent, primarily that contained in the Respondent's statement, the Applicant rejected the conclusion of the Respondent which was that:-

"I am correct in saying that this leaves the contaminated syringe to be the only possible source of the AAF."

49 The Applicant submits that I should reject the explanation for the commission of the ADRV proffered by the Respondent for the following reasons:-

- there is no evidence for the proffered explanation and that "it is simply speculation";
- the Respondent's account does not explain how the metenolone and stanozolol Metabolites and the metenolone, came to be present in the Sample some three months after the claimed injection. The Applicant refers to "ingested" in this context but that should be "injected". On the Respondent's proffered explanation for the AAF, the Prohibited Substances had entered his system by injection and I read the submissions of the Applicant in that context;

- Professor Cowan's opinion that a finding of the intact metenolone Anabolic Steroid indicated a much more recent administration of the substantive Anabolic Steroid than three months prior to Sample Collection;

- that the explanation proffered by the Respondent depends on there having been a sufficient quantity of metenolone and stanozolol present in the syringe prior to use by the Respondent for the Prohibited Substances to be identified in a Sample collected three months subsequently. The Applicant submits that the presence of the intact metenolone means that either the quantities of the original intact Anabolic Steroid taken some three months prior to Sample collection must have been much larger than the dose which would be consistent with the Respondent's proffered explanation, and/or the metenolone must have been taken more recently than three months prior to Sample collection;

- that in the written account of events and other evidential material provided by the Respondent there is nothing provided from Mr Collins notwithstanding that his evidence, on the basis of the Respondent's proffered explanation, would plainly be relevant; and

- no information is provided by the Respondent as regards the identity of the person who is claimed to have provided the used syringe to the Respondent either in the form of a statement from that individual or on the basis of information provided by Mr Collins. The Applicant observes that this is notwithstanding that the Respondent claims to visit this gym regularly.

50 The Applicant refers to the terms of Article 10.2 ADR which provides, so far as relevant, as follows:-

"*10.2 The period of Ineligibility for an Anti-Doping Rule Violation under Articles 2.1, 2.2 or 2.6 that is the Athlete's or other Person's first anti-doping offence shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:*

10.2.1 The period of Ineligibility shall be four years where:

(a) *The Anti-Doping Rule Violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the Anti-Doping Rule Violation was not intentional.*

(b) *The Anti-Doping Rule Violation involves a Specified Substance and UKAD can establish that the Anti-Doping Rule Violation was intentional.*

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes or other Persons who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct, which he or she knew constituted an Anti-Doping Rule Violation, or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk .... "

51 The Applicant goes on to submit that in order for the mandatory period of Ineligibility to be reduced from four years to two years the Respondent must establish that he did not act intentionally and that he must do so on the balance of probabilities per Article 3.8.2 ADR.

52 Further, that in order to establish that he did not act intentionally it is necessary for the Respondent to establish how the metenolone and the stanozolol came to be present and ingested or administered. Recognising there is no explicit requirement in the wording of Article 10.2 ADR in this regard, the Applicant submits that without the decision maker being satisfied as to the method of ingestion or administration, the decision maker will not be able to make a proper assessment of intention. The Applicant asserts that unless the Respondent can satisfy me that he did not either engage in conduct which he knew constituted an Anti-Doping Rule Violation or that there was a significant risk that such conduct might constitute or result in an Anti-Doping Rule Violation and he manifestly disregarded that risk, that the period of Ineligibility cannot be reduced. The

Applicant submits that the words "the conduct" must mean the facts, matters and circumstances that led to the ADRV and that an Athlete who seeks to show that he did not commit an Article 2.1 ADR Violation intentionally must explain how the violation occurred and that this is "the conduct". The consequence of this, submits the Applicant, is that in order for an Athlete to establish that "the conduct" falls outwith the definition of "intentional" in Article 10.2.3 ADR, it is necessary for the Athlete concerned to show how the relevant Prohibited Substance(s) entered his or her system because that is, it is submitted, the crucial part of "the conduct". If the Athlete cannot explain what "the conduct" was that led to the "positive test" then he or she cannot show that the violation was not intentional.

53 It is submitted by the Applicant that this is an analysis that is consistent with the decision of the NADP in *UKAD v Paul Songhurst* dated 8 July 2015. The Applicant relies on paragraph 31 of that decision which states:-

> *"Mr Songhurst has failed to provide any real explanation as to how this prohibited substance came to be found in his body. In such circumstances, we find that he has failed to discharge the burden of proof under article 10.2."*

54 The Applicant goes on to refer to the decision of the CAS Sole Arbitrator in *International Wheelchair Federation v UKAD and Gibbs* (CAS 2010/A/2230, 22 February 2011). The Applicant observes that at paragraph 11.5 of that decision, the sole arbitrator noted that in an Article 10.4 (WADA Code 2009) case an Applicant who was able to establish how a substance entered his or her system could do so as part of establishing that he or she did not intend to enhance performance, but that the reverse was not the case. The Applicant notes that the context of the previous version of Article 10.4 is different to the now Article 10.2.3 in that under the former provision, there was an explicit requirement that the Athlete had to show how the substance entered his or her system. However, the logic of the *Gibbs* decision, it is submitted, continues to apply in respect that an assertion of an absence of intent cannot be enough to prove absence of intent because there is no proof as to what actually occurred i.e. how the Prohibited Substance entered the Athlete's system. If an Athlete was able to establish "the

conduct" by relying on a bare assertion that he or she did not act intentionally in ingesting or administering the relevant Non-Specified Prohibited Substance however it came to be present in his or her system, then that would undermine the relevant ADR provisions because all Athletes who were either established or admitted to have committed a Presence ADRV involving a Non-Specified Substance could make the requisite assertion with the result, solely on the basis of that assertion, that the period of Ineligibility would be restricted to two years.

55 The Applicant acknowledges that the Respondent should be given credit for the period of Provisional Suspension pursuant to ADR 10.11.3(a) and that the Period of Ineligibility should commence on 25 June 2015.

56 Subsequent to putting in its main written submission the Applicant drew my attention to the later NADP decision in *UKAD v Lewis Graham*, which is a case involving a rugby football league player who committed an ADRV involving the presence of a Prohibited Substance which was not a Specified Substance in a Sample of urine provided by him, on this occasion on 17 February 2015. In its email of 18 September 2015 the Applicant contends that the decision in *Graham* supports the Applicant's submission in the present case that the Respondent is required to provide evidence regarding the method of ingestion or administration of the detected Non-Specified Prohibited Substance(s) in order to effectively invoke 10.2.1(a) ADR such that the Period of Ineligibility is limited to two years.

Discussion

57 The principal issue for determination in this arbitration is whether the Respondent has, for the purposes of Article 10.2.1(a) ADR, established on the balance of probabilities that the ADRV, which he admits he committed, "was not intentional".

58 The admitted ADRV is a violation constituted in terms of Article 2.1 ADR:-

> *"Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample, unless the Athlete establishes that the presence is consistent with a TUE granted in accordance with article 4."*

59 "Presence" is not a defined term in either ADR or in the 2015 Code. Accordingly, giving the word its ordinary meaning in its context, it is that Analytical Testing that detected the identified Prohibited Substance(s) and/or Metabolite(s) and/or Marker(s) as being present in an Athlete's Sample.

60 The Period of the Respondent's Ineligibility resulting from the commission by him of the charged and admitted ADRV falls to be determined in terms of Article 10.2 ADR since it is an Article 2.1 ADR ADRV and it is his first anti-doping offence. Further, there is no potential reduction of that Period pursuant to Articles 10.4, 10.5 and/or 10.6 ADR.

61 As Article 2.1.1 ADR makes clear, it is the personal duty of each Athlete to ensure that no Prohibited Substance enter his or her body, that an Athlete is responsible for any Prohibited Substance etc. present in his or her Sample and that "accordingly" there is no requirement for intent, Fault, negligence or knowing Use on the Athlete's part to be demonstrated for an ADRV in terms of Article 2.1 ADR to be established. Article 2.1.1 goes on to provide that lack of intent, Fault, negligence or knowledge being established on the part of an Athlete is not a defence to a charge of the Commission of an ADRV in terms of Article 2.1. However the commentary to the 2015 Code provides:-

> *"An Athlete's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under Article 10."*

62 Article 10.2.1(a) ADR is relevant in the case of the admitted ADRV because the Prohibited Substances present in the Respondent's Sample were not Specified Substances (consequently Article 10.2.1(b) is not relevant) and the Respondent seeks to establish that the admitted ADRV was not intentional.

63 In the context of an Article 2.1 ADRV in determining whether there should be a reduction of an otherwise mandatory Period of Ineligibility of four years in terms of Article 10.2.1(a), it is for the Athlete to establish on the balance of probabilities that he or she did not intend that the identified Prohibited Substance(s) be present in his or her Sample. In effect, this requires that the Athlete establishes that he or she did not intend that those Prohibited

Substance(s) be present in his or her system when the Sample was taken, it being a consequence of the presence of the Prohibited Substance(s) in his or her system that it/they would be present in his or her Sample. Whilst such intent is neither a component of the offence nor is it permitted to be a relevant component of a defence to a charge of the commission of an ADRV in terms of Article 2.1 ADR, the establishment by an Athlete of the absence of such intent is, subject to the penultimate and final sentences of Article 10.2.3 ADR, the necessary requirement for a reduction in the Period of Ineligibility in the case of an AAF involving a Prohibited Substance which is not a Specified Substance from four years to two years in terms of Article 10.2.1(a) ADR.

64 The penultimate and final sentences of Article 10.2.3 ADR are not relevant in this case since the AAF does not involve substances that are only prohibited In-Competition and the Respondent did not suggest otherwise.

65 In considering whether the Respondent has established that the admitted ADRV was not intentional it is necessary to apply what is effectively the definition of "intentional" in the first two sentences of Article 10.2.3. These provide that where the term "intentional" is used in Articles 10.2 and 10.3 ADR that it means those Athletes or other Persons who cheat. An Athlete who commits an ADRV, including pursuant to Article 2.1 ADR (presence), where the AAF involves a substance which is not a Specified Substance, is rebuttably, in terms of Article 10.2.1(a) ADR, presumed to be have done so intentionally and therefore to have cheated resulting in the sanction of a Period of Ineligibility of four years.

66 The reference to engaging in conduct applies both to a circumstance in which an Athlete knew that what he or she was doing or omitted to do constituted an ADRV or a circumstance in which there was a substantial risk that his or her acts and/or omissions might constitute or result in an ADRV and manifestly disregarded that risk.

67 The consequence of the definition of "intentional" in Article 10.2.3 of ADRV is that an Athlete who seeks to reduce the otherwise mandatory period of Ineligibility from four years to two years in reliance on Article 10.2.1(a) ADR must establish on the balance of probabilities that he is not an Athlete who has cheated. To do

so he must so establish that (i) he or she did not engage in conduct which he or she knew constituted an ADRV; or (ii) that he or she did not engage in conduct where there was a significant risk that such conduct on his or her part might constitute or result in an ADRV where he or she did not manifestly disregard that risk.

68 There is no equivalent provision in Article 10.2 ADRV to that formerly included in Article 10.4 in WADA Code 2009 which required that in order for an Athlete to secure the benefit of Article 10.4 it was a mandatory requirement that the Athlete had to establish how the Prohibited Substance(s) had entered his or her system and how it therefore became present in his or her Sample. This is discussed in *Graham* from paragraphs 30 to 40 (inclusive) and I respectfully agree with the conclusion reached by the Tribunal in that case that whilst there is no express or implicit mandatory requirement in Article 10.2 ADR that the Athlete must establish how the Prohibited Substance entered his or her system that, per paragraph 38:-

> *"... without establishing the likely method of ingestion of the Prohibited Substance it is difficult to see how [a] tribunal could properly and fairly consider the question of intent in relation to the conduct which led to that ingestion".*

69 In a context in which the onus is on the Athlete to establish lack of intent the difficulties, which would be faced by an Athlete who sought to establish absence of intent in circumstances where he or she could not identify the acts and/or omissions by him or her that resulted in the ingestion or administration by or to him or her of the Prohibited Substance, would be formidable. I do not entirely exclude the possibility that an Athlete might be able to establish a set of factual circumstances which might result in him or her being able to establish an absence of such intent where he or she is not able to proffer an explanation as to how the substance(s) was/were ingested or administered, there are any number of possible explanations capable of being proffered in any number of hypothetical circumstances, and there is no basis on the language of Article 10.2.3 why such must be excluded. However, it is not necessary to reach any concluded view on this issue in order to determine this case.

70 In this case the Athlete has attempted to establish that the commission of the ADRV by him was not intentional by offering up claimed "conduct" on his part which he asserts explains the presence in his Sample of the detected Prohibited Substances and establishes, on the balance of probabilities, the requisite absence of intent. The Respondent must therefore prove to me on the balance of probabilities that his claimed conduct took place as he describes it since it is claimed conduct in relation to which the risk, if the events which he alleges took place on 17 February 2015 in fact took place, that an ADRV by the Respondent might be constituted or result was, in my judgement, both substantial and manifestly disregarded by the Respondent.

71 Having considered all of the evidence, submissions and arbitral awards referred to I have concluded that the Respondent has, for the following reasons, failed to establish for the purposes of Article 10.2.1(a), on the balance of probabilities, that the Anti-Doping Rule Violation which he admits having committed was not intentional:-

(a) I am not satisfied that the claimed events of 17 February 2015 occurred as asserted by the Respondent. He asserts that he returned home very tired and run down on 15 February, arriving at his home address at 2pm. He claims to have gone to the gym session on 17 February still feeling very tired. He claims the administration of an ampoule of Vitamin B12 was intended to address that tiredness. There is no explanation given as to why the ampoule was not administered between his returning home on 15 February and going to the gym on 17 February. If he bought four ampoules in November 2014 (AH1) why would he buy less than the same number of syringes or, if he was prepared to utilise the used syringe of a third party, why would he not use one of his own "used" syringes? If he did not have a syringe why would he have taken an ampoule of Vitamin B12 to the gym with him along with a needle and a swab when he would have known that he could not take the ampoule at the gym because he did not have a syringe? On the facts as claimed he would have had no basis to expect any person he might meet at the gym would have a syringe, used or otherwise. The Athlete is an elite level Athlete. There has been

extensive coverage in recent years of the dangers of the contamination of products with Prohibited Substances resulting in adverse anti-doping consequences for Athletes. Having regard to the context it is implausible that an elite level Athlete such as the Respondent would voluntarily expose himself to the manifest risks associated with the use of a syringe which had previously been used by a person who he did not know, had never met and in relation to whom he had no knowledge of the use to which he had put a syringe. The suggestion that a receipt for the purchase of items bought on eBay cannot be provided is difficult to reconcile with the consideration that accessing one's account on eBay enables one to view one's purchase record and that copies of transaction records, eBay emails etc. can all be printed off to verify purchases. The copy packaging material at AH2 includes nothing that correlates that copy packaging with the Respondent or dates the purchase of the relevant item. It is unexplained why, on the proffered explanation, the Respondent had no syringe on 17 February either at home or at the gym, noting that he claims to have used the used syringe at home after he returned from the gym, but he claims that he still has the packaging for one of the syringes which he claims to have purchased previously on eBay. The absence of any verifying evidence in the form of statements, emails, notes or the offer of oral evidence from Mr Collins and/or the person from whom the syringe was allegedly sourced is both inexplicable and unexplained. This is particularly so where the existence of a statement from Mr Collins is confirmed by the skeleton argument but the statement has not been lodged and no explanation has been given for its absence. The Respondent's counsel must have seen the statement or he could not have included the time for my reading it in his estimated reading time for me of 30 minutes. Mr Collins is described as someone the Respondent knew and from whom a secure introduction could be sourced to a trusted person to provide a used syringe. There is no explanation provided as to why, in these circumstances, Mr Collins and/or the unidentified supplier of the used syringe is not verifying the version of events involving the supply of the used syringe set out in the Respondent's statement. Having regard to each and all of these factors, I am not satisfied on the balance of probabilities that the events described

in the Respondent's letter of 8 July 2015 and in the statement of 26 August 2015 occurred as described.

(b) In any event, even if the claimed events occurred as described by the Respondent, they are not evidence that: (i) the alleged used syringe contained residual liquid; (ii) such residual liquid comprised both metenolone and stanozolol; and (iii) that the quantities and concentrations of same in such residual liquid could have been such that they would have been capable of detection as the Prohibited Substances detected in the Sample of urine collected from the Respondent on 30 May 2015. That the alleged used syringe was the source of the Prohibited Substances comprised in the AAF is, in the absence of any evidence from the alleged provider of it to the Respondent or another person who knows what substances it was previously used to inject immediately prior to being allegedly used by the Respondent, no more than speculation.

(c) Further, there is the evidence of Professor Cowan that the particular combination of Prohibited Substances, including Metabolites and the period from the date of the claimed administration to the date of Sample collection is such that it is, at best for the Respondent, highly unlikely that the claimed used syringe could have been the original source of the Prohibited Substances comprising the AAF.

(d) On the basis of the evidence of Mr Wojek, the particular Prohibited Substances present in the Respondent's Sample are consistent with an Athlete engaged in the sport in which the Respondent was engaged seeking to achieve performance enhancement through the use of Prohibited Substances.

(e) Even if the conduct involving the use of the claimed used syringe described by the Respondent occurred as described by him and assuming that it is feasible that any residual liquid in the syringe could have contained sufficient quantities of metenolone and stanozolol to result in the particular combination of Prohibited Substance and Metabolites found in the Respondent's Sample taken on 30 May 2014, that would not, in my

judgement, establish on the balance of probabilities that the Anti-Doping Rule Violation was not intentional. In the context of his conduct, as claimed by the Respondent, on 17 February, there was a significant risk that by injecting himself using a used syringe supplied by a person who he did not know and who he knew nothing of the background of, to self-administer an injection, might constitute or result in the commission by the Respondent of an Anti-Doping Rule Violation and that the Respondent manifestly disregarded that risk. Having regard to each and all of the complete absence, in the described circumstances, of any information as to the substances which it had previously been used to inject, it being apparent that it had been used previously, the wholly non-medical context and the absence of any information regarding its previous user there was, in my judgement, a substantial risk which the Respondent manifestly disregarded, of it containing some residue comprising a Prohibited Substance resulting in an Anti-Doping Rule Violation being constituted or resulting. Such an Anti-Doping Rule Violation could have been constituted by or resulted from "presence" (Article 2.1 ADR) and/or "use" (Article 2.2 ADR) of a Prohibited Substance. In order to establish that **the** Anti-Doping Rule Violation was not intentional, i.e. the presence ADRV on 30 May 2015 admitted to by the Respondent, the Respondent requires, for the purposes of Article 10.2.1(a), to establish that he was not engaged in conduct which constituted or in relation to which there was a significant risk, which he manifestly disregarded, that it could constitute or result in **an** Anti-Doping Violation. (Emphasis Added). He has, in my judgement and for the reasons given above, failed so to do.

72 Having regard to each and all of 71(a), (b), (c) and (d) above, in the case of each of (a), (b) and (c) both individually and cumulatively with any one or more of the others and, in the case of (d), cumulatively with any one or more of (a), (b) and/or (c), I am not satisfied that the Respondent has established on the balance of probabilities that the Anti-Doping Rule Violation committed by him was not intentional. Further and in any event, having regard to 71(e) I am not satisfied that the Respondent has established on the balance of probabilities that the Anti-Doping Rule Violation committed by him was not intentional.

Accordingly, the requisite period of Ineligibility resulting from the admitted Anti-Doping Rule Violation is four years.

Other Issues Relating to Sanction

73 I agree that pursuant to Article 10.9.3 ADR the Respondent is entitled to have the period of his Provisional Suspension credited against the total four year period of his Ineligibility and that accordingly, as a minimum, his period of Ineligibility should commence on the date of receipt of the notification of his Provisional Suspension, that being 26 June 2015, assuming that the letter of 25 June 2015 arrived in ordinary course of post. If it can be established that the Respondent received the letter on any other date, then I will reconsider the date of commencement of the period of Ineligibility having regard to the requirement to take into account the period of Provisional Suspension. The Applicant may provide a written submission on this issue in accordance with the procedure set out in the first directions within 7 days of the date of this interim decision and the Respondent shall have 7 days to respond using the same procedure.

74 The Respondent argues that the period of Ineligibility should commence as from the date of Sample collection on an application of Article 10.9.2 ADR. I have received no submissions from the Applicant in relation to this issue and I will need to consider the Applicant's position, if any, on this matter. The Applicant is invited to provide a written submission on this issue in accordance with the procedure set out in the first directions within 7 days of the date of this interim decision and the Respondent shall have 7 days to respond using the same procedure.

75 The Respondent submits that, on the basis of the application of *lex mitior* pursuant to Article 25.2 of the WADA Code 2015, the Respondent should be permitted to return to training no longer than two months before the expiry of his period of Ineligibility pursuant to Article 10.12.2 of the WADA Code 2015. There is a replicating provision at Article 10.12.4(b) of ADR. In order for the case of the Respondent to be considered with reference to Article 10.12.4(b), it is not necessary to apply the principle of *lex mitior.* The right to such consideration arises having regard to the fact that the ADRV was committed after the WADA

Code 2015 came into force and that the Sample was provided after that date. However, I am not convinced that the issue of whether the Respondent should be permitted to return to training two months prior to the expiry of his period Ineligibility in terms of Article 10.12.4(b) is a matter for me. My provisional view is that the application of 10.12.4(b) in the case of an individual Athlete such as the Respondent is a matter for the NADO i.e. the Applicant, in discussion at the relevant time with the relevant member organisation and the Athlete. I am not in a position at this stage to say whether the circumstances which would permit such a return to training as set out in 10.12.4(b) will or will not be present two months prior to the expiry of the Athlete's period of Ineligibility. I note that this issue was the subject of a decision of an NADP Tribunal in *UKAD v Evans* but I have no submissions from the Applicant on this issue and again I invite the Applicant to provide written submissions on this issue in accordance with the procedure set out in the first directions within 7 days of the date of this decision with the Respondent having 7 days to respond.

76 There will require to be Disqualification in relation to all results of the Respondent in Competitions pursuant to Articles 9.1, 10.1 and 10.8 of ADR as from and including the date of Sample collection on 30 May 2015. For the avoidance of doubt, this includes the Event. Further, there will require to be all of the resulting Consequences as provided for in Article 10.1.1 ADR as from and including 30 May 2015. This shall include all points or other contributions applicable to the performance of the Respondent in the Event and any participation of the Respondent in any subsequent Competitions taking place after the date of that Sample Collection. It is not clear whether the Respondent took part in any Competitions in the Championships other than the Event in which he was placed second on 30 May 2015 and which resulted in collection of the Sample but if he did then Consequences shall require to be considered with respect to such other Competitions having regard to Article 10.1.1 ADR. Further I have no information that would enable any adjustment of opponent and/or opponent team results for the purposes of Article 9.1 ADR.

77 The result of all such Disqualifications applies to all relevant results, including the forfeiture of any medals, titles, points and prizes having regard to the provisions of Article 9.1 ADR.

78 I am not in a position to make specific orders with respect to all such Disqualifications and Consequences but if I am to be asked so to do I invite the Applicant to provide written submissions on this issue in accordance with the procedure set out in the first directions within 7 days of the date of this decision with the Respondent having 7 days to respond.

Conclusion

79 For the reasons set out above I make the following decisions:-

79.1 the Anti-Doping Rule Violation under Article 2.1 of the ADR with which the Respondent was charged has been established;

79.2 the Respondent not having established that the Anti-Doping Rule Violation was not intentional, the Period of Ineligibility is four years;

79.3 pursuant to Article 10.11.3 ADR credit will be given against the total Period of Ineligibility of the Respondent to include his period of Provisional Suspension which commenced (subject to representations to be received) on 26 June 2015; and

79.4 the Respondent is Disqualified of results from and including the Event in accordance with the provisions of Articles 9.1, 10.1 and 10.8 ADR, together with all of the Consequences provided for in Article 9.1 ADR.

80 The precise date of commencement of the Period of Ineligibility and the termination date of the Period of Ineligibility will be determined in my final decision, I will give further consideration to the application to make an order permitting the Respondent to return to training not more than two months prior to the expiry of his Period of Ineligibility pursuant to Article 10.12.4(b) ADR and any specific orders as regards Disqualifications and Consequences all having considered written representations to be received as set out above.

Appeal

81 Since this is an interim decision any exercise of a right of appeal will fall to be undertaken after the issue of the final decision when the outstanding matters referred to above have been determined."

Written Submissions regarding the Outstanding Matters

E The Outstanding Matters are:

(i) the date of commencement of the Respondent's Provisional Suspension;

(ii) whether, in terms of Article 10.9.2 of ADR the Respondent's period of Ineligibility should commence as from the date of Sample collection in circumstances where it is claimed that the Respondent made a timely admission of the charged;

(iii) whether, pursuant to article 10.12.2 of the WADA Code 2015 and Article 10.12.4(b) of ADR, the Respondent should be permitted to return to training no longer than two months before the expiry of his Period of Ineligibility; and

(iv) whether any specific orders are required to be made by me with respect to Disqualifications and Consequences in Competitions in which the Respondent took part as from the date of the commencement of the Respondent's period of Ineligibility.

F In relation to the Outstanding Matters, the Applicant submitted as follows:

(i) no specific date was suggested for the commencement of the period of Provisional Suspension;

(ii) that the Respondent had made a timely admission of commission of the ADVR as provided for in Article 10.11.2 of ADR and the Respondent's period of Ineligibility might therefore commence on 30 May 2015 i.e. the date of Sample collection, subject that if the Respondent competed in any Competitions between the date of Sample collection on 30 May 2015 and the date of imposition of his Provisional Suspension, then the Respondent

would forfeit all results and prizes in all such competitions and be formally Disqualified from all such Competitions;

(iii) that Article 10.12.4(b) of ADR applied and that I was not required to make provision in that regard although it might be helpful if I did so; and

(iv) that the Applicant agrees with my analysis as regards Disqualifications, Consequences and Competitions as set out in paragraphs 76 to 78 of the interim decision.

G The Respondent put in a detailed written submission dated 12 November 2015. In that written decision, he initially responded to paragraphs 73 to 78 of the interim decision i.e. the Outstanding Matters, and then made comments with respect to the issues determined in the interim decision as set out in paragraphs 79.1 to 79.4. As discussed at paragraph A above, my determinations at paragraphs 79.1 to 79.4 of the interim decision are, subject to any appeal, final and binding on the parties and in the circumstances it would not be appropriate for me to make any comment on that part of the Respondent's written submissions of 12 November 2015 which concerns the claims determined at paragraphs 79.1 to 79.4 of the interim decision.

H As regards the Outstanding Matters, the Respondents written submissions were to the following effect:

Paragraph 73 No dispute.

Paragraph 74 Period of Ineligibility now agreed as commencing from 30 May 2015 under reference to an email exchange with the Applicant and confirmation that the Respondent had competed between 30 May 2015 and 25 June 2015 so that the Consequences would be that he would "forfeit all results and prizes from such Competitions".

Paragraph 75 Under reference to *lex mitior* the Respondent submitted that the principle was that the more lenient law must be applied if the laws relevant to the offence had been amended. The

Respondent contended that the reference in paragraph 75 of the interim decision should be to the commencement of periods of Ineligibility and not, he asserted, the retrospective application of previous WADA Codes. The Respondent made reference to Article 25.2 of the WADA Code 2015. The Respondent went on to assert that in November 2014 his membership of CTT had been confirmed for 2015 and that his Racing Licence had been issued; also that what he called the "negligent offence" occurred on 17 February 2015 with Sample collection taking place on 30 May 2015. He therefore contended that the result was that the maximum period of Ineligibility for this, his first, ADRV should therefore be two years and not the four-year period specified at paragraph 79.2 of the interim decision.

Paragraph 78 — The Respondent expressed thanks for the opportunity of making submissions in relation to the matters set out at paragraph 78 of the interim decision but since he now found himself without counsel, he requested if the agreed date could be reviewed and guidance offered.

Discussion regarding Outstanding Matters

I In the absence of any dispute, the date of commencement of the Provisional Suspension of the Athlete is considered to be 26 June 2015 i.e. the assumed date of receipt by the Respondent of the letter from the Applicant charging the Respondent with the ADRV dated 25 June 2015. In the absence of any objection from the Applicant and in respect that it is considered that the Respondent made a timely admission of the commission of the ADRV, it is appropriate that the Respondent's period of Ineligibility commence on the date of Sample collection, i.e. on 30 May 2015.

J Paragraph 79.4 of the interim decision therefore has effect from and including 30 May 2015 such that the Respondent is Disqualified of results from and including the Event on 30 May 2015 in accordance with provisions of Articles 9.1, 10.1 and

10.8 ADR, with all of the Consequences provided for in Article 9.1 ADR. I have not been requested to make any specific orders in relation to the Event or any Competitions in which the Respondent participated between the date of the Event on 30 May 2015 and the date of commencement of the period of Provisional Suspension on 26 June 2015. Leave is given to the Applicant to make any application that is considered appropriate with respect to forfeiture, return and/or payment etc. necessary to give effect to paragraph 79.4 of the interim decision including all such Disqualifications as may apply and/or are set out in paragraph 77 of the interim decision.

K It is apparent that the Respondent has misunderstood the application of the *lex mitior* principle for the purposes of Articles 10.12.2 and 25.2 of the WADA Code 2015 and Article 10.12.4(b) of ADR. The point made in paragraph 75 of the interim decision, with reference to the principle of *lex mitior*, was that it was not necessary for that principle to be applied as referenced in Article 25.2 of the WADA Code 2015, in order for the Respondent to be entitled to consideration of him being permitted to return to training two months prior to the expiry of his period of Ineligibility in terms of Article 10.12.4(b). The principal of *lex mitior* is described by the European Court of Human Rights in *Scoppola v Italy (10249/03)* (2010) 51 E.H.R.R. 12 as being, in a context such as this, that where a more lenient law applied at the date when final judgement in a case was rendered than applied at the date on which the relevant offence was committed, then the more lenient law applicable at the date of final judgement requires to be retrospectively applied as at the date of commission of the offence.

L In this arbitration there has been no change in either the WADA Code or in the Rules as between the date of commission of the ADRV i.e. 30 May 2015, when Presence occurred in the Respondent's Sample, and the date of issue of my interim decision on 26 October 2015. Article 10.12.2 of the WADA Code 2015 and Article 10.12.4(b) of ADR applied in the same terms on both dates. Accordingly, it is not necessary for the Respondent to rely on the principle of *lex mitior* in order for him to obtain the benefit of Articles 10.12.2 of the WADA Code 2015 and Article 10.12.4(b) of ADR. The argument sought to be advanced by the Respondent concerning the application of the *lex mitior* principle as between the

date on which the Applicant's membership of CTT for 2015 and his Racing Licence were issued in November 2014 and the commission of the ADRV on 30 May 2015 was not advanced by the Respondent before the issue of the interim decision on 26 October 2015 is misconceived in that the issue for this application of the lex mitior principle is the application of different laws between the date of the offence and the date of final judgement and not as between the date of membership of the sporting body with submission to its rules and the date of final judgement. In any event this is not an argument that may now be considered by me having regard to the final and binding nature of my determination at paragraph 79.2 of my interim decision that the period of Ineligibility of the Respondent is four years.

M Neither the Applicant nor the Respondent suggested that my provisional view that it was not for me as an arbitrator to make an order pursuant to Article 10.12.4(b) of ADR regarding whether the Respondent as an individual Athlete should be permitted to return to training not more than two months prior to the expiry of his Period of Ineligibility was wrong. I therefore confirm that such a return to training during any such period is a matter for the NADO, i.e. the Applicant, in discussion at the relevant time with the relevant member organisation and involving the Athlete. Such a decision will be informed by the specific circumstances applying at that time and the nature and arrangements for the training proposed. Since the Applicant has indicated that it would be helpful for me to give an indication of my view, I confirm that I have not identified any reason why, at this stage, such a return to training not more than two months prior to the expiry of the period of Ineligibility should not be permitted in the case of the Respondent but the decision is not one for me. I cannot know the precise circumstances that will apply and/or be proposed in respect of such training in 2019 so I am not in a position to make a determination at this stage even it were competent, which I do not consider that it is, for me to do so.

Conclusion

N For the reasons set out above, I make the following decisions:

N.1 the Respondent's period of Provisional Suspension commenced on 26 June 2015;

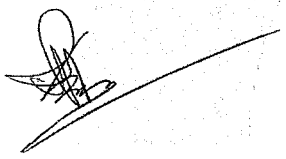
N.2 pursuant to Article 10.9.2 ADR, the Respondent's period of Ineligibility shall commence from 30 May 2015 and will end at midnight on 29 May 2019 i.e. a period of four years from the date of Sample collection;

N.3 no order is made under and in terms of Article 10.12.4(b) of ADR in respect that it is not competent for me to do so; and

N.4 paragraph 79.4 of the interim decision concerning Disqualification of results from and including the Event together with the Consequences referred to therein applies from and including 30 May 2015.

Appeal

O Since this is a final decision, the parties are reminded of the right of appeal provided for in Rule 13 of the National Anti-Doping Panel Procedure Rules 2015.



Rod McKenzie (Sole Arbitrator)

18 November 2015

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