

**CAS 2009/A/2012 Doping Authority Netherlands v/ Mr Nick Zuijkerbuijk**

**ARBITRAL AWARD**

delivered by the

**COURT OF ARBITRATION FOR SPORT**

sitting in the following composition:

Sole Arbitrator: Mr Manfred Peter **Nan**, Arnhem, Netherlands

in the arbitration between

**Doping Authority Netherlands, Capelle aan den IJssel, Netherlands**

**-Appellant-**

and

**Mr Nick Zuijkerbuijk, Netherlands**

Represented by Mr. Ilmar Woldring, Beek, Netherlands

**-Respondent-**

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## **I. PARTIES**

1. The Appellant, Doping Authority Netherlands (hereinafter "NADO"), is the National Anti-Doping Organisation for the Netherlands, and so designated by the government of the Netherlands in accordance with the World Anti-Doping Code (hereinafter "WADAC"), and has its headquarters in Capelle aan den IJssel, Netherlands.
2. The Respondent, Mr Nick Zuijkerbuijk (hereinafter the "Athlete"), is a Dutch billiard player. At the point in time relevant in these proceedings he was registered as a member of the Royal Dutch Billiards Federation (hereinafter "KNBB"), playing in the Three-Cushion Premier League, which is the highest billiard-league in the Netherlands.

## **II. FACTUAL BACKGROUND**

3. The background facts stated herein are a summary of the main relevant facts, as established on the basis of the parties' written and oral submissions and of the evidence examined in the course of the proceedings. Additional facts will be set out, where material, in connection with the discussion of the parties' factual and legal submissions.
4. On 5 April 2009, the Athlete was selected for an in-competition anti-doping control on the occasion of the Dutch league match in the Three-Cushion Premier League between A1 Biljarts and Crystal Kelly. The test was performed by the WADA-accredited Anti-Doping laboratory of Zwijnaarde (Belgium). The urine sample provided by the Athlete revealed the presence of "Benzoyllecgonine", which is a metabolite of cocaine. This is a prohibited substance appearing on the 2009 Prohibited List accompanying the Doping Regulations of the Institute for Sports Law (hereinafter "ISR") followed by the KNBB in the category "substances and methods prohibited in competition".
5. The Athlete was notified that his "A" Sample of 5 April 2009 had tested positive, and that the analysis of the "B" Sample confirmed the result of the analysis of the "A" Sample.
6. In the disciplinary proceedings brought by the KNBB against the Athlete before the Dutch Disciplinary Committee of the ISR, the Athlete did not submit any defence. On 25 August 2009, the Dutch Disciplinary Committee excluded the Athlete from competition for a period of two years, starting on the date of the decision.
7. On 8 September 2009, the Athlete lodged an appeal against the decision of the Dutch Disciplinary Committee. In the disciplinary appeals-proceedings before the

Dutch Appeals Committee (hereinafter “DAC”) a hearing was held on 20 October 2009. The Player, assisted by his father and by his advisor Mr. I.Woldring, admitted the disciplinary charge against him.

8. On 26 November 2009, DAC confirmed the decision of the Dutch Disciplinary Committee dated 25 August 2009 that the violation was proven, but reduced the ineligibility period imposed to 1 year, starting from 25 August 2009, stating that after application of the principle of proportionality an ineligibility period of two years is excessive, disproportional and also unacceptable in the sense of section 2:8 of the Netherlands Civil Code. The DAC takes the following facts and circumstances into consideration: “*Grounds for Consideration*”

“a) *The defendant has not been found positive previously.*

b) *Cocaine is not a performance-enhancing substance in billiards. The sports doctor and doping expert Harm Kuipers has stated (Dagblad de Stentor, 6 September 2006) that the use of cocaine has no performance-enhancing effect for an athlete whatsoever. “Certainly not for a billiards player. This is a sport requiring coordination and cocaine is of no use in that respect. Alertness is enhanced, but only for a very short time. Indeed, coordination is rapidly adversely affected, as is the capacity to take decisions quickly. Athletes who use cocaine may have a problem, but it’s not a doping problem.”*

c) *The presence of cocaine in the urine of an athlete in an out-of-competition control does not constitute a violation of the Doping Regulations. The appeals committee concludes from this that the use of cocaine does not provide athletes with any advantage other than immediately after use. In this case, there were three days between the use of the cocaine and the competition in which the defendant participated.*

d) *On the basis of the account of the defendant, which the committee considers to be credible, the appeals committee finds in this procedure that it is a fact that the cocaine was taken unthinkingly in the context of the defendant’s nightlife and that there was no question of any link to sports performance.*

e) *There is no intention to enhance performance and so there was also no intention to acquire an unfair and irregular advantage with respect to competitors.*

f) *Although it is the case that the defendant did not admit the violation in good time, or at least not in accordance with the Doping Regulations in the correct way prior to the results of the analysis and the charge, the defendant did not make any secret of the recreational use. He has frankly admitted using the substance and did so again during the hearing, seated alongside his father with a contrite expression. The KNBB also was also visibly uncomfortable with its own draconic and implacable regulations. Its representative at the hearing was clearly embarrassed about the situation, but he had no choice.*

*There has been a case recently in another sport of a “spontaneous” admission of cocaine use which was evidently inspired by a sample being taken shortly after cocaine has been used. That strategic honesty – in the light of the prospect of discovery – was found to be grounds for halving the penalty. The defendant has not had routine experience with doping controls targeting cocaine use, by contrast with the reluctant repentant who was clearly motivated by strategic considerations. In all reasonableness, the defendant should not suffer a worse fate than that fellow-user.*

*g) The defendant has also admitted his cocaine use in public. This can be seen from publications in the press and on various billiards websites. In this respect, the defendant contrasts favourably with numerous other athletes who, when confronted with a positive result, deny using prohibited substances regardless of the facts. With this public admission, and his expressions of regret about what has happened, the defendant has made a contribution to the discussion about his problem for, in particular, younger billiards players. The publicity relating to this case has inflicted considerable damage on the defendant’s good name, fame and reputation, and what is even worse in a matter that should have remained private (also from the point of view of the WADA ideology) if use had been established out of competition.*

*h) The defendant has stated that he did not know that the traces of cocaine would still be apparent in his urine after three days. Particularly when elite sports are involved, it is of course the responsibility of the athlete to be informed about the effect of the substances on the prohibited list. However, this does not absolve the sports associations from their responsibility in this respect. Article 22 of the Doping Regulations is very clear in this respect. Without wishing to suggest that there has been any significant shortcoming in the information provided by the KNBB, the appeals committee does believe it is justifiable to conclude that this information may have left something to be desired, at least in terms of the punish- ability and traceability of this forbidden substance. In the view of the appeals committee, the defendant is a serious athlete who, if he had been able to oversee the consequences of his cocaine use, would have been in a better position to resist the temptation.*

*i) The general goal of doping regulations in the field of sports is to combat doping in order to ensure fair competition and it includes the need to ensure that all athletes have the same chances and to safeguard their health. The KNBB’s aim – following in the footsteps of WADA – of setting punishments of the presence in the body of a series of substances is based on this general objective. Banning cocaine, a substance which does not enhance sporting, or at least billiards, performance is therefore, in the opinion of the appeals committee, difficult to describe as conducive to that aim. At the same time, the detection and prosecution of the presence of this substance leads in this case to a serious infringement of the privacy of the defendant which is therefore not justified by the core aim of the fight against doping in sports. The infringement of privacy is all the more disproportional and the ineligibility period coming on top of that should be all the shorter in order to attain a reasonable proportionality.”*

9. On 1 December 2009, ISR notified NADO by email about the Decision of DAC dated 26 November 2009 (hereinafter the "Decision").

### **III. CAS PROCEEDINGS**

10. On 9 December 2009, NADO filed with CAS its statement of appeal against the Decision. The timeline of the appeal filed by NADO is undisputed.
11. By letter dated 10 February 2010 the Athlete submitted his position with respect to the present matter.
12. On 11 February 2010, NADO filed its appeal brief together with 17 exhibits.
13. By letter dated 16 March 2010 the Athlete confirmed that his letter dated 10 February 2010 can be considered as his answer brief.
14. Both parties agreed that the dispute should be decided by a Sole Arbitrator.
15. Mr Manfred Nan, Attorney-at-Law in the Netherlands, was duly appointed as Sole Arbitrator by the President of the CAS Appeal's Arbitration Division.
16. On 7 April 2010, the CAS Court Office issued, on behalf of the Sole Arbitrator, an Order of Procedure, which confirmed amongst others that CAS has jurisdiction to rule on this matter, that the applicable law would be determined in accordance with Art. R58 of the Code and that no hearing would be held, the parties confirming that their right to be heard has been respected within the framework of the present procedure, accordingly confirming their satisfaction with the Sole Arbitrator drafting the award on the basis of the parties' written submissions. The parties signed and returned such Order of Procedure to the CAS Court Office.
17. On 15 April 2010, the Sole Arbitrator invited the Appellant - pursuant to article R44.3 of the CAS Code - to provide the CAS Court Office with a copy of the additional record which is part of the challenged Decision as stipulated in its paragraph 7.2.
18. By letter dated 16 April 2010 the Appellant submitted the requested additional record.
19. With the consent of the parties, the Sole Arbitrator has decided, pursuant to Art. R57 of the Code, that it was not deemed necessary to hold a hearing and that he was sufficiently well informed to issue a decision on the basis of the parties' written submissions.

#### IV. SUMMARY OF THE PARTIES' POSITIONS

20. The following summaries of the parties' positions are only roughly illustrative and do not purport to include every contention put forward by the parties. However, the Sole Arbitrator has carefully considered all of the arguments advanced by the parties, even if there is no specific reference to those arguments in the following outline of their positions.

##### A) NADO

21. With regard to the merits of the case, NADO emphasizes that the Athlete did not dispute the results of the doping test and his admission to have taken cocaine, which is a prohibited substance, establishes the violation of the Anti-Doping rule as mentioned in Article 3 ISR Doping Regulations. NADO points out that on the basis of Article 38 ISR Doping Regulations, a mandatory sanction of a two-year suspension for the first offence has to be imposed upon any athlete who tests positive for a prohibited stimulant, such as a cocaine metabolite like "Benzoylecgonine". NADO states that apart from the principle of proportionality, Article 39, 40, 41 and 42 ISR Doping Regulations offer a possibility to reduce the standard period of ineligibility. NADO argues that the Athlete does not meet the requirements set out by Articles 39 - 42 ISR Doping Regulations and that "no circumstances exist that justify a reduction of the standard two year period of ineligibility as described in article 38.1".

22. NADO argues that DAC "*has not applied the doctrine of proportionality as developed by CAS, or at least has not applied this doctrine correctly in accordance with CAS case law. It has not established circumstances that make this case truly exceptional, and it has not (correctly) applied the criteria established in CAS case law on applying proportionality in doping cases*".

23. NADO asserts that "*As there are no grounds to reduce the standard period of ineligibility of two years in accordance with the Doping regulations, nor any circumstances that would call for this period to be excessive or disproportionate, the period of ineligibility to be imposed in the case of the Respondent should be two years*".

24. Therefore, NADO requests the CAS to grant the following relief:

*1. "The complete and full annulment of the decision by the Committee of Appeal;*

*2. That a two year period of ineligibility, commencing on 25 August 2009, is imposed on the Respondent;*

*3. With regards to the costs, that the Respondent is ordered to pay for the CAS fees, and that otherwise each party will be ordered to bear its own costs."*

B) Mr NICK ZUIJKERBUIJK

25. The Athlete admits the use of cocaine. He argues that he is only 23 years old and was not aware of the possible consequences. Four days before the doping test at the match, *“at a party, he was tempted to take a single joint of cocaine, or actually no more than one or two sniffs”*. He feels very sorry for his misconduct and promises never to use drugs again. The Athlete points out that *“no performance enhancing abilities whatsoever can be attributed to the drug in question”* and he is a first offender. In his view a two-year sentence is *“out of proportion”* and *“would apply to structural use of doping, especially when meant to enhance performance”*. The Athlete argues that DAC *“acknowledged the draconic and uncompromising nature of the applicable doping regulations, justifiably calling upon the principle of proportionality”*.
26. The Sole Arbitrator understands from the Athlete's Brief that he is satisfied with the Decision.

V. JURISDICTION

27. Article R47 of the Code of Sports-related Arbitration (the “Code”) provides as follows:

*“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.*

*An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance”*.

28. Article 53.1 ISR Doping Regulations reads as follows:

*“In the case of suspected violations (...), an appeal may be filed to the CAS (...) only after all appeal options within the sports association have been exhausted. Such an appeal shall be subject to the conditions of the CAS.”*

29. It follows that CAS has jurisdiction, which is also explicitly recognised by the parties by signing the Order of Procedure.

## **VI. ADMISSIBILITY**

30. The parties agree that the appeal is admissible. No issue is taken as to the admissibility of the appeal.

## **VII. APPLICABLE LAW**

31. Article R58 of the CAS Code reads as follows:

*“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.”*

32. Such provision was expressly mentioned in the Order of Procedure signed by the parties.
33. No issue of applicable law arose in the present case.
34. Pursuant to Article R57 of the CAS Code, the Sole Arbitrator has *‘full power to review the facts and the law’*. As repeatedly stated in CAS case-law, this means that the CAS appellate arbitration procedure entails a *de novo* review that it is not confined to deciding whether the body that issued the appealed ruling was correct or not.

## **VIII. MERITS**

### **A) EVIDENCE OF THE ANTI-DOPING RULE VIOLATION**

35. It is undisputed that the analysis of both urine samples “A” and “B” delivered by the Athlete on 5 April 2009, on the occasion of the Dutch league match in the Three-Cushion Premier League between A1 Biljarts and Crystal Kelly showed evidence of an adverse analytical finding of "Benzoylcgonine", which is a metabolite of cocaine. This is a prohibited substance appearing on the 2009 Prohibited List accompanying the ISR Doping Regulations, followed by the KNBB in the category “substances and methods prohibited in competition”.
36. The Athlete admitted the anti-doping rule violation.
37. Article 3 ISR Doping Regulations, provides that the *“presence of a prohibited substance and or evidence of a prohibited method, the associated metabolites and/or markers in an athlete’s sample”* constitutes an anti-doping rule violation.



Article 3.7 ISR Doping Regulations further specifies that it “*is each athlete’s personal duty to ensure that no prohibited substance, metabolite and/or marker enters his or her body (...). Athletes are responsible for all prohibited substances, evidence of prohibited methods, metabolites and/or markers found in their samples. Accordingly, it is not necessary that intent, fault, negligence or deliberate use on the athlete’s part be demonstrated in order to establish a violation of article 3*”.

38. As a result, the Sole Arbitrator finds that the objective presence of “Benzoyllecgonine” (a cocaine metabolite) in the Athlete’s urine sample, regardless of the Athlete’s subjective attitude (i.e. his possible intent, knowledge, fault or negligence), constitutes an anti-doping rule violation.
39. Having established that the Athlete committed an anti-doping rule violation, the Sole Arbitrator has to determine the applicable sanction.

## B) SANCTION

### (a) In general

40. Under Article 38.1 ISR Doping Regulations, the sanction in relation to the presence of a prohibited substance or its metabolites or markers, in the case of a first violation is a two-year suspension.
41. The Sole Arbitrator remarks that, under Article 38.1(a) ISR Doping Regulations, the two-year sanction may be eliminated or reduced:
  - a) if the prohibited substance is a *specified substance* (Article 39 ISR Doping Regulations),
  - b) if the athlete discharges the burden of proving that “*he bears no fault or negligence*” (Article 40 ISR Doping Regulations),
  - c) if the athlete discharges the burden of proving that “*he bears no significant level of fault or negligence*” (Article 41 ISR Doping Regulations),
  - d) if the athlete “*admits the anti-doping rule violation in the absence of other evidence*” (Article 42 ISR Doping Regulations).

### Specified substance

42. Firstly, the Sole Arbitrator looks at the possible applicability of Article 39 ISR Doping Regulations. As “Benzoyllecgonine”, as a cocaine metabolite – according to the 2009 Prohibited List - is not a specified substance, a reduction of the ineligibility period on the grounds of Article 39 ISR Doping Regulations does not apply.

No fault or negligence

43. In the light of the admitted anti-doping rule violation by the Athlete, the Sole Arbitrator agrees with the DAC that under Article 40 ISR Doping Regulations an elimination of the sanction is not possible. As considered by the DAC *“Article 40(1) of the Doping Regulations stipulates as a condition for the non-imposition of the ineligibility period that the defendant did not know or suspect, and could not reasonably have known or suspected, even after exercising the greatest possible care, that he had used the prohibited substance. The defendant stated in his appeal form and at the hearing that he deliberately used the prohibited substance, in this cocaine. The fact that he did not realise at that time the consequences to which this use could lead does not detract from the fact that the condition stated in article 40(1) has not been fulfilled. There are therefore no factual grounds based on article 40 of the Doping Regulations for the non-imposition of the eligibility period”*.

No significant fault or negligence

44. In continuation the Sole Arbitrator has to assess whether Article 41 ISR Doping Regulations is applicable. Article 41.1 ISR Doping Regulations stipulates that *“there is no question of a significant level of fault or negligence if the athlete can demonstrate that his fault or negligence is, given the circumstances of the case and taking into account the criteria referred to in article 40.1, not significant in relation to the violation of these regulations.”*

Article 41.2 prescribes as a supplementary requirement in the case of the application of this provision *“that the athlete must demonstrate how the prohibited substance(s) (...) have entered his or her body”*.

45. The ISR Doping Regulations do not provide any useful guidance on the interpretation of this provision.
46. The ISR Doping Regulations have been established on the basis of the WADC. One of the main intentions of the WADC is the harmonisation of the worldwide fight against doping. In order to achieve this goal, it is necessary to interpret anti-doping rules that have been established on the basis of the WADC in harmony with the WADC, the respective set of rules of other international sport federations and the respective CAS case law.
47. Article 41 ISR Doping Regulations contains wording similar to Article 10.5.2 WADC. It can therefore be considered by the Sole Arbitrator for assistance.
48. Accordingly, relying on a long line of CAS cases (see e.g. CAS 2006/A/1067, IRB v/ J Keyter, §6.8) and on the WADC principles related to the athletes' fault or negligence, the Sole Arbitrator observes that the Athlete, in order to establish that he bears no significant fault or negligence, must prove:

- a) how the prohibited substance came to be present in his body and, thus, in his urine samples, and
  - b) that his level of fault or negligence, when viewed in the totality of the circumstances was not significant in relationship to the anti-doping rule violation.
49. The proof of both (a) and (b) would reduce the Athlete's sanction to a penalty ranging between one year and two years (Article 41.2 ISR Doping Regulations: "*the ineligibility period may be reduced but may never be less than half of the ineligibility period referred to in article 38*").
50. The Sole Arbitrator observes that, in the light of the CAS case-law, the burden of proving the above is a very high hurdle for an athlete to overcome (cf e.g. CAS 2005/A/830, G. Squizzato v/ FINA; TAS 2007/A/1252, FINA v/ Mellouli & FTN). Indeed, the WADC's official comment to Article 10.5.1 and 10.5.2 unequivocally states that the mitigation of mandatory sanctions is possible "*only in cases where the circumstances are truly exceptional and not in the vast majority of cases*". The comment shows the intention of the WADC to apply the exception in a very restrictive manner.
51. With regard to the standard of proof required from the indicted athlete, the Sole Arbitrator observes that, in accordance with established CAS case-law and the WADC, the athlete must establish the facts that he alleges to have occurred by a "*balance of probability*". According to CAS case-law, the balance of probability standard means that the indicted athlete bears the burden of persuading the judging body that the occurrence of the circumstances on which he relies is more probable than their non-occurrence or more probable than other possible explanations of the doping offence (see CAS 2004/A/602, Lienhard v/ FISA, §5.15; TAS 2007/A/1411, Flachi v/ CONI, §59). This means also that the evidence considered must be specific and decisive to explain the athlete's departure from the expected standard of behaviour.
- (b) *Evidence of how the prohibited substance entered the Athlete's body*
52. In these proceedings, as in the DAC proceedings, the Athlete has argued that the prohibited stimulant came to be present in his system because he *was tempted to take a single joint of cocaine, or actually no more than one or two sniffs* at a party four days before the match. Although the Athlete has not brought substantial evidence in this respect, the Sole Arbitrator, taking in consideration all the special elements of the present case, could be willing to share the conclusion that the explanation offered by the Athlete is acceptable. In any event, for the reasons set out below, the Sole Arbitrator believes that the issue about how the substance entered into the body of the Athlete can be left open.

(c) *Athlete's caution and degree of fault or negligence*

53. With regard to the duty of caution required under the applicable rules, the Sole Arbitrator shares the following opinion expressed by other CAS Panels:

*“No fault” means that the athlete has fully complied with the duty of care. [...] “No significant fault” means that the athlete has not fully complied with his or her duties of care. The sanctioning body has to determine the reasons which prevented the athlete in a particular situation from complying with his or her duty of care. For this purpose, the sanctioning body has to evaluate the specific and individual circumstances. However, only if the circumstances indicate that the departure of the athlete from the required conduct under the duty of utmost care was not significant, the sanctioning body may [...] depart from the standard sanction» (CAS 2005/C/976 & 986, FIFA & WADA,; CAS 2007/A/1370 & 1376 FIFA & WADA v/Dodo).*

54. This definition is also in line with the WADC’s official comments to Article 10.5.1 and 10.5.2 WADC.

55. In the light of such definition of the athlete’s duty of care, even if the Athlete’s explanation of how the cocaine metabolite had come into his body were plausible, it seems to the Sole Arbitrator that the Athlete’s behaviour was significantly negligent under the circumstances. His departure from the required duty of utmost caution was clearly significant. Indeed, the Athlete did not exercise the slightest caution.

56. From the additional record of the hearing at DAC and the Athlete's brief the Sole Arbitrator concludes that the Athlete deliberately used cocaine, but that the Athlete argues that inhaling the cocaine was a mere incident, an act on an impulse and that *“he was unaware of the possible consequences, also because he was “unaware of the fact that cocaine can even be traced after four days and consequently forgetting the entire act”*. At the day of the match, it did not occur to him that he had sniffed cocaine four days earlier.

57. Although it might have slipped his mind at the day of the match, the Athlete knew that he had consumed cocaine four days before the match on 5 April 2009. Still he did not tell anyone about it, nor had he seen a doctor for advice, nor did he make a comment on the Doping Control Form. He just played the match without thinking that the cocaine might still be present in his body. Under these circumstances the Athlete knowingly and wilfully accepted the risk that a prohibited substance would still be present in his body at the day of the match.

58. Therefore, the Sole Arbitrator finds that the Athlete’s degree of ‘fault or negligence, viewed in the totality of the circumstances, is clearly “significant” in

relation to the anti-doping rule violation. It follows that Article 41 ISR Doping Regulations also is not applicable.

59. The circumstances, that the Athlete was only 23 years old, has admitted the anti-doping rule violation and was not aware of the possible consequences, are not relevant as with regard to the degree of his fault. The CAS has already affirmed in a previous CAS award that the age is not a relevant factor when imposing a sanction. "*(...), it is not the age, sex or any other personal characteristics of an individual that determines the application of the anti-doping rules but the participation of an athlete in events governed by the rules. (CAS 2006/A/1032 Sesil Karatancheva v/International Tennis Federation, in particular paragraphs 137 and following).*
60. Because cocaine (and its metabolites) is a prohibited substance and is not listed as a specified substance in the ISR Doping Regulations, it is also irrelevant whether there was a lack of intention to enhance his sport performance. Only if cocaine (and its metabolites) would have been listed as a "specified substance", it would be relevant to give evidence for the declaration that the specified substance was not intended to enhance sporting performance. The Sole Arbitrator refers to Article 13.5 ISR Doping Regulations, which reads as follows:
- "Any performance-enhancing effect of a substance and/or method on the prohibited list is not relevant for the evaluation of a possible violation or for the imposition of any sanction subsequent to the violation of these regulations, unless these regulations explicitly state otherwise".*
61. The Sole Arbitrator concludes that the Athlete did not demonstrate that he bears no significant fault or negligence.

Admission of an anti-doping rule violation in the absence of other evidence

62. The Sole Arbitrator observes that Article 42 ISR Doping Regulations provides that if:
- a) *" an athlete, either before he or she has been informed that he or she will be subjected to a doping control that may identify a violation of these regulations, or before being notified of a suspected violation by the Doping Authority (...), voluntarily admits to a violation of the kind referred to in Part II, and*
  - b) *this admission is the only reliable evidence of the aforesaid violation at that point in time, the ineligibility period to be imposed shall be reduced by no more than half of the period that would have applied in the absence of this admission".*
63. Subsequently, the Sole Arbitrator concludes that the requirements for a reduction of the period of ineligibility as laid down in Article 42 ISR Doping Regulations are also not met, because the Athlete only acknowledged the use of cocaine in the

proceedings at DAC, and not before he was informed that he would be subject to a doping control that may identify a violation of the doping regulations, or before he was notified of a suspected violation. The Sole Arbitrator states that the Athlete's confession in the proceedings at DAC is clearly too late to be able to apply Article 42 ISR Doping Regulations.

64. The Sole Arbitrator establishes that the options for reducing the standard period of two years ineligibility available in the ISR Doping Regulations are not applicable and thus holds that the Athlete is in principle liable for the full two-year period of suspension provided under Article 38 (1) ISR Doping Regulations.

Principle of proportionality

65. However, the determination of the period of ineligibility necessarily requires the Sole Arbitrator to consider the issue of proportionality.
66. The sanction must be proportionate. The issue is whether the Sole Arbitrator can impose a lesser period of ineligibility than is prescribed by Article 38.1 ISR Doping Regulations, knowing that the requirements for reduction as mentioned in Articles 39 – 42 ISR Doping Regulations are not met.
67. NADO argues that DAC *“has not applied the doctrine of proportionality as developed by CAS, or at least has not applied this doctrine correctly in accordance with CAS case law. It has not established circumstances that make this case truly exceptional, and it has not (correctly) applied the criteria established in CAS case law on applying proportionality in doping cases”*.
68. The Athlete argues that a two years period of ineligibility is *“out of proportion”* and *“would apply to structural use of doping, especially when meant to enhance performance”*. The Athlete argues that DAC *“acknowledged the draconic and uncompromising nature of the applicable doping regulations, justifiably calling upon the principle of proportionality”*. DAC has reduced the ineligibility period imposed to one year, stating that after application of the proportionality principle an ineligibility period of two years is excessive, disproportional and also unacceptable in the sense of section 2:8 of the Netherlands Civil Code. In this regard, DAC refers in its Decision to facts regarding the Athlete, namely (a) *that he has not been found positive previously*, (d) *the cocaine was taken unthinkingly (...)*, (e) *there is no intention to enhance performance (...)*, (f) *he has frankly admitted using the substance (...)*, (g) *the defendant has also admitted his cocaine use in public (...)*, (h) *he did not know that the traces of cocaine would still be apparent in his urine (...)*. In its Decision DAC also states that (b) *cocaine is not a performance-enhancing substance in billiards (...)*, (c) *the presence of cocaine in the urine of an athlete in an out-of-competition control does not constitute a violation of the Doping Regulations (...)*, (f) *there has been a case recently in another sport of a “spontaneous” admission of cocaine use (...)*. That (...) was found to be grounds for halving the penalty (...). In all reasonableness, the

*defendant should not suffer a worse fate than that fellow- user (...). Furthermore, DAC finds in its decision that (h) the information provided by the sports association KNBB with reference to the punishability and traceability of cocaine has left something to be desired. Finally, DAC holds that (i) banning cocaine, (...) is difficult to describe as conducive to the aim of combat doping.*

69. The WADC and the ISR Doping Regulations, considerably restrict the application of the principle of proportionality. Whether an Athlete has never tested positive before in his sporting career is relevant only for determining the applicable range of sanctions as mentioned in Articles 38 and 45 ISR Doping Regulations. The Athlete's age, that he took the prohibited substance unthinkingly and not with the intention to enhance performance, the question of whether taking the cocaine metabolite had a performance-enhancing effect, the (not timely) admission, the admission in public, his unawareness of the traceability of cocaine, the fact that the presence of cocaine in the sample of an Athlete in an out-of-competition control does not constitute a violation of the Doping Regulations or the peculiarities of the particular type of sport, are not – according to the WADC– matters to be weighed when determining the period of ineligibility. The purpose and intention of the WADC is, inter alia, to make the fight against doping more effective by harmonising the legal framework and to provide uniform sanctions to be applied in all sports. These rules, for instance, do not distinguish between amateur or professional athletes, old or young athletes or individual sport or team sport.
70. DAC's reference to an anonymous case in another sport and their opinion that banning cocaine is difficult to describe as conducive to the aim of combat doping do not justify a departure of the mandatory rule. DAC also mentioned in its Decision that the information provided by the sports association KNBB with reference to the punishability and traceability of cocaine has left something to be desired. Although Article 22 ISR Doping Regulations provides *that the association board is required to inform members about the content and operation of these regulations (...)*, it is not the duty of the sports association to warn athletes against the use of cocaine (or its metabolite). While it is certainly desirable that a sports association should make every effort to educate athletes about doping, it is principally the sole duty of the individual athlete to ensure that no prohibited substances enter his body.
71. Article 10.2 WADC and Article 38.1 ISR Doping Regulations provides for a uniform sanction of an ineligibility of two years for first offences. The only possibility for the athlete to reduce this fixed sanction is by evidence of exceptional circumstances (Article 10.5 WADC and Article 40 and 41 ISR Doping Regulations). If the Sole Arbitrator denies the existence of exceptional circumstances, it has, under the WADC and ISR Doping Regulations, no other choice than to apply the sanction of a two year suspension.

72. The consequences of this abstract and rigid approach of the WADC when fixing the length of the period of ineligibility in an individual case may be detrimental or (in rare cases) advantageous to the athlete (see for instance CAS 2002/A/376 *Baxter v/ FIS*). Insofar as the WADC prevents specific circumstances to be taken into account for the benefit of the athlete, the admissibility of such provisions is often questioned.
73. However, CAS case law and various legal opinions confirm that the WADC mechanisms are not contrary to human rights legislation. In the case CAS 2004/A/690 (*Hipperdinger v/ ATP*), the Panel found that the athlete had not established either “No Fault or Negligence” or “No Significant Fault or Negligence”. In this case, in which the Panel upheld the two years suspension, the Panel cited with approval the decision of the Swiss Federal Court in *N. et al. v/FINA* (W. v/FINA 5P.83/1999). This latter case involved positive doping tests by four Chinese swimmers. The appeal concerned the CAS award upholding the swimmer’s suspension. The award was rendered prior to the adoption of the WADC. One of several claims raised by the swimmers on appeal was that the CAS award failed to comply with the principle of proportionality. The amount of banned substance was very low, yet the suspension handed down could possibly end the swimmers’ careers. The Swiss Federal Court held that under the applicable FINA Anti-Doping Rules, the appropriate question is not whether a penalty is proportionate to an offence, but rather whether the athlete is able to produce evidence of mitigating circumstances. Furthermore, the issue of proportionality would only be a legitimate issue if a CAS award constituted an infringement of individual rights that was extremely serious and completely disproportionate to the behaviour penalised. The Court found that the two year suspensions in question were only a moderate restriction on the athletes, because the suspensions resulted from a proven doping violation under rules that had been accepted by the athletes. In the result, the Court held that the two year suspensions handed down without examination of proportionality did not constitute a violation of the general principles of Swiss law.
74. The Sole Arbitrator refers also to CAS 2005/A/847 *H. Knaus v/FIS* and CAS 2005/A/830 *G.Squizzato v/FINA*. In this latter case the Panel considered: “*The Panel recognizes that a mere uncomfortable feeling alone that a one year penalty is not the appropriate sanction cannot itself justify a reduction. The individual circumstances of each case must always hold sway in determining any possible reduction. Nevertheless, the implementation of the principle of proportionality as given in the World Anti-Doping Code closes more than ever before the door to reducing fixed sanctions. Therefore, the principle of proportionality would apply if the award were to constitute an attack on personal rights which was serious and totally disproportionate to the behaviour penalised (...)*”.
75. In continuation, the Sole Arbitrator takes also in account the Advisory Opinion delivered by CAS in relation to the implementation of the WADC into the FIFA



Disciplinary Code (CAS 2005/C/976 & 986 *FIFA & WADA*), in which the Panel held that the principle of proportionality is guaranteed under the WADC.

76. Furthermore, in the opinion by Prof. G. Kaufmann-Kohler, Antonio Rigozzi and Giorgio Malinverni (*Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, dated 26 February 2003*), the rigid system of fixed sanctions in the WADC considerably restricts the doctrine of proportionality, but is nevertheless compatible with human rights and general legal principles. These experts justify this characteristic by citing the legitimate aim of harmonising doping penalties.
77. Whether the conclusions to be drawn from these experts are correct in such finality can be left unanswered here (see also CAS 2004/A/690 *Hipperdinger v/ ATP* and CAS 2005/A/847 *Knaus v/ FIS*); for the case at hand does not require an in-depth discussion of the issue. The mechanism of fixed sanctions according to the WADC is incorporated into the ISR Doping Regulations, At least in the opinion of the Swiss Federal Tribunal, sports bodies can limit in their rules the circumstances to be taken into account when fixing sanctions and thereby also restrict the application of the doctrine of proportionality. However, in the opinion of the Swiss Federal Tribunal, the sport associations exceed their autonomy if these rules constitute an attack on personal rights, the nature and scope of which is extremely serious and totally disproportionate to the behaviour penalised. In the Sole Arbitrator's opinion, this threshold has not been exceeded in the present case. The Sole Arbitrator holds that a two years period of ineligibility is not out of proportion, excessive or disproportional.
78. This opinion is not contrary to the standard as set out in section 2:8 of the Netherlands Civil Code. This provision implies that a judging body is not allowed to apply a rule when the result of the application of that rule will be unacceptable. As said above, the application of the mandatory rule of a two years suspension is not unacceptable according to standards of reasonableness and fairness in the given circumstances.
79. For these reasons, the Sole Arbitrator decides that the Athlete is sanctioned with a period of ineligibility of two years.

#### C) PERIOD OF SUSPENSION

80. As to the commencement of the ineligibility period, the Sole Arbitrator takes notice of the principles set forth by Article 46.1 and 46.4 ISR Doping Regulations, which reads as follows:

*(1)“The ineligibility period starts on the day of the decision made in the disciplinary proceedings, unless otherwise stated in these regulations, as in article 46.4 (...).*

*(4)“The ineligibility period associated with the imposition of a disciplinary measure shall be deducted from the total ineligibility period that is imposed, unless the athlete has failed to comply strictly with the said disciplinary measure. The same shall apply to a provisional measure, suspension or ineligibility period imposed by a disciplinary body”.*

81. The Sole Arbitrator observes that both disciplinary bodies of the ISR applied Article 46.1 ISR Doping Regulations and imposed a sanction, starting on 25 August 2009. The Sole Arbitrator notes that NADO requests in his prayer for relief that the period of ineligibility starts on 25 August 2009 and the Athlete did not contest this starting date.

82. Accordingly, the Sole Arbitrator holds that the two-year period of suspension must start on 25 August 2009. There is no reason to apply Article 46.4 ISR Doping Regulations, because the documents in the file provide no evidence of a provisional suspension.

**D) OTHER PRAYERS FOR RELIEF**

83. The above conclusion, finally, makes it unnecessary for the Sole Arbitrator to consider other requests submitted by the parties to the Sole Arbitrator. Accordingly, all other prayers for relief are rejected.

**IX. COSTS**

84. Article R64.4 of the CAS Code provides that:

*“At the end of the proceedings, the Court Office shall determine the final amount of the costs of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS fee scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties.”*

Article R64.5 of the Code provides that:

*"The arbitral award shall determine which party shall bear the arbitration costs or in which proportion the parties shall bear them. As a general rule, the award shall grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs*

*of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and financial resources of the parties."*

86. Taking into consideration all the relevant criteria in Article R64.4 of the Code and circumstances including the outcome of the proceedings, the Athlete's limited financial resources given his young age, the Athlete's acceptance of the sanction imposed in the Appealed Decision, the Athlete's manner of conducting the case at CAS and the position of NADO as the National Anti-Doping Organisation for the Netherlands, the Sole Arbitrator rules that the Athlete shall bear one quarter of the arbitration costs, and NADO shall bear three quarters of the arbitration costs.
87. Furthermore, as a general rule, the award grants the prevailing party a contribution towards its legal and other expenses incurred in connection with the proceedings. Having taken into account the outcome of the proceedings, the conduct and financial resources of the parties, the Sole Arbitrator does not believe that it would be appropriate for the Athlete to have to reimburse NADO for its legal and other costs. Therefore, the Sole Arbitrator orders that each party shall bear its own costs.

\* \* \* \* \*

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules:**

1. The appeal of the Doping Authority Netherlands (NADO) against the decision dated 26 November 2009 of the Committee of Appeal of the ISR (DAC) is upheld.
2. The decision dated 26 November 2009 of the Committee of Appeal of the ISR (DAC) is set aside.
3. Mr Nick Zuijkerbuijk is suspended for a period of two years, starting from 25 August 2009.
4. The costs of the present arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne by 3/4 (three quarters) by the Doping Authority Netherlands and 1/4 (one quarter) by Mr Nick Zuijkerbuijk.
5. Each party shall bear its own costs.
6. All other prayers for relief are rejected.

Done in Lausanne, 11 June 2010

## **THE COURT OF ARBITRATION FOR SPORT**

**Manfred Peter Nan**  
Sole Arbitrator