SPORT RESOLUTIONS (UK)

NATIONAL ANTI-DOPING PANEL

SR/NADP/885/2017

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF RUGBY FOOTBALL LEAGUE

Before:

Robert Englehart QC (Chair)

Dr Terry Crystal

Colin Murdock

BETWEEN:

UK Anti-Doping ***National Anti-Doping Organisation***

-and-

Ryan Bailey ***Respondent***

DECISION OF THE ANTI-DOPING TRIBUNAL

INTRODUCTION

1. We were appointed as the Arbitral Tribunal to determine a Charge brought by the Anti-Doping Organisation ("UKAD") against the Respondent, Mr Bailey, a professional rugby league player. Before us UKAD was represented by Mr Dario Giovannelli. Mr Bailey was represented by Mr Daniel Saoul. We would wish at the outset to pay tribute to both representatives for their able and thorough presentation of the case. We are grateful to them for their written and oral submissions.

2. The Charge faced by Mr Bailey was of refusing or failing to submit to a drug test. More specifically, he was charged with committing an Anti-Doping Rule Violation under Article 2.3 of the applicable anti-doping rules. That Rule provides for the following to be an Anti-Doping Rule Violation:

> ***Evading, Refusing or Failing to Submit to Sample Collection***
>
> *Evading Sample collection, or without compelling justification, refusing or failing to submit to Sample collection after notification of Testing as authorised in these Rules or other applicable anti-doping rules.*

3. Mr Bailey is, as noted, a rugby league player. He is a player registered with the Rugby Football League and has over a distinguished career played for a number of different clubs. His current club, although he is currently subject to provisional suspension, is the Toronto Wolfpack Rugby League Football Club ("Toronto Wolfpack"). That Club plays in both Canada and England. There is no dispute between the parties that at all material times Mr Bailey has been subject to the Rugby Football League Anti-Doping Rules ("ADR").

THE FACTUAL BACKGROUND

4. We heard and, by agreement of the parties, read a considerable body of evidence during a hearing which stretched over three days. There were some disagreements of detail between the witnesses. However, we think it right to concentrate in our decision on those facts which are in our view material to our decision. Whilst we have had in mind

the numerous disagreements in the evidence, for the purposes of this decision we shall not address every single factual point raised by the parties.

5. On 30 May 2017 the Canadian anti-doping agency, Canadian Centre for Ethics in Sport ("CCES"), attended at the Lamport Stadium in Toronto in order to carry out urine and blood tests for UKAD on Toronto Wolfpack players. This stadium is where the club is based in Canada and was on 30 May 2017 having a training session. The stadium is in fact owned by the local authority; it, rather than the club, was responsible for, amongst other matters, designating one room within the stadium as the Doping Control Station. The CCES Doping Control Officer on the occasion in question was Ms Corina Mark. Mr Perry Taylor acted as a chaperone or drug tester.

6. One of the players selected for testing was Ryan Bailey. He confirmed before us that he was very familiar with testing as he had been selected for testing on numerous occasions in the past and had undergone drugs education with his clubs.

7. Mr Taylor told us how he and Ms Mark had visited a store on the morning of the test and had bought a considerable quantity of water for the purposes of the test. They had removed the plastic shrink wrapping around the bottles and placed them in the chaperones' cooler bags. It is right to note that on the day in question a number of other bottles of water were also used; they had come from Ms Mark's house. However, what matters for our purposes was the evidence that all the bottles in Mr Taylor's cooler bag had in fact come from that morning's purchase. Mr Taylor told us how he was wearing a wholly visible CCES lanyard and carrying his cooler bag when he approached Mr Bailey as the latter came off the training pitch.

8. Mr Taylor told us that he greeted Mr Bailey with the words: "Hello, Ryan. My name is Perry. You have been selected today for doping control testing. Would you like to hydrate?". Thereupon, Mr Bailey took a bottle out of the cooler bag and drank three-quarters of the bottle. Mr Bailey's version was somewhat different. He told us that he was approached as he came off the training pitch by a stranger whom he did not know but was perhaps a journalist. The stranger just said: "Would you like some water?" whereupon he grabbed a bottle and drank it, for it was a very hot day. We are confident that Mr Bailey was doing his best to tell us as he remembers matters. Nevertheless, we have to say that we prefer the recollection of Mr Taylor. It is improbable that Mr Bailey

would simply have grabbed a bottle of water from an unknown stranger. It is equally improbable that Mr Taylor would not have introduced himself at all.

9. After the initial meeting Mr Bailey "hightailed it to the club house", as Mr Taylor put it, with Mr Taylor following. In the dressing room at the club house Mr Taylor filled in an Athlete Selection Order in front of Mr Bailey and read out the following which appears on the face of the form:

> *You have been selected for doping control and you are required to comply with sample collection. Please be advised that failure to comply or refusal to provide a sample may result in an anti-doping rule violation.*

Mr Taylor also told us that he read out the section of the form headed "**Athlete Rights and Responsibilities**". He also tried to show Mr Bailey the reverse of the form, but Mr Bailey declined to look at it saying he knew what it said because he had been tested so often in the past. As Mr Saoul points out, the reverse of the form includes a warning "that should the athlete choose to consume food or fluids prior to providing a sample, he/she does so at his/her own risk". Both Mr Taylor and Mr Bailey then signed the form. Whilst these formalities were being addressed, Mr Taylor and Mr Bailey were chatting in a friendly way. Mr Bailey seemed entirely co-operative and gave no indication that he did not want to provide a sample. During this time Mr Bailey took and consumed another bottle of water from Mr Taylor's cooler bag. At the end of the process, which had lasted some 20-30 minutes, Mr Bailey stood up and asked for more water. He selected a bottle from Mr Taylor's cooler bag and took a sip. He then commented that the screw top of the bottle did not "crack" when he opened it and asked to try another bottle. Mr Taylor assured him that the bottles were in fact sealed as they had been bought by Ms Mark and himself about an hour beforehand but nevertheless offered another bottle. Mr Bailey opened the fourth bottle but again said that it had not "cracked", and he was worried that it might be contaminated. It was Mr Taylor's evidence that he then asked a member of the training staff to open a bottle. That person did so and said that he had in fact felt a "crack"; the water was fine. We were told that the club has despite inquiry been unable to locate any such member of staff.

10. It was Mr Taylor's evidence that he tried to re-assure Mr Bailey that the water could not be contaminated as it had just been bought, but Mr Bailey said it could have been contaminated in the shop. Mr Taylor tried to reason with Mr Bailey and persuade him to take the test. As he put it in evidence: "I understand that his concern was legitimate, but my message to him was at all cost to provide a sample". He understood Mr Bailey's concerns. He himself had also not noticed any "crack", but there was no possibility of the water being contaminated. Although Mr Taylor was doing his best to encourage Mr Bailey, we cannot accept the suggestion made that Mr Taylor told Mr Bailey that he too would probably not take the test if he were in Mr Bailey's position. Mr Taylor also said that, if he were worried, Mr Bailey should drink club water to which Mr Bailey said: "Why didn't you tell me that I could drink my own water?". In any case, it was in Mr Bailey's view too late. He had already drunk Mr Taylor's water.

11. Since Mr Bailey was adamant that the water he had drunk might have been contaminated and he would not provide a sample, Mr Taylor reminded him that failure to provide a sample might be an Anti-Doping Rule Violation. He also suggested that he would be quite content for Mr Bailey to compile a formal report in writing to express concern that he might have consumed contaminated water. But Mr Bailey was unmoved. He would not be providing a sample after having drunk the water which Mr Taylor had provided.

12. Mr Taylor then went with Mr Bailey to the room designated as the Doping Control Station where they spoke to Ms Mark after she had finished dealing with another player. When she was told what had happened, she again reminded Mr Bailey that not taking part in the test might result in Anti-Doping Rule Violation. But Mr Bailey said he was not going to do so since he could not guarantee that the water had not been tampered with. Despite Ms Mark's efforts to persuade him that this was impossible, since she had herself bought the water, he remained firm that he was not going to provide a sample. He also declined even to submit to a blood test since contaminated water might already have reached his blood stream.

13. It is right to note that Mr Bailey seems not to have been in any way truculent or aggressive. He readily completed an athlete refusal form in which he wrote [*sic*]:

> *I WAS APPROACHED BY THE UKAD CHAPERONE AFTER TRAINING AND HANDED BOTTLED WATER THAT I DRANK BUT THEN RAISED ISSUES ABOUT THE BOTTLES NOT BEEN SEALED. 2 BOTTLES THAT I CHECKED ALSO WASNT SEALED. IM CONCERED ABOUT THIS WATER COMPROMISED. ALSO THE CHAPERONE WHITNESSED THE BOTTLES NOT BEEN SEALED AND DIDNT HEAR THE LID CLICK WHEN TWISTED.*

Despite all the attempts by Ms Mark and Mr Taylor both to cajole Mr Bailey and to remind him how serious the consequences of refusal could be, Mr Bailey would not change his mind. He would not be deflected from his view that the water could have been contaminated. Indeed, he told us in evidence that he would act in the same way now; he was not going to jeopardise his career from having drunk potentially contaminated water before taking a drug test.

14. Whilst his behaviour may seem quite perverse, we have no doubt that Mr Bailey genuinely did think that the water might have been contaminated and simply could not take in the serious consequences of refusing a test. He explained in evidence that he [redacted] he "just wanted to get out of the room". And he was not going to take the test because "it's my career on the line".

15. In his witness statement Mr Bailey summarised his feelings:

> *I thought I was being fitted up. Something did not seem right. The tester did not appear to know what was going on. The way he had approached me, got me to drink his water and then told me I was going to be tested was dodgy.*

He described his symptoms while Mr Taylor and Ms Mark were trying to persuade him to provide a sample:

[redacted]

16. Having heard Mr Bailey give evidence we do not for one moment think that he is a cheat or was trying to cover up drug taking. Indeed, we note that a few days later Mr Bailey did in fact undergo a drug test (which was negative) without any problem.

THE MEDICAL EVIDENCE

17. There was a considerable amount of medical evidence [redacted]

18. We heard evidence from two psychiatrists, Dr Hopley and Dr Kaitiff. We were particularly impressed by the evidence of Dr Hopley, although Dr Kaitiff also expressed considered and thoughtful views. Ultimately, there was little difference between the views of the two psychiatrists even though Dr Hopley was perhaps rather more forceful in his opinion. [redacted]

19. Dr Kaitiff did not disagree with Dr Hopley's analysis although he was rather more cautious in his conclusions. [redacted]

20. [redacted]

SUBMISSIONS FOR UKAD

21. As for the Anti-Doping Rule Violation under Article ADR 2.3 (cited above), UKAD's primary case was that there had been a refusal to submit to sample collection but, if this were not a refusal, there had certainly been a failure. The following elements were identified by Mr Giovannelli: (1) that Mr Bailey had been notified of the testing (2) that the notification had been authorised (3) that Mr Bailey had refused and (4) that the notification was intentional or, in the case of a failure, intentional or negligent. If these elements were made out, then the burden of demonstrating "compelling justification" lay on Mr Bailey.

22. There was no issue about the CCES authority and Mr Taylor's evidence clearly demonstrated that Mr Bailey had been notified. The reason why intention was said to be required for a refusal was that the Commentary to Article 2.3 of the WADA Code identifies "evading" or "refusing" as contemplating intentional conduct in contrast to "failing" which may be either intentional or negligent. Here, there was on the evidence a conscious and deliberate decision by Mr Bailey not to undergo sample collection. There was an intentional refusal.

[redacted]

23. The onus of showing some "compelling justification" was on Mr Bailey. But the authorities were quite clear. The matter had to be judged objectively. The fact that Mr Bailey may himself have thought he was justified in the refusal was immaterial. A narrow interpretation of the words "compelling justification" was required. We were referred to a number of CAS authorities to make good these propositions including *Troicki v ITF*, CAS 2013/A/3279 at paragraph 9.15, *Azevedo v FINA*, CAS 2005/A/4631 at paragraph 75 and *Brothers v FINA* CAS2016/A/4631 at paragraph 77-9. Our attention was also drawn to the observations of an NADP Appeal Tribunal in *Jones v WRU*, 9 June 2010 at paragraph 57.

24. On the basis that this was a refusal case, the mandatory period of Ineligibility under the ADR was four years: ADR Article 10.3.1. It was submitted that no reduction was possible under ADR Article 10.4 (No Fault or Negligence) or 10.5 (No Significant Fault or

Negligence). The reason for this was that the Commentary to Article 10.5.2 of the WADA Code stated that the Rule was not applicable "where intent is an element of the anti-doping rule violation", and a refusal was an intentional act. No other argument was adduced for saying that ADR Articles 10.4 and 10.5 were not even capable of application. And Mr Giovannelli did very fairly draw our attention to two authorities where, contrary to his stance, ADR Article 10.5 had been applied in a refusal case.

25. Mr Giovannelli also drew our attention to various features of the evidence, particularly the medical evidence, which pointed to this not being such an "exceptional" case as to fall within either Article 10.4 or Article 10.5. Mr Bailey could not possibly be said to have exercised the "utmost caution"; on the contrary, he had been repeatedly warned about the serious consequences of refusing to provide a sample but had simply ignored these warnings. Finally, we were reminded that, even if we were to invoke Article 10.5, the mandatory period of Ineligibility here would still be two years: see ADR Article 10.5.2.

26. Mr Giovannelli also responded briefly to Mr Saoul's reliance on proportionality as a discrete ground for reducing or disapplying any sanction. In his submission there was no warrant for departing from the sanctioning regime established by the ADR based on the WADA Code.

27. In summary, Mr Giovannelli submitted that this was a clear cut case of an Anti-Doping Rule Violation which under the ADR necessarily attracted a four year period of Ineligibility.

SUBMISSIONS FOR MR BAILEY

28. Mr Saoul put at the forefront of his submissions what he described as a catalogue of procedural defects on the part of Mr Taylor and the CCES testing in general. It was submitted that these defects were so fundamental that we ought summarily to dismiss the UKAD claim. The matters of complaint against CCES concerned: (1) Ms Mark having shown Mr Rusling in advance a list of players to be tested (2) Mr Taylor's initial contact with Mr Bailey and the fact that Mr Taylor had not shown Mr Bailey the reverse of the Athlete Selection Order (3) a failure to maintain a controlled environment at the Doping Control Station where no log was maintained, there was no privacy for a player, activities

other than doping control were going on in the room and deviations from doping control requirements were not recorded and (4) Mr Taylor having handled the bottles of water which were not, or seemed not to be, sealed. The testing was a "shambles" as shown by the evidence of Mr Rowley, Mr Rusling, Mr Dixon and Mr Beswick.

29. Mr Saoul submitted that the informal way in which Mr Taylor had initially approached Mr Bailey and then waited until the dressing room before completing the formalities was particularly serious. There had been no proper notification of testing to Mr Bailey for the purposes of ADR Article 2.3. Moreover, even if the procedural defects had to be shown to be causative of the alleged Anti-Doping Rule Violation, the fact that Mr Bailey had not been told that he did not have to drink Mr Taylor's water and the lack of privacy for him at the Doping Control Station were, [redacted], both causative of a sample not being provided.

30. Mr Saoul agreed with Mr Giovannelli in reliance on the Commentary to Article 2.3 of the WADA Code that there had to be intention for a refusal to submit to sample collection. However, he submitted that intention had to be judged by reference to the definition provided by ADR Article 10.2.3. A narrow construction of Article 2.3 was appropriate for that Article, for it was similar in effect to a penal provision: cf. Bennion on Statutory Interpretation (6th ed). There could not here be any intention either within the Article 10.2.3 definition [redacted]

31. We were also reminded by Mr Saoul of the requirement for an absence of compelling justification before there could be an Anti-Doping Rule Violation. He accepted that the threshold for establishing "compelling justification" was high. [redacted]

And he referred to three decisions where compelling justification had been found: *IRB v Nelo Liu, USADA v Page* and *Greek Swimming Federation v Xynadas*. Whilst cases where a successful plea of compelling justification might be rare, it is important not to water down an express requirement to such an extent as to deprive it of all of all practical content. Mr Saoul submitted that, whether or not Mr Bailey was correct, he clearly had a legitimate fear that the water might have been contaminated and that this justified him in not taking a test. The water bottles provided to him were not sealed or at least did

give that impression. And there could be no doubt as to the genuineness of Mr Bailey's belief.

32. If we were against Mr Bailey on everything else, Mr Saoul submitted that we should conclude [redacted] there was No Fault or Negligence or, at least, No Significant Fault or Negligence. Contrary to Mr Giovannelli's submission, it would be open to us to find that there was No Fault, or No Significant Fault or Negligence even if we were to find an intentional refusal by Mr Bailey; see for example *Brothers v FINA* CAS 2016/A/4631 especially at paragraph 96; *Azevedo* v FINA CAS 2005/A/925. He also referred us to observations made in a recent NADP Appeal decision, *Lucinda Turner v British Equestrian Federation*, 1 August 2014, at paragraph 101.

33. As CAS had on several occasions pointed out, it was important not to set the test for No Fault or Negligence so high as to make it impossible to meet. [redacted] This is a truly exceptional case and it would be wrong to judge Mr Bailey by standards wholly inappropriate for him. He had had a genuine belief that he might have drunk contaminated water [redacted]

34. Finally, Mr Saoul invited us to consider an overarching question of proportionality. A four year period of Ineligibility, or even on a certain hypothesis a two year period, would be grossly unfair for a [redacted] player nearing the end of his playing career who had held a genuine, even if unjustifiable, belief. In support of his argument Mr Saoul prayed in aid a number of cases which are familiar in the context of this argument such as the cases of *Puerta v ITF* CAS 2006/A/1025 and, more recently, *Klein v Australian Sports Anti-Doping Authority* CAS A4/2016 and *Football Association v Livermore*.

DISCUSSION

Refusal or failure

35. It appears to us that there cannot sensibly be any doubt but that Mr Bailey refused to submit to sample collection. He was urged to provide a sample on several occasions, and on several occasions he was adamant that he was not going to do so because the bottles of water from which he had drunk had, he said, not been sealed. Furthermore,

Mr Bailey not only refused verbally. He also made his position crystal clear by signing the Athlete Refusal Form and then himself filling in and signing a Supplementary Report. His reaction to events and the way he responded may be regarded as irrational. But, an irrational refusal is still a refusal.

36. As for intention, Mr Bailey's refusal was on any showing, as Mr Giovannelli put it, conscious and deliberate. It was indubitably intentional on the ordinary meaning of that word. ADR Article 2.3 does not expressly refer to an intentionality requirement. However, we do note that the Comment to Article 2.3 in the WADA Code says:

> *A violation of "failing to submit to Sample collection may be based on either intentional or negligent conduct of the Athlete, whilst "evading" or "refusing" Sample collection contemplates intentional conduct by the Athlete.*

By Article 1.5.4 of the ADR we are required to use this and other Comments to the WADA Code to interpret the ADR. The Comments are an aid to construction but not, of course, themselves free standing provisions of the ADR. Nevertheless, building on this Comment Mr Saoul submits that (1) UKAD has to establish intention to refuse on the part of Mr Bailey and (2) intention is to be judged by reference to the specific provisions of ADR Article 10.2.3. [redacted]

37. There are a number of difficulties with this argument. First, intention is not referred to as a requirement in ADR Article 2.3 itself. In our view the Comment in question is doing no more than saying that, whilst a failure may be inadvertent, it is hard to see how a refusal can be anything other than deliberate. Secondly, whilst ADR Article 10.2.3 specifically refers to the application of the term "intentional" to ADR Articles 10.2 and 10.3 it makes no reference to Article 2.3. Instead, ADR Article 2.3 is expressly mentioned in Article 10.3.1 which provides:

> *For an Anti-Doping Rule Violation under Article 2.3 or Article 2.5 that is the Athlete's or other Person's first anti-doping offence, the period of Ineligibility shall be four years unless, in a case of failing to submit to Sample collection, the Athlete can establish that the commission of the Anti-Doping Rule Violation was not intentional (as defined in Article 10.2.3), in which case the period of Ineligibility shall be two years.*

It will be noted that this Article only mentions a case of failing, rather than refusing, to submit to Sample collection.

38. In our view, Mr Bailey plainly did intend to refuse the provision of a Sample [redacted] As with a refusal, an irrational intention is still an intention. In any event, we do not believe that ADR Article 2.3 is to be interpreted as if it incorporates what a criminal lawyer would refer to as *mens rea*. That would be to read too much into the Article.

Notification and Authority

39. In our view Mr Bailey plainly was notified of a request to provide a sample. He knew that he was being asked to do so; indeed, that was precisely why he refused. ADR Article 2.3 itself incorporates no specific requirement as to how the notification is to be effected. We shall address below what are said to have been the procedural defects in the form of notification. As for the authority under which the testing was to be carried out by CCES on behalf of UKAD, it is not in dispute that the testing was duly authorised.

Compelling Justification

40. The great preponderance of authority is to the effect that the existence of a "compelling justification" is to be judged objectively rather than by reference to a given athlete's own perception. As it was put in *Azevedo v FINA*, cited above:

> *No doubt, we are of the view that the logic of anti-doping tests and of the DC Rules demands and expects that, whenever physically, hygienically and morally possible, the sample be provided despite objections by the athlete. If that does not occur, athletes would systematically refuse to provide samples for whatever reasons, leaving no opportunity for testing.*

In the *Brothers* case, cited above, the Tribunal followed the same principle in saying at paragraph 77:

> *After due consideration, the Panel chooses to follow the precedent set in the Azevedo, Troicki and Boyle decisions cited above. If it remains ''physically, hygienically and morally possible", for the sample to be provided, despite objections by the athlete, the refusal to submit to the test cannot be deemed to have been compellingly justified.*

To the same effect are a number of other decisions cited to us. We propose to follow the above approach. The subjective state of mind and thoughts of the athlete may come into play when considering a question of fault or negligence. But in our view, compelling justification is used in ADR Article 2.3 as a matter of objective fact. On that basis, there can be no question of compelling justification here. There was no valid reason for Mr Bailey not to have taken the test. Any concern of Mr Bailey over the water could have been catered for by doing as Mr Taylor in fact suggested, that is by his making a written record of his concerns, and even retaining one of the bottles of water for subsequent analysis if necessary.

Procedural Defects

41. ADR Article 5.1 provides:

> *These Rules adopt and incorporate the International Standard for Testing and Investigations, as amended from time to time.*

We were also referred by Mr Saoul, in addition to that Standard ("ISTI"), to the WADA Blood Sample Collection Guidelines ("the Guidelines") which he informed us, without contradiction from Mr Giovannelli, were identical to guidelines for urine sample collection. The Guidelines do not form part of the ADR, but we accept they may potentially have some relevance.

42. As a practical matter, we do not think it fair to criticise CCES for the fairly informal way in which the testing of 30 May 2017 was conducted. Mr Taylor was evidently anxious to secure the co-operation of players and his informal approach was designed to put Mr Bailey at his ease. Having said that, a number of departures from ISTI and the

Guidelines were identified. We have to consider whether they were such as entirely to vitiate the proposed test for Mr Bailey which he refused to undergo.

43. The following departures from ISTI and the Guidelines were identified:

(1) Ms Mark had shown Mr Rusling, the Toronto Wolfpack Head Physio, a list of players to be tested in advance of commencement of the testing procedure for Mr Bailey. This was contrary to Article 5.3.7 of ISTI which provides for the Athlete to be the first person to be notified that he or she has been selected for sample collection.

(2) ISTI Article 5.4.1 has a list of matters of which the Athlete is to be informed "when initial contact is made". Mr Bailey was first approached as he came off the training pitch. There was a gap between then and the time when Mr Taylor attended to the formalities in the dressing room. Moreover, Mr Taylor did not read out all an Athlete's rights and responsibilities; his attempt to draw Mr Bailey's attention to what was said on the reverse of the Athlete Selection Order was thwarted by Mr Bailey's unwillingness to look at it because of his familiarity with testing. Thus, ISTI Article 5.4.1(g) was not complied with. This requires an Athlete to be informed: "That should the Athlete choose to consume food or fluids prior to providing a Sample, he/she does so at his/her own risk".

(3) Mr Saoul also complained of what was said to have been a failure to "maintain a controlled environment" for the Doping Control Station. Ms Mark kept no log of exits and entry contrary to the Guidelines, Article 6.2.1. There were breaches of ISTI Article 6.3.2 in that (a) activities other than just doping control were being conducted there (b) Mr Bailey was not attended to in private and (c) no record of deviations from the ISTI requirements was kept.

(4) The final complaint was of what was said to have been a breach of Article 6.1.2 of the Guidelines. This states that "the DCO/Chaperone should not handle food or drink items for the Athlete" and was said to have been breached by Ms Mark and Mr Taylor buying the water bottles, unpacking them and putting them in Mr Taylor's cooler bag. We do doubt if unpacking water bottles is really a vice at which the Guidelines are aiming.

44. In considering the allegations of procedural error we are required to bear ADR Article 8.3.6 and 8.3.7 in mind. They provide in material part:

> *8.3.6 Departures from any other [than sample analysis] International Standard or other anti-doping rule or policy set forth in these Rules of [sic] the Code that did not cause … the factual basis for any other Anti-Doping Rule Violation with which the Athlete or other Person is charged shall not invalidate such evidence or results. If the Athlete or other Person charged with committing the Anti-Doping Rule Violation establishes the occurrence of a departure from another International Standard or other anti-doping rule or policy occurred that could reasonably have caused the …. factual basis for any other Anti-Doping Rule Violation with which the Athlete or other Person is charged, then UKAD shall have the burden of establishing that such departure did not cause the … factual basis for such other Anti-Doping Rule Violation.*
>
> *8.3.7 Any other deviation from … the procedures referred to in these Rules shall not invalidate any finding, procedure, decision or result under the Rules unless the Athlete or other Person relying on such deviation establishes that it casts material doubt on the reliability of that finding, procedure, decision or result, and UKAD is unable to rebut that showing.*

In summary, we are required by the ADR to consider the causative effect on the facts of any breaches of ISTI (and possibly, as well, the Guidelines).

45. Mr Saoul's primary submission was that the procedural defects which he identified were such fundamental breaches that we should dismiss the present case regardless of Article 8 of the ADR. In support of this submission he relied on four authorities, although Mr Giovannelli pointed out that three of the older cases antedated the introduction of a causation qualification in the WADA Code. Nevertheless, more recently, in *United States Anti-Doping Agency v Jenkins*, American Arbitration Association, 25 January 2008, it was said at paragraph 136:

> *In view of the grave implications for athletes, such as Ms. Jenkins, who are held entirely in account for any transgression of applicable anti-doping rules, testing laboratories must also be held strictly to account for any non-*

compliance with those same rules. Failure to comply with the mandatory standard contained in ISL 5.2.4.3.2.2 cannot be viewed as a mere technicality. The strict liability regime which underpins the anti-doping system requires strict compliance with the anti-doping rules by everyone involved in the administration of the anti-doping regime in order to preserve the integrity of fair and competitive sport.

No doubt these are laudable sentiments, although we note that on the facts of that case the failure in question may have caused the Adverse Analytical Finding. We do not believe it is open to us simply to disregard the explicit provisions of ADR Article 8, however seriously any procedural defects are to be viewed. We turn, therefore, to consider the actual or potential causative effect of the defects in the present case.

46. We agree with Mr Giovannelli that none of the errors of which complaint is made could have been causative of the "factual basis" of Mr Bailey's refusal to provide a sample. It could perhaps be said that, if Mr Bailey had been told that he drank water "at his own risk", he might not have drunk the water at all and this was what resulted in his refusing to provide a sample. However, the difficulty with this argument is that the warning in question was on the reverse of the Athlete Selection Order and Mr Bailey himself declined to read the document because, so he said, he was very familiar with the testing procedure and had heard it all before. And it is notable that it was after the completion of all the notification formalities in the dressing room that Mr Bailey in fact drank a second bottle of water without any concern. It was not until the third bottle of water that the problems arose.

47. The importance of anti-doping authorities observing the ISTI requirements should not be underestimated. Nevertheless, we also think that any Tribunal must have the substance rather than merely the form in mind. We do not dismiss the claim on account of any procedural errors on the present facts.

Anti-Doping Rule Violation

48. [redacted] However, it follows from the above that we are driven to conclude that there was an Anti-Doping Rule Violation in the refusal to submit to sample collection on 30 May 2017. This would necessarily involve a four year

period of Ineligibility under ADR Article 10.3.1 unless the Rules about no, or No Significant, Fault or Negligence apply or, perhaps, if Mr Saoul's proportionality arguments are correct. Accordingly, we turn to these questions.

Fault or Negligence

49. Articles 10.4 and 10.5 provide in material part as follows:

> *10.4* ***Elimination of the Period of Ineligibility where there is No Fault or Negligence***
>
> *If an Athlete or other Person establishes in an individual case that he/she bears No Fault or Negligence for the Anti-Doping Rule Violation charged, then the otherwise applicable period of Ineligibility shall be eliminated.*
>
> *10.5* ***Reduction of the period of Ineligibility based on No Significant Fault or Negligence…***
>
> *10.5.2 Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1:*
>
> *In an individual case where Article 10.5.1 is not applicable, if an Athlete or other Person establishes that he/she bears No Significant Fault or Negligence, then (subject to further reduction or elimination as provided in Article 10.6) the otherwise applicable period of Ineligibility may be reduced based on the Athlete's or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable…….*

The definitions of Fault and No Significant Fault in the ADR are also relevant to the present case. Fault is defined as:

> *Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by*

the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.

No Fault or Negligence and No Significant Fault or Negligence also bear defined meanings under the ADR:

> ***No Fault or Negligence**:*
>
> *The Athlete or other Person establishing that he or she did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had… violated an anti-doping rule….*
>
> ***No Significant Fault or Negligence**:*
>
> *The Athlete or other Person establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relation to the Anti-Doping Rule Violation…*

50. If our conclusion depended on the standard of the reasonable man, we would be quite unable to say that there was no, or No Significant, Fault or Negligence. Any ordinary rational person would not have refused to provide a sample because he had drunk from a water bottle which did not "crack". However, we are clearly of the view that the ADR test does not depend on how a reasonable man would have behaved. It is plain from the definition of fault that we are directed to an assessment of the individual circumstances of the individual committing the Anti-Doping Rule Violation. Indeed, we note with interest that the definition directs us specifically to, amongst other considerations, "special considerations such as impairment".

51. Mr Saoul described this as an extremely unusual – indeed unique - case. We agree. [redacted]

The way Mr Bailey behaved with a sudden swing from evident co-operation to downright refusal was entirely irrational. As we have said, we were impressed with the psychiatric evidence, particularly the evidence of Dr Hopley. Although Mr Bailey was told that his refusal might be an anti-doping rule violation and that the consequences might be serious, his mind was quite unable to take in or process this information. [redacted]

On that basis we do not believe it to be right to conclude that he was at fault or negligent. It would be unfair to Mr Bailey and inconsistent with the approach of the ADR in its definition of fault to judge his actions artificially, [redacted]

52. We would therefore conclude in the very exceptional circumstances of this case that, unless there is some bar to our doing so, Mr Bailey bears No Fault or Negligence. Mr Giovannelli submitted that we would be precluded from such a finding because Articles 10.4 and 10.5 cannot apply to an intentional act like refusing to provide a sample. He referred us to the Comment to Article 10.5.2 of the WADA Code. We query whether, strictly speaking, intent is actually an element of the Anti-Doping Rule Violation of refusing a sample although we agree that it is hard to envisage a case in practice of refusal without intent. But in any case Mr Giovannelli's submissions in our view read too much into the Comment. This Comment, like other Comments, is clearly addressing the position of the average ordinary person [redacted]

53. We do not think that we are precluded from reaching the conclusion that ADR Article 10.4 of the Code applies here in the extremely unusual circumstances. We are fortified in this conclusion by passages in cases to which we were referred, notably *Brothers v FINA* (cited above), *Azevedo v FINA* (cited above) and *ITF v Mak,* 7 November 2017. We pay less attention to NADP cases in which UKAD has previously not disputed that a refusal case is at least capable of entailing No Significant Fault, that is *UKAD v Six* and *UKAD v Hale*.

54. Given our conclusion on ADR Article 10.4, we do not need to address ADR Article 10.5. We should, however, like to stress that the present is a truly exceptional case on its own very special facts and psychological evidence. We do not think that it should be taken as any sort of precedent for other cases.

Proportionality

55. In the light of our conclusion on ADR Article 10.4, we do not need to address the arguments on proportionality. We would only remark that we have the gravest doubts whether the principle can be properly used so as to disapply some result expressly mandated by the ADR and WADA Code. Possibly, the principle may apply to a genuine lacuna. But, our decision demonstrates that there is no lacuna here.

CONCLUSION

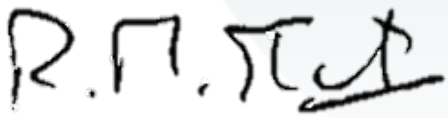
56. For the reasons set out above we find that:

(1) the Anti-Doping Rule Violation is established; but

(2) in the truly exceptional circumstances of his case, Mr Bailey bears No Fault or Negligence so that the otherwise applicable period of Ineligibility is eliminated;

(3) neither party sought an order for costs.

In accordance with Article 13 of the National Anti-Doping Panel Rules, either party may file a Notice of Appeal against this decision within 21 days of receipt of the decision.



Robert Englehart QC

Chairman on behalf of the Tribunal

London, 08 December 2017

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