SPORT RESOLUTIONS (UK)

NATIONAL ANTI-DOPING PANEL

SR/NADP/987/2017

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF UK ATHLETICS

Before:

Mr Jeremy Summers (Chair)
Dr Kitrina Douglas
Dr Neil Townshend

Between:

UK ANTI-DOPING LIMITED ("UKAD") *National Anti-Doping Organisation*

and

DAVID PAUL BURRELL ("the Athlete") *Respondent*

DECISION OF THE ANTI-DOPING TRIBUNAL

INTRODUCTION

1. This is the unanimous decision of an Anti-Doping Tribunal ("the Tribunal") convened under Article 5.1 of the 2015 Procedural Rules of the National Anti-Doping Panel ("the Procedural Rules") and Article 8.4 of the IAAF Anti-Doping Rules (" the ADR") to determine an Anti-Doping Rule Violation (“ADRV”) alleged against Mr David Burrell (“the Athlete”).

2. The ADRV relates to an alleged violation of ADR Article 2.3 (Evading, Refusing or Failing to Submit to Sample Collection).

3. The Athlete was charged by letter issued by UKAD dated 18 October 2017 and the Tribunal was appointed by the President of the National Anti-Doping Panel (the "NADP").

4. At a hearing on 17 January 2018, held at the offices of Sport Resolutions, the Athlete was represented by Mr Jason Torrance, solicitor, and UKAD appeared through Mrs Stacey Cross, solicitor. The Tribunal records its gratitude to both advocates.

5. A preliminary case management conference was held by way of a telephone call on 29 November 2017 at which the parties were represented. Directions were thereafter issued, all of which were fully complied with.

PRELIMINARY ISSUE

6. The Athlete attended the hearing with a party who wished to be present as an observer and to offer support, which ordinarily would not cause any difficulty.

7. The Tribunal was however informed that the party concerned was subject to separate and unrelated proceedings to be heard before a further NADP tribunal, and UKAD had some concerns as to the position arising from that fact.

8. The Tribunal had no information in relation to this further matter and expressly indicated that it was not to be provided with any such information.

9. Following discussion with the parties, and with their agreement, the Tribunal directed that the party concerned should be allowed to attend subject to not taking notes and withdrawing from the hearing whilst evidence was given in relation to any issues that could potentially relate to her proceedings.

10. In any event the party concerned was not present whilst the Athlete gave evidence.

JURISDICTION

11. Jurisdiction was not challenged but for completeness the Athlete is a 53 year old male. He is now principally an assistant athletics coach whilst still competing from time to time in the throws disciplines.

12. UK Athletics is the National Governing Body ("NGB") for athletics in the UK. UK Athletics has adopted the ADR as its anti-doping rules. The ADR apply to all members of UK Athletics who, by virtue of that membership, agree to be bound by and to comply with them.

13. ADR Articles 1.6 and 1.7 provide:

> 1.6 *These Anti-Doping Rules shall apply to the IAAF and to each of its National Federations and Area Associations. All National Federations and Area Associations shall comply with the Anti-Doping Rules and Anti-Doping Regulations. The Anti-Doping Rules and Anti-Doping Regulations shall be incorporated either directly, or by reference, into the rules or regulations of each National Federation and Area Association, and each National Federation and Area Association shall include in its rules the procedural regulations necessary to implement the Anti-Doping Rules and Anti-Doping Regulations effectively (and any changes that may be made to them). The rules of each National Federation and Area Association shall specifically provide that all Athletes and other Persons under its jurisdiction shall be bound by the Anti-Doping Rules and Anti-Doping Regulations, including submitting to the results management authority set out in such rules.*
>
> *1.7 These Anti-Doping Rules also apply to the following Athletes, Athlete Support Personnel and other Persons, each of whom is deemed, as a condition of his membership, accreditation and/or participation in the sport, to have agreed to be bound by these Anti-Doping Rules, and to have submitted to the authority of the Integrity Unit to enforce these Anti-Doping Rules:*
>
> *(a) all Athletes, Athlete Support Personnel and other Persons who are members of a National Federation or of any member or affiliate organisation of a National Federation (including any clubs, teams, associations or leagues);*
>
> *(b) all Athletes, Athlete Support Personnel and other Persons participating in such capacity in Competitions and other activities organized, convened, authorized or recognized by (i) the IAAF (ii) any National Federation or any member or*

affiliate organization of any National Federation (including any clubs, teams, associations or leagues) or (iii) any Area Association, wherever held;

(c) all Athlete Support Personnel and other Persons working with, treating or assisting an Athlete participating in his sporting capacity; and

(d) any other Athlete, Athlete Support Person or other Person who, by virtue of an accreditation, licence or other contractual arrangement, or otherwise, is subject to the jurisdiction of the IAAF, of any National Federation (or any member or affiliate organization of any National Federation, including any clubs, teams, associations or leagues) or of any Area Association, for purposes of anti-doping.

14. Pursuant to ADR Article 1.7 (a), at all material times the Athlete was a registered member of UK Athletics, and thus subject to, and bound to comply with, the ADR.

15. UKAD submitted a request for arbitration to the NADP by letter dated 21 November 2017.

BRIEF FACTS

16. At 06:30 on 23 August 2017, Mr Alan Garside, a UKAD Doping Control Officer ("DCO") attended at the Athlete's home address to conduct an Out-of-Competition test.

17. The DCO notified the Athlete of his requirement to provide a Sample at 07:16. The Athlete's response to this request was along the lines of 'I can't do it as I'm going to work'. The DCO confirmed that he was attending on behalf of UKAD and that there could be serious consequences, including the commission of an ADRV, if the Athlete refused to provide a Sample.

18. Despite this warning, the Athlete continued to protest, stating 'I don't care, I am only a coach and I have to get to work or I may be fired.' The Athlete then declined to sign the Doping Control Form to confirm that he was refusing to provide a Sample, got in his van and drove off. The test was therefore abandoned without the

Athlete having provided a Sample.

THE CHARGE

19. ADR Article 2.3 provides as follows:

> ***2.3 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.*

20. UKAD's primary position was that the Athlete had refused, without compelling justification, to submit to Sample collection after notification of Testing as authorised by the ADR and in breach of ADR Article 2.3.

21. UKAD accepted that to sustain that position the burden was upon it to prove, to the comfortable satisfaction of the Tribunal, that:

i. the Athlete had been properly notified of the Testing;

ii. such notification was authorised under the ADR;

iii. the Athlete had refused to provide the Sample required; and

iv. the Athlete's refusal was intentional.

22. The comment to ADR Article 2.3 notes:

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

23. If the Tribunal rejected UKAD's primary submission, UKAD relied on the alternative limb of the ADRV and would assert that the Athlete had failed, without compelling justification, to submit to Sample collection after notification of testing as authorised in the ADR.

24. UKAD further accepted that, to sustain that position, it would need to prove, to the comfortable satisfaction of the Tribunal, that:

i. the Athlete was properly notified of the testing;

ii. such notification was authorised under the ADR;

iii. the Athlete had failed to provide the Sample required; and

iv. the Athlete's failure was either intentional or negligent.

25. UKAD was not required to prove that the Athlete had no compelling justification for his refusal or failure. In the event that UKAD established the elements as set out above, it would have established a prima facie case against the Athlete, in which event that burden of proof would switch to the Athlete. The Athlete would then be required to establish, on the balance of probabilities, that he had a compelling justification for his refusal or failure.

26. In the event of compelling justification being established, no ADRV would have occurred, and therefore no sanction would fall to be imposed.

27. In an opening statement, Mr Torrance confirmed on behalf of the Athlete that it would not be argued that there had been compelling justification. Thereafter however, the Athlete challenged the case as advanced by UKAD.

UKAD EVIDENCE

28. The DCO gave oral evidence before the Tribunal and confirmed the veracity of his written statement dated 13 December 2017.

29. He detailed a noteworthy police career spanning 33 years from which he had retired at the rank of Inspector.

30. He had joined UKAD in 2010 as a DCO. He had been appointed a lead DCO in 2012 and now trains and assesses other DCOs. He estimates that he conducts about 200 anti-doping tests annually. He passed separate assessments as both DCO and lead

DCO in the last quarter of 2017. He also works at present in an investigative capacity for a local authority.

31. He had arrived at the Athlete's address by 06:30 on 23 August 2017. He had been unable to park opposite as he would normally do, and so had parked directly outside, about 5 metres from the property.

32. At 06:30 he knocked on the front door. He also rang the bell, but nobody answered. It had been unclear to him whether the bell was working or not as he could not hear it ring, although a blue light had illuminated, indicating that something was working. In any event he said that he had knocked on the door extremely loudly.

33. The door was not answered and he therefore returned to the car to keep observation. He had an unobstructed view. He did not see a female or anyone leave in a taxi.

34. When the Athlete eventually opened the door, the DCO identified himself and showed his UKAD badge. He asked the Athlete to confirm his identity which he did. He had also taken with him a printed photo of the Athlete and so was satisfied it was him.

35. He had told the Athlete that he had been selected to provide a urine sample. The Athlete had responded by saying he couldn't do it as he was going to work and that his mate was coming to collect him.

36. The DCO had explained that he was there on behalf of UKAD, and that it was important that the Athlete provided a sample, as there could be serious consequences if he did not. He explained that it would not take long, and if the Athlete did not comply, it might amount to an Anti-Doping Rule Violation. He had used the exact words "Anti-Doping Rule Violation."

37. The Athlete had then said that he had just been to the toilet and could not go again. The DCO then suggested that they move inside (not least because the Athlete was not wearing trousers) in the hope that he would be able to persuade the Athlete to provide a sample. The Athlete refused that suggestion and had shut the door in his

(the DCO's) face.

38. The DCO described the Athlete's attitude as unhelpful and uncooperative. The Athlete did not want to engage or get involved in conversation.

39. The Athlete did not invite the DCO to come to work with him to collect a sample. If that offer had been made, the DCO would have considered the offer, based on the privacy and location of the Athlete's workplace.

40. The DCO had suggested that the Athlete contact his work to explain that he would be late, and the Athlete had not responded. The Athlete had not offered to meet later to take a test. That would have been impractical in any event, but he would have included this in his report if this had happened.

41. The Athlete had not said that he would have co-operated but for his need to get to work, and had not presented as a man who was willing to co-operate.

42. The DCO had waited outside the house until 07:35 to see if the Athlete would return. He then left the premises and had written up his notes directly after returning home.

43. The DCO stated that it normally takes 20 minutes to take a Sample, but it can take longer if an athlete is unable at the time to provide a Sample, or the Sample is out of range.

44. In response to cross examination by Mr Torrance, the DCO was shown photographs of the Athlete's property that were recorded as DB/4-6.

45. The DCO confirmed where he had parked and that he had not seen either the Athlete's daughter or a taxi. In fairness he agreed that if the taxi had pulled up behind him, he might not have seen it.

46. It was put to the DCO that the Athlete's recollection was that he had been told "you could be in big trouble". In response, the DCO stated that the exact words spoken were that he (the Athlete) could be disciplined for committing an "Anti-Doping Rule Violation" if he did not provide a sample. The Athlete had then said "I don't care. I'm only a coach. I have to get to work or I may be fired".

47. He had used that form of wording twice, firstly at the door and secondly by the Athlete's van after he had come out of the house.

48. The DCO was asked if he could have forgotten to say those words. He rejected that suggestion and indicated that it was the standard practice to say those words, in the event that an athlete declined to be tested.

49. The conversation had been very brief. The DCO had never previously had a door shut in his face in all his years as a DCO. It was extremely rare for an Athlete to decline a test. The Athlete had not wanted to engage and had shown no concern about the process.

50. The DCO was adamant that the Athlete had made no offer for the DCO to accompany him to work. He had accompanied other athletes to different locations before and, had an offer been made, he would have considered it.

51. In response to a question as to why he had not challenged the Athlete's account in his own statement, he stated that it had never happened, so why would he put it in his statement.

EVIDENCE ON BEHALF OF THE ATHLETE

52. The Athlete gave oral evidence before the Tribunal and confirmed the veracity of his written statement dated 16 November 2017.

53. He summarised his athletics career over 42 years and noted that he was an assistant coach and only now allowed by UK Athletics to refer to himself as such. To the extent that he still competed from time to time, this was just for fun and his love of athletics.

54. He had never had formal anti-doping training but was broadly aware of the anti-doping regime, having been told about it by friends.

55. He said that he had not known what an ADRV was before these proceedings. He accepted however that he had known that an athlete had to provide a sample if asked, although he did not know what the procedure was.

56. He said that on 23 August 2017 his alarm had gone off at 06:51. He had used the snooze function and got up at 07:09. He then went the bathroom, used the toilet and brushed his teeth. It was at this stage that he heard the doorbell and a loud banging on the door.

57. He ran down in a t-shirt and pants and opened the door. He said that the DCO had introduced himself and confirmed that he was the Athlete. He had however been unsure who the DCO was with; UKAD or UK Athletics.

58. The DCO had told him he was there to collect a sample. He had responded by saying that he had just used the toilet and that he had to go to work. The DCO had then said it would only take ten minutes. He had sniggered, replying that it would take ten minutes to do the paperwork alone.

59. The Athlete had been clear that he couldn't produce a sample within the next ten minutes, and that he had to go to work, although he didn't explain at the time why he had to go to work.

60. He was taken aback by the DCO and a bit shocked. The DCO only identified himself verbally and did not show a badge. He stated his belief that a tester cannot go into someone's house without a proper form of identification. The DCO had not shown him any identification, but had just introduced himself by saying his name and what he was there to do.

61. The Athlete spoke as to his work regime, a salary cut and the appraisal he was due to have on the morning of 23 August 2017. He had previously been warned about his time keeping and was very concerned not to be late that morning.

62. He confirmed that he had left the property at 07:25 and had therefore been on time for his appraisal.

63. He had (previously) closed the door on the DCO. He had then got dressed and gone outside to his van and had seen the DCO again. He had gone to the side of his van to put his tools and the DCO had come over to him. They had spoken for about three to four minutes.

64. The DCO had been "a bit blunt". The Athlete indicated that he had laughed at the

DCO and told him that “this is not a random test, and I know why you are here”.

65. The DCO had again said it would only take ten minutes and had then said that, if the Athlete did not provide a Sample, he would be in “BIG trouble”. In this regard, the Athlete said that the DCO had elongated the time it had taken to say the word "big".

66. The Athlete had then retorted, “if I don’t get to work I will be in BIG trouble” mimicking the over emphasis on the word “big”. The Athlete had told the DCO that he had a choice of getting into trouble with him, or getting into trouble with work.

67. At no stage had the DCO mentioned an ADRV. The DCO had not been listening to the Athlete and had just kept mentioning 10 minutes (to take the test). The DCO had said it was now or never and had raised his voice, upsetting the Athlete.

68. The Athlete was 100% positive that he made an offer to test either at his workplace or at an alternative time. Likewise, if the DCO had come back at 18:00 that evening he would have provided a Sample.

69. He was not doping and had never doped. He was 53, not an elite Athlete and would have had nothing to gain.

70. He spoke as to a chronic condition with his foot that had resulted from an accident at work some nine years ago. He had undergone a procedure to assist with this two weeks before the DCO’s visit.

71. He maintained that he had disclosed all his medication to the hospital prior to that procedure, and in his view this established that he had not been taking prohibited substances.

72. He confirmed that he knew that he could be tested at any meeting he attended, but did not know he could be tested at home.

73. In cross examination, he said he had thought that he could only be tested at a pre-selected location or nominated whereabouts. If he had been subject to nominated whereabouts, he would not have chosen to be tested just before going to work as the time to be tested, as he liked his sleep too much.

74. He had not known at the time what would happen if he failed to provide a Sample. All he knew was that he thought an athlete was allowed three tests. He did not believe it would be that bad if he missed a test. He did not know that there could be serious consequences, and that he could get a four-year ban.

75. There was a discussion about whether he was a coach or a coaching assistant and the process to gain qualification as a coach.

76. The Athlete had not checked to see if any medication he was taking in relation to his foot was a prohibited substance.

77. The Athlete was clear that if the DCO had rung/knocked on his door before 07:15 as was claimed, he would have heard it.

78. The Athlete stated that he had been told by a friend that, because one of his athletes (that he coached) had tested positive, he was likely to be tested. Someone from UK Athletics had also told him he was likely to be tested. He was though still surprised to see the DCO. He could not recall the DCO showing him ID at any stage. The DCO had used the expression BIG trouble and had been blunt with the Athlete.

79. Asked why he had refused to sign the form, he replied because of his attitude with me. “He was not flexible and did not agree when I asked him to accompany me to work.”

80. The Athlete had made an offer for the DCO to come to his work, and the DCO was lying (in saying he had not).

81. He said he had thought about contacting UKAD by letter after the visit but had not done so. He had though sent a document by email to Mr Torrance within 24 hours detailing what had happened.

82. In response to questions from the Tribunal, the Athlete confirmed that the DCO could have been wearing a badge from a lanyard around his neck, but that he had not showed it to him.

83. In response to specific questions from the Chair, the Athlete confirmed that his

evidence was that he was aware:

i. that he had to provide a Sample if asked;

ii. that there could be consequences for not providing a Sample; and

iii. that he had expected to be targeted for testing, albeit not at home.

84. During the cross examination Mrs Cross had attempted to ask questions relating to the Athlete's partner and her proceedings. The Tribunal ruled these as irrelevant and the detail relating to the issues concerned was excluded by the Tribunal in reaching its determination.

85. In relation to the document referred to at 81 above, this document was available at the hearing venue, and consideration was given by the Athlete and Mr Torrance as to it being adduced in evidence. The Tribunal wished to ensure that there was no unintentional waiver of privilege by the Athlete, and accordingly suggested that the position was considered further in private by the Athlete and Mr Torrance during the lunchtime adjournment.

86. Prior to that adjournment the Tribunal also heard oral evidence from the Athlete's daughter, Ms Christine Burrell, who confirmed the veracity of her written statement dated 16 November 2017.

87. Ms Burrell attested to having woken at 06:00 on 23 August 2017 in order to attend her work as a croupier in Luton. She produced in evidence a document[1] which indicated that her shift on that day had commenced at 07:00.

88. She had called a taxi (after having woken up) to drive her to work which would have arrived at about 06:45. Prior to getting into the taxi she had not at any time heard either the door-bell ring or the door being knocked. Although her room is at the back of the residence, the internal ringer is positioned close to her door and is very loud.

89. She was also clear that, when she left the property, she had not seen anyone waiting outside and no car was parked in front of the property. She was shown

[1] CB/1 bundle page 88

where the DCO had stated he had parked by reference to DB4. She stated that there had been no car there and that in fact the taxi had pulled up directly in front of where the DCO's car was supposed to have been.

90. In response to questions from the Tribunal, she stated that she would not have been staying away from the property that night.

91. At the conclusion of Ms Burrell's evidence, the hearing took a short adjournment for lunch.

92. On the resumption of the hearing after lunch, the Tribunal was informed that the document referred to at paragraph 81 above would not be adduced and that there was no further oral evidence to be called on behalf of the Athlete.

93. The Tribunal also considered a written statement from a Mr Mark Lambert dated 27 November 2017. Mr Lambert is the Athlete's work supervisor. His statement confirmed that the Athlete had been due to have an appraisal on 23 August 2017. It noted that it would have been possible to have held the appraisal before work or after work. Although the statement confirmed that the Athlete had been warned about previous time keeping issues, the statement did not specifically indicate that, had the Athlete been late for the appraisal, he would have been dismissed. The statement further noted that Mr Lambert would not be available at work before 08:00 but did state that in an emergency he could be contacted from 07:30 on his mobile phone.

SUBMISSIONS

94. The Tribunal had the benefit of being able to consider detailed and helpful written submissions from the parties, for which they were grateful.

95. Those submissions were further addressed at the hearing and the Tribunal intends no discourtesy to either advocate for not recording these in full.

96. In summary, UKAD submit that the Athlete should be found to have refused to have submitted to Sample collection. In the alternative, even if the Athlete had failed

rather than refused to have submitted to Sample collection, that failure should be found to have been intentional.

97. In either eventuality therefore, pursuant to ADR Article 10.3.1, the period of Ineligibility to be imposed is four years.

98. On behalf of the Athlete, it was submitted that there had been a failure, not a refusal, to submit to Sample collection, and that such failure had been negligent rather than intentional.

99. In so submitting, Mr Torrance argued that the making by the Athlete of an offer to find alternative arrangements for giving a Sample could not be viewed as a refusal. The Athlete had not been saying he would not give a Sample, simply that he could not give one at that precise time.

100. In this regard, the Athlete had been solely and genuinely concerned about losing his employment if he was late for his appraisal. Reference was made to *UKAD v Six*[2] in this regard, which in Mr Torrance's view should be viewed as analogous to the Athlete's case.

101. He also complained that the inflexibility shown by the DCO in refusing to test at an alternative time was unreasonable, which again should result in the Athlete not being found to have intentionally failed to submit a Sample.

102. The DCO had not warned the Athlete as to the risk of committing an ADRV.

103. The failure having been negligent, the period of Ineligibility should be two years.

104. Mr Torrance further submitted that the Tribunal should find that, in addition to acting negligently, the Athlete had acted with No Significant Fault or Negligence. Pursuant to ADR Article 10.5.2, the Tribunal could therefore further reduce the period of Ineligibility to one that fell within a range of between one and two years. In his submission, the circumstances of the case were such that the Athlete had not acted with Significant Fault or Negligence.

105. Mr Torrance conceded that, if the Tribunal found the Athlete had refused to submit a

[2] NADP decision (SR/NADP/323/2015) dated 26.9.12

Sample, which he urged would be incorrect, the period of Ineligibility to be imposed would be four years.

DECISION ON THE ADRV

106. The Tribunal noted that the burden was initially on UKAD to establish to its comfortable satisfaction that the Athlete had either refused or failed to submit to Sample collection.

107. Comfortable satisfaction is greater than a mere balance of probabilities, but less than proof beyond a reasonable doubt.

108. If that burden is discharged, a prima facie case is established as to an ADRV contrary to ADR Article 2.3.

109. In that event, the burden then transferred to the Athlete to satisfy the Tribunal, on the balance of probabilities, that:

a) he had compelling justification for refusing or failing to submit to the sample collection; or

b) he bore No Significant Fault or Negligence.

110. The Tribunal noted that it was not disputed on behalf of the Athlete that an ADRV had occurred. The Athlete, however, challenged UKAD's contention that he had refused to submit to Sample collection

111. The Tribunal accordingly made formal findings that:

i. the Athlete had been properly notified of the Testing;

ii. such notification was authorised under the ADR;

iii. there were no factors present such as would amount to a compelling justification for not having submitted a Sample.

Refusal or Failure

112. The Tribunal then proceeded to consider whether the conduct of the Athlete amounted to a refusal to submit to Sample collection or a failure to submit to Sample collection, the distinction being of significance in terms of the potential sanction that might then follow. The burden of proof rested on UKAD.

113. In this regard there had been a clear divergence of evidence between the DCO on the one hand and the Athlete and his daughter on the other.

114. In particular the Tribunal had to resolve the following key issues:

1) the DCO's position that he had been outside the property trying to gain access from 06:30. This was disputed by the Athlete;

2) the Athlete's position that he had made an offer to the DCO to be tested at an alternative time. This was disputed by the DCO and UKAD; and

3) the Athlete's position that he had not been warned about the risk of committing an ADRV, but had simply been told he could be in "BIG trouble". This was again disputed by the DCO and UKAD.

115. The Tribunal found the DCO to be a credible and balanced witness. He is plainly an experienced DCO with a lengthy prior career in law enforcement. The Tribunal concluded that the DCO would not have claimed to have been outside the property from 06:30 had he had not in fact been so.

116. The DCO was consistent and clear in rejecting the Athlete's assertion that he had suggested that the test could take place at another time. The Tribunal noted that on the Athlete's own evidence the conversation during which any such offer would have been made lasted only three to four minutes before the Athlete had driven away in his van. The Athlete had gone directly to his van and the DCO had then been required to go to the van to speak to him. The Athlete had not gone to speak to the DCO.

117. The DCO indicated that, in line with procedure, he had warned the Athlete of the risk of committing an ADRV by refusing to submit a Sample using wording

reflective of the warning endorsed on the form the Athlete had been asked to sign but had refused to do so[3].

118. Turning to the Athlete, Mr Torrance had urged the Tribunal to make allowance for his possible confusion and nervousness demonstrated whilst giving evidence. Even making such an allowance, the Tribunal found the Athlete to be a less than credible witness who had at times appeared evasive and on occasion verging towards argumentative.

119. Of note, in evidence the Athlete had made much of the fact that he had not been warned by the DCO of the risk of committing an ADRV, but had simply been told he could be in BIG trouble if he did not provide a Sample. This apparently core element of the Athlete's case was not found in his signed witness statement.

120. Having carefully considered all the evidence, the Tribunal had no hesitation in preferring the evidence tendered by the DCO as opposed to the evidence of the Athlete.

121. The Tribunal also considered the evidential conflict between Ms Burrell and the DCO.

122. It noted that Ms Burrell had given a statement some two months after the incident. On the Athlete's own evidence he had contacted his solicitor within 24 hours of the attempted sample collection and had obtained evidence from his hospital the following day (24 August 2017).

123. Ms Burrell's evidence centred on the fact that she had called for, and got into, her taxi to go to work at the time that the DCO claimed to have been outside her home and that she had not seen him or his car (and had not heard him ringing or knocking on the door).

124. Given the almost immediate efforts to seek legal advice and evidence from the hospital, the Tribunal found it notable that there was no evidence to corroborate Ms Burrell's position in relation to the taxi. Such evidence could have been adduced in the form of a booking record from the taxi company or with direct

[3] This form (which had not been completed /signed by the Athlete) was not in evidence, but the fact of the endorsement referred to by the DCO was not challenged.

evidence from the taxi driver.

125. Whilst there was evidence purporting to show that Ms Burrell would have been at work at 07:00 on the morning of the attempted test, ultimately there was no evidence to corroborate that she had been at work that day. Similarly, there was nothing to independently confirm that she had stayed at the Athlete's home the night before and had been picked up by the taxi.

126. In light of these lacunae, whilst the Tribunal would have been minded to prefer the DCO's evidence above that of Ms Burrell, it concluded that it was not in fact necessary to make a formal finding in this regard.

127. Whether or not the DCO had been at the Athlete's property at 06:30 (and on balance the Tribunal would have found this to have been likely), by 07:15 there was no dispute that the DCO had been at the front door, had requested the Athlete to provide a Sample and that the Athlete had thereafter declined to do so.

128. In light of its determinations in relation to the witnesses as above, and having given careful consideration to all the evidence and submissions, the Tribunal made the following findings:

i. The DCO had arrived at the Athlete's home at 06:30.

ii. First contact with the Athlete had occurred at approximately 07:15.

iii. The Athlete drove away from his property at approximately 07:25 having not submitted a Sample and having refused to complete or sign the form as requested by the DCO.

iv. The Athlete, on his own evidence, had known that a Sample had been requested by the DCO.

v. The Athlete, on his own evidence, had known that there were consequences for declining to provide a Sample.

vi. The Athlete, on his own evidence, had expected to be targeted for testing in light of the anti–doping proceedings against another athlete under his charge, but had not expected this testing to have occurred at his home.

vii. The Athlete had not permitted the DCO to enter his home and had shut the door in his face.

viii. The Athlete had thereafter come out of his home having got dressed and had proceeded directly to his van.

ix. He had left his property within approximately ten minutes of being contacted by the DCO. For the majority of that time he had been in his house and not in the presence of the DCO. He had accordingly limited the possibility for dialogue.

x. The DCO twice warned the Athlete as to the risk of committing an ADRV. The Athlete's suggestion, made in oral evidence that the DCO had simply said he would be in "BIG trouble" was, as noted, not included in his witness statement, and that oral evidence was rejected.

xi. The Athlete made no attempt to contact his work to explore whether he could be late due to the need to submit a Sample.

xii. The Athlete did not make any offer to provide a Sample at an alternative time.

xiii. The Athlete had contacted his legal adviser shortly after the DCO had requested a Sample. Detailed written instructions appeared, on the Athlete's own evidence, to also have been sent to his lawyer that day.[4]

xiv. The Athlete obtained evidence from his hospital on 24 August 2017[5].

xv. The Athlete, on his own evidence, made no attempt to engage with UKAD (or UKA) prior to receiving the Notice of Charge dated 18 October 2017.[6]

129. In light of the findings above, the Tribunal was comfortably satisfied that the Athlete had refused to submit to sample collection and the Athlete's case that the violation should be characterised as a failure was rejected.

[4] As above that document was not adduced before the Tribunal.
[5] Bundle pages 78 and 79.
[6] Bundle pages 1-5.

130. In this regard, the Tribunal noted that the Athlete had expected to be tested, albeit not at home. On any view he had plainly only allowed limited engagement with the DCO before getting into his van and driving away. The Tribunal found that, had the Athlete made any offer of to be tested at an alternative time as he claimed, this would have been recorded by the DCO. The Tribunal further could not readily understand why, if the Athlete had genuinely been willing to submit a Sample later, he had not then made any contact whatsoever with UKAD to endeavour to do so.

131. To the extent that the Athlete sought to persuade the Tribunal that the ADRV should be viewed as a failure because he had tried to offer alternative arrangements for testing and that the making of that offer could not be viewed as a refusal, that argument was rejected. As noted the Tribunal found that no such offer had been made.

132. The Tribunal was comfortably satisfied that the Athlete had acted intentionally as defined by the ADR.

133. The relevant section of the definition of intentional at ADR Article 10.2.3 (as also set out in the Code) provides:

> *As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes 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.*

134. The Athlete's evidence was that he was aware he was liable to be tested, knew there were consequences for not providing a Sample and was expecting to be targeted. The Tribunal accordingly found that the Athlete, at the very least, knew that there was a significant risk that, by leaving his home without providing a Sample, his conduct might constitute or result in an Anti-Doping Rule Violation, and that he then manifestly disregarded that risk.

SANCTION

135. ADR Article 10.3.1 states:

> 10.3.1 *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.*

136. The comment to Article 2.3 as set out in the Word Anti-Doping Agency Code (the Code") provides:

> *[Comment to Article 2.3: For example, it would be an anti-doping rule violation of "evading Sample collection" if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or Testing. A violation of "failing to submit to Sample collection" may be based on either intentional or negligent conduct of the Athlete, while "evading" or "refusing" Sample collection contemplates intentional conduct by the Athlete.]*

137. The prescribed period of Ineligibility is accordingly four years in the case of a refusal to submit to Sample collection.

138. The Tribunal noted that in recent cases[7], tribunals had, notwithstanding a finding of intentional conduct, found that a period of Ineligibility could be reduced by reason of the athlete concerned having not acted with Significant Fault or Negligence.

139. UKAD submit that those authorities are incorrectly decided. On behalf of the Athlete reliance was not placed on the decisions.

140. Whilst the Tribunal could see that the reasoning reached by the tribunals concerned was not without merit, it did not feel it necessary to consider the position further.

141. Even in the decisions concerned, the reasons given make it clear that the principle laid down (if any) is dependent on extraordinary circumstances being present. In the finding of the Tribunal, the facts in this matter were in no way capable of being so regarded.

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[7] *Brothers v FINA (*CAS 2016/A/4631*); ITF v Mak (*SR/Adhocsport/844/2017*)* 7.11.17

142. The parties agreed that, pursuant to ADR Article 10.10.2(a), any period of Ineligibility imposed should commence with effect from 18 October 2017, being the date the Athlete was notified of his provisional suspension.

CONCLUSION

143. The Athlete had violated ADR Article 2.3 in that he had refused to submit to Sample collection.

144. The Tribunal imposed a period of Ineligibility of four years upon the Athlete.

145. The period of Ineligibility is ordered to run from 18 October 2017 (the date that the Athlete was notified that he had been made subject to a Provisional Suspension).

146. The Athlete's competition results between 23 August 2017 and 18 October 2017 are disqualified.

APPEAL

147. Both parties are advised of their right to appeal against this decision as provided for in Article 13 of the ADR and the Procedural Rules.

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