

DECISION OF THE ATHLETICS INTEGRITY UNIT IN THE CASE OF MR SAMMY KITWARA

Introduction

1. In April 2017, World Athletics (formerly the IAAF) established the Athletics Integrity Unit ("**AIU**") whose role is to protect the integrity of the sport of Athletics, including fulfilling World Athletics' obligations as a Signatory to the World Anti-Doping Code. World Athletics has delegated implementation of the World Athletics Anti-Doping Rules ("**ADR**") to the AIU, including but not limited to the following activities in relation to International-Level Athletes: Testing, Investigations, Results Management, Hearings, Sanctions and Appeals.
2. Mr. Sammy Kitwara is a 33-year old Kenyan long-distance runner who is an International-Level Athlete for the purposes of the ADR (the "**Athlete**").
3. This decision is issued pursuant to Article 8.4.7 ADR which provides that:

8.4.7 "[i]n the event that [...] the Athlete or Athlete Support Person admits the Anti-Doping Rule Violation(s) charged and accedes to the Consequences specified by the Integrity Unit, a hearing before the Disciplinary Tribunal shall not be required. In such a case, the Integrity Unit...shall promptly issue a decision confirming...the commission of the Anti-Doping Rule Violation(s) and the imposition of the Specified Consequences (including, if applicable, a justification for why the maximum potential sanction was not imposed)".

The Athlete's commission of an Anti-Doping Rule Violation

4. On 17 March 2019, the Athlete underwent an in-competition doping control at the 'Dong-A Ilbo Seoul Marathon' which was held in Seoul, South Korea (the "**Competition**"). The Athlete provided a urine sample numbered 4375773 (the "**Sample**").
5. On 8 April 2019, the WADA accredited laboratory in Seoul, South Korea, reported an Adverse Analytical Finding (the "**AAF**") for the presence of Terbutaline in the Sample.
6. Terbutaline is a Prohibited Substance under the 2019 WADA Prohibited List (S3. Beta-2 Agonists). It is a Specified Substance and is prohibited at all times. The Athlete did not have a Therapeutic Use Exemption ("**TUE**") permitting the use of Terbutaline.
7. On 9 April 2019, the AIU notified the Athlete of the AAF. The Athlete was requested to provide an explanation for the presence of Terbutaline in the Sample and was also afforded the opportunity to request analysis of the B Sample.
8. On 12 April 2019, the Athlete provided his explanation to the AIU. The Athlete set out that he had sought medical treatment from a clinic in Kenya on 10 March 2019 because at that time he was experiencing symptoms including chest pain and difficulty in breathing. He was diagnosed with pneumonia and immediately treated with injections and oral medication.

9. On 13 April 2019, the Athlete provided a handwritten copy of his medical record of 10 March 2019 concerning his visit to the clinic in Kenya on that date.
10. On 15 April 2019, the Athlete submitted typed versions of his medical documents and, on 24 April 2019, he provided further supporting evidence (including pictures of the medication prescribed to him at the clinic on 10 March 2019) in relation to his explanation for the AAF.
11. According to the prescription, the oral medication prescribed to the Athlete included a medication called Broxol syrup. The Athlete asserted that he took this medication according to the prescription given to him (i.e., in 5 ml doses for a period of five days from 10 March 2019 to 15 March 2019).
12. The supporting evidence provided by the Athlete concerning his medication confirms that the Broxol syrup prescribed to him contains "*Terbutaline Sulfate*" (1.5mg per 5ml) as an active ingredient.

Consequences

13. This is the Athlete's first anti-doping rule violation.
14. Terbutaline is a Prohibited Substance under the WADA 2019 Prohibited List under the category S3. Beta-2 Agonists. It is a Specified Substance prohibited at all times.
15. Article 10.2.1 ADR provides that the period of ineligibility to be imposed for the presence of a prohibited substance in an athlete's sample shall be determined as follows:

**"10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method
[...]"**

10.2.1 *The period of ineligibility shall be four years where:*

- (a) *The Anti-Doping Rule Violation does not involve a Specified Substance, unless the Athlete or other Person establishes that the Anti-Doping Rule Violation was not intentional.*
- (b) *The Anti-Doping Rule Violation involves a Specified Substance and the Integrity Unit establishes that the Anti-Doping Rule Violation was intentional.*

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

10.2.3 *As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes or other Persons who cheat. The term therefore requires that the Athlete or other Person engaged in conduct that he knew constituted an Anti-Doping Rule Violation or knew that there was significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance that is only prohibited In-Competition (a) shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that it was Used Out-*

of-Competition; and (b) shall not be considered "intentional" if the Substance is not a Specified Substance and the Athlete can establish that it was Used Out-of-Competition in a context unrelated to sport performance".

16. Terbutaline is classified as a 'Specified Substance' under the Prohibited List i.e., as a substance that is more likely to have been consumed for a purpose other than enhancement of sport performance. Article 10.2.1 ADR specifies that a violation for such a substance carries a 4-year ban if the AIU is able to prove that the violation was "intentional". Article 10.2.3 ADR explains that, in the context, the term "intentional" is meant to identify those who cheat. The term therefore requires that the athlete engaged in conduct that he/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. The jurisprudence is clear that what counts in this context is what the athlete actually knew, not what he/she should have known.
17. Given the facts set out above, the AIU does not have any basis to contend that the violation was 'intentional' within the meaning of Article 10.2.3 ADR.
18. The mandatory period of ineligibility to be imposed in the Athlete's case is therefore two (2) years, subject to a potential reduction in sanction pursuant to Article 10.4 ADR (No Fault or Negligence) or Article 10.5 ADR (No Significant Fault or Negligence) based upon the Athlete's level of Fault.¹
19. It is a precondition of any mitigation of sanction for an Article 2.1 ADR violation based on No (or No Significant) Fault or Negligence that the Athlete must be able to establish (on the balance of probabilities) how the prohibited substance entered his/her system.
20. As described above, in support of his explanation that the Terbutaline in the Sample came from medication prescribed to him by a doctor, the Athlete provided the AIU with a copy of his medical records for the visit to the clinic on 10 March 2019 as well as a copy of his prescription for Broxol. The AIU considers in the circumstances that the Athlete has provided sufficient evidence to establish that the Terbutaline entered his system through the ingestion of his prescribed Broxol syrup medication.

Mitigation of Sanction

21. To sustain a plea of No Fault or Negligence (Article 10.4 ADR), the Athlete must show that he did not depart from the duty imposed on him under the ADR to use 'utmost caution' to ensure that no prohibited substance entered his body. Alternatively, to sustain a plea of No Significant Fault or Negligence, (Article 10.5 ADR), he must show that his departure from the strict standard of care was not significant (objective analysis) and/or that there are legitimate reasons why he failed to take all the steps required (subjective analysis) such that his overall fault should not be regarded as significant.
22. A finding of No Fault or Negligence eliminates the period of ineligibility completely (Article 10.4 ADR) and a finding of No Significant Fault or Negligence triggers a discretion under Article 10.5.1(a) to impose a sanction between a reprimand and a two-year period of ineligibility, depending on the

¹ **Fault:** Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to 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 behavior. 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 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

degree of Fault borne by the Athlete. The decision of the Court of Arbitration for Sport (“CAS”) in CAS 2013/A/3327 *Marin Cilic v. ITF* provides helpful guidance on where an athlete’s fault lies within that range. An athlete’s ‘objective fault’ is first assessed to determine into which category his fault falls – ‘light’ (0-8 months); ‘normal’ (8-16 months); or ‘considerable’ (16-24 months) – and then his ‘subjective’ fault is assessed to move him up or down within that category (or into a different category).

23. In assessing the ‘objective’ fault, the CAS Panel in *Cilic* stated² that, in ordinary circumstances (including when using in-competition a product that is banned in-competition), athletes should read the label of the product used (or otherwise ascertain the ingredients), (ii) cross-check all the ingredients on the label against the list of prohibited substances, (iii) make an internet search of the product, (iv) ensure that the product is reliably sourced, and (v) consult appropriate experts in such matters and instruct them diligently before consuming the product.
24. Applying the above to the facts of the Athlete’s case:
 - (i) The Athlete did not read the product label on the box, the bottle itself or the leaflet included with the medication. Had he done so, he would have been alerted to the fact that the medication he had been prescribed by his doctor contained Terbutaline Sulfate.
 - (ii) The Athlete did not cross check the ingredients of the medication against the Prohibited List.
 - (iii) The Athlete did not carry out his own research on the product before using it.
 - (iv) The Athlete was on the other hand suffering from a potentially serious medical condition (pneumonia) and he consulted with a qualified doctor before taking any medication for its treatment.
 - (v) The medication taken by the Athlete was reliably sourced on prescription from a qualified doctor within a safe setting.
25. It is therefore clear on the facts that the Athlete cannot establish that he bears No Fault or Negligence and the AIU considers that that his objective level of fault is in the ‘normal’ category by reference to the *Cilic* scale. Taking into consideration the fact that the Athlete is relatively experienced and that there are no other mitigating factors, the AIU considers the Athlete’s subjective fault to be at the ‘high’ end of the ‘normal’ category.
26. In light of the above, the AIU considers that a 16-month period of ineligibility is appropriate in the Athlete’s case and the Athlete has accepted the sanction.
27. Given the Athlete’s timely admission of the violation after being confronted by the AIU, there is discretion under Article 10.10.2(b) ADR to back-date the start of the ban to the date of sample collection. The AIU agrees to exercise its discretion in the Athlete’s case such that the Athlete’s ban should run for 16 months from the date of sample collection on 17 March 2019 i.e., until 17 July 2020.
28. The Athlete’s results on and since 17 March 2019 are disqualified pursuant to Articles 9 and 10.8 ADR, with all resulting consequences, including forfeiture of any titles, medals, points and prize and appearance money.

² at paras 74-75 of the CAS award

Decision

29. On the basis that the Athlete has admitted to committing Anti-Doping Rule Violations under Article 2.1 ADR and Article 2.2 ADR, the AIU confirms by this decision the following consequences for a first Anti-Doping Rule Violation:
 - 29.1. a period of ineligibility of 16 months pursuant to Article 10.2.2 and 10.5.1(a), commencing on 17 March 2019; and
 - 29.2. disqualification of the Athlete's results on and since 17 March 2019 with all resulting consequences, including forfeiture of any titles, medals, points and prize and appearance money pursuant to Article 9 and 10.8 ADR.
30. The Athlete has accepted the above consequences for his Anti-Doping Rule Violations and has expressly waived his right to have those consequences determined by the Disciplinary Tribunal at a hearing.

Publication

31. In accordance with Article 8.4.7(b) ADR, the AIU shall publicly report this decision on the AIU's website.

Rights of Appeal

32. This decision constitutes the final decision of the AIU pursuant to Article 8.4.7 ADR.
33. Further to Article 13.2.4 ADR, WADA and the Anti-Doping Agency of Kenya ('**ADAK**') have a right of appeal against this decision to the Court of Arbitration for Sport in Lausanne, Switzerland, in accordance with the procedure set out at Article 13.7.2 ADR.
34. If an appeal is filed against this decision by WADA or the ADAK, the Athlete will be entitled to exercise his right of cross-appeal in accordance with Article 13.9.3 ADR.

Monaco, 20 December 2019