

**IN THE MATTER OF DISCIPLINARY PROCEEDINGS
BROUGHT BY THE ATHLETICS INTEGRITY UNIT UNDER
THE IAAF ANTI-DOPING RULES**

BETWEEN

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATION (IAAF)
Anti-Doping Organisation

and

SULEIMAN KIPSES SIMOTWO

Respondent

DECISION OF THE DISCIPLINARY TRIBUNAL

Introduction

1. On 22 December 2017 the Athletics Integrity Unit ("AIU") of the International Association of Athletics Federations ("IAAF") charged Mr Simotwo, with committing a violation of the IAAF Anti-Doping Rules ("ADR"). Mr Simotwo, a 38 year old Kenyan athlete who was a world class middle distance runner in his peak years but has more recently specialized in road races, disputes the charge.

Background

2. On 23 April 2017 Mr Simotwo provided an In-Competition urine sample ("the sample") at the IAAF Vienna city marathon in Austria.
3. Analysis of the sample, carried out at the WADA accredited Seibersdorf Laboratory in Austria, established an adverse analytical finding ("AAF") for Norandrosterone, a metabolite of Nandrolone, which is a prohibited substance under the World Anti-Doping Code ("WADC") and the ADR.
4. On 14 July 2017, the AIU wrote to Mr Simotwo requesting, inter alia, his explanation for the presence of Norandrosterone in the sample ("the AIU letter"). Mr Simotwo was provisionally suspended from competition pursuant to Article 7.10.1 of the ADR.
5. On 27 July 2017 Mr Simotwo attended the offices of the Anti-Doping Agency of Kenya ("ADAK") and was handed a copy of the AIU letter. He was informed that he should provide a written explanation for the presence of Norandrosterone in his sample by no later than 3 August 2017.
6. On 4 August 2017, Mr Simotwo provided the following explanation:

"I'm really depressed to hear this news. For the last 15 years I have never cheated in my entire career life. I'm now 37 years almost end of my career. I suspect someone was jealous with my consistent on my career and use advantage of me in attending one of his health facilities either between December and January when at one point slide in my bathroom and taken hospital or I had malaria. To this point I can't find how I got. Remember I have been in doping list from 2005 all tested in and out of competition and no day have I missed or fail to cooperate. I wish in your ruling that you consider me. I only have 3 or 4 years to run."
7. The AIU reviewed Mr Simotwo's explanation for the presence of Norandrosterone in the sample, considered that it was inadequate and therefore that he had a case to

answer and, accordingly, charged him with committing the following Anti-Doping Rule violations ("ADRVs"):

"Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample, pursuant to Article 2.1 ADR, by virtue of the presence of Norandrosterone in a urine Sample provided by you on 23 April 2017 numbered A4102705; ('the Presence Charge') and

Use of a Prohibited Substance, namely Nandrolone, pursuant to Article 2.2 ADR. ('the Use Charge')"

The Notice of Charge enclosed the evidence that the AIU relied upon to support each Charge.

8. Mr Simotwo was at the same time advised that if either Charge was upheld (or he accepted it) the consequences that would be imposed upon him, in the absence of any grounds under the ADR for extinguishing or diminishing the same, were:

a. Disqualification of Results

Pursuant to Article 9 ADR, his individual results obtained in the Vienna City Marathon on 23 April 2017 shall be disqualified with all resulting consequences including the forfeiture of any medals, titles, awards, points and prize and appearance money.

Pursuant to Article 10.8 ADR, any results obtained by him in Competitions that have taken place between 23 April 2017 and the date of his Provisional Suspension shall also be disqualified, including the forfeiture of any medals, titles, awards, points and prize and appearance money.

b. Period of Ineligibility

Since this was his first anti-doping rule violation he would be subject to the mandatory period of ineligibility specified in Article 10.2.1(a) ADR for a first offence, which is a

period of ineligibility of four years, beginning on the date of his Provisional Suspension, I.e., 14 July 2017.

c. Publication

Once this matter had been fully determined it shall be Publicly Disclosed by the AIU in accordance with Article 14.3.2 ADR. At a minimum, this means that information regarding this matter shall be placed on the AIU website (or published through others means) for the longer of one month of the duration of your period of ineligibility.”

(“the Combined Sanctions”)

9. Mr Simotwo was informed if he wished this matter to be heard by the Disciplinary Tribunal he must submit a written request for a hearing to the AIU as soon as possible but in any event by no later than 8 January 2018, specifying how he wished to respond to the Charge (i.e., whether he denied it or whether he admitted it but wished to seek mitigation of the consequences) and must explain in summary form the basis for that response. It was explained to him verbatim (and correctly):

“If this matter proceeds to a hearing, the AIU will have the burden of proving the Charge to the comfortable satisfaction of the Tribunal. You will have the opportunity to challenge the evidence put forward by the AIU and/or to introduce evidence of your own that you believe shows the AIU cannot meet/has not met its burden of proof.

You will also have the opportunity to argue that the Tribunal should reduce the period of ineligibility. To do so, you must be able to establish that the anti-doping rule violation was not intentional (as that term is defined in Article 10.2.3 ADR), in which case the period of Ineligibility shall be reduced to two years.

If you are able to establish that the anti-doping violation was not intentional, then may also seek further reduction of the period of Ineligibility from the Tribunal, if you can demonstrate:

4.9.1 That you bear No Significant Fault or Negligence for the anti-doping rule violation (in which case the period of Ineligibility may be further reduced to between one and two years) Article 10.5.2 ADR; or

4.9.2 that you bear No significant Fault or Negligence for the anti-doping rule violation AND that the detected Prohibited Substance came from a Contaminated Product (then the period of Ineligibility) may be between 0 and 24 months) (Article 10.4 ADR); or

4.9.3 that you bear No Fault or Negligence for the anti-doping rule violation (in these circumstances, the period of Ineligibility shall be eliminated) (Article 10.4 ADR)."

10. On 5 January 2018, Mr Eddie Nyoro, Anti-Doping Agency of Kenya ("ADAK") representative, contacted Mr Simotwo again by telephone. Mr Simotwo informed him that he had deleted the correspondence from the AIU containing the Notice of Charge by mistake. Mr Nyoro therefore provided him with a further copy by e-mail. Mr Simotwo replied immediately, by e-mail directly to the AIU stating in summary form "*As per information I do request to be hard by tribunal*" [sic]. As is apparent on its face, this reply omitted to confirm his response to the Notice of charge or the basis of his request for a hearing, as required by the ADR.
11. By separate e-mail the same day to the AIU, Mr Simotwo wrote "*Got accident and lost one finger and others serious injured. I'm attending medication until 15 January. please allow me to finish then any day I'm ok.*" [sic]
12. On 9 January 2018 Mr Simotwo sent a further email to the AIU in the following terms: "*I hereby request hearing. To my knowledge I deny but I wish to be heard before any matter is determined for any consequences. Please allow me to explain my innocence.*" [sic]
13. On 19 January 2018 Mr Simotwo sent an e-mail to Sport Resolutions (UK) by way of the promised explanation:

"First I'm innocent, I have never doped entirely my career. i have two reasons 1.I know the effects.(2)I have attends seminars and my research and to my best of my knowledge steroid are detected most in urine especially the one mention, and can last up to 18 months. So no way Will I dope and compete within that period. I got accident and taken to hospital when I was unconscious. How it got to my body I don't know. I'm 38 years and I can destroy my name when I'm about to retire. This year I got accident where 19 people lost their lives and I was serious injured to extend my left leg was squeeze that now still not supporting itself and my right finger chopped off. I was out hospital last week. i was with my family and were seriously injure. I do request that any decision please be confidential cause they are still recovering.my pledge. I'm not sure whether I will be back to my career .please consider." [sic]

14. On 13th February 2018 Mr Simotwo provided the AIU with copies of the following documents:
1. The outpatient continuation sheet from Kitale County Hospital dated 21 December 2016 which showed, inter alia, that Mr Simotwo had a brain scan;
 2. A letter from Daniel Kadei (CI) dated and stamped 4 December 2017; and
 3. A letter from Crystal Cottage Hospital and Medical Clinic dated 5 February 2018.

Procedure

15. On 14 February 2018, a Preliminary Meeting was held by telephone in which the participants were Mr Simotwo (who had not availed himself of an offer of Pro Bono Assistance), Mr Tony Jackson and Mr Huw Roberts of the AIU and Ms Kylie Brackenridge, Senior Case Manager of Sport Resolutions (UK).
16. In the course of the Preliminary Meeting Mr Simotwo clarified that he had never sought to rely upon his work-related accident in December 2017 as an explanation for the AAF - that accident occurred after the date of sample collection and could ex hypothesi not have provided such explanation- but only as an explanation for why any hearing should be *pro tem* postponed.

17. Mr Simotwo said, consistently with what he had said earlier in correspondence, that he could only suggest that, during his hospitalization in the Kitale District hospital on the occasion of his earlier domestic accident in December 2016 when he was rendered unconscious by a fall in the bath, something may have happened, which was responsible for the AAF four months or so later.
18. Mr Simotwo helpfully answered impromptu certain questions posed to him by the AIU designed to obtain further details of the earlier accident. In summary it occurred on 21 December 2016. He was having a shower in the bathroom and fell over. He suffered an injury to the back of the head with some minimal bleeding. He was taken to Kitale District Hospital where, after regaining consciousness, he saw a nurse and students. He was discharged after three hours with some medication (unspecified). He informed his police employer of the accident but no other authorities. These answers elaborated but did not, in my view, alter the essential nature of his response to the charge as provided in the previous correspondence fully set out above.
19. The AIU said (as confirmed by email later that day) that it did not challenge this version of events but did not accept that it provided any explanation for the AAF.
20. It was agreed by Mr Simotwo and the AIU, after discussion of the various procedural options, that, pursuant to paragraphs 8.7 and 8.8 of the ADR (i) I could determine the matter alone (ii) I could do so on the basis of the written materials available at that time, with no further exchanges or written submissions required. Given the absence of any material factual dispute or complexity of the governing law, this was, in my view, a sensible agreement which did not disadvantage Mr Simotwo or impair his right to be heard.

Analysis

21. The explanation for the AAF set out in paragraph 17 above was the main explanation proffered by Mr Simotwo. He submitted as well that the occasional treatment he may have received from time to time for malaria (about which, however, he provided no

details whatsoever) could also have provided such explanation ("the ancillary explanation"). I must consider those explanations in the context of the applicable provisions of the ADR whose general effect was accurately set out by the AIU in the Notice of Charge as quoted in paragraph 9 above.

22. The AIU bore the burden of proof that an ADRV by Mr Simotwo had been established to its comfortable satisfaction (ADR 3.1.). The sample analysis, itself unchallenged, carried out by a WADA accredited laboratory satisfied that burden (ADR 3.2). The sanctions in ADR 9 followed automatically. It was for Mr Simotwo to establish on the balance of probabilities, facts which would lead to an extinction or diminution of the sanctions in ADR 10. It is clear, as a result of authoritative CAS jurisprudence, that to prove an absence of intent in all but the rarest cases the athlete must establish the source of the prohibited substance found in his system, (see CAS 2016/A/4919 WADA v WSF and Iqbal paras 65-66). To prove an absence of fault or negligence it is always necessary to do so (ditto paras 81-82).

23. After careful consideration of all the written material available to me, I am unable to find that Mr Simotwo has satisfied the burden which lies upon him. He has failed to identify how the Norandosterone entered his system. It is in any event difficult to see how and why anyone in the hospital, to which he was admitted on an emergency basis, should wish to or would in some unspecified way be able to administer Norandosterone to him; nor of course is there any evidence whatsoever that any such person did do so. Moreover (in the absence of expert evidence) I could be reluctant to find that even had it been administered to him, it could have caused an AAF so many months thereafter. As to the ancillary explanation Mr Simotwo's mere surmise fell far short of supplying adequate evidence. I take due note of Mr Simotwo's hitherto clean record and his protestations of innocence but these are of no avail in the context of the relevant provisions of the WADC-derived ADR which albeit strict, as they may in the eyes of some seem, are designed in the interests of clean athletics.

24. I find for those reasons the Presence Charge proved. Proof of the Use Charge would not affect the sanction and I need not consider it independently.

25. Mr Simotwo must therefore be subject to the Combined Sanctions, namely;

1. his individual results obtained in the Vienna City Marathon on 23 April 2017 shall be disqualified with all resulting consequences including the forfeiture of any medals, titles, awards, points and prize and appearance money.
2. any results obtained by him in Competitions that have taken place between 23 April 2017 and the date of his Provisional Suspension shall also be disqualified, including the forfeiture of any medals, titles, awards, points and prize and appearance money.
3. he will be subject to the mandatory period of ineligibility specified in Article 10.2.1(a) ADR for a first offence, which is a period of ineligibility of four years, beginning on the date of his Provisional Suspension, I.e., 14 July 2017.
4. information regarding this matter shall be placed on the AIU website (or published through others means) for the longer of one month of the duration of his above period of ineligibility.

26. In accordance with IAAF ADR Article 13 the parties may appeal against this decision by lodging a Notice of Appeal according to the applicable time limits.

Michael J Beloff QC

Michael J Beloff QC
Chair IAAF Disciplinary Panel

27 February 2018

London



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