

Issued Decision

UK Anti-Doping and Mark Dry

Disciplinary Proceedings under the Anti-Doping Rules of UK Athletics

This is an Issued Decision made by UK Anti-Doping Limited ('UKAD') pursuant to the Anti-Doping Rules of UK Athletics ('UKA'). It concerns a violation of the UKA Anti-Doping Rules committed by Mr Mark Dry as confirmed by the decision of the National Anti-Doping Appeal Panel dated 25 February 2020.

The 2021 World Anti-Doping Code, the 2021 UKA Anti-Doping Rules ('2021 UKA ADR') and the 2021 UK Anti-Doping Rules ('2021 UK ADR') came into effect on 1 January 2021. Mr Dry initially applied to UKAD on 16 December 2020 for reconsideration of his sanction in light of the 2021 World Anti-Doping Code. This Issued Decision records UKAD's decision on that application (including later representations made on his behalf).

Capitalised terms used in this Decision shall have the meaning given to them in the 2021 UK ADR unless otherwise indicated.

Background to the Anti-Doping Rule Violation

1. World Athletics, formerly the International Association of Athletics Federations ('IAAF'), is the International Federation governing the sport of athletics. UKA is the national governing body for the sport of athletics in the United Kingdom and a National Federation for the purposes of the IAAF Anti-Doping Rules ('IAAF ADR')¹. In accordance with Article 1.6 of the IAAF ADR, UKA adopted the IAAF ADR via Rule 2.1 of the UKA Anti-Doping Rules ('2015 UKA ADR')²:

2.1 UKA hereby adopts the IAAF Anti-Doping Rules (as amended from time to time) as its anti-doping rules subject to UKA's specific amendments and supplemental rules as to management and enforcement set out below. The IAAF Anti-Doping Rules currently in force are set out at <http://www.iaaf.org/about-iaaf/documents/anti-doping>. In the event that the IAAF adopts new Anti-Doping Rules which supersede these Rules, the new IAAF Anti-Doping Rules will prevail...

2. Section 1 of the 2015 UKA ADR also provides:

Background to these Rules

...In addition to the rules which are derived directly from the IAAF Anti-Doping Rules, there are supplementary UKA anti-doping rules as to management and

¹ Effective 6 March 2018. These Rules have since been updated by World Athletics.

² Effective 1 January 2015. These Rules have since been updated by UKA.

enforcement which are applicable to able-bodied athletes. The supplementary rules are set out in Section 3...

International Level and National Level Athletes

... Meanwhile, National Level Athletes are those athletes who are not categorised as International Level Athletes under the IAAF Anti-Doping Rules but who are nevertheless subject to Testing as part of UKAD's anti-doping procedures or who otherwise fall under the jurisdiction of UKA. National Level Athletes may also be part of the National Registered Testing Pool or the Domestic Registered Testing Pool.

3. By way of a decision dated 25 February 2020 ('the Appeal Decision'), the National Anti-Doping Appeal Panel ('the Appeal Panel') found that Mr Dry, a British hammer thrower and Olympian within UKAD's Domestic Testing Pool ('DTP'), had committed an Anti-Doping Rule Violation ('ADRV') pursuant to IAAF ADR Article 2.5 (Tampering or Attempted Tampering with any part of Doping Control) by deliberately providing false information with the intention of evading the operation of the anti-doping rules.
4. The underlying facts of Mr Dry's violation are set out in detail in the Appeal Decision. In summary, Mr Dry was a member of the DTP at the material time and was required to provide whereabouts information to facilitate effective Out-of-Competition Testing. When UKAD attempted to test him on 15 October 2018, he was not at his home address in Shepshed, Leicestershire, as stated in his whereabouts filing. A neighbour informed a Doping Control Officer ('DCO') that he was away in Scotland. UKAD asked Mr Dry, as part of its normal results management process, why he was not at his Shepshed address on 15 October 2018.
5. In response, on 18 October 2018, Mr Dry falsely stated (and on 24 October 2018 he allowed his girlfriend to also falsely state) that he had been out fishing when Doping Control Personnel turned up at his house on 15 October 2018³. He added that he had travelled to Scotland on 16 October 2018 and that his neighbour had '*misinformed the DCO*'⁴. That was not true. In fact, he had gone to Scotland on 12 October 2018 and had failed to update his whereabouts filing to that effect. UKAD was not satisfied with the responses provided by Mr Dry in October 2018, and so sent him an invitation on 3 December 2018 to attend a formal interview with UKAD. Mr Dry then accepted⁵ that he had lied to UKAD to avoid getting a '*strike*' whilst in the DTP, in circumstances where three strikes would lead to him being elevated to the National Registered Testing Pool.

³ Inferring that his whereabouts filing was correct and that he had stayed in Shepshed on 15 October 2018 (but was out fishing at the material time).

⁴ It is this conduct (the provision of false information to UKAD) which constitutes Mr Dry's violation of IAAF ADR Article 2.5.

⁵ By way of a written letter on 11 December 2018 and in interview on 23 January 2019.

6. It has been Mr Dry's position throughout the subsequent ADRV proceedings that followed that his conduct does not amount to an ADRV pursuant to IAAF ADR Article 2.5. Mr Dry argued this position both at first instance and before the Appeal Panel. He maintains that position in his application to UKAD dated 16 December 2020 and later representations in support of that application.
7. Having found that Mr Dry had violated IAAF ADR Article 2.5, the Appeal Panel imposed a period of Ineligibility of four (4) years, which was the fixed period mandated by IAAF ADR Article 10.3.1. Mr Dry's four-year period of Ineligibility was deemed to have commenced on 25 February 2020 and therefore (affording him credit for five months he had spent provisionally suspended) will expire on 24 September 2023.

The 2021 World Anti-Doping Code, 2021 UKA ADR and 2021 UK ADR

8. The 2021 World Anti-Doping Code, the 2021 UKA ADR, and the 2021 UK ADR came into effect on 1 January 2021 (the 'Effective Date').
9. Further to Rule 3 of the 2021 UKA ADR, UKA has adopted the 2021 UK ADR (as amended from time to time) to apply to and govern all anti-doping activities carried out by UKAD in respect of Athletes who fall under UKA's jurisdiction (such as Mr Dry) from 1 January 2021.
10. Article 1.6.2(e) of the 2021 UK ADR, implementing Article 27.3 of the 2021 World Anti-Doping Code, provides:

...Where a final decision finding an Anti-Doping Rule Violation has been rendered prior to the Effective Date, but the Athlete or other Person is still serving the period of Ineligibility as of the Effective Date, the Athlete ... may apply to UKAD before the period of Ineligibility has expired to reduce the period of Ineligibility in light of a lex mitior in these Rules...

11. There is a potential *lex mitior* in the 2021 UK ADR for Article 2.5 violations:
 - a. Article 10.3.1 of the IAAF ADR in force when Mr Dry's case was decided provided as follows:

10.3.1 For an Anti-Doping Rule Violation under Article 2.3 or Article 2.5 that is the Athlete or other Person's first anti-doping offence, the period of Ineligibility imposed 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.

- b. In contrast, Article 10.3.1 of the 2021 UK ADR (tracking Article 10.3.1 of the 2021 World Anti-Doping Code) provides:

10.3.1 For an Anti-Doping Rule Violation under ... Article 2.5 that is the Athlete's ... first doping offence, the period of Ineligibility shall be four (4) years except:

(a) ...

(b) in all other cases, if the Athlete... can establish exceptional circumstances that justify a reduction of the period of Ineligibility, the period of Ineligibility shall be in a range from two (2) years to four (4) years, depending on the Athlete's ... degree of Fault; or

(c) ...

(Emphasis added)

12. Fault is defined within the 2021 UK ADR as follows:

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 Protected Person, 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 a career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.6.1 or 10.6.2.

13. Accordingly, in relation to an Article 2.5 violation, Article 10.3.1(b) of the 2021 UK ADR now provides a potential *lex mitior*, such that where an Athlete can establish exceptional circumstances, a discretion exists to depart from the fixed four-year period of Ineligibility, and to impose instead a period of Ineligibility between two (2) and four (4) years, depending on the Athlete's degree of Fault.

14. UKAD invited Mr Dry to make an application pursuant to Article 27.3 of the 2021 World Anti-Doping Code in April 2020.

Mr Dry's Application for reconsideration of his sanction

15. Mr Dry ultimately filed an application on 16 December 2020. He requested that UKAD apply the new 2021 World Anti-Doping Code Article 10.3.1 to reduce his period of Ineligibility to two years, and he asked that UKAD enter into a case resolution agreement in accordance with Article 10.8.2 of the 2021 UK ADR, so

that start date of that period of Ineligibility could be backdated to 15 October 2018 (the date of UKAD's attempt to test him at home when he was actually in Scotland).

16. UKAD responded to Mr Dry's initial application by seeking clarification as to the exceptional circumstances Mr Dry considered would justify a reduction of the otherwise mandatory four-year period of Ineligibility under 2021 UK ADR Article 10.3.1(b). UKAD also invited Mr Dry to outline any factors he considered relevant to his degree of Fault and sought clarification as to the basis upon which he considered it was open to the parties to enter into a case resolution agreement in this case.
17. Additional representations were provided on Mr Dry's behalf on 31 December 2020 and 3 March 2021⁶. Within these additional representations, Mr Dry argued that a two-year period of Ineligibility should be applied.

UKAD's consideration of Mr Dry's Application

18. Mr Dry's application raises three questions for determination by UKAD:
 - a. Do 'exceptional circumstances' within the meaning of 2021 UK ADR Article 10.3.1(b) exist in this case, triggering a discretion to reduce the period of Ineligibility for Mr Dry's ADRV below four (4) years?
 - b. If yes, based on the degree of Fault that Mr Dry bears for his ADRV, where within the range of two (2) to four (4) years should his period of Ineligibility be fixed?
 - c. Should the start date of Mr Dry's period of Ineligibility be backdated pursuant to 2021 UK ADR Article 10.8.2?
- a. Do 'exceptional circumstances' exist within the meaning of 2021 UK ADR Article 10.3.1(b)?
19. 2021 UK ADR Article 10.3.1(b) requires Mr Dry to establish that exceptional circumstances exist that trigger a discretion to reduce his period of Ineligibility for his Article 2.5 violation below four years. If he is able to establish exceptional circumstances, depending on his degree of Fault, the period of Ineligibility to be applied will be between two (2) and four (4) years.
20. At the outset UKAD acknowledges the Appeal Panel's comments at paragraph 42 of the Appeal Decision about the fixed four-year period of Ineligibility mandated

⁶ UKAD stresses that whilst the contents of Mr Dry's application and subsequent representations are not rehearsed in full in this Issued Decision, they have been considered by UKAD in their entirety. However, UKAD observes that some representations made on Mr Dry's behalf seek to go behind the findings of the Appeal Panel. UKAD issues this decision supplementary to the Appeal Decision and the findings made by the Appeal Panel.

pursuant to then IAAF ADR Article 10.3.1: *'We agree with the [first instance] Tribunal that such a penalty is an extremely harsh punishment on the facts of this case. Mr Dry told a deliberate lie and his behaviour was foolish in the extreme. But we share the unhappiness of the Tribunal in reaching the conclusion that this gave rise to a four year ban'*.

21. UKAD notes that Mr Dry has submitted with his application a letter from the Athletics Integrity Unit dated 14 December 2020, agreeing with that assessment, and therefore supporting Mr Dry's request for reconsideration of his period of Ineligibility pursuant to 2021 UK ADR Article 10.3.1(b).
22. UKAD considers that the Appeal Panel's comment, and the Athletics Integrity Unit's agreement with that comment, constitute exceptional circumstances that trigger a discretion to reduce Mr Dry's period of Ineligibility to between two (2) and four (4) years, depending on his degree of Fault.

b. Based on the degree of Fault that Mr Dry bears for his ADRV, what should his period of Ineligibility be?

23. Whilst the availability of a period of Ineligibility of between two (2) and four (4) years for an Article 2.5 violation is new to the 2021 World Anti-Doping Code, consideration of where to fix a period of Ineligibility within a range, depending on an Athlete's degree of Fault, is not in itself a new concept. The approach to determining a period of Ineligibility within a wide spectrum based on an Athlete's degree of Fault was explored in Cilic v ITF⁷, which introduced three different gradations of Fault⁸: (1) significant degree of or considerable Fault (which the panel considered warranted a ban in the top third of the 0-24 month spectrum, i.e., in the range 16-24 months); (2) a normal degree of Fault (8-16 months); and (3) a light degree of Fault (0-8 months). The panel in Cilic added:

71. *In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capabilities.*

72. *The Panel suggests that the objective element should be foremost in determining into which of the three relevant categories a particular case falls.*

⁷ Cilic v ITF, CAS 2013/A/3327, paragraph 69, see also how gradations may be adapted as in FIS v Johaug and Norwegian Olympic and Paralympic Committee and Confederation of Sports, CAS 2017/A/5015 & 5110, paragraph 169.

⁸ When considering the application of what was then World Anti-Doping Code Article 10.4 (Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specified Circumstances).

73. *The subjective element can then be used to move a particular athlete up or down within that category.*
24. The principles in Cilic assist UKAD in considering Mr Dry's degree of Fault for his Article 2.5 violation, although here the three bands would be (a) 40-48 months for 'considerable' Fault; (b) 32-40 months for 'normal' Fault; and 24-32 months for 'light' Fault.
25. In terms of relevant objective and subjective elements, on the one hand:
- a. Mr Dry was 31 years old at the time of his ADRV and an Athlete who had competed at the highest level in sport. A Rio 2016 Olympian, he twice won bronze medals in the hammer throw at the Commonwealth Games (Gold Coast 2018 and Glasgow 2014). Furthermore, as an Athlete competing in elite sport, he received formal anti-doping education commensurate to his level of competition⁹. Therefore, he was old enough and educated enough to know what his anti-doping responsibilities were, and that lying to UKAD was wrong.
 - b. Although Mr Dry states that he '*panicked*' when he was asked to account for his whereabouts on 15 October 2018, his provision of false information was not a momentary lapse of judgment. He lied specifically and consciously to avoid a '*strike*', so as to maintain a '*clean record*', on 18 October 2018 (when he first responded to UKAD). On 24 October 2018 his girlfriend provided a response to UKAD on his behalf corroborating this lie. He did not come clean until 11 December 2018, after he had been called to an interview by UKAD.
 - c. Mr Dry did not just lie himself; he also allowed his girlfriend to lie to UKAD on his behalf, to corroborate his own lie. UKAD considers the fact that Mr Dry allowed a third party to also lie in order to corroborate false information that he had provided some days earlier, to be a particularly aggravating factor.
26. On the other hand:
- a. While any deliberate provision of false information to an Anti-Doping Organisation such as UKAD, in an effort to prevent the proper operation of the anti-doping rules, is a very serious matter, Mr Dry's lie was only intended to avoid him receiving a whereabouts '*strike*', which would have been his first. Such a '*strike*' would never have led to an ADRV, but only (if followed by two more) to his elevation to the National Registered Testing Pool. This is very different to circumstances where an Athlete deliberately provides false information in an effort to prevent a finding that he has committed an ADRV,

⁹ As detailed in the Witness Statement of Alexandra Newman dated 8 July 2019.

or in an effort to sustain an unwarranted plea in mitigation of sanction and so to avoid the rightful period of Ineligibility from sport.

- b. Once he had been invited by UKAD to attend a formal interview, Mr Dry did admit that he had lied about his whereabouts on 15 October 2018 and expressed regret for his actions. Mr Dry also co-operated with UKAD by later attending a formal interview on 23 January 2019. By coming clean in this way, the consequences of his lie were limited in time and in scope.
27. Having considered Mr Dry's application in full, together with the findings of the Appeal Panel, and each of the factors identified in paragraphs 25 and 26 above, UKAD considers that Mr Dry's Fault lies in the middle of the 'light' category of Fault (24-32 months), corresponding to a period of Ineligibility of 28 months. UKAD therefore reduces Mr Dry's period of Ineligibility from four (4) years to 28 months (i.e. two (2) years and four (4) months in total).
28. Mr Dry has not identified any other *lex mitior* within the 2021 UK ADR that might justify reducing his period of Ineligibility any further, and nor has UKAD identified any.
- c. Should the start date of Mr Dry's period of Ineligibility be backdated pursuant to 2021 UK ADR Article 10.8.2 (Case resolution agreements)?
29. In his application, Mr Dry requested that any reduced period of Ineligibility 'be backdated to the date of the sample collection (15 October 2018) and pursuant to a Case Resolution Agreement'.
30. Article 10.8.2 of the 2021 UK ADR provides (in relevant part):

10.8.2 Case resolutions agreements:

Where the Athlete ... admits an Anti-Doping Rule Violation after being confronted with it by UKAD and agrees to Consequences acceptable to UKAD and WADA, at their sole discretion:

- (a) *... the Athlete... may receive a reduction in the period of Ineligibility based on an assessment by UKAD and WADA of the application of Articles 10.1 through to 10.7 to the asserted Anti-Doping Rule Violation, the seriousness of the violation, the Athlete's ... degree of Fault, and how promptly the Athlete ... admitted the violation; and*
- (b) *the period of Ineligibility may start as early as the date of Sample collection or the date on which another Anti-Doping Rule Violation last occurred.*

...The decision by WADA and UKAD to enter or not to enter in case resolution agreement, and the amount of the reduction to, and the starting date of, the period of Ineligibility agreed, are not

matters that may be determined or reviewed by a hearing panel and are not subject to appeal under Article 13...

(Emphasis added)

31. It is clear that a strict pre-condition to the application of 2021 UK ADR Article 10.8.2 is that an Athlete *'admits an Anti-Doping Rule Violation after being confronted with it by UKAD'*. Such a pre-condition is entirely logical, as without an admission to the ADRV it would not be possible for the case to be resolved by agreement, or to avoid the time and cost involved in a contested procedure, which is the apparent purpose behind the provision.
32. Mr Dry did not admit (and has never admitted) his commission of an ADRV in this matter. Mr Dry contested that his actions amounted to an ADRV contrary to IAAF ADR Article 2.5 before the National Anti-Doping Panel both at first instance and on appeal. Indeed, he has expressly maintained on this application that his conduct did not amount to an ADRV.
33. As a result, 2021 UK ADR Article 10.8.2 cannot apply to Mr Dry's case. UKAD cannot therefore grant Mr Dry's request to backdate the start date of his period of Ineligibility pursuant to 2021 UK ADR Article 10.8.2(b). Mr Dry has not identified any other basis to backdate that start date, and nor is UKAD able to identify any other basis.
34. As noted above, Mr Dry's period of Ineligibility commenced on 25 February 2020 and therefore (affording him credit for five months he had spent provisionally suspended) would have expired on 24 September 2023. Because his period of Ineligibility has been reduced by 20 months (from 48 months to 28 months), his period of Ineligibility will now expire on 24 January 2022.

Summary

35. For the reasons given above, UKAD issues the following decision:
 - a. In accordance with Articles 1.6.2(e) and 10.3.1(b) of the 2021 UK ADR, Mr Dry's period of Ineligibility is reduced from four (4) years to 28 months; and
 - b. Given the time Mr Dry has already served of his period of Ineligibility, Mr Dry's 28-month period of Ineligibility will expire on 24 January 2022.
36. Mr Dry, UKA, World Athletics, and WADA have a right to appeal against this decision in accordance with 2021 UK ADR Article 13.4.

37. This Issued Decision will be publicly announced via UKAD's website in accordance with 2021 UK ADR Articles 8.5.3, 13.8 and 14.1.3.

7 May 2021