TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

CAS 2024/A/10766 Sport Integrity Commission v. Turagalailai

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Ms Elizabeth Brimer KC, Melbourne, Australia
Ad hoc Clerk: Ms Amy Silver, Attorney-at-law, Melbourne, Australia

in the arbitration between

Sport Integrity Commission, formerly Drug Free Sport New Zealand, Auckland, New Zealand

Represented by Mr Adam McDonald and Kate Hursthouse, Counsel, Auckland, New Zealand

- Appellant -

and

Inoke Turagalailai, Suva, Fiji

Represented by Ms Sarah Wroe, Barrister, Auckland, New Zealand

- Respondent -

I. THE PARTIES

1. The Sport Integrity Commission (formerly Drug Free Sport New Zealand) is New Zealand's national anti-doping organisation ("the "Appellant").[1]

2. Mr Inoke Turagalailai ("the "Respondent") is a Fijian football player.

II. INTRODUCTION

3. The Appellant filed an appeal in the Court of Arbitration for Sport ("CAS") against the decision, by majority, of the Sports Tribunal of New Zealand ("the Tribunal") of 3 July 2024 to impose a sanction of eight (8) months of ineligibility on the Respondent. The appeal was filed under Rule 13.2.1 of the Sports Anti-Doping Rules 2023 ("SADR").

III. BACKGROUND FACTS

4. Below is a summary of the relevant facts and allegations based on the parties' written and oral submissions and evidence. Additional facts and allegations found in the parties' written submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, she refers in its Award only to the submissions and evidence she considers necessary to explain her reasoning.

5. The Respondent is a Fijian football player who was playing for the Fijian Men's National Under 23 football team in the Oceania Football Confederation Men's Olympic Qualifying Tournament in New Zealand in September 2023.

6. As the Respondent was competing at an international level in New Zealand, he was bound to the SADR by Rule 1.1.5.4 of the SADR.

7. The Respondent was tested in competition by the Appellant on 9 September 2023. The Respondent declared on his Doping Control Form that he had taken or used energy gel, magnesium tablets and whey protein.

8. The Respondent's A Sample test showed the presence of Carboxy-THC metabolite: 11-nor-delta-9-tetrahydrocannabinol carboxylic acid (commonly known as cannabis). Under the 2023 Prohibited List, cannabis is a specified substance which is prohibited in-competition. It is classed as a substance of abuse.

[1] The first instance Anti-Doping Rule Violations ("ADVR") application was brought by Drug Free Sport New Zealand ("DFSNZ"), New Zealand's previous national anti-doping organisation. DFSNZ was disestablished on 30 June 2024 and its functions subsumed by the Appellant, which commenced operations on 1 July 2024.

9. The Respondent confirmed via his counsel that he did not wish to have his B Sample tested and accepted a provisional suspension which was ordered by the Tribunal on 1 March 2024.

10. On 15 March 2024, the Appellant brought proceedings alleging breaches of Rule 2.1 of the SADR (Presence of a Prohibited Substance or its Metabolites or Markers) and Rule 2.2 of the SADR (Use or Attempted Use).

11. The Respondent admitted the anti-doping rule violations (the ADRVs) and admitted that he took cannabis on the morning of match day, meaning that he used the substance 'in-competition'.

12. Having initially sought to rely on the no significant fault or negligence defence under Rule 10.6 of the SADR, the Respondent withdrew his reliance on the no significant fault or negligence defence. He maintained however, that he did not intentionally take cannabis to enhance his performance.

13. The hearing before the Tribunal took place on 20 June 2024. DFSNZ accepted and the Tribunal found that the Respondent did not take the substance intentionally to enhance his performance pursuant to Rule 10.2.4.2 and noted that the Respondent's sanction would be that which is set out in Rule 10.2.2.

14. Rule 10.2 of the SADR is as follows:

> *"10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substances or Prohibited Methods*
>
> *The period of ineligibility imposed for a violation of Rules 2.1, 2.2 or 2.6 shall be as follows, subject to potential elimination, reduction or suspension pursuant to Rules 10.5, 10.6 or 10.7:*
>
> *10.2.1 The period of Ineligibility, subject to Rule 10.2.4 shall be four years where:*
>
> > *10.2.1.1 The anti-doping rule violation does not involve a Specified Substance or a Specified Method, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.*
> >
> > *10.2.1.2 The anti-doping rule violation involves a Specified Substance or a Specified Method and DFSNZ can establish that the anti-doping rule violation was intentional."*
>
> ***10.2.2 If Rule 10.2.1 does not apply, subject to Rule 10.2.4.1, the period of Ineligibility shall be two years.***
>
> *10.2.3 As used in Rule 10.2 the term "intention" is meant to identify those Athletes or other Persons who engage in conduct which they 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. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intention" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

"10.2.4 Notwithstanding any other provision in Rule 10.2, where the anti-doping rule violation involves a Substance of Abuse:

10.2.4.1 If the Athlete can establish that any ingestion or Use occurred Out-of-Competition and was unrelated to sport performance, then the period of Ineligibility shall be three months Ineligibility. In addition, the period of Ineligibility calculated under this Rule 10.2.4.1 may be reduced to one month if the Athlete or other Person satisfactorily completes a Substance of Abuse treatment program approved by DFSNZ. The period of Ineligibility established in this Rule 10.2.4.1 is not subject to any reduction based on any provision in Rule 10.6.

10.2.4.2 If the ingestion, Use or Possession occurred In-Competition, and the Athlete can establish that the context of the ingestion, Use or Possession was unrelated to sport performance, then the ingestion, Use or Possession shall not be considered intentional for purposes of Rule 10.2.1 and shall not provide a basis for a finding of Aggravating Circumstances under Rule 10.4." *(emphasis added and footnotes omitted)*

15. The Respondent was heard on the level of sanction. He contended that the application of the SADR led to a disproportionate sanction being imposed, which sanction should be reduced in the context of the principle of proportionality and equal treatment. He was also heard on significant delay and the backdating of any period of ineligibility.

16. The Tribunal issued a split decision on 3 July 2024. The majority Tribunal concluded that a two-year period of ineligibility would be unjust and disproportionate, and that a just and proportionate sanction would be an eight-month period of ineligibility. In their decision, the Tribunal found that:

> *"Despite the wording of the Code, the majority considers that it can have regard to proportionality. Under Swiss law anti-doping rules are subject to the principles of proportionality and CAS jurisprudence would indicate that there is a general discretion to consider proportionality and, where the circumstances of a particular case raise the issue of proportionality, the majority has a duty to ensure that any sanction it imposes is just and proportionate.*[2]
>
> *The majority considers that a just and proportionate sanction would be an eight-month period of ineligibility… This acknowledges Mr Turagalailai's breach of the rules, the potential risk of harm to his own health by smoking a cannabis cigarette on the morning of a game and the extent to which in so doing he might have violated the spirit of sport. It also acknowledges… the difference in sanctions for in-competition use of substances of abuse compared to out-of-competition use and the fact that substances of abuse are all treated the same."*[3]

17. The Tribunal concluded that it would be reasonable to backdate any period of ineligibility to the date of the beginning of the Christmas shutdown period, 14 December 2023.

18. The Tribunal ordered, by majority that:

> *"a period of ineligibility from participation in any capacity in a competition or activity organised, sanctioned, or authorised by any sporting organisation that is a signatory to the SADR, of eight months, is imposed on Mr Turagalailai under Rule 10.2, and by unanimous decision it is backdated to commence as from 14 December 2023. That means he is ineligible to participate in competitive sports until 14 August 2024"*

("the majority Tribunal decision").

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. On 24 July 2024, the Appellant filed a Statement of Appeal in accordance with Article R48 of the Code of Sports-related Arbitration (2023 Edition) ("the CAS Code"). In its Statement of Appeal, the Appellant requested that the matter be heard by a Sole Arbitrator. On 5 August 2024, the Respondent consented to the matter being heard by a Sole Arbitrator.

20. On 5 August 2024, the Appellant filed an Appeal Brief in accordance with Article R51 of the CAS Code.

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[2] *Drug Free Sport New Zealand v Turagalailai* ST01/24, 3 July 2024 at [63].
[3] *Drug Free Sport New Zealand v Turagalailai* ST01/24, 3 July 2024 at [65] – [66].

21. On 26 August 2024, the Respondent filed its Response to the Appellant's Statement of Appeal in reply (the "Response"). No issue was taken with the late filing of the Response under R55 of the CAS Code.

22. On 17 September 2024, with the consent of the parties, pursuant to Article R54 of the CAS Code, the Deputy Division President of the CAS Appeals Arbitration Division appointed Ms Elizabeth Brimer KC as Sole Arbitrator.

23. On 25 September 2024, the Registry wrote to the parties to confirm whether a Case Management Conference was to be requested in these proceedings, pursuant to Article R56 of the CAS Code.

24. On 26 September 2024, the Registry wrote to the parties to offer the Appellant the opportunity to respond by way of written submission to section 3 of the Response which stated:

> *"Alternatively, if the arbitrator upholds the appeal and determines that the period of ineligibility should be two years, the respondent says that the commencement date should be the date his sample was taken (9 September 2023) in view of the substantial delays in the doping control process."*

25. On 27 September 2024, the parties responded agreeing that a Case Management Conference was not required and that the Appellant file reply submissions as to backdating.

26. On 17 October 2024, the Registry wrote to the parties seeking confirmation of the agreed law applicable to the merits.

27. On 18 October 2024 the parties confirmed that the law applicable to the merits is New Zealand Law.

28. On 24 October 2024, by agreement of the parties, the Appellant filed reply submissions as to backdating in relation to the Response.

29. On 1 November 2024, the Registry sent the Order of Procedure to the parties for agreement and signing.

30. On 1 November 2024, the parties signed and returned the Order of Procedure to the Registry.

31. On 4 November 2024, the Appellant, on behalf of the Parties, filed a common bundle of authorities in anticipation of the hearing.

32. At 9:00am (AEDT) on 8 November 2024, the hearing of the appeal commenced at the Registry's Melbourne office. The Sole Arbitrator was assisted by Ms Amy Silver, Solicitor in Melbourne, Australia, as ad hoc clerk. In addition, the following persons attended the hearing (as present on the video conference):

For the Appellant

i. Mr Hayden Tapper (Appellant);

ii. Mr Paul O'Neil (Appellant);

iii. Ms Sadie Verity (Appellant);

iv. Mr Adam McDonald (Counsel); and

v. Ms Kate Hursthouse (Counsel).

For the Respondent

i. Mr Inoke Turagalailai (Respondent); and

ii. Ms Sarah Wroe (Counsel).

33. The hearing proceeded by way of submissions. No witnesses were called to give oral evidence. Following the hearing, the representatives for each of the parties confirmed that their respective rights to be heard had been fully respected by the Sole Arbitrator and that they had no issue with respect to the way the CAS procedure or hearing was conducted.

V. OUTLINE OF THE APPEAL

34. The grounds of appeal are that the majority of the Tribunal erred in finding that:

i. *"when applying the SADR, the Tribunal has a general discretion to adjust sanctions prescribed by the SADR on the basis of principles of proportionality; and*

ii. *on the basis of the purported discretion, a two-year period of ineligibility, as prescribed under the SADR, was not applicable in this case because it considered that sanction to be disproportionate and unjust on its assessment of Mr Turagalailai's violation of the SADR."*

35. The Appellant sought orders allowing the appeal and:

i. *"declaring that there is no general discretion for the Tribunal to adjust sanctions prescribed under the SADR on the basis of principles of proportionality (the Declaration);*

ii. *imposing a sanction on Mr Turagalailai in accordance with the SADR; and*

iii. *any other orders the panel or sole arbitrator, as the case may be, sees fit."*

36. During the Hearing, the Appellant accepted that the appeal is a hearing *de novo*. Accordingly, it did not persist with or press the making of Order 1, the Declaration.

37. The Respondent's position as stated in his Answer is that:

> *"the period of ineligibility of 8 months imposed by the Sports Tribunal of New Zealand was appropriate as a sanction of two years would be unjust and disproportionate. Sport Integrity Commission's appeal should be dismissed."*

38. The Respondent seeks orders:

i. *"To dismiss the appeal filed by the Commission in its entirety;*

ii. *To order the Commission to pay any and all costs of these appeal arbitration proceedings; and*

iii. *To dismiss any other relief sought by the Commission.*

iv. *Alternatively, if the arbitrator upholds the appeal and determines that the period of ineligibility should be two years, the respondent says that the commencement date should be the date his sample was taken (9 September 2023) in view of the substantial delays in the doping control process."*

VI. SUBMISSIONS OF THE PARTIES

39. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this Award, the Sole Arbitrator has accounted for and carefully considered all of the submissions and evidence, including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. Summary of the Appellant's Submissions

40. The Appellant's Counsel, Mr McDonald and Ms Hursthouse, submitted that the prescribed sanction under Rule 10.2.2 of the SADR of two years ineligibility should be imposed as it is open to the Sole Arbitrator to find that the Respondent's Anti-Doping Rule Violations ("ADRV") were unrelated to sport performance.

41. As the Respondent admitted to ingesting cannabis in-competition, he is not eligible for a reduced period of ineligibility of three months or one month upon satisfactory completion of a substance of abuse treatment program for out-of-competition ingestion under Rule 10.2.4.1 of the SADR.

42. Rule 10.2 of the SADR codifies the bases on which the prescribed sanctions for a breach of SADR 2.1 or 2.2 can be eliminated, reduced or suspended. They are set out under rule 10.5 (no fault or negligence), rule 10.6 (no significant fault or negligence), or rule 10.7 (substantial assistance/admissions).

43. The Respondent is not eligible for any of the reductions available to athletes according to their level of fault. He used cannabis in-competition, ignoring the anti-doping education he had received which warned him that he might be tested and that he should not use drugs.

Proportionality

44. The Appellant submitted that proportionality is inherent in the sanctioning regime in the World Anti-Doping Code (2021) ("WADC") and the SADR reflects the WADC. The WADC specifically states that it "*has been drafted giving consideration to the principles of proportionality and human rights.*"[4] To the extent that the WADC and thus the SADR prescribe consequences for ADRV's they are deemed to be proportionate.

45. It is well accepted in CAS jurisprudence that proportionality is inherent in the sanction framework of the WADC. This is illustrated by the availability of the no fault and no significant fault defences. A fault-based sanction regime is the central basis on which proportionality is able to be exercised by arbitrators.

46. The Appellant referred to *Nabi v Estonian Centre for Integrity in Sports* CAS 2021/A/8125 ("Nabi"), in which the Panel found that:

> "*…even an 'uncomfortable feeling' regarding a sanction mandated in the rules, had there been one, would not have been sufficient to involve the principle of proportionality where the applicable rules include a sanctioning regime which is proportionate and contains a clear and considered mechanism which allows for a reduction of the applicable sanction*."[5]

47. In CAS 2018/A/5546 *Guerrero v FIFA*, the Panel determined that even where the application of the WADC may be perceived to bear harshly on an individual, arbitrators ought not to depart from the WADC, because to do so would be destructive of it, and legal certainty is critically important in this context.

48. If there is any ability at all for a panel to independently consider the principles of proportionality in imposing a sanction, it could only be in the most exceptional of circumstances. This could conceivably be where the SADR does not provide an answer, or the WADC stipulates an outcome that is so insupportable or untenable that it cannot be lawful. The present case falls a long way short of such a situation.

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[4] WADC 2021, p.9.
[5] *Nabi* at [193].

49. The Tribunal fell into error when it determined that when applying the SADR it has a "general discretion" to adjust sanctions prescribed by the SADR if it considered the two year sanction to be disproportionate. This is because:

    i. The WADC itself states that all of its provisions are mandatory in substance and expressly sets out where discretions exist. The SADR are the anti-doping rules that give effect to the WADC in New Zealand.

    ii. A general discretion is antithetical to the intent of the WADC. To adjust prescribed sanctions on the basis of proportionality runs counter to the application of the WADC as it is designed to operate, namely in a global and harmonised way, across more than 200 jurisdictions and independent of the particular criminal legal or societal conditions of any given jurisdiction. What is a socially, morally or legally proportionate response to the use of cannabis will be different in, for example, Singapore or Saudi Arabia than it is in New Zealand.

    iii. The Tribunal's apparent reliance on an obiter, somewhat "throw away" comment of the Panel in *RUSADA v Valieva* CAS 2023/A/9451 ("Valieva") in determining that there is a general discretion to amend sanctions on proportionality grounds does not bear scrutiny. The underlying authority cited in *Valieva*, *Puerta v ITF* CAS 2006/A/1025 ("Puerta") confirms the contrary. In *Puerta* the Panel found that the existence of a general discretion would be:

        > *"… inimical to the WADC, which seeks to achieve consistency and certainty. The panel does not believe that such a discretion exists and would not welcome its existence."*[6]

    iv. To the extent that the Respondent relies on the reference of the panel in *I v FIA*[7] to "*exercising its discretion*" in imposing a period of ineligibility of eighteen months (instead of the prescribed period of two years), it is an aberration and is probably wrongly decided when the cases following are considered.

50. The Appellant acknowledged, however, that the appeal is *de novo*.[8] Accordingly, the Appellant did not persist with or press the making of the Declaration.

Sanction

51. The Appellant submitted that the introduction of the Substance of Abuse provisions into the WADC was a major change and was very carefully considered. The WADC review was a two-year process with multiple rounds of stakeholder consultations on three different exposure drafts ("the WADC review").

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[6] *Puerta* at [94].
[7] CAS 2010/A/2268.
[8] The comment to Rule 13.1.2 of the SADR is as follows: "*CAS proceedings are de novo. Prior proceedings do not limit the evidence or carry weight in the hearing before CAS.*"

52. Sanctioning differences connected to Substances of Abuse, turning on whether use occurred out-of-competition and whether use was related to sporting performance and fault, are rational and consistent with the overarching policy objectives of the WADC and the SADR. The sanction regime is a graduated and proportionate response consistent with the policy objectives of the WADC:

    i. the lower sanction regime for out-of-competition use reflects an athlete wellbeing approach to recreational drug use occurring out-of-competition and that is unconnected to sporting performance; and

    ii. there are good reasons for the higher starting point for sanctions for in-competition use of substances of abuse including the protection of athlete health and safety and the right of other athletes to compete in a safe and fair environment.

53. The question of cannabis in-competition remaining on the prohibited list was examined by the executive committee of WADA in 2022. The working group was composed of external and internal experts in pharmacology, forensic toxicology, drugs of abuse, pharmacies and sports medicine, and conducted a full *de novo* review of the status of THC in sport.

54. The rationale for wanting firm deterrents of the use of cannabis in-competition is found in the conclusions. In summary:

    i. there is compelling medical evidence that the use of THC is a risk for health, mainly neurological, and has a significant impact on the health of young individuals a cohort which is over-represented in athletes;

    ii. the evidence is not really conclusive either way on whether THC is performance enhancing or not; and

    iii. looking at the so-called spirit of sport value, respect for self and other participants includes the safety of fellow competitors and because of that reason the use of THC in competition violates the spirit of sport.

55. In WADA's own view, the welfare and safety of other participants may be compromised by impaired judgment associated with the presence of cannabis in an athlete in-competition. WADA has described protection of athletes' "right to compete in a safe and fair environment" as its "raison d'etre".[9]

56. The majority Tribunal's view that the sanctioning regime under the SADR created a "disparity" between in-competition and out-of-competition use, with the implication that the difference led to disproportionate sanctioning outcomes, does not properly consider underlying policy for differing sanctions for in-competition and out-of-

[9] WADA Athletes & Support Personnel <hhtps://www/wada-ama.org/en/athletes-support-personnel>

competition use. The majority Tribunal also overlooked the element of athlete “fault" which has always been central to the sanction regime

B. Summary of the Respondent’s Submissions

57. The Respondent's Counsel, Ms Wroe, accepted on behalf of Mr Turagalailai that the effect of the SADR for use of cannabis in-competition that is unrelated to sport performance is a two-year sanction, subject to reductions under rules 10.5, 10.6 and 10.7. However, she submitted that the applicable sanction of two years is unjust and disproportionate. The period of ineligibility of eight months imposed by the Tribunal is appropriate.

Proportionality

58. The Respondent submitted that the WADC creates contractual arrangements between sporting organisations and their members. They are intended to create proportionate responses when athletes commit anti-doping rule violations. If they did not, they would be illegal. Sitting behind those contractual relations is the general law and part of the general law that applies in anti-doping law and sports law is the principle of proportionality.

59. A sanction that is evidently and grossly disproportionate to the proven rule violation can be considered a violation of fundamental justice and fairness and can be reduced to ensure that it complies with the law of Switzerland which governs the anti-doping regime. Proportionality is not “inherent” in the WADC in the manner described by the Appellant which would make the drafters of the WADC the final arbiters of proportionality rather than (ultimately) the courts.

60. The Respondent submitted that when read in context of the decision as a whole, the majority Tribunal’s reference to a “general discretion” is an acknowledgement of the issue of proportionality, that it will arise in rare cases and that it is necessary to have something more than an “uncomfortable feeling” about the effects of a sanction for it to offend the principles of proportionality.

61. Whilst Ms Wroe said she would not have used the term “general discretion”, nor did she consider she had submitted to the Tribunal that there was one, whether the use of the words “general discretion” by the Tribunal is appropriate is perhaps neither here nor there for a *de novo* consideration of this case.

62. It is a nuanced point in relation to whether there needs to be a “gap” in the relevant rules before a sanction can be reduced or what is meant by a gap in any particular case:

    i. In *Puerta*, the application of the rules led to a result. However, the CAS determined that the rules did not properly provide for the situation in hand as it would have led to a disproportionate response.

ii. In *I v FAI*, the circumstances led to the need to examine the proportionality of the sanction and adjust it to ensure that it remained proportionate.

63. The Respondent accepted that the scope for arguing that a sanction should not apply is limited. The ability to get in behind the rules is limited, will only come up in rare cases and you need more than an uncomfortable feeling about the rules. In most cases the rules produce a proportionate result.

Sanction

64. A sanction of two years would be grossly disproportionate in the circumstances of this case. The relevant circumstances are:

i. the unexplained changes to the WADC making the sanction for cannabis users harsher than it used to be and disproportionately harsher for use in-competition, without any clear connection to policy objectives; and

ii. the particularly harsh effect on the Respondent given his personal situation and living conditions.

65. The new approach to substances of abuse should be considered against the context of the developments in the WADC including the increase to the decision limit for cannabis in 2013 and the 2015 increase in the maximum sanction to four-years, but with the ability to adjust the sanction depending on the degree of fault based on no significant fault or negligence if the use of cannabis was unrelated to sport performance.

66. The new changes were made against the background of a debate as to whether cannabis should continue to be on the Prohibited List. At the conclusion of the WADC review, it was determined that cannabis ought to remain on the Prohibited List as it satisfies two of the three inclusion criteria. That is, it represents an actual or potential risk to the health of the athlete and it violates the spirit of sport as defined in the WADC. It was not included on the Prohibited List under the first criteria; that it enhances or has the potential to enhance sport performance.

67. The Respondent submitted that it is the presence of cannabis in the system that meets those criteria, not the timing as to when the cannabis was taken. Any rationale for prohibiting cannabis in competition comes from the harm that may occur given the presence of the substance at particular levels in competition rather than the timing of when it was taken. An athlete may take a substance out-of-competition just before midnight and have the same levels of THC in their system than an athlete who used the substance just after midnight. As such, the rationale or policy reason for distinguishing between sanctions for in-competition and out of competition users is not supported.

68. Further, there is no reason to impose a period of ineligibility on an athlete who used the substance in-competition so significantly longer than an athlete who used the substance out-of-competition. The result of the changes is a much stricter regime for athletes who

use in-competition than existed before. The different approach is manifestly disproportionate and without any explanation or clear connection to policy objectives.

69. The effects of the 2021 changes suggest something has gone wrong in the introduction of the substance of abuse provisions which was not anticipated or intended. Alternatively, the approach taken by WADA is manifestly disproportionate, offends the principles of proportionality and equal treatment and it ought not to be applied in the circumstances. For example:

    i. If an athlete admits use of cannabis after midnight on the day of competition they face stricter sanctions than would previously have applied before the introduction of the substance of abuse provisions. This is despite the focus of the commentary being on the need to offer treatment for athletes who use substances of abuse.

    ii. More lenient sanctions were introduced and available to athletes who use a substance of abuse out-of-competition. Why the same opportunity for sanction reduction is not offered to athletes who use in-competition is not explained. The need for rehabilitation is the same.

    iii. The changes to the "no significant fault" provisions together with substance of abuse provisions create obvious disparities that are not explicable by any of the purposes of the WADC. As the only real change in the goals sought to be achieved by the introduction of the substance of abuse provisions is the focus on the need for rehabilitation and treatment, that runs contrary to having longer sanctions for people who would previously have been able to rely on the no significant fault definition if the use was unconnected to sport performance.

    iv. Cannabis is treated in the same way as other Substances of Abuse such as Class A drugs (e.g. cocaine) which are accepted to have a performance enhancing aspect and which use would be more serious in relation to health, character and the "spirit of sport".

70. Consequently, in respect of the Respondent:

    i. he does not have access to the same possibility of a reduced sanction if he undergoes treatment as an athlete who used cannabis out-of-competition. This is even though his behaviour has not had a greater effect on sporting performance, is no more risky in terms of potential impact on health and is open to the same degree of criticism in relation to the spirit of sport;

    ii. had the previous version of the WADC applied to the Respondent's circumstances he would have been sanctioned on the basis of having no significant fault or negligence because he could show that his use was not related to sporting performance. That would have enabled a panel to look at the degree of fault and to impose a proportionate sanction. Such a difference is not justified by policies of retribution or education and may hinder his rehabilitation; and

iii. the Respondent's sanction for use of cannabis ought to be treated differently to drugs such as cocaine but that is not available under the WADC or the SADR.

71. The aims of sanctions in relation to substances of abuse are rehabilitation, retribution and education. The sanction here exceeds that which is reasonably required for the justifiable aims of rehabilitation, retribution and education.

72. Past cases in New Zealand in which an athlete had cannabis in their system during competition, for a first violation generally received sanctions of four to nine months whether or not they had received education. These sanctions were sufficient to meet the objectives of the WADC and considered proportionate.

73. The Respondent is a young man that does not work but received some payments when he played football. He has suffered social isolation, loss of income and an effect on his sense of wellbeing. Although he received anti-doping education there is no evidence that he was told what the sanction would be if he took cannabis in-competition. The goals of retribution and education have been achieved after a short sanction and would have continued to be felt throughout the rest of the sanction which expired in mid-August 2024. Given the Respondent's personal circumstances and living conditions, the consequences of a sanction of two years is particularly harsh and disproportionate

VII. JURISDICTION

74. This is an appeal from the majority Tribunal decision.

75. The appeal is brought pursuant to Rule 13.2.1 of the SADR. Under Rule 13.2.1 of the SADR:

> *"In cases arising from participation in an International Event or in cases involving International -Level Athletes, the decision may be appealed exclusively to CAS."*

76. The appeal is conducted pursuant to the CAS Code.

77. Article R47 of the CAS Code provides as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body."*

78. The parties agree that the CAS has jurisdiction This was confirmed by the parties in the Order of Procedure signed by them on 1 November 2024 and at the hearing on 8 November 2024.

79. Therefore, CAS has jurisdiction to decide this matter.

VIII. ADMISSIBILITY

80. Article R49 of the CAS Code provides in relevant part as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against."*

81. There is no issue that the appeal was lodged by the Appellants in time. As such the appeal is admissible on that basis and there is no other objection to the admissibility of the appeal.

IX. SCOPE OF THE SOLE ARBITRATOR'S REVIEW

82. Article R57 of the CAS Code provides in relevant part as follows:

> *"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decisions challenged or annul the decision and refer the case back to the previous instance …"*

X. APPLICABLE LAW

83. Article R58 of the CAS Code provides in relevant part as follows:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

84. The "applicable regulations" in this case is the SADR and subsidiarily, the applicable law chosen by the Parties, i.e. New Zealand law.

XI. THE MERITS

85. In the present appeal, the Appellant does not challenge the Tribunal's finding that the Respondent did not take cannabis intentionally to enhance his performance pursuant to

Rule 10.2.4.2 of the SADR such that the appropriate sanction is the prescribed period of ineligibility of two years under Rule 10.2.2 of the SADR.[10]

86. The Respondent accepts:

i. the ADRVs;

ii. that he used cannabis 'in-competition'; and

iii. that the prescribed sanction under Rule 10.2.2 of the SADR is a period of ineligibility of two years.

87. The present appeal concerns the consequences of the ADRVs; whether, as contended for by the Appellant, the prescribed period of ineligibility of two years under Rule 10.2.2 of the SADR is the appropriate sanction to be imposed, not the period of ineligibility of 8 months imposed by the majority Tribunal having regard to the principle of proportionality.

88. As a result of the Parties' requests and submissions, the Sole Arbitrator will address:

i. the application of the principle of proportionality in respect of sanctions prescribed under the WADC (and the SADR); and

ii. whether, in the circumstances of the Respondent's case, the application of the prescribed sanction would be unjust and disproportionate, violating the principle of proportionality as contended for by the Respondent.

B. Proportionality

89. Proportionality is "…*a general principle of law governing the imposition of sanctions of any disciplinary body, whether it be public or private*."[11]

90. The principle of proportionality "…*provides that the severity of a sanction must be proportionate to the offense committed. To be proportionate, the sanction must not exceed that which is reasonably required in the search of the justifiable aim*."[12]

91. In the *Advisory Opinion delivered by the CAS in relation to the implementation of the WADC into the FIA Disciplinary Code* CAS 2005/C/976 & 978 ("the CAS Advisory Opinion"),[13] although the panel stated that the principle of proportionality is guaranteed under the WADC, the opinion nevertheless held that:

[10] Not four years under Rule 10.2.1 of the SADR.
[11] Prof. G. Kaufmann-Kohler, et al., *Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International* Law, referred to in *Puerta* at [78].
[12] *I v FIA* at [137] citing the *Advisory Opinion delivered by the CAS in relation to the implementation of the WADC into the FIA Disciplinary Code* CAS 2005/C/976 & 978 at, [138]- [139].
[13] At [143], referred to in *Puerta* at [82].

> *"The right to impose a sanction is limited by the mandatory prohibition of excessive penalties, which is embodied in several provisions of Swiss Law. To find out whether a sanction is excessive, a judge must review the type and scope of the proved rule violation, the individual circumstances of the case, and the overall effect of the sanction on the offender. However, only if the sanction is evidently and grossly disproportionate in comparison to the proved rule violation and if it is considered as a violation of fundamental justice and fairness, would the Panel regard such a sanction as abusive and, thus, contrary to mandatory Swiss Law."*[14]

92. The Sole Arbitrator accepts Ms Wroe's submission that if the consequences prescribed by the WADC (and the SADR) for ADRVs are deemed to be proportionate as contended for by the Appellant, that "…*would make the drafters of the Code the final arbiters of proportionality rather than (ultimately) the courts*."

93. The circumstances in which the WADC has been found not to provide a just and proportionate sanction, however, have been described as "*in those very rare cases*…"[15], and in "…*a very exceptional situation...*".[16]

94. This is perhaps unsurprising given that the WADC was drafted having regard to the principals of proportionality:

> "*The Code has been drafted giving consideration to the principles of proportionality and human rights*."[17]

95. Where however, the imposition of a sanction constitutes an infringement of individual rights that is "*evidently or grossly disproportionate to the proved rule violation*" and is considered a violation of fundamental justice and fairness, the decision maker is "mandated" to impose a proportionate sentence.[18]

96. Accordingly, the description of the application of the principle of proportionality as an exercise of a "general discretion" as referred to in the majority Tribunal decision, is inapposite. Indeed, the Respondent did not contend that there is a "general discretion" as such.

97. The absence of a "general discretion" as referred to by the majority Tribunal, is supported by the decision in *Puerta*, in which the Panel considered that on the particular facts of that case, the WADC did not provide a just and proportionate sanction by reason of there being a "gap or lacuna" which was to be filled by the Panel "*...applying the*

[14] CAS 2005/C/976 & 986 at [143], cited in *Puerta*.
[15] *Puerta* at [92].
[16] *I v FIA* at [144].
[17] The Code, Purpose, Scope and Organisation of the World Anti-Doping Program and the Code p.8.
[18] *Puerta* "*Any sanction must be just and proportionate. If it is not, the sanction may be challenged*" at [90].; *I v FIA* at [138].

overarching principle of justice and proportionality on which all systems of law, and the WADC itself, is based." In undertaking that exercise, the Panel disavowed any exercise of a general discretion. The Panel went further and stated that:

> *"Although the WADC does provide for tribunals to exercise a discretion in certain, limited circumstances…it [the principle of proportionality] does not bestow upon tribunals a general discretion. Indeed, the existence of such a general discretion would be inimical to the WADC, which seeks to achieve consistency and certainty…"*[19]
>
> *"The Panel has attempted to make it as clear as it possibly can that its decision in the present case does not involve the exercise of a discretion…"*[20]

98. Although the word "discretion" was used by the *Valieva* panel in obiter observations made in closing remarks, the Sole Arbitrator does not consider that it supports a finding of a "general discretion' as referred to by the Tribunal when considered in the context of its adoption of the panel's observations in *Guerrero* and reliance on *Puerta*:

> *"…The panel carefully considered whether there was scope for the exercise of its discretion to reduce the period of ineligibility according the principles of proportionality adumbrated in CAS 2006/A/1025 [Puerta] and CAS 2007/A/1252. In the result…a majority of the Panel decided against such a course and in this respect adopts what was said by the panel in CAS 2018/A/5546 [Guerrero] at [86-90]:*
>
> > *"86. Additionally, the CAS jurisprudence since the coming into effect of WADC 2015 is clearly hostile to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by the WADC (and there is only one example of its being applied under the previous version of the WADC). In CAS 2016/A/4534, when addressing the issue of proportionality, the Panel stated: "The WADC 2015 was the product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end. It sought itself to fashion in a detailed and sophisticated way a proportionate response in pursuit of a legitimate aim." (para. 51)…*
> >
> > *…89. The Panel is conscious of the much quoted legal adage "Hard cases make bad law", and the Panel cannot be tempted to breach the boundaries of the WADC…because their application in a particular case may bear harshly on a particular individual…*

[19] *Puerta* at [92]-[94].
[20] *Puerta* at [98].

> *92. It is in the Panel's view better, indeed necessary, for it to adhere to the WADC. If change is required, that is for a legislative body in the iterative process of review of the WADC, not an adjudicative body which has to apply the lex lata, and not some version of the lex ferenda."*
>
> *425. A majority of the Panel agrees that so it is in this case..."*

99. In *I v FIA*, the panel considered that the principle of proportionality may "*mandate a judging body*", in the particular circumstances before the Panel, to reduce the sanction below that which is provided by the applicable sports rules derived from the WADC.[21] Having regard to the particular circumstances of that case, the panel considered that the fixed two-year sanction must be "*measured against the principle of proportionality to check whether in the specific case of that driver, the sanction was consistent with the principle of proportionality.*" The specific circumstances included that the appellant was 13 years at the time of the award, he was competing in a youth category and not against adults at the top level. Significantly, given the timing of the European karting season, the overall effect of a two-year sanction would extend well beyond the 24 months, impacting three karting seasons. The Panel went on to state:

> "*Considering all of the above and exercising its discretion, the Panel deems that, exceptionally, a period of ineligibility of eighteen months must be considered as proportionate to the offense and, thus, a just and fair penalty.*"

100. The reference to an exercise of discretion in determining the period of ineligibility that would be just and proportionate, having formed the view it was mandated to reduce the sanction below that which was prescribed by the particular rules is not inconsistent with the approach set out above.

C. Sanction

101. The appropriate sanction is the prescribed period of ineligibility of two years under Rule 10.2.2 of the SADR as the Respondent's use of cannabis was unrelated to sport performance.

102. For the reasons set out below, the Sole Arbitrator does not consider that the application of the prescribed sanction under Rule 10.2.2 violates the principle of proportionality in the circumstances of this case. It is not a case where the sanction is "*evidently and grossly disproportionate in comparison to the proved rule violation"* such as to constitute a violation of fundamental justice and fairness, contrary to mandatory Swiss law.

[21] *I v FIA* at [138].

103. The fundamental rationale for the WADC (and the SADR) is reflected on page 2 of the SADR:

> *"Anti-doping programs are founded on the intrinsic value of sport. This intrinsic value is often referred to as "the spirit of sport": the ethical pursuit of human excellence through the dedicated perfection of each Athlete's natural talents.*
>
> *Anti-doping programmes seek to protect the health of Athletes and to provide the opportunity for Athletes to pursue human excellence without the Use of Prohibited Substances and Prohibited Methods.*
>
> *Anti-doping programmes seek to maintain the integrity of sport in terms of respect for the rules, other competitors, fair competition, a level playing field, and the value of clean sport to the world.*
>
> *The spirit of sport is the celebration of the human spirit, body and mind. It is the essence of Olympism and is reflected in the values we find in and through sport, including:*
>
> - *Health*
> - *Ethics, fair play and honesty…*
> - *Excellence in performance*
> - *Character and Education…"*

104. The policy objectives that justify the infringement on the Respondent's fundamental rights are addressed in the *2021 Code Revision – Third Draft, the Summary of Major Modifications* ("the Summary"), the *2021 WADC and ISF Development and Implementation Guide for Stakeholders* ("the Stakeholders Guide") and the WADA "*Substances of abuse under the 2021 World Anti-Doping Code" guidance note for anti-doping organizations* ("the Guidance Note"). *They are supported by the Summary of Major Modifications and Explanatory Notes to the 2023 Prohibited List* ("the Explanatory Notes"), *and the article authored by Thomas Hudzik titled "Cannabis and sport: A World Anti-Doping perspective"*[22] ("the *Hudzik* article").

(collectively, "the Materials")[23]

105. Read together, the rationale and policy basis for differentiating between sanctions imposed where a substance of abuse is used in-competition and where it is used out-of-competition is evident.

[22] Editorial in "Addiction SSA" 2023 Society for the Study of Addiction Journal received 1 March 2023, accepted 17 July 2023.
[23] Included in the common bundle of authorities filed by the Parties.

106. The Materials reveal a connection between the risk to health of athletes that use cannabis, the potential health and safety impacts of cannabis at certain levels in-competition and the connection between those levels and the timing of the use of cannabis:

i. The List Expert Advisory Group (LiEAG) concluded that there is compelling medical evidence that use of THC is a risk for health, mainly neurological, that has a significant impact on the health of young individuals, a cohort which is overrepresented in athletes;[24]

ii. It was found that there is comprehensive historical literature as well as a rapidly growing body of contemporary literature supporting the assertion that cannabis use can negatively impact the health, safety or wellbeing of the athlete. As stated in the *Hudzik* article:

> "*Acute intoxication can result in deficits in reaction time, temporal estimation and dexterity [7-11] as well as in psychiatric symptoms [12]….*"[25]

iii. In respect of the use of cannabis in-competition, the Explanatory Notes record that at the levels of cannabis required to trigger an Anti-Doping Rule Violation In-Competition[26]:

> "*…they would be problematic on medical grounds for a competing Athlete, or indicative of a chronic habitual user*."[27]

iv. The current decision limit of 180 ng/ml of THC in urine and a cut-off of 150 ng/ml plus the uncertainty of measurement of 30 ng/ml takes account of the prohibition of cannabis being in-competition only.[28] According to the authors of the *Hudzik* article:

> "*Because of these high thresholds, primarily chronic, frequent cannabis users and athletes consuming high doses in-competition will be detected*."[29]

v. The guidance note records the thought that was given to the relationship between the time of the use of cannabis and the levels required to trigger an in-competition ADRV. It states:

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[24] The Explanatory Notes at p.9.
[25] *Hudzik* article at p.2040.
[26] The main psychoactive component of cannabis is reported as an Adverse Analytical Finding by WADA-accredited laboratories when the urinary concentrations exceeds a threshold of 150 ng/ml with a Decision Limit of 180 ng/ml. *Explanatory Notes* 2023 at p.7.
[27] Explanatory notes Prohibited List 2023 at p.9.
[28] *Hudzik* article at p.2041.
[29] *Hudzik* article at p.2041.

> "*Presence of carboxy-THC at a concentration above (>) the Decision Limit (DL) of 180 ng/mL should be considered likely to correspond to an In-Competition use of cannabis*."[30]

107. It is evident from the Materials that consideration was given to balancing an athletes' freedom to consume cannabis legally outside of competition (although it was noted in the Guidance Note that cannabis remains an illegal substance in the majority of the world) and the above concerns in respect of the use of cannabis in-competition:

    i. The Explanatory Note records that:

    > "*Because of these high thresholds, primarily chronic, frequent cannabis users and athletes consuming high doses in-competition will be detected. Therefore, the cut-off [which is defined as after 23:59 hours on the day prior to competition] generally will not affect the freedom of an athlete who wishes to legally consume cannabis outside of competition.*" [31]

    ii. The *Hudzik* article authors considered that:

    > *"… the cut-off generally will not affect the freedom of an athlete who wishes to legally consume cannabis outside of competition."*[32]

108. Consideration of the Spirit of Sport; the notion of respect for self and other participants, part of the third criterion for inclusion on the Prohibited List supports the differentiation between sanctions for use of a substance of abuse in-competition and out-of-competition. This criterion includes the welfare and safety of other participants and is stated to be "as important as the other two criteria."[33] The Ethics Advisory Group noted that the spirit of sport encompasses a number of universal values of sport including respect for self and other participants and considered that:

> "*…the welfare and safety of other participants may be compromised by impaired judgment associated with the presence of cannabis in an athlete in-competition*."[34]

109. The differentiated approach is further supported by:

    i. the first purpose of the WADC which is to "*…protect the Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide*…". Protecting the health and safety of athletes

[30] WADA Substances of abuse under the 2021 World Anti-Doping Code guidance note for anti-doping organizations at p.3.
[31] The Explanatory Notes at p.7.
[32] *Hudzik* article at p.2040.
[33] *Hudzik* article at p.2040. In its decision, the majority of the Tribunal noted that it "*…does not see that the health of the athlete includes the concept of the safety of the athlete or of other competitors…*" at [30]. It appears the Tribunal did not consider the safety of other participants under the Spirit of Sport criteria.
[34] *Hudzik* article at p.2040.

has been acknowledged by the CAS to be a significant function of the WADC. In *Guerrero*, the panel observed in respect of the 2015 WADC that:

> "*The WADC 2015 was designed not only to punish cheating, but to protect athletes' health…*"[35]

ii. the expression of the ultimate goal of the WADC as stated in the stakeholders guide:

> "*…The ultimate goal is for all athletes to benefit from the same anti-doping procedures and protections, no matter the sport, the nationality or the country where tested, so that all athletes may participate in competition that is both safe and fair.*"[36]

110. Given the correlation between the decision limit and the likely use in-competition, respect for the WADC, the SADR, and other participants takes on particular significance having regard to the potential health and safety impacts on other participants arising from impaired judgment in-competition. If, however, an athlete was to return a sample above the decision limit, the product of chronic, frequent use out-of-competition, that is likely reflective of a lower degree of disrespect for the WADC and the potential health and safety impacts on other participants. In those circumstances, the emphasis on rehabilitation and a therapeutic approach to address recreational out-of-competition use and possible addiction issues may be readily understood.

111. Although there is no express statement in the Summary of the rationale for not taking the same welfare or therapeutic approach to in-competition use, it is noted that in order for the article to apply, the athlete must establish the use occurred out-of-competition and was unrelated to sport performance. The third draft note records that if the use was unrelated to sport performance then it shall not be considered "intentional" for the purposes of the longer sanctions (with a reduction from four years to two years' ineligibility).

112. One might readily infer the objective of deterring in-competition use for the protection, health and safety of all participants including the relevant athlete. As such, that which is reasonably required for the justified aims of rehabilitation and education on the one hand and deterrence and retribution on the other differs in respect of in-competition and out-of-competition use. This difference is reflected in the sanction regime and is proportionate having regard to the purposes of the WADC (and the SADR) and the objectives referred to above.

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[35] *Guerro* at [88].
[36] 2021 World Anti-Doping Code and International Standard Framework Development and Implementation Guide for Stakeholders at p.1.

113. The Respondent's challenge in oral submissions to the difference between in-competition and out-of-competition sanctions focussed on the proposition that, having regard to the 11.59pm cut off designating in-competition use, the levels of THC in an athlete who used before midnight would be the same in-competition (and the levels of impairment the same) as an athlete who used just after midnight. The disparity in sanction for the athlete who consumed cannabis on the wrong side of midnight is disproportionate.

114. Whether in any particular case, the presence of THC in an athlete's system who used on the "wrong" side of midnight is the same as an athlete who used cannabis on the "right" side of midnight would be a matter for evidence in that particular case, should that issue arise.

115. It is conceivable that there may be a case where the timing of ingestion and levels of THC detected in the athlete's system are significant facts and circumstances on the question of proportionality having regard to the definition of in-competition. However, that is not the Respondent's case. The Respondent admitted to using cannabis on the morning of the competition. The concentration in his sample was 444ng/ml.[37] Any potential issue arising from the definition of "in-competition" being the period commencing at 11:59pm on the day before a competition through to the end of the competition and sample collection process, does not arise on the facts and circumstances of the Respondent's case.

116. In relation to the Respondent's submission that the substance of abuse changes result in stricter sanctions for in-competition use of substances of abuse than would have applied under the previous version of the WADC, (including given the change to the definition of no significant fault), a complete and fair reading of the Materials reveals an expert informed approach to the emphasis on athletes' health and safety in-competition, supporting the different sanctions applicable for use in-competition and use out-of-competition.

117. In relation to the failure of the substance of abuse provisions to differentiate between substances of abuse such as cocaine and cannabis, Ms Wroe submitted that cannabis is "*…also different from cocaine…well certainly in our jurisdiction and possibly most jurisdictions as being not as – that morally objectional as cocaine a lower level drug so to speak*…". This submission involves a value judgment that is not necessarily reflected in all jurisdictions across the globe.

118. The reality of the global application of the WADC is recognised in its introduction, which states that:

[37] Respondent's document package section 4, Respondent's response submissions at [9].

> "*When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport.*"[38]

119. The Explanatory Notes record that the reviewers of the Prohibited List were cognisant of shifting public attitudes and laws in certain countries, however determined that:

> "*…the weight of evidence and argument, along with broad international restrictive regulatory laws and policies, supports the continuance of cannabis on the Prohibited List at this time.*"[39]

120. Other aspects of the sanction treatment of substances of abuse under the WADC and referred to by the Respondent to illustrate disparities in the application of the substance of abuse provisions, simply do not arise on the facts and circumstances of the Respondent's case.[40]

121. The issue for the Respondent is that, whilst his use was not related to sport performance (and as such he is entitled to a reduction from four years to two years' ineligibility), the Respondent accepted in his written response that "…his level of fault was 'significant'"[41] in the sense that the no significant fault or negligence defence and any further reduction in sanction is not open to him. The Respondent received anti-doping education including in relation to the WADC:

i. In relation to drugs, players were educated about the risks associated with substance abuse, including the misuse of substances like cannabis. Over and above anti-doping education, players were encouraged to adopt healthy habits, refrain from smoking and excess alcohol consumption, uphold the values of teamwork and fair play, preserve their reputation and career and safeguard their health generally.[42]

ii. Education was delivered during team meetings. One such meeting was on 31 July 2023 which the Respondent attended. The purpose of the meeting was to discuss team culture, vision and playing style. Refraining from taking drugs was stated as a "non-negotiable."[43]

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[38] The WADC at p.18.
[39] The Summary at p.9.
[40] For example, for unintentional violations *where no significant fault or negligence is found* an athlete will be sanctioned under SADR 10.6.1.1 in respect of specified substances other than substances of abuse, whereas the user of a substance of abuse would be sanctioned under SADR 10.6.2, where there is not the same flexibility to reduce a sanction according to fault.
[41] Written Submissions of the Respondent at p.4.
[42] Mr Augustine's statement at [6] and [9].
[43] Mr Augustine's statement at [10].

iii. Anti-doping was also discussed during one-on-one medical screening processes including habits related to smoking, alcohol and yagona (kava) consumption and any form of drug usage including cannabis, meth, heroin and cocaine.[44]

iv. On 26 August 2024 the athletes were told by text message "*There will be doping control in this tournament. OFC will do random drug tests at games. So please don't try and do anything silly*".

122. Whilst the new sanction regime for in-competition use of cannabis is undoubtedly a significant step up from sanctions previously imposed for use of cannabis in New Zealand, the cases referred to by the Respondent are for the most part pre-2021 decisions of the Tribunal and are therefore not concerned with use in-competition under the substance of abuse provisions. The weight to be given to those pre-2021 WADC decisions in considering the principles of proportionality and equal treatment is limited.

123. Having regard to the Materials, it could not be said that the impact of the changes is the product of a lack of thought for the consequences for cannabis users in the Respondent's position suggesting that something has gone wrong that was not anticipated or intended, as submitted by the Respondent. This is underscored by the following:

i. The WADC review was extensive and thorough. It involved three consultation periods over two years, the consideration of submissions from 211 stakeholders, the receipt of 2,035 comments, the holding of 68 meetings with stakeholders and 123 meetings of the code drafting team.[45]

ii. In respect of the review of the inclusion of cannabis on the prohibited list, in 2022, WADA reviewed more than 2700 scientific articles.[46] As part of the scientific review process, "…*world leading experts on cannabis and addiction behaviour were consulted to validate the conclusions of the committees*."[47]

124. Any changes to the sanction regime for substances of abuse to address what the Respondent identifies as "disparities" are, as aptly stated by the panel in *Guerrero*, for "…*a legislative body in the iterative process of review of the WADC, not an adjudicative body which has to apply the lex lata* [the law as it exists]*, and not some version of the lex ferenda* [what the law should be]"[48] to make.

125. In relation to the impact and overall effect of the imposition of the sanction prescribed by the SADR on the Respondent, football has been his only source of income in recent years. Being banned from playing football has had a big impact on his life. It is the main thing that he does to socialise and earn money. He has experienced shame and spends

[44] Mr Augustine's statement at [14].
[45] The Stakeholders Guide at p.3.
[46] *Hudzik* article at p.2040.
[47] *Hudzik* article at p.2040.
[48] *Guerrero* at [90].

time indoors. It is hard for him to get a job. The situation is embarrassing. Not having football in his life is boring to him, life is meaningless without football.[49]

126. The Sole Arbitrator accepts the Respondent's statements. One may well have an "uncomfortable feeling" about the impact of the sanction on the Respondent in light of the significant step up in sanction since the introduction of the substance of abuse provisions. However, for the reasons set out above, it could not be said that the impact of the sanction produces an outcome that is "exceptional" or "rare" such as was found to be the case in *Puerta* and *I v FIA,* where the panels considered the particular circumstances led to a manifestly disproportionate effect on the individual with reference to the goals and purposes of the WADC.

D. Conclusion

127. The appropriate sanction is the prescribed period of ineligibility of two years under Rule 10.2.2 of the SADR. For the reasons set out above, I do not consider that the application of the prescribed sanction of two years under Rule 10.2.2 of the SADR violates the principle of proportionality in the circumstances of the Respondent's case.

XII. THE COMMENCEMENT DATE OF THE SANCTION – SUBSTANTIAL DELAY

A. Respondent's Submissions

128. In his statement of defence,[50] the Respondent submitted in the alternative that if the Sole Arbitrator upholds the appeal and determines that the period of ineligibility should be two years, the commencement date should be the date his sample was taken (9 September 2023) in view of the substantial delays in the doping control process. On a full rehearing, the commencement date will need to be determined. The arbitrator is not bound to accept the commencement date in the Tribunal if a different sanction is imposed.

129. The Respondent submitted it is appropriate to backdate commencement of a longer period of ineligibility to 9 September 2023, the date of sample collection. There was substantial delay not attributable to the Respondent. The Respondent was not notified of the ADRV for over 5 months from sample collection on 9 September 2023. No steps were taken between the Appellant being notified on 28 November and 14 December 2023.

130. Once a delay is identified, the discretion that is available under Rule 10.13.1 is to go right back to the date of the sample. There is no need to relate the backdating to a period of delay. The whole period of the doping control process must be taken into account:

[49] The Respondent's Statement.
[50] Answer of the Respondent dated 26 August 2024.

i. The International Standard for Laboratories provides that the test result should "occur in ADAMS" within 20 days of receipt of the Sample. In this case it took 38 days;

ii. No steps were taken by the Appellant between being notified on 28 November and 14 December 2023. Between 14 December and 9 February 2024, all that happened was that FIFA and the Fiji federation were notified.

B. Appellant's Submissions in Reply

131. The Appellant submitted that backdating even further would ignore the material delay in serving the Respondent. This delay was caused by the Respondent having given only a partial street address. Further, the Respondent's submission ignores the time required to advance proceedings in the ordinary course. CAS has urged restraint in applying backdating as it can have the effect of undermining the anti-doping regime. Further, it may be that the Arbitrator, considering the issues afresh finds that the backdating was generous and the period ought to be reduced.

132. The starting point is that where there have been "substantial delays" in the Doping Control process that are not attributable to the Athlete, the Tribunal may backdate the period to a date as early as the date of sample collection.

133. CAS has found that, when considering whether there has been "substantial delay", the decision-maker must ask the following of itself:[51]

i. How long has been the period of any delays in the disciplinary process? (a question of fact);

ii. Is any of that period attributable to the Athlete? (a question of fact);

iii. After deducting any period found in answer to question (ii), are the overall delays substantial? (a question of appreciation); and

iv. If the answer to question (iii) is Yes (thereby triggering the Panel's discretion), should the Panel, having regard to all relevant circumstances, exercise its power to backdate? (a question of judgment).

134. In his reply statement dated 18 August 2024, Mr Tapper set out the steps taken to advance the case and appended a chronology. To the extent that there has been delay not attributable to the athlete, it is, at best, generous to say that it was "substantial".

C. Conclusion

135. The Sole Arbitrator agrees with the Tribunal's assessment that there was substantial delay not attributable to the Respondent. The Tribunal stated as follows:

[51] *CAS 2020/A/7526&7559* at [221].

> "*Answering the four questions posed by the CAS, the Tribunal assesses that there was a five month time period between the sample being taken and notification of the AAF; if we generously say that the average time period is three months, then in this situation there was a delay of two months, which means it took 40% longer than it should have and consequently the delay was substantial. The Tribunal further assesses that the delay was not attributable to the athlete and was exacerbated by a long period of inactivity spanning the New Zealand summer break period…*"[52]

136. Having found that there was substantial delay not attributable to the Respondent, the Sole Arbitrator may start the period of ineligibility at an earlier date commencing as early as the date of sample collection.[53]

137. The Sole Arbitrator does not accept, however, that no steps were taken by the Appellant between it being notified of the AAF on 28 November 2023 and 14 December 2023 as contended for by the Respondent. Mr Tapper's statement and chronology refers to DFSNZ seeking to confirm the Respondent's membership of a signatory organisation and to ascertain whether he had undertaken anti-doping education in New Zealand. After 14 December 2023 and prior to Christmas, DFSNZ sought legal advice on matters concerning the case. On 19 January 2024, in his first week back from the Christmas shut down period, Mr Tapper contacted FIFA and Drug Free Sport Fiji. I accept that it took time between 9 February 2024 and 16 February 2024 to serve the Respondent as the phone number the Respondent provided on the Doping Control Form was invalid and he had given a partial street address.

138. On balance, the Sole Arbitrator considers that backdating the commencement of the period of ineligibility to 14 December 2023 strikes the right balance between recognising substantial delay not attributable to the athlete due to the Christmas/New Year shut down period and the exercise of restraint in applying backdating so as not to have the effect of undermining the anti-doping regime. It also effects credit for the period of ineligibility served by the Respondent between 14 December 2023 and 14 August 2024.[54] It places the Respondent, in effect, in the position he would have been in had the Tribunal imposed the prescribed period of ineligibility of two years.[55]

    i. On 25 March 2025, Ms Wroe informed the CAS that the Fiji Football Association is treating the Respondent as ineligible to play until the appeal is finalised. On 22 April 2025, the Respondent's father re-iterated that the Fiji Football Association "still treats this case as no game" for the Respondent.

[52] Majority Tribunal decision at [76].
[53] Rule 10.13.1. CAS 2018/A/5853 FIFA v Tribunal Nacional Disciplinario Antidopaje & Damian Marcelo Musto at [145]-[147].
[54] Rule 10.13.2.1.
[55] CAS 2014/A/3868 WADA v Bhupender Singh and NADA India at [64]

ii. There is no information to the contrary. On 21 May 2025, in response to a query from the CAS as to the Appellant's position, the Appellant informed the CAS that it confirmed to Fiji Football that the period of ineligibility imposed by the Tribunal expired in August 2024 and the Respondent was eligible to return to sport including while the decision was subject to appeal. However, the Appellant stated it did not have any insight into Fiji Football disciplinary matters.

139. Considering that the respondent has in effect been ineligible to play since 14 Dec 2023, a period of ineligibility of 2 years commencing 14 Dec 2023 without any interruption can be imposed. As a consequence, he shall be barred from participating in any Competition or other activity as provided in Rule 10.14 of the SADR for a period of two years commencing on 14 December 2023.

XIII. COSTS

(…)

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ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the Sport Integrity Commission against the decision rendered by the Sports Tribunal of New Zealand on 3 July 2024 is upheld.

2. The decision rendered by the Sports Tribunal of New Zealand on 3 July 2024 is set aside.

3. Pursuant to Rule 10.2.2 of the SADR, Mr Turagalailai is barred from participating in any Competition or other activity as provided in Rule 10.14 of the SADR, for a period of two years commencing on 14 December 2023.

4. (…).

5. (…).

Seat of arbitration: Lausanne, Switzerland
Date: 1 July 2025

THE COURT OF ARBITRATION FOR SPORT

Elizabeth Brimer KC
Sole Arbitrator

Amy Silver
Ad hoc Clerk