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The second McLaren Report - a basis for establishing anti-doping rule violations by Russian athletes?

The second part of the McLaren Report was released on 9 December 2016, together with redacted documentary evidence, which has been made available on a public website. The McLaren team has also provided anti-doping organisations with the names of the athletes identified as being part of the practices described in the Report, together with evidence related to such athletes. Some athletes have already been provisionally suspended, on the basis of such evidence. Claude Ramoni, Partner at Libra Law, addresses each of the potential violations identified by the McLaren team and analyses the possible issues that could arise when turning information and evidence from the McLaren Report into evidence that may be validly used as proof of an anti-doping rule violation.

In a nutshell, the doping practices described in the McLaren Report can be summarised as the following:

- Practices described as the ‘disappearing positive methodology,’ i.e. information provided by the Moscow laboratory to third parties after a first screening that some samples were ‘suspicious’ and could contain a prohibited substance. Based on the instructions received from such third parties, the Moscow laboratory was then either pursued the analysis and reported an adverse analytical finding - if any - or wrongly reported the sample as ‘negative’ or even failed to report the sample at all;
- Several manipulations of urine samples of selected athletes aimed at the replacement of ‘dirty’ urine with ‘clean’ urine of the same athlete, or proceeding with other manipulations of urine; and
- The provision to some athletes of the ‘Duchess Cocktail,’ i.e. a combination of anabolic steroids, which was supposed to be washed out from the body quickly, as well as the carrying out of ‘excretion studies’ aimed at ensuring that athletes taking part in competition would not test positive for the prohibited substances they had ingested.

Presence of a prohibited substance in an athlete’s sample

The burden of proving the presence of a prohibited substance in an athlete’s sample and a breach of Article 2.1 of the World Anti-Doping Code (‘WADC’) is quite high, the athlete benefiting from numerous procedural rights with respect to the testing procedure. Such rights include, notably, (i) the right for counter-expertise to be performed by the same laboratory by opening and analysing the B-sample¹ and (ii) the requirement that the WADA International Standards are complied with, implying mainly the International Standard for Testing and Investigations - governing sample collection and transportation (‘ISTI’) and the International Standard for Laboratories (‘ISL’) and the attached Technical Documents (‘TD’).

There are numerous examples in Court of Arbitration for Sport (‘CAS’) jurisprudence where athletes were not considered to have violated Article 2.1 WADC due to a failure in the conduct of the B-sample opening procedure² or in the B-sample analysis³, or a departure from the ISTI⁴ or the ISL⁵.

It seems quite clear in the cases reported in the McLaren Report that the sole

reference in an email from the Moscow laboratory that a sample provided by a certain athlete (referred to either by his/her name or reference number) was suspected of containing a prohibited substance cannot be used as valid evidence of a breach of Article 2.1 WADC. In most of the cases, the Moscow laboratory did not perform a full analysis in compliance with the ISL and the TDs, but only a screening; the B-sample is probably no longer available for analysis. Moreover, the interference of third parties in the day-to-day operations of a WADA-accredited laboratory, which was found to be the case in the McLaren Report that Dr Rodchenkov knew the names of (some) athletes who provided the samples analysed by him or the urine swapping and manipulations are gross violations of the basic principles governing the work of an anti-doping laboratory enshrined in the WADA International Standards, which are likely to invalidate the analysis. In order for the presence of a prohibited substance to be proven, this would require the retesting of the samples of athletes identified in the McLaren Report (provided that they are still available); in his Report, Prof. McLaren comes to the same conclusion as the violation of Article 2.1 WADC is mentioned in connection with one sample only, where the A and B



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samples are still available for (re)analysis.

Use of a prohibited substance

The standard of proof for demonstrating use in the meaning of Article 2.2 WADC is the same as the standard of proof applicable for the presence of a prohibited substance in a sample (Art. 2.1 WADC), i.e. the comfortable satisfaction of the hearing panel (Art. 3.1 WADC). Nevertheless, use can be proven by 'any reliable means' (Art. 3.2 WADC), including according to CAS jurisprudence and the comment to Art. 2.2 WADC, admission, witness statements, documentary evidence, etc⁶. Except in cases based on analyses of athletes' biological passports, there is no clear standard or guideline with respect to the procedure and athlete's rights in connection with breaches of Article 2.2 WADC⁷. This means that, actually, the formal requirements for proving breaches of Article 2.2 WADC appear - except in cases based on biological passport findings - lower than the strict procedures to be complied with in order for a breach of Article 2.1 WADC to be proven.

The McLaren Report identifies 'strands in a cable,' which may together be used to prove use of a prohibited substance, including notably contextual evidence, initial testing procedures by the Moscow laboratory, evidence relating to sample tampering or substitution and evidence by Dr Rodchenkov linking an athlete to doping. It is true that, in order for an anti-doping rule violation to be established, strict and direct evidence is not always needed; circumstantial evidence may be sufficient to prove a violation⁸.

We will address in turn each of the means of evidence identified by the McLaren Report as proving the use of prohibited substances:

Contextual evidence

The McLaren team uncovered evidence in the form of lists and tables with

athletes' names, who were supposed to be 'protected' or to have used the cocktail of prohibited substances prepared by Dr Rodchenkov, as well as email correspondence with third parties mentioning names of athletes, or sample reference numbers. There is little doubt that, for an athlete, being named on one of the lists or in correspondence appears to be circumstantial evidence that the athlete in question was part of the organised doping scheme described by the McLaren Report.

In this respect, different CAS panels have assessed this matter in a different way. In the award issued on 11 January 2016 in the case of the players of the Australian football club Essendon⁹, the majority of the panel was comfortably satisfied that all players of the team were injected with a prohibited substance, as the panel ruled that the regime was not designed for any particular player, but for the whole team and that all players had been administered injections. However, the CAS panel did not address the individual situation of each of the 32 players one by one. In another award issued on 26 October 2010 in the matter of the players of the Cypriot football club APOP Kinyras¹⁰, the CAS panel sanctioned the players who tested positive and the coach who administered pills containing steroids to the players. None of the other members of the team were sanctioned as the panel was not comfortably satisfied that the same pills had been administered to the other players, in particular those who underwent doping controls, which did not reveal the presence of prohibited substances.

In the context of the McLaren Report, and in view of the seriousness of the allegations, as well as the wider context surrounding the Report, notably the cover-up of Russian biological passport cases within the IAAF, the information provided by the Stepanovs, the ARD documentaries and the 'Fancy Bear'

attacks, one can only guess that the overall context and decisions issued against Russian sports governing bodies will play a decisive role in the case of each individual athlete.

The results of the testing procedure by the Moscow laboratory

It appears from the evidence attached to the McLaren Report that, further to the intervention of third parties, some analyses by the Moscow laboratory, which should have been pursued in order to report an adverse analytical finding, were stopped and reported as 'negative.' In the absence of A and B samples, of proper documentation packages and of full analysis performed in compliance with the ISL, such evidence is not sufficient to demonstrate the presence of a prohibited substance in a sample.

Can, however, such evidence show 'use' of prohibited substances within the meaning of Article 2.2 WADC? This raises the question as to whether an incomplete or defective laboratory analysis - which cannot serve as a basis for proving a violation of Article 2.1 WADC - may nevertheless be used as evidence of use of a prohibited substance under Article 2.2 WADC.

The Comment to Article 2.2 WADC seems to imply that the analysis of the A sample or of the B sample alone could prove the 'use' of a prohibited substance even though this might not be sufficient to establish the presence of the substance in the sample. It is nevertheless doubtful that a defective analysis, i.e. an analysis by a laboratory which has been performed in breach of the ISL and cannot be used as evidence of the presence of the substance could qualify as a 'reliable means of evidence' of use of the same substance. In several awards, CAS panels have specified that, even though the athletes could not be charged with a doping offence further to departures from the WADA International

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Standards, the award should not be interpreted as an “exoneration of the athlete.” In none of those cases has there been any attempt to ‘requalify’ analyses performed in breach of the WADA International Standards as valid evidence of use of a prohibited substance¹¹.

The reference to an athlete with regard to a positive finding in the framework of a screening analysis by the Moscow laboratory constitutes circumstantial evidence of a doping practice, but shall not, in the absence of any other evidence, be considered as valid evidence of the use of a prohibited substance applying the ‘comfortable satisfaction’ standard of proof.

Forensic evidence

As part of the investigation conducted under supervision of the McLaren team, forensic analyses were performed and showed (i) scratches or marks on B sample bottles consistent with the opening and the closing of such bottles further to urine substitution or manipulation; (ii) non-physiological levels of salt showing urine manipulation, and (iii) inconsistencies further to DNA analyses. It is true that, even though there is no evidence that a specific athlete was actually involved in tampering with or manipulating his or her sample, the fact that a specific sample was tampered with is quite strong circumstantial evidence that such sample may well have been ‘dirty.’

Evidence provided by Dr Rodchenkov

The McLaren Report also mentions as evidence of the use of doping substances the information provided by

Dr Rodchenkov. Using such evidence may be challenging for the hearing panel. First, samples analysed by laboratories shall be identified by their reference number only, and not by the athletes’ name. In other words, one of the key aspects of sample analysis is that the laboratory does not know - and does not have any possibility of knowing - the identity of the person who provided the sample tested by the laboratory. Consequently, it is quite awkward for the director of a WADA-accredited laboratory to disclose the names of athletes who were using substances, but whose samples were reported as negative by the same laboratory director. To what extent would any witness statement by Dr Rodchenkov be held as reliable evidence before the CAS, in view of all the circumstances in the case at hand?

Furthermore, it is unclear whether Dr Rodchenkov would be available for cross-examination by the concerned athlete. It is true that CAS considered affidavits by Prof. McLaren as admissible evidence on the occasion of several awards issued on the occasion of the Rio Olympic Games¹². This could be justified in view of the urgency and as the evidence available to Prof. McLaren had not, at that time, been made available to the hearing panel. However, in the framework of an ordinary disciplinary procedure conducted in accordance with Article 8 WADC or the CAS Code, the concerned athletes shall be granted the opportunity to exercise his/her procedural rights in full, including the right to adduce evidence and to cross-examine witnesses called by the prosecuting authority.

Summary

It is certain that evidence from the McLaren Report constitutes circumstantial evidence of the use of prohibited substances, even in the absence of proper adverse analytical findings. The key here will be to assess the evidence in order to consider, on a case-by-case basis, whether there is sufficient evidence to demonstrate an anti-doping rule violation or not. One should also take into consideration the following possible issues: (i) the numerous departures from the WADA International Standards in the process of sample collection, storage and testing in Russia may result in shifting onto the anti-doping organisation the heavy burden of demonstrating that such a departure did not cause the factual basis for the anti-doping rule violation as per Article 3.2.3 WADC; and (ii) the possible lack of evidence that athletes were actually involved in the malpractice described in the McLaren Report or, in other words, the absence of a proper link between the findings of the McLaren team and the conduct of each individual athlete¹³.

Tampering

Tampering is defined by the WADC as ‘altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing, misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring.’ This offence is addressed by two provisions of the WADC:

- Tampering to ‘alter the integrity and validity of Samples collected during Doping Control. Including but not



limited to: urine substitution and/or adulteration, e.g. proteases' is defined as a Prohibited Method (Class M2 of the WADA Prohibited List). This implies that the doping offence resulting from such practice would qualify as 'use' of a Prohibited Method within the meaning of Article 2.2 WADC; and

- Tampering defined as conduct which subverts the Doping Control process, such as intentionally interfering or attempting to interfere with Doping Control Officials, providing fraudulent information to an anti-doping organisation or intimidating or attempting to intimidate a potential witness would result in a breach of Article 2.5 WADC.

The distinction between Tampering defined as a Prohibited Method (Art. 2.2 WADC) and Tampering addressed by Article 2.5 WADC is far from clear. On the one hand, the text of Article 2.5 WADC, as amended in 2015, is clearer than the text in former versions as it is specified that Tampering under Article 2.5 WADC addresses conduct, which would not otherwise be included in the definition of Prohibited Method. This could mean that urine substitution or manipulation, as it is defined as a Prohibited Method, should qualify as use of a prohibited method under Article 2.2 WADC and not as Tampering under Article 2.5 WADC. On the other hand, the Comment to Article 2.5 WADC mentions as an example of conduct prohibited under this specific provision (and not Art. 2.2 WADC) 'altering a Sample by addition of a foreign substance.'

The McLaren Report refers to Tampering only in connection with a violation of Article 2.5 WADC, not of Article 2.2 WADC. The distinction between Articles 2.2 and 2.5 WADC is not purely rhetorical. Under Article 2.2 WADC, it is not necessary for an anti-doping organisation to establish intent or knowledge by the athlete to establish use of a prohibited method. In other words, a breach of Article 2.2 WADC is proven by the simple fact that urine substitution or manipulation occurred. The burden would then shift to the athlete to establish whether he or she deserves an elimination or a reduction of the ordinary four year period of ineligibility. In order, however, for a breach of Article 2.5 WADC to be proven, the anti-doping organisation has to prove, by reliable means to the comfortable satisfaction of the doping hearing panel, that the athlete engaged in a conduct defined as 'tampering' under Article 2.5 WADC. In other words, if 'tampering' of a urine sample happened without any involvement or knowledge of the athlete, this would constitute a breach of Article 2.2 WADC (as the offence would be committed), which may possibly result in no further sanction other than the automatic cancellation of results in competition as per Article 10.4 WADC (No Fault or Negligence), but this would not constitute a breach of Article 2.5 WADC, as the athlete did not engage in any prohibited conduct. The jurisprudence of CAS does not provide more guidance in this respect.

The case CAS 2004/A/607¹⁴ involved three A and B samples which, even though they had been provided by three different athletes, all contained

the same urine, which did not originate from any of the athletes involved. CAS held that the use of a prohibited method was proven by this manipulation. The issue of the athletes' involvement in this manipulation was addressed by the CAS panel in the discussion about the sanction to be applied in this case. In another award involving samples supposed to have been collected from the same athlete, but which actually belonged to different individuals, as proven by DNA analysis, the CAS panel applied Article 2.5 WADC (and not Article 2.2 WADC). The panel addressed the issue of the athlete's collaboration with this urine manipulation when addressing whether a doping offence had been committed, thus implying that the collaboration of the athlete was necessary in order for Tampering, in the meaning of Article 2.5 WADC, to be proven¹⁵.

To revert back to the McLaren Report, the issue is whether athletes have actually been involved in tampering practices, regardless of whether these fall under Article 2.2 or 2.5 WADC. The McLaren Report qualifies as 'tampering,' subject to sanction by Article 2.5 WADC, the provision by athletes of bottles of clean urine aimed at being substituted with samples collected during anti-doping controls or the participation of athletes in washout testing. It is true that if athletes provide urine in order for it to be swapped with 'dirty' urine collected during competition, this could be seen as tampering. However, it is not so clear whether athletes actually knew about the system and the swapping of samples. In itself, providing urine does not necessarily mean that athletes are engaging in doping

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practices; there is nothing unusual or forbidden about an athlete to having their biological markers regularly tested, and providing blood or urine to practitioners or physicians. As a consequence of regulations providing for sanctions to national federations whose athletes have returned numerous positive tests resulting from doping controls performed by anti-doping organisations other than the national federation concerned¹⁶ or to teams if several athletes affiliated to them return positive tests¹⁷, numerous national federations or teams regularly test their athletes and follow their biological markers in order to ensure that they do not test positive in international competitions. The UCI considered that analysing the riders' biological passports or submitting riders to regular medical checks were examples of measures to be implemented by cycling teams in order to reduce the risk of doping¹⁸. The distinction between the collection of urine or blood for legitimate testing or biological markers monitoring, aimed at the prevention of doping cases and the unfair provision of urine by Russian athletes described by the McLaren Report is extremely thin. It may be difficult in a given case to assess, depending on the circumstances in which the urine was provided, whether athletes knew about the use that was made of their urine by the Moscow laboratory.

Other offences

The McLaren Report mentions possible violations of Articles 2.8 and 2.9 WADC, i.e. complicity or administration of substances. There is no doubt that the evidence collected by the McLaren team could be used to sanction such violations by the persons actually engaged in sample swapping and tampering. It is however not clear from the Report and the evidence whether athletes were amongst the persons playing an active role in the doping scheme described by McLaren.

Conclusion

Most of the evidence discovered by the McLaren team will result in the opening of disciplinary cases for the use of a prohibited substance and/or tampering based on circumstantial evidence. The handling of such cases depends on the assessment of evidence, which may be difficult to obtain. It is not an easy task for sports organisations and the outcome of disciplinary procedures based on circumstantial evidence only is uncertain¹⁹. However, if the evidence provided by the McLaren Report is corroborated by other means of evidence from other sources, such as admission, whistleblower information, abnormal biological passports and the like, this would facilitate the proof of doping practices of individual athletes.

One could then consider whether specific regulations should be adopted to deal with the exceptional situation described by the McLaren Report. In cycling, in order to address the allegations of systematic doping in the sport, a commission was established in 2014 (the Cycling Independent Reform Commission). As part of the CIRC system, specific anti-doping regulations were in force for a limited time²⁰, allowing athletes who admitted anti-doping violations or provided valuable information concerning anti-doping rule violations to benefit from sanctions lower than the ordinary sanctions provided for under the WADC. A similar system in the Russian cases could encourage Russian athletes or support personnel to provide information or admit wrongdoing in order to (i) gather more evidence which, combined with the information provided in the McLaren Report, may help sanction doping offences and (ii) facilitate the conduct of proceedings and limit costs by encouraging athletes who have engaged in doping practices to admit their anti-doping rule violations.

1. Or the B2-sample for samples which have been 'split' in accordance with the amendment to the ISL which entered into force on 1 January 2015.
2. See e.g. CAS 2008/A/1607 Varis v. IBU and CAS 2010/A/2161 Tong v. IJF.
3. See e.g. CAS 2009/A/1752 & 1753 Devyatovskiy & Tsikhan v. IOC; TAS 2006/A/1119 UCI c Landaluce & RFEC
4. See e.g. CAS 2014/A/3487 Campbell-Brown v. JAAA & IAAF.
5. See e.g. CAS 2009/A/1752 & 1753 Devyatovskiy & Tsikhan v. IOC.
6. See notably CAS 2004/O/645 USADA v. M & IAAF.
7. Section 12 ISTI only provides for very broad general legal principles.
8. See for doping cases: CAS 2015/A/4059 WADA v. Bellchambers et al, Australian Football League, ASADA; CAS 2010/A/2083 UCI v. Ullrich & Swiss Olympic; CAS 2004/O/645 USADA v. M & IAAF. The same applies in match fixing cases, see e.g. CAS 2013/A/3256 Fenerbahçe v. UEFA.
9. CAS 2015/A/4059 WADA v. Bellchambers et al, Australian Football League, ASADA.
10. CAS 2009/A/1817 & 1844 WADA & FIFA v. Cyprus Football Association, Eranosian et al.
11. See e.g. CAS 2009/A/1752 & 1753 Devyatovskiy & Tsikhan v. IOC; TAS 2006/A/1119 UCI c Landaluce & RFEC. See also CAS 2008/A/1607 Varis v. IBU where the CAS panel concluded that, even though all other evidence available indicated that the athlete had committed an anti-doping rule violation, absence on the opening and testing of the B sample was sufficient to rule that no offence was committed by her.
12. See CAS OG 16/024 Klishina v. IAAF; CAS OG 16/021 Anyushina & Korovashkov v. ICF; CAS OG 16/019 Podolskaya & Dyachenko v. ICF; CAS OG 16/018 Sveschnikov, Sokolov & Strakhov v. UCI.
13. As a matter of comparison, in the case CAS 2011/A/2625 Bin Hammam v. FIFA, the panel held that there was not sufficient evidence applying the 'comfortable satisfaction standard' that the money that had been offered to national association representatives was constitutive of bribery by Bin Hammam.
14. CAS 2004/A/607 B v. IWF, §§10+11.
15. CAS 2008/A/1572, 1632 & 1659 Gusmao v. FINA.
16. See Section 12 of the WADA Model Rules.
17. See Article 11 of the UCI Anti-Doping Rules in force as of 1 January 2015.
18. See CAS 2012/A/3031 Katusha v. UCI §101.
19. For example, in the case CAS 2015/A/4059 WADA v. Bellchambers et al, Australian Football League, ASADA, the ASADA panel was not comfortably satisfied that the players breached the anti-doping rule, and the award by the CAS was issued by a majority decision of the arbitrators.
20. See the UCI ad hoc Regulations and the Cycling Independent Reform Commission, applicable from 1 February 2014 until 31 January 2015.