

1. **INTRODUCTION**

- 1.1 This is an Appeal by the IWBF against the Decision of the National Anti-Doping Appeal Panel (Chairman Robert Englehart QC) (“the Appeal Panel”) in the case of *Gibbs v UK Anti-Doping* (23 August 2010) (“the Decision”), which imposed a penalty of 2 years in eligibility for a doping offence contrary to the UKAD Anti-Doping Rules (“the Rules”), because it was not satisfied that Mr Gibbs had shown how the prohibited substance in question (mephedrone) came to be in his system.
- 1.2 It raises, apparently for the first time before CAS, the meaning and validity of Article 10.4 of the World Anti-Doping Code (“the Code”).

2. **THE PARTIES**

- 2.1 The International Wheelchair Basketball Federation (“IWBF”) is the World governing body for wheelchair basketball. It is recognized by the International Paralympic Committee (“IPC”) as the sole competent authority in wheelchair basketball worldwide and by the Federation Internationale de Basketball/The International Basketball Federation (“FIBA”) under Article 53 of its General Statutes.
- 2.2 The Second Respondent, UK Anti-Doping Ltd. (“UKAD”), is the UK national anti-doping authority. It is a non-departmental public body accountable to the Department for Culture, Media and Sport and to Parliament.
- 2.3 The Second Respondent, Mr Simon Gibbs, is a wheelchair basketball player.
- 2.4 The Great Britain Wheelchair Basketball Association (“GBWBA”) is the national governing body (“NGB”) and a charity registered in England and Wales. It is not a party to this appeal, but intervened with written submissions.

3. **FACTUAL BACKGROUND**

- 3.1 The relevant facts referable to the anti-doping violation, which were agreed before the Appeal Panel below, are as follows.

General

- 3.2 Wheelchair basketball is a popular and high-profile sport at the Paralympic Games, and is the fastest growing sport for athletes with a disability.
- 3.3 Games take place between national teams and between clubs in national leagues and cups; there are also European and World club competitions.

Mr Gibbs

3.4 Mr Gibbs was, at the time of the anti-doping violation, under consideration for a place in the Great Britain team for the Paralympic Games in 2012 and competed in national and European club competitions.

The Offence

- 3.5 (i) On 21 February 2010 Mr Gibbs gave a urine sample in-competition.
- (ii) The “A sample” tested positive for 4-methylmethcathinone (which is known as mephedrone). The sale and recreational use of mephedrone was lawful at the time of the violation.
- (iii) 4-methylmethcathinone is a prohibited substance under s6 of the Prohibited List (stimulants), which is incorporated within the Rules by Article 3.1.1. It is a “specified substance”¹.
- (iv) On 25 March 2010, a notice of the charge of the violation and a provisional suspension was sent to Mr Gibbs.
- (v) On 8 April 2010, Mr Gibbs confirmed that he was not challenging the finding in the A Sample.
- (vi) On 10 May 2010, Mr Gibbs admitted the violation set out in the charge.

Proceedings below

3.6 On 17 May 2010 the case came before the first-tier tribunal of the National Anti-Doping Panel (“the first tier tribunal”). At that hearing, Mr Gibbs argued that the presence of the prohibited substance in his system was the result of another person (Mr Henderson) having “spiked” Mr Gibbs’ drinks with a product which consisted of, or contained, mephedrone.

3.7 The decision of the first-tier panel was that it did not believe Mr Henderson’s admission that he had spiked Mr Gibbs’ drinks, and that a reduction under Article 10.4 was, for that reason, not available. It imposed a two-year period of ineligibility under Article 10.2 of the Rules.

3.8 On 9th August 2010 the appeal, by way of a *de novo* hearing before the second-tier body, i.e. the Appeal Panel, took place.

¹ 4-methylmethcathinone is a prohibited substance under s6 of the Prohibited list being not expressly listed but a “substance with similar chemical structure or similar biological effects” to the listed stimulants and a specified substance as defined by Article 3.3.1.

- 3.9 The IWBF and the GWBA intervened, arguing that the penalty imposed by the first tier tribunal was manifestly disproportionate, and contrary to principle and sound anti-doping policy.
- 3.10 The Appeal Panel upheld the decision of the first tier tribunal to impose a two-year period of ineligibility on the same grounds as had the first tier tribunal.

4. **LEGAL BACKGROUND**

(i) **Anti-doping enforcement in the UK**

- 4.1 The UK is obliged under international law to promote the fight against doping in sport, with a view to its elimination, and to do so compatibly with the Code: see the UNESCO International Convention Against Doping in Sport (“the UNESCO Convention”), which the UK ratified in 2005 and which came into force in February 2007.
- 4.2 Anti-doping measures and compliance with the UNESCO Convention fall within the remit of the Secretary of State for Culture, Media and Sport (“the Secretary of State”).
- 4.3 On 14 December 2009, and in order to fulfil the UK’s international law obligations, the Secretary of State issued the UK National Anti-Doping Policy (“the Policy”). Under the Policy:
- (i) UKAD is set up as a non-departmental public body to enforce anti-doping rules and to act as the government’s advisor on anti-doping policy, and is accountable to the Department of Culture, Media and Sport and to Parliament (see Introduction and paragraph 2.11);
 - (ii) in accordance with paragraph 2.3.1, UKAD publishes and maintains a set of rules “*implementing the requirements of the [WADA] Code on a national level*” for adoption by the national sports governing bodies (such as the GWBA), i.e. the Rules;
 - (iii) UKAD is granted the right and responsibility of enforcing the Rules by charging athletes and presenting the charge to a tribunal (paragraph 2.8.1);
 - (iv) the National Anti-Doping Panel (“NADP”) is set up as a body distinct from UKAD and under contract with the Department of Culture, Media and Sport (paragraph 5.5) in order to determine charges and penalties, which jurisdiction the NGBs must recognise (paragraph 4.7.1).
- 4.4 At present, Sports Resolutions (UK) Ltd provides the services of the NADP under contract with the Department of Culture, Media and Sport. The first-tier body may be appealed to the National Anti-Doping Appeal Panel, as happened in this case.

(ii) UK Anti-Doping Rules 2009

4.5 On 14 December 2009 the Rules came into force. The relevant rules are in the same terms as their counterparts in the Code.

4.6 Article 2.1 makes it a violation for an athlete's sample to contain a prohibited substance unless the athlete has a therapeutic use exemption under Article 4.

4.7 Article 2.1.1 states, in relation to an Article 2.1 anti-doping rule violation,

“It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his/her body. An Athlete is responsible for any Prohibited Substance or any of its Metabolites or Markers found to be present in his/her Sample. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an Anti-Doping Rule Violation under Article 2.1; nor is the Athlete’s lack of intent, fault, negligence or knowledge a valid defence to a charge that an Anti-Doping Rule Violation has been committed under Article 2.1.”

[Emphasis added in bold]

4.8 Prohibited substances are those listed in the WADA Prohibited List [as updated from time to time by WADA], which is incorporated by Article 3.1.1 of the Rules.

4.9 Article 10.2 provides that the normally applicable penalty for a violation consisting of an athlete having a specified substance in his system is a period of ineligibility (i.e. a ban) of two years:

“For an Anti-Doping Rule Violation under Article 2.1 (presence of a Prohibited Substance...)...that is the Participant’s first violation, a period of Ineligibility of two years shall be imposed, unless the conditions for eliminating or reducing the period of Ineligibility (as specified in Article 10.4 and/or Article 10.5)...are met.”

4.10 Article 10.4 provides for an elimination or reduction of the normally applicable penalty, in respect of “specified substances²”. It states:

“10.4.1 Where the Participant can establish how a Specified Substance entered his/her body or came into his/her Possession and that such Specified Substance was not intended to enhance the Athlete’s sport performance or to mask the Use of a performance-enhancing substance, and it is the Participant’s first violation, the period of Ineligibility established in Article 10.2 shall be replaced with, at a minimum, a reprimand and no period of Ineligibility, and at a maximum a period of Ineligibility of two (2) years.

(The Sole Arbitrator’s emphasis)

² These are only commonly understood to be those which are defined as more likely to be consumed unintentionally, such as through the use of the over-the-counter medicines and/or for reasons other than to enhance sporting performance. See the commentary to Article 10.4 in the Code: “[...] there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation.”

10.4.2 To qualify for any elimination or reduction under this Article 10.4, the Participant must produce corroborating evidence in addition to his/her word that establishes, to the comfortable satisfaction of the hearing panel, the absence of an intent to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance. The Participant's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility."

- 4.11 Article 10.5.1 also provides an elimination of the normally applicable penalty for prohibited substances. It states, as relevant:

*"If a Participant establishes in an individual case that he/she bears No Fault or Negligence for the Anti-Doping Rule Violation charged, the otherwise applicable period of Ineligibility shall be eliminated. When the Anti-Doping Rule Violation charged is an Article 2.1 violation (Presence of a Prohibited Substance or its Markers or Metabolites). **The Athlete must also establish how the Prohibited Substance entered his/her system in order to have the period of Ineligibility eliminated. [...]"***

- 4.12 The same conditions apply to the reduction of the period of ineligibility (to a minimum of one half of the minimum period otherwise applicable) under Article 10.5.2, save that the requirement is to show no *significant* fault or negligence.

- 4.13 Appendix One of the Rules provides the following definitions:

"No Fault or Negligence

The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method.

No Significant Fault or Negligence

The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relation to the Anti-Doping Rule Violation."

5. **PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

- 5.1 On 13th September 2010 IWBF filed a Statement of Appeal at the Court of Arbitration for Sport ("the CAS") against the Decision pursuant to the Code of Sports-related Arbitration 2010 edition (the CAS "Code").
- 5.2 On 23 September 2010 IWBF filed its appeal brief.
- 5.3 By letter dated 22 December 2010, the parties were advised that pursuant to Article R54 of the Code, The Honourable Michael J. Beloff QC, Barrister in London, United Kingdom, had been appointed Sole Arbitrator.

- 5.4 On 13 January 2011, the GBWBA filed its written submission.
- 5.5 On 17 January 2011 UKAD filed its answer.
- 5.6 On 17 January 2011 Mr Gibbs filed his answer and request for provisional measures.
- 5.7 On 25 and 26 January 2011 respectively, IWBF and UKAD filed their responses to Mr Gibbs's request for provisional measures.
- 5.8 On 31 January 2011 the Sole Arbitrator issued an Order granting Mr Gibbs's request for provisional measures.
- 5.9 The hearing in this matter was held on 11 February 2011 at The Honourable Society of Gray's Inn, London, United Kingdom. The Sole Arbitrator was assisted at the hearing by Ms Louise Reilly, Counsel to the CAS.
- 5.10 The following persons were present at the hearing:

IWBF:

1. Owain Draper, Barrister, Monckton Chambers
2. Douglas Hughes, Solicitor

UKAD:

1. Jonathan Taylor, Solicitor, Bird and Bird LLP
2. Hannah McLean, UKAD Legal Officer
3. Jason Torrance, UKAD Paralegal Officer
4. Rob Hamblin, Trainee Solicitor, Bird and Bird LLP

Simon Gibbs:

1. Simon Gibbs, Second Respondent
2. Elisa Holmes, Barrister, Monckton Chambers
3. David Jeacock, Solicitor
4. Jacqueline Paul, Witness
5. Jasmine Fisher, Mini-pupil, Monckton Chambers

6. Catherine Guo, Observer

GBWBA:

1. Charlie Bethel, GWBA Chief Executive
2. Haj Bhanja, GWBA Programme Manager
3. Murray Treseder, GWBA Head Coach

6. **JURISDICTION OF THE CAS**

- 6.1 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 the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said-related body.

An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance.”

- 6.2 In its statement of appeal, the IWBF relied on the Rules Article 13.1, 13.4 and 13.4.2 which grant a right of appeal to the CAS. The jurisdiction of the CAS was not contested by the Respondents and was confirmed by the signature of the Order of Procedure by the parties. The CAS accordingly enjoys jurisdiction.

7. **APPLICABLE LAW**

- 7.1 Article R58 of the CAS Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and 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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.”

- 7.2 In their submissions, the parties rely on the provisions of the Rules and the Code. Accordingly, these are the regulations which are applicable to this dispute.

7.3 The Rules Article 1.5.4 provides that they themselves are to be “*interpreted in a manner that is consistent with the Code*” and further “*the comments annotating various provisions of the Code shall be used, where applicable, to assist in the understanding and interpretation of these Rules.*”

7.4 The Rules Article 16.1.a provides “**Subject to Article 1.5.4, these Rules** ... shall be governed by the law of England and Wales”. The emboldened proviso ensures that there will be consistency of interpretation of Rules and Code which itself provides at Article 24.3 “*The Code shall be interpreted as an independent and autonomous text, and not by reference to the existing law or statutes of the Signatories or governments.*”

8. ADMISSIBILITY

8.1 The Statement of Appeal was filed within 21 days of the Decision. It follows that the appeal was filed in due time and is admissible.

9. THE APPEAL PANEL’S ANALYSIS

9.1 The Appeal Panel held that:

- (1) Article 10.4 provides four conditions that an athlete **must** satisfy in order to benefit from *any* reduction of the two-year period of ineligibility:
 - (i) the prohibited substance is a specified substance (Article 10.4.1);
 - (ii) the athlete establishes on the balance of probabilities³ how the specified substance entered his body (Article 10.4.1);
 - (iii) the athlete produces corroborating evidence that he did not intend to enhance his performance or mask the use of a performance-enhancing substance (Article 10.4.2);
 - (iv) the athlete satisfies the Tribunal that the specified substance was not intended to enhance his sports performance or to mask the use of a performance-enhancing substance (Articles 10.4.1 and 10.4.2).
- (2) Once those conditions are met the athlete’s “*degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility*” (Article 10.4.2); but if any one of

³ This is the applicable standard of proof: see Article 8.3.2. The higher standard applies only to showing that the athlete had no intention to enhance his performance (see Article 10.4.2).

them is not met, there can be no reduction, irrespective of the nature of the substance in question and the fact that the penalty that would be applied for deliberate use would be “relatively minor”.

- 9.2 The Appeal Panel observed at paragraph 27 of the Decision that its approach to the case, and the result, were determined by an “*oddity*” in the Rules, stating:

“[...] We think it is important to stress that this is a consequence of the Rules because of the submissions, including those of the Interveners, that ineligibility for 2 years is a disproportionate sanction for mephedrone. Indeed, we have sympathy with the oddity of a position in which we would have a discretion as to sanction when an athlete admits deliberately consuming a Specified Substance but have no option but to impose 2 years’ ineligibility where an athlete cannot prove how it came to be in his body. This is a curious feature of the Rules which those responsible for their drafting might wish to consider.”

10. PARTIES’ SUBMISSIONS

- 10.1 Mr Draper for IWBF and Ms Holmes for Mr Gibbs helpfully divided the issues between them, while adopting each other’s submissions.
- 10.2 The IWBF’s submissions in essence were that that the provisions of Article 10.4 could be read down⁴ or disapplied in so far as they, on their literal reading, produced a disproportionate result, by reference either to EU law on competition and freedom of movement of workers, the law of the European Convention on Human Rights (“ECtHR”) in particular Article 6 (fair trial) and/or Article 8 (right to respect for private life) or CAS’s own jurisprudence; that Article 10.4, at any rate as interpreted by the Appeal Panel did so, because it prevented Mr Gibbs from adducing evidence as to his lack of culpability simply because he could not establish how the mephedrone was present in his body and that, perversely, he would have been better off to have admitted – falsely - that he had deliberately taken mephedrone.
- 10.3 Mr Gibbs’s submissions in essence were that given what was at stake for Mr Gibbs, a proportionate assessment of the evidence - as Ms Holmes phrased it “*a lesser degree of particularity*” - would lead to the conclusion that he **had** established how the mephedrone had entered his body ie by spiking by Mr Henderson or a person unknown; that he had produced evidence to corroborate his denial of taking it to enhance performance; and that in all the circumstances his fault was extremely small.

⁴ By adding the words “*The penalty imposed under Article 10.2 and 10.4 cannot in any case exceed that which would be imposed for the deliberate use of the specified substance in the circumstances of the case.*”

10.4 UKAD were prepared to assume (without formally accepting⁵) that by one or other of the routes relied on by IWBF and Mr Gibbs a disproportionate rule could be read down or even departed from but submitted that the language of Article.10.4 could be applied literally without violating principles of proportionality; that it was justifiable and proportionate to require an athlete to produce evidence of how a substance entered his body before seeking to establish absence of intent to enhance performance and any degree of culpability; that Mr Gibbs had failed to produce evidence of that threshold requirement; that what he claimed to corroborate his own assertion of innocence of deliberate doping was not corroboration; and that his fault could not be in the circumstances determined at all, but, alternatively, was not insubstantial.

11. **ANALYSIS: THE RULE**

11.1 This case turns on the interpretation and application of Article 10.4 of the Rules.

11.2 Article 10.4 constitutes an exception to Article 10.2. Article 10.4 is as noted above to be interpreted by reference to the Code commentary (Article 1.5 of the Rules) and is modelled on the Code, the international instrument on doping control, itself to be interpreted by reference to the commentary. [The Code Article 24.2.] It follows that any determination in relation to Article 10.4 of the Rules will be relevant to the interpretation and application of Article 10.4 of the Code and any domestic regulations based on it.

11.3 On its face Article 10.4 creates two conditions precedent to the elimination or reduction of the sentence which would otherwise be visited on an athlete who is in breach of Article 2.1.

The athlete must:

- (i) establish how the specified substance entered his/her body (Condition (i)).
- (ii) that he did not intend to take the specified substance to enhance performance (Condition (ii)).

If, but only if, those two conditions are satisfied can the athlete (iii) adduce evidence as to his degree of culpability with a view to eliminating or reducing his period of suspension⁶ (Condition (iii)).

11.4 Therefore there are three stages to the exercise envisaged by Article.10.4. Both Condition (i), and Condition (ii) must be successfully negotiated before (iii) is attempted.

⁵ The facts set out at paras 4.1-4.4 above provide sustenance for a contention that UKAD and its Panels are public bodies: but the Sole Arbitrator does not need to determine the issue.

⁶ This sequence of stages was adopted, *inter alia*, in *UKAD v Dooler* (Methylhexaneamine/rugby league) UKAD Panel 24.11.10 paras 2.8-2.9. Laura TSO: ITF Panel 23.12.2008

- 11.5 Moreover Condition (i) and Condition (ii) are distinct. If an athlete could argue that by satisfying Condition (ii), he must *ipso facto* have satisfied Condition (i) Condition (i) would become redundant. It may be the case that in certain circumstances the evidence adduced which satisfies Condition (i) will itself necessarily satisfy Condition (ii). For example if an athlete can show that his drink was spiked with a specified substance by a rival it must follow that he himself did not intend in ingesting it to enhance performance. The reverse, however, is not the case. An athlete cannot by asserting, even with what purports to be corroborative testimony to the same effect, that he did not intend to enhance performance thereby alone establishing how the substance entered his body. Seeking to eliminate by such an approach all alternative hypotheses as to how the substance entered his body and thus to proffer the conclusion that what remains must be the truth reflects the reasoning attributed to the legendary fictional detective Sherlock Holmes by Sir Arthur Conan Doyle in “The Sign of Four” but is reasoning impermissible for a judicial officer or body. As Lord Brandon said disapproving of such approach in *The Popi M* 1985 1 WLR 948 a judge (or arbitrator) can always say that “*the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden*”. [p.955]
- 11.6 The structure and sequence of the Article lead irresistibly to the conclusion that an ability to satisfy Condition (ii) presupposes that the athlete has been able to satisfy Condition (i) ie if the athlete cannot establish **how** the specified substance entered his or her body, s/he cannot establish that it was not intended to enhance his or her performance: and as a matter of language ‘*such specified substance*’ in Condition (ii) refers back to the specified substance in Condition (i). Ignoring for present purposes the need for corroboration, it is not enough for an athlete to say “*I never took and would never take Specified Substance X*’ and so to satisfy Condition (ii) since such general statement cannot and does not adequately attach to the **particular actual** amount of Specified Substance found in his body when s/he has not established how it came to be there. And if Condition (i) and (ii) are not both satisfied, Condition (iii) (degree of fault) does not fall for consideration at all. Article 5 notably requires Condition (i) to be established in addition to absence of fault. This interpretation has hitherto been generally accepted as appears from the authorities cited below.
- 11.7 As to condition (i) the standard of proof is the balance of probabilities. Any admissible and relevant evidence can be adduced. A single item could suffice. As to condition (ii) the standard is a higher one – the sport-specific standard of comfortable satisfaction, more stringent than balance of probabilities, less stringent than beyond reasonable doubt. Corroborative evidence in addition to the athlete’s own statement is required. Two items at least are necessary. (See Commentary on the Code p.55 “*in combination*”). “*Corroboration is not a technical term of art but a dictionary word bearing its ordinary meaning ... The word “corroboration” by itself means no more than evidence tending to confirm other evidence*”. (*R v Kilbourne*: 1973 AC 729 per Lord Hailsham LC at p.741).

- 11.8 The key question, therefore, is whether proportionality requires the literal meaning of the Article to be read down or departed from.
- 11.9 In determining whether the limitation of an ECtHR or EU or human right is proportionate, a court must conventionally ask whether:
- (i) the measures designed to meet the legitimate objective are rationally connected to it;
 - (ii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective; and
 - (iii) the measures strike an appropriate balance between the interests of society and those of individuals and groups.

(See *Huang v Secretary of State for the Home Department* [2007] 2 A.C. 167, at [19] reflecting ECtHR and common law jurisprudence)

- 11.10 It was well recognised that the continued battle to eliminate doping from competitive sport waged by lawyers and laboratories on one side against (some) scientists and sportsmen on the other is necessary if sport is to preserve its integrity and its attraction. It is also recognized that there may in consequence of that battle be innocent victims. In the seminal case of *Q v UIT CAS 94/129* in considering the strict liability rule - now enshrined in the Rules and Code - the Panel while recognising the argument that such a standard "*is unreasonable and indeed contrary to natural justice because it does not permit the accused to establish moral innocence*" (para 16) rejected it. In an earlier case in England *Gasser v Stinson* 1988 15 June Scott J was prepared to accept that the then rule of the International Association of Athletics Federations ("IAAF") which did not allow an athlete **even** at the stage of sanction to establish his moral innocence was not in unreasonable restraint of trade. Neither decision, in particular the second, bears directly on the issue before the Sole Arbitrator but each provides a reminder that a rule which at first sight may appear to be unfair to one athlete may on mature consideration be justified as fair to athletes as a whole.
- 11.11 The objective pursued by anti-doping penalties was indeed specifically addressed by the Court of Justice of the European Communities ("ECJ") in Case C-519/04P *Meca-Medina and Majcen v Commission* [2006] 5 C.M.L.R. 18.

43 *As regards the overall context in which the rules at issue were adopted, the Commission could rightly take the view that the general objective of the rules was, as none of the parties disputes, to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.*

- 44 *In addition, given that penalties are necessary to ensure enforcement of the doping ban, their effect on athletes' freedom of action must be considered to be, in principle, inherent itself in the anti-doping rules.*

The ECJ, however, added:

- 47 *It must be acknowledged that the penal nature of the anti-doping rules at issue and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition because they could, if penalties were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from sporting events, and thus in impairment of the conditions under which the activity at issue is engaged in. The restrictions thus imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport. ...*

- 48 *Rules of that kind could indeed prove excessive by virtue of, first, the conditions laid down for establishing the dividing line between circumstances which amount to doping in respect of which penalties may be imposed and those which do not, and second, the severity of those penalties." (emphasis added)*

- 11.12 In the Sole Arbitrator's view, the requirement that Condition (i) be satisfied is *prima facie* proportionate. To permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body. The Sole Arbitrator has sympathy with athletes who are – as, he accepts they can be – victims of spiking without evidence to prove its occurrence; but the possible unfairness to such athletes is outweighed by unfairness to all athletes if proffered, but maybe untruthful, explanations of spiking are too readily accepted.
- 11.13 The Sole Arbitrator acknowledges that CAS jurisprudence itself illustrates that proportionality may require reduction of a sentence below the stipulated minimum both as “*a widely generally accepted principle of sports law*”. *S v FINA* CAS 2005/A/830 para 44 (as well as under Swiss law ditto para 45). Recognising Article 10.5 of the Code itself injects “*substantial elements of the doctrine of proportionality*” into the Code (ditto para 470) the Panel there held that “*the mere adoption of WADC ... by a respective federation does not force the conclusion that there is no other possibility for a greater or lesser sanction than allowed by DC 10.5*”, (ditto para 48) by reference to “*a potentially' more forgiving principle of proportionality*” (ditto para 50). However, in that case S ‘*had established how the prohibited substance entered her system*’ (para 34) and there is nothing to suggest that this was not a *sine qua non* of any outcome of reduction of sentence. It therefore provides no precedent for a successful appeal by an athlete who cannot establish that threshold matter.

- 11.14 *Puerta v ITF* CAS 2006/A/1025 was a case where the Panel found that what it identified as a gap or lacuna in the Code enabled it to reduce what was a mandatory 8 year sanction for a second offence to two years in unusual and sympathetic circumstances; the player had accidentally drunk from a glass which appeared to him to be empty but had been used by his wife as a vessel for premenstrual tension medicine containing a prohibited substance. The amount ingested was negligible and incapable of enhancing performance. The penalty *prima facie* applicable under the Code resulted from the player having sustained a previous positive test for an asthma medication for which he could have – but had not – obtained a Therapeutic Use Exemption (“TUE”). The Panel said that “*the issue which arises in the present case is not an issue which the draftsmen of the WADC appear to have had in mind*” (para 11.7.5) and deployed the doctrine of proportionality to achieve what is perceived as a just result. However the case was not concerned with Article 10.4 [mentioned en passant (para 11.7.8)], and the Panel was at pains to stress how exceptional were the circumstances which engaged the need to read words into the Code and how important it was that its decision should not be seen as “*a weakening of the war against doping*” see paras 11.7.23-34 and especially 11.7.32. Again critically the presence of the substance in the athlete’s body was explained (para 11.5.7). So *Puerta* too has no value as a precedent to an athlete who cannot advance such explanation.
- 11.15 The Sole Arbitrator was also pressed with awards made in previous UKAD cases, e.g. *GBWBA v Lahmar* (wheelchair basketball/cannabis) Appeal Panel 17th July 2009, *GBWBA v Peasley* (wheelchair basketball/cannabis) (ditto) where on arguably slender evidence the UKAD Sole Arbitrator found that both Conditions (i) and (ii) had been satisfied (para 15 in each case). But it is critical that in each case the UKAD Sole Arbitrator did find that the athlete had established how the specified substance entered his body (ditto).
- 11.16 The Sole Arbitrator was also pressed with ‘other agreed’ decisions made in previous UKAD cases where UKAD consented to a short period of ineligibility. (*Forgerty* (Rugby League/Cannabis) 16th November 2010 *Tunnah* (Rugby Union/ephedrine 27th April 2010), but again it is critical that UKAD were prepared to accept in those cases that the athlete had established how the specified substance entered his body. The references only reminded the Sole Arbitrator that previous awards, unless authoritatively stating principles of general application, are of no real assistance given their fact sensitive nature and the lack of detailed knowledge of their particular circumstances available to later panels or sole arbitrators.
- 11.17 Finally some reliance was also placed on what appeared arguably to be a laxer approach to Article.10.4 by UKAD as prosecuting authority itself where cannabis use was concerned. The Sole Arbitrator is unpersuaded that UKAD’s approach in such cases, whatever it may have been, can inform construction this way. The proper interpretation of a rule is a matter of law, not practice. In any event the cannabis cases provide no true analogy since the substance is not a performance

enhancing drug whereas mephedrone, albeit its use to enhance performance is hitherto unrecorded, is a stimulant and thus has performance enhancing properties. The cannabis cases were in any event essentially concerned with fault i.e. on the Sole Arbitrator's taxonomy Condition (iii); not Conditions (i) and (ii).

- 11.20 Further argument was based on the proposition that the reverse burden of proof in Article 10.4 was contrary to the presumption of innocence and hence violated the athlete's fair trial rights under Article 6 of the Convention. But the premise for the proposition was unsound. The Code does not rely on the presence of a prohibited (including a specified) substance as proof of an offence of using such substance with intent to enhance performance unless the athlete disproves such intent. The offence is of having a prohibited (including a specified) substance in one's body. [Article 2.1] The submission conflates an offence of strict liability with an offence with a reverse burden of proof.
- 11.21 Reference was made in this context to *Regina v DPP ex p Kebilene* [2000] 2 AC 326 (HL) ("*Kebilene*") where Lord Hope referred to the ECtHR cause of *Salabiaku v France* (1988) 13 European Human Rights Reports ("EHRR") at 379, noting that there:

"The court was concerned with an article in prohibited goods was established, the person was deemed liable for the offence of smuggling. Read strictly, the provision appeared to lay down an irrebuttable presumption. The code did not provide expressly for any defence. But the court held that there was no failure to comply with Article 6(2), because in practice the courts were careful not to resort automatically to the presumption but exercised their power of assessment in the light of all the evidence. At p.388, para 28 the court gave this guidance:

"Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal ... Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires states to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. The court proposes to consider whether such limits were exceeded to the detriment of Mr Salabiaku."

As a matter of general principle therefore a fair balance must be struck between the demands of the general interest of the community and the protection of the fundamental rights of the individual: see also Sporrang and Lonroth v Sweden (1982) 5 EHRR 35, 52, para 69. (p384)

- 11.22 But *Salabiaku* was a case where the offence itself (unlike the offence under Article 2.1 of the Rules) was defined by an irrebuttable presumption, and it was acknowledged by the ECtHR, such a presumption was not automatically held to violate convention rights; rather the issue was one of balance.
- 11.23 IWBF's submission has more purchase if the focus is switched from the ingredients of the offence to the sanctions imposed for its commission for a CAS Panel has aptly commented that "[a]s far as the application of sanctions is concerned,...the World Anti-Doping Code is not a system of strict liability

but a system based on presumed fault (intent or negligence) on the part of the athlete found to have a prohibited substance in his sample". WADA v Stauber & Swiss Olympic Committee, CAS 2006/A/1133, para 30.

- 11.24 But this too is in the Sole Arbitrator's judgment, an entirely proper and proportionate approach achieving the requisite equilibrium. As the Code Commentary to Article 2.1 states:

The strict liability rule for the finding of a Prohibited Substance in an Athlete's Sample, with a possibility that sanctions may be modified based on specified criteria, provides a reasonable balance between effective anti-doping enforcement for the benefit of all "clean" Athletes and fairness in the exceptional circumstance where a Prohibited Substance entered an Athlete's system through No Fault or Negligence or No Significant Fault or Negligence on the Athlete's part. It is important to emphasize that while the determination of whether the anti-doping rule violation has occurred is based on strict liability, the imposition of a fixed period of Ineligibility is not automatic.

- 11.25 *FIFA & WADA, CAS 2005/C/976 & 986 (an Advisory Opinion) a CAS Panel stated emphatically "Tough and relentless action" is required in order to achieve the ultimate goal of the Code, namely "to protect the Athlete's fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide" para 150 . "[T]here is no doubt that the two years' suspension as a standard provided by the WADC is capable of serve [sic] as an effective deterrent". Ditto para 150-1*

- 11.26 CAS has also stated in the same opinion that *"two years ineligibility is also accepted as appropriate and necessary sanction in the vast majority of sports organisations. Any shorter ineligibility period would inevitably reduce the deterrent effect of a doping sanction and increase the risk that athletes would become less careful with regard to prohibited substances and methods."* and that *"the overall goal of (anti-doping) is in the predominant interest of all athletes and their audiences, and this justifies the consequence that the person who has violated the rules will suffer substantial sanction". ... "the two years' ineligibility for doping offenses where the athlete may not demonstrate "no significant fault or negligence" is not excessive" para 151. It noted further "The fact that under the WADC, the standards of sanction of two years ineligibility is subject to reduction if the player can demonstrate no significant fault for negligence" and concluded "**Applied to the individual case this is in full compliance with the principle of proportionality** (para 154)."*

- 11.27 In *Kebilene* Lord Hope further explained how to identify the correct balance:

Mr Pannick QC suggested that in considering where the balance lies it may be useful to consider the following questions:

- (1) *what does the prosecution have to prove in order to transfer the onus to the defence?*

- (2) *what is the burden on the accused – does it relate to something which is likely to be difficult for him to prove, or does it relate to something which is likely to be within his knowledge or (I would add) to which he readily has access?*
- (3) *what is the nature of the threat faced by society which the provision is designed to combat? It seems to me that these questions provide a convenient way of breaking down the broad issue of balance into its essential components, and I would adopt them for the purpose of pursuing the argument as far as it is proper to go in the present case.*

11.28 Analysing Article 10.4 by reference to these 3 tests:

- (i) in order to transfer the onus of reducing the two year ineligibility period to the athlete the prosecution has to show presence of the specified substance in the athlete's body.
- (ii) the athlete is likely (sic) to have knowledge or access to knowledge of how the substance came to be present – certainly compared with the prosecution.
- (iii) the nature of the threat – here to sport – is unfair competition.

The Sole Arbitrator considers that those answers to the triple test show again that the balance demanded has been achieved.

11.30 A further argument was based on anomaly, reflecting the concern of the Appeal Panel cited above at para 9.2 that an athlete who could (truthfully) admit use of substance might be better off than an athlete who (truthfully) could not establish how substance was found in his body. The former had a chance of reducing or eliminating his sanction under Article 10.4 or indeed Article 10.5; the latter, on the Appeal Panel's and UKAD's interpretation, none.

11.31 The Sole Arbitrator certainly does not accept that the former would necessarily be better off than the latter, although he does accept while the latter could not achieve reduction or elimination of sentence: the former in theory could. However if the substance had performance enhancing qualities, it is doubtful whether the former would, if only because to use a substance which had performance enhancing qualities even if innocently, ordinarily betokens a degree of carelessness would result in a small, if any, lowering of sentence. The commentary on the Code stipulates "*In assessing the athlete's or other persons degree of fault, the circumstances considered must be specific and relevant to explain the athletes or other persons departure from the expected standard of behaviour*".

11.32 IWBf's expressed concern that construing Article 10.4 according to its ordinary and natural meaning which, the Sole Arbitrator has found, it bears, might encourage athletes who could not establish how the prohibited substance entered their body to lie and claim that they took it deliberately. The Sole Arbitrator does not consider that in principle it is appropriate to approach a question of construction on such a premise. The assumption should always be that an athlete will tell the truth; honesty is

usually, if not always, the best policy. Further he has already mentioned the limited opportunity to procure reduction of sentence where the use was of a substance with the capacity to enhance performance. Moreover if an athlete started with a lie as to how the substance came in his body, he would need to lie too as to his innocence in ingestion, and his lack of culpability. Successful misleading of a panel by lies piled on lies might be a difficult, if not impossible, exercise.

11.33 The Sole Arbitrator notes too in this context the stigma attached to deliberate taking of a specified substance and the risk of exposure to criminal prosecution for possession or use of the substance in question, if criminalised, as mephedrone has been⁷.

11.34 The corpus of authority supports the Sole Arbitrators' analysis in chronological order.

- (1) *'Bearing in mind that the Athlete has the burden of establishing on a balance of probabilities that he bears no fault or negligence, or no significant fault or negligence for the anti-doping violation, there must be evidence of contamination of the marijuana used by the Athlete if I am to be persuaded that exceptional circumstances that would result in elimination or reduction of the normal penalty exist. While recognizing that obtaining such evidence might be difficult if not impossible, mere speculation as to what may have happened will not satisfy the standard of proof required'. CCES v Lelievre, Sport Dispute Resolution Centre of Canada decision dated 7 February 2005, para 51.*
- (2) *"The player [] bears the burden of proving how the prohibited substance entered his system ...he has signally failed to discharge that burden on the balance of probabilities. He cannot discharge it by merely denying wrongdoing and advancing an innocent explanation. He must go on to show that the innocent explanation is more likely than not to be the correct explanation, and to do so he must show what the factual circumstances were in which the substance entered his system, not merely the route by which it entered his system."* ITF v Burdekin, Anti-Doping Tribunal decision 4 April 2005.
- (3) *"Obviously this precondition to establishing no fault or no significant fault must be applied quite strictly, since if the manner in which a substance entered an athlete's system is unknown or unclear it is logically difficult to determine whether the athlete has taken*

⁷ Mr Gibbs's statement that had he anticipated that his inability to establish how the mephedrone came into his body would necessitate a two year ineligibility sanction he would have felt "*under almost unbearable pressure*" to admit – falsely – taking Shake-n-Vac (Mephedrone's street name) does not go so far as to say that he would have succumbed to that pressure; but he does not appear in any event to have appreciated that such a false confession might not have availed him.

precautions in attempting to prevent any such occurrence”. *Karatantcheva v ITF*, CAS 2006/A/1032, Award dated 3 July 2005, para 117.

- (4) *‘[The purpose of the requirement is] to confine the circumstances in which the automatic sanctions may be reduced to truly exceptional circumstances in which the player can show, the burden of proof lying upon him, how the substance did indeed enter his body. That burden of proof must be discharged on the balance of probability. **The provision thus ensures that mere protestations of innocence, and disavowal of motive or opportunity, by a player, however persuasively asserted, will not serve to engage these provisions if there remains any doubt as to how the prohibited substance entered his body. This provision is necessary to ensure that the fundamental principle that the player is responsible for ensuring that no prohibited substance enters his body is not undermined by an application of the mitigating provisions in the normal run of cases.** (para 18)... The opportunity was there, the motive is asserted but any evidence is lacking. ... On all the evidence the tribunal finds that the player has clearly failed to discharge the burden of proving how the substance entered his body. The explanations put forward are no more than theoretical possibilities’); “On all the evidence the Tribunal finds that the player has clearly failed to discharge the burden of proving how the substance entered his body. **The explanations put forward are no more than theoretical possibilities.** Regrettably this is not a case where exceptional circumstances are proved but a conventional case in which the player asserts his moral innocence but is unable to prove how the prohibited substance entered his body” (para 23) “on that basis the tribunal is not able to make any finding as to the players lack of fault. **In the absence of proof as to how the substance entered the players body it is unrealistic and impossible to decide whether in those unknown circumstances he did, or did not, exercise all proper precautions to avoid the Commission of a doping offence**” (para 24). *ITF v Beck*, Anti-Doping Tribunal decision dated 13 February 2006, (where the athlete alleged his drink must have been spiked by a colleague who was jealous of his girlfriend).*
- (5) *“Obviously this precondition is important and necessary otherwise an athlete’s degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up.”* *WADA v Stanic and Swiss Olympic Association*, CAS 2006/A/1130, Award dated 4 January 2007, para 39.
- (6) *‘The player invited the Tribunal to accept as the most likely explanation the consumption of drink, food, a supplement or medication that contained cocaine or its principal metabolite. However, she issued that invitation to the Tribunal not because she could give specific knowledge from her own personal consumption of such consumption, but on the basis that it*

should be inferred from the player's assertion -- which we are invited to accept – that the player did not take cocaine deliberately. ... Mr Taylor for the ITF submitted that the player must show by positive evidence, not merely speculation or deduction from a protestation of innocence, how the substance entered the player's system; and must show that the innocent explanation advanced was more likely than not to be the correct one; ... Whether or not the player's denial of having deliberately taken cocaine is true, we agree with the ITF that the player cannot discharge the burden on her of establishing how it entered the system'). ITF v Hingis, Anti-Doping Tribunal decision dated 3 January 2008, paras 147-153

11.35 The Sole Arbitrator accepts (i) that frontal assault of the validity of the rule in question, of the kind mounted in the present appeal, did not appear to feature in the arguments before the various adjudicative bodies, save that in *Burdekin* the Tribunal assumed, in the absence of clarification by the advocate, that it must be on public policy grounds (para 55), (ii) that the cases mainly turned on the analogous Articles 10.5.1 and 10.5.2⁸. However in both it is a *sine qua non* of an elimination reduction of the period of ineligibility that the athlete should establish how the prohibited substance entered his system, and in any event it is not only their conclusion but the rationale that is compelling.

12. ANALYSIS: MR GIBBS

Condition (i)

12.1 Mr Gibbs's case provides itself an example of how Article 10.4 operates. By asserting his lack of deliberate taking of the mephedrone (in combination with other evidence said to constitute corroboration) he invites the Sole Arbitrator to reason backwards and to conclude that the explanation for its presence in his body must be spiking. But that is to subvert the logic and to invert the language of the Article.

12.2 Ms Holmes argued that there were actually only two occasions when, during the week before the competition at which he tested positive, he was out and about; the Tuesday, a habitual break in a day's training session at Aylesbury with his teammates and the Friday when he was in a number of public houses with Ms Paul; the former being, it is asserted, an unlikely occasion for the use of such substances by anyone, the latter, given the public house environment, the stronger candidate for a spiking. But once analysed the argument comes to no more than this: Mr Gibbs says he does not (did not) use mephedrone; Ms Paul says the same; Mr Treseder, the UK Wheelchair Basketball team

⁸ But in *Thio* an ITF Panel case 23 December 2008, applied a regulation similar to that of Article 10.4 in accordance with the Sole Arbitrator's analysis (paras 3.6-7).

coach gives him a clean bill of health and a strong character reference. It is contended that the Sole Arbitrator should accept such evidence and conclude that the only possible explanation for the presence of mephedrone in Mr Gibbs's body is spiking.

- 12.3 That contention cannot succeed on the Sole Arbitrator's analysis of Article 10.4 and the authorities cited in support.

Condition (i) in the parlance of English criminal law is concerned with the *actus reus*; the guilty act;

Condition (ii) is in the same parlance concerned with *mens rea*, the state of mind.

Unless the *actus reus* is established, there is nothing on which the *mens rea* can operate.

- 12.4 There are a number of possibilities as to how the mephedrone came to be present in Mr Gibbs's body. That he took it deliberately (a possibility that Ms Holmes accepted); that he was given it by Ms Paul his girlfriend and partner; that food or drink taken during whatever period before the test would have resulted in the amount shown in his sample was contaminated; that by accident someone who possessed mephedrone and in whose company Mr Gibbs was either at home or during his Tuesday break with team mates or, in the pub's on Friday, allowed the mephedrone to enter Mr Gibbs's food or drink; or that on one or more of those occasions, someone spiked his drink. Mr Gibbs can produce no actual evidence as to which of those possibilities was a probability.
- 12.5 Ms Holmes had a further string to her bow, or arrow in her quiver. Mr Henderson, Mr Gibbs's friend, admitted to the first tier panel that he had spiked Mr Gibbs's drink; it is said by Ms Paul that he had form i.e. had done this before.
- 12.6 Mr Gibbs claimed, however, that any such "spiking" took place without his knowledge. He was therefore unable to provide any evidence of his own in support of this claim. Instead he relied and had to rely on the testimony of Mr Henderson.
- 12.7 The first tier tribunal at para 99 listed no less than 9 cogent reasons why they did not find Mr Henderson's evidence to be "*reliable and credible*". There is no basis upon which the Sole Arbitrator could depart from that finding given that he lacked the advantage of sight and sound of Mr Henderson which the first tier tribunal enjoyed. The Appeal Panel declined a similar invitation to rely on Mr Henderson's written statement alone for the same reasons paras 28 and 29. Mr Henderson's subsequent disappearance from the proceedings scarcely enhances his credibility.
- 12.8 I therefore regret that I cannot accept that Mr Gibbs has established how mephedrone entered his body.

Condition (ii)

12.9 Ms Holmes relied on three items said to constitute corroboration of Mr Gibbs's denial that he had any intent to enhance sport performance by use of mephedrone. Mr Henderson's written statement, Ms Paul's evidence as to the reaction of Mr Gibbs to being informed of the results of the drugs test and their subsequent discussion of possible causes; and Mr Treseder's evidence as to Mr Gibbs's candour in revealing his positive test result and to Mr Gibbs's general admirable character.

12.10 The Sole Arbitrator already explained why it is not possible to give any weight to Mr Henderson's written statement. He would add that surprised or aggrieved reaction to notification of a positive drugs test can be the product of discomfiture at being unmasked, and conversation about possible causes a colourable effort to conceal actual knowledge. General character reference can again not qualify; there is after all a first time for everything. Within the context of Article 10.4 the Sole Arbitrator cannot ascribe corroborative effect to material of that kind.

12.11 Such evidence in particular falls measurably short of the kind of sufficient evidence illustrated in the comment to the Code which the Sole Arbitrator lists.

- (a) The fact that the nature of the specified substance or the timing of its ingestion would not have been beneficial to the Athlete.

This clearly does not apply to Mr Gibbs. The substance was a stimulant.

- (b) The athletes open use or disclosure of his or her use of the specified substance.

This clearly does not apply to Mr Gibbs who denies use.

- (c) A contemporaneous medical record files substantiating the non sports-related prescriptions for the specified substance.

Mr Gibbs does not seek to produce such record.

- (d) Generally the greater potential performance enhancing benefit, the higher the burden on the athlete to prove an act of intent to enhance sport performance.

The Sole Arbitrator repeats observations under (a).

12.12 As the commentary to Code Article 10.4 states:

'Specified Substances are not necessarily less serious agents for purposes of sports doping than other Prohibited Substances (for example, a stimulant that is listed as a Specified Substance could be very effective to an Athlete in competition): for that reason, an Athlete who does not meet the criteria under this Article would receive a two-year period of Ineligibility and could receive up to a four-year period of Ineligibility under Article 10.6.'

12.13 But, the Sole Arbitrator repeats, all this is moot since Mr Gibbs's case cannot advance to this second stage at all.

Condition (iii)

12.14 Even if Mr Gibbs's claim that his drink was spiked had been accepted, that would not in and of itself have entitled him to any reduction in the standard sanction. Instead any reduction would have depended on his relative fault (or lack thereof).

12.15 The Sole Arbitrator notes the remarks made by the First Tier Panel in this case (at paragraphs 103,104 and 105):

*"Had the Tribunal found that the [Athlete] had established that the 4-methylmethcathinone had entered his body/system by the means claimed by him and described by Mr. Henderson...we would have found that the Respondent had been at significant fault in the circumstances. Accordingly, a finding of no fault or negligence for the purposes of Article 10.5.1 would not have been made. The Respondent was an International Athlete who would or should have been aware of the risks of leaving drinks unattended in public places. The commentary on the Code and the CAS decisions referred to make it clear that athletes bear a significant level of responsibility for taking care to ensure that they do not inadvertently ingest Prohibited Substances. Athletes who are liable to be Tested must take care of their food and drink in public places so that they are able to discharge the duty to take care incumbent upon them. In this case the Respondent had been careless of his drinks. He had consumed a significant quantity of alcohol and repeatedly left his drinks unattended. He readily acknowledged that he had "mingled" throughout the course of an evening leaving his drink behind him whilst he socialised. He had allowed Mr. Henderson, an associate, and others ready and repeated access to his drinks. Acting in this way does not discharge the high degree of responsibility incumbent on Athletes. **In such circumstances we would have imposed a period of ineligibility of 12 months in substitution for the period of two years by application of Article 10.4.1 of the Anti-Doping Rules.**"*

12.16 Mr Gibbs candidly states that on the evening in question he visited general public houses, and there – and earlier at home – drank beer and vodka chasers returning home at 3am. Ms Paul described him in a statement as "merry drunk" and (unsurprisingly) as having a hangover on the Saturday. The Sole Arbitrator makes no criticism of Mr Gibbs's choice of how to unwind at the end of a working week but observes only that his vigilance would inevitably and predictably have been diminished in consequence of his drinking.

- 12.17 Ms Holmes drew attention to Mr Gibbs's record and reputation including a role model; his Olympics prospects and ambitions; the fact that mephedrone is a recreational drug; lawful at the material time; that – at worst – he had left his drink unattended that his environment in which he was relaxing was not suspect; nor was he aware that Mr Henderson might have a propensity to spike another's drink; and he had no special reason to be specially vigilant; and the difficulties posed by his disability. In terms of his duty to be vigilant; some of these points were well made; others begged the question. Against them would need to be juxtaposed the finding of the first tier tribunal.
- 12.18 In *IRB v Keyter*, CAS made it clear that even if it had accepted the athlete's claim that his drink had been spiked by a person he met in a nightclub, it would not have reduced his sanction to below two years on grounds of No Significant Fault or Negligence, because it was significantly negligent to go to a nightclub, drink so much that one cannot take care of oneself or what one is drinking, and accept drinks from someone one does not know. *IRB v Keyter*, CAS 2005/A/1067, award dated 13 October 2006, paras 6.13 – 6.15.
- 12.19 The comment to Article 10.4 notes: *'This Article applies only in those cases where the hearing panel is comfortably satisfied by the objective circumstances of the case that the Athlete in taking or Possessing a Prohibited Substance did not intend to enhance his or her sport performance.'* If the Athlete fails to provide an explanation, with supporting evidence, that satisfies the Tribunal, then it cannot guess, or speculate, but must proceed on the basis that there is no *'credible, non-doping explanation'* for the presence of the stimulant in his system.
- 12.20 Where (as here) Mr Gibbs's claim that his drink was spiked has not been established, then he has fallen at the crucial first hurdle and his claim to innocent use cannot be considered any further, he has simply not laid the ground for an intelligible assessment of his degree of fault. The standard sanction has to be applied.
- 12.21 The Appeal Panel expressed a more lenient view than that of the First Tier Panel stating that *'For a so-called recreational drug like mephedrone we agree that the cannabis cases do provide some analogy. On the basis that there was no intent to enhance performance we would have thought that a period of ineligibility of a few months would have been appropriate for the purposes of Article 10.4 of the Rules'*. [para 30] But neither Panel were seemingly aware that mephedrone is very different from cannabis. It is a stimulant whose effects are likened to those of amphetamines. An athlete who has ingested mephedrone can never pray in aid an assumption of recreational use.

13. **ENVOI**

- 13.1 In summary, the Sole Arbitrator concludes that the Appeal is dismissed but emphasises that this does not mean that he – or any of the adjudicative bodies – have attached stigma of ‘doper’ to Mr Gibbs. It means only that Mr Gibbs has not been able to supply evidence to pass through the gateway of Article 10.4, so as to reduce or eliminate the sanctions consequential upon the indisputable presence of mephedrone found in his body by an in-competition test. It was not, the Sole Arbitrator repeats, for UKAD to provide intent to dope.

14. (...)

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the International Wheelchair Basketball Federation on 13th September 2011 against the decision of the UK National Anti-Doping Appeal Panel dated 23rd August 2010 is dismissed.
2. The costs of arbitration, to be calculated and notified to the parties by the CAS Court Office shall be borne by the International Wheelchair Basketball Federation.
3. (...)

Lausanne, 22 February 2011

THE COURT OF ARBITRATION FOR SPORT

The Hon. Michael J. Beloff QC
Sole Arbitrator