UNION CYCLISTE INTERNATIONALE

Anti-Doping Tribunal

UCI Anti-Doping Tribunal

Judgment

case ADT 01.2019

UCI v. Mr Gaston Emiliano Javier

Single Judge:

Mr Ulrich Haas (Germany)

Aigle, 15 July 2019

I. INTRODUCTION

1. The present Judgment is issued by the UCI Anti-Doping Tribunal (hereinafter referred to as "the Tribunal") in application of the UCI Anti-Doping Procedural Rules (hereinafter referred to as "the ADT Rules") in order to decide upon violations of the UCI Anti-Doping Rules (hereinafter referred to as "the ADR") committed by Mr. Gaston Emiliano Javier (hereinafter referred to as "the Rider"), as alleged by the UCI (hereinafter collectively referred to as "the Parties").

II. FACTUAL BACKGROUND

2. The circumstances stated below are a summary of the main relevant facts, as submitted by the Parties. Additional facts may be set out, where relevant, in connection with the legal discussion that follows. While the Single Judge has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the Judgment refers only to the necessary submissions and evidence to explain his reasoning.

1. The Rider

3. The Rider is a professional cyclist of Argentinian nationality. He was born on 3 July 1993. At the time of the alleged anti-doping rule violation (hereinafter "ADRV"), the Rider was affiliated to the Cycling Union of the Republic of Argentina and held a license of the category "Elite". He was, thus, a License-Holder within the meaning of the ADR.

2. The Team

4. The Rider started his professional career with the UCI Continental Team Sindicato de Empleados Publicos de San Juan (hereinafter "the Team"). He was contracted to the Team in 2018.

3. The Alleged ADRV

5. On 23 January 2018, the Rider provided a urine sample (number 4133382) during an in-competition doping control at the Vuelta a San Juan Internacional. The race took place from 21 to 28 January 2018 in Argentina. The doping control was carried out by a Doping Control Officer of the Cycling Anti-Doping Foundation on behalf of the UCI. The Rider confirmed on the Doping Control Form that the sample had been taken in accordance with the applicable regulations and declared that he had taken "multivitaminas" and "aminoacidos", however no other medication or supplement over the seven days preceding the test.

6. The urine sample provided by the Rider was then analysed in the WADA-accredited Laboratory in Madrid, Spain (hereinafter referred to as "the Laboratory").

7. On 28 March 2018, the Laboratory reported an Adverse Analytical Finding (hereinafter "AAF") with regard to endogenous Anabolic Androgenic Steroids (hereinafter "AAS") in the Rider's A-sample. The report holds that the *"GC/C/IRMS results are consistent with the exogenous origin of Testosterone and at least one of the Adiols (5αAdiol and/or 5βAdiol)" and the "GC/C/IRMS results are consistent with the exogenous origin of 5αAdiol and 5βAdiol".*

8. On 3 May 2018, the Rider was notified of the AAF and of the mandatory provisional suspension according to Article 7.9.1 ADR with effect from the date of the notification.

9. Since a Rider's teammate, Mr. Gonzalo Joaquin Najar, was also notified of an AAF for CERA based on a sample taken during the same race on 21 January 2018, the Team was suspended for a period of 45 days.

10. On 10 May 2018, the Rider requested the B Sample opening and analysis as well as the A Sample Laboratory Documentation Package. Furthermore, the Rider made it clear that he did not accept the AAF for the presence of AAS.

11. On 28 May 2018, the opening and analysis of the B Sample took place at the Laboratory. The analysis confirmed the results of the A Sample.

12. On 6 June 2018, the UCI informed the Rider of the results of the B Sample analysis. Furthermore, the letter advised the Rider as follows: "*Consequently, the UCI asserts that you have committed an anti-doping rule violation under article 2.1 and/or 2.2 of the UCI Anti-Doping Rules (ADR)*". The UCI also invited the Rider to provide an explanation and supporting documents with regard to the AAF within 14 days. In addition, the letter advised the Rider of the possibility to put an end to this matter by means of an "Acceptance of Consequences" as provided under Article 8.4 ADR. Enclosed with the letter was the A Sample Laboratory Documentation Package previously requested by the Rider.

13. On 28 June 2018, the Rider submitted his comments in which he essentially explains that *"[i]t is not specified at any time which is allegedly ingested the banned substance. As well as the documentation package laboratory sample "A" […] are the conclusion of the analysis and says: "Testosterone does not meet all the criteria for identifying" and then establishes the character of endogenous the result".* Also, he states: "*[…] I repeat not having used any illegal substance for concluding with the analysis results in question."* In addition, he comments that no banned substances were found, however "*higher values of testosterone index*".

14. On 26 July 2018, the UCI offered an Acceptance of Consequences – according to Article 8.4 ADR – to the Rider. The latter was also advised that if he did not agree with the proposed Acceptance of Consequences, the UCI would refer the matter to the Tribunal. The UCI also provided the Rider with a report of Daniel Carreras, Director of the Laboratory, including further explanations with regard to the analysis of the sample taken on 23 January 2018 and its results.

15. On 8 August 2018, the Rider informed the UCI that he rejects the Acceptance of Consequences.

16. On 24 April 2019, the UCI referred the case to the Tribunal. In its referral to the Tribunal ("Petition"), the UCI requested the following:

    - *Declaring that Mr. Javier has committed an Anti-Doping Rule Violation.*
    - *Imposing on Mr. Javier a Period of Ineligibility of 4 years, commencing on the date of the Tribunal's decision.*
    - *Holding that the period of provisional suspension served by Mr. Javier since 3 May 2018 shall be deducted from the Period of Ineligibility imposed by the Tribunal.*
    - *Ordering the disqualification of all results obtained by Mr. Javier at the 2018 Vuelta a San Juan Internacional and all subsequent results obtained until 3 May 2018.*
    - *Condemning Mr. Javier to pay a fine of* [redacted].
    - *Condemning Mr. Javier to pay the costs of results management by the UCI (2'500.- CHF), the costs of the B Sample analysis (800.- EUR) and the costs of the A Sample Laboratory Documentation Package (500.- EUR).*

III. PROCEDURE BEFORE THE TRIBUNAL

17. In accordance with Article 13.1 ADT Rules, the UCI has initiated proceedings before this Tribunal through the filing of a Petition to the Secretariat on 24 April 2019. Before referring the case to the Tribunal, the UCI has tried to settle the dispute by offering the Rider an Acceptance of Consequences within the meaning of Article 8.4 ADR and Article 2 ADT Rules. The Offer of Acceptance of Consequences was rejected by the Rider on 8 August 2018.

18. On 3 May 2019, the Secretariat of the Tribunal appointed Mr. Ulrich Haas to act as Single Judge in the proceedings in application of Article 14.1 ADT Rules.

19. In application of Article 14.4 ADT Rules, the Rider was informed with the same communication that disciplinary proceedings had been initiated against him before the Tribunal. Furthermore, the Rider was informed that he was granted a deadline until 20 May 2019 to submit his answer (hereinafter the "Answer") in conformity with Articles 16 paragraph 2 and 18 ADT Rules.

20. On 16 May 2019, the Rider requested an extension of the deadline to file his Answer.

21. With letter dated 19 May 2019, the Tribunal Secretary informed the Rider that the Single Judge has granted an extension until 23 May 2019.

22. On 23 May 2019, the Rider submitted his Statement of Defence.

23. On 3 June 2019, the Tribunal acknowledged receipt of the Rider's Answer and stated that, in accordance with Article 17 of the ADT Rules, the Parties should not be authorized to supplement or amend their submissions after having filed the Petition and the Answer, unless so ordered by the Single Judge. Furthermore, the parties were informed that the Single Judge decided not to hold a hearing.

IV. JURISDICTION

24. The jurisdiction of the Tribunal follows from Article 8.2 ADR and Article 3.1 ADT Rules according to which "*the Tribunal shall have jurisdiction over all matters in which an anti-doping rule violation is asserted by the UCI based on a results management or investigation process under Article 7 ADR*".

25. Furthermore, Article 3.2 of the ADT Rules provides the following:

> *"Any objection to the jurisdiction of the Tribunal shall be brought to the Tribunal's attention within 7 days upon notification of the initiation of the proceedings. If no objection is filed within this time limit, the Parties are deemed to have accepted the Tribunal's jurisdiction."*

26. Neither of the Parties raised any objection to the jurisdiction of the Tribunal within said time limit. Therefore, the Tribunal has jurisdiction to decide on the Petitions.

V. OTHER PROCEDURAL ISSUES

27. The Respondent in his Answer dated 23 May 2019, informed the Tribunal that he "*also used the federal courts of … Argentina in defense of* … [his] *sporting rights*" and that a proceeding was

pending before the "Juzgado Federal de San Juan". Said court – according to the Rider – has "*granted an injunction … consisting of the suspension of the sanction imposed on* … [him] *by the disciplinary commission of the UCI*." The injunction issued by the "Juzgado Federal de San Juan" orders the "*International Cycling Union UCI … to refrain from effectuate the sanction imposed four – year suspension … until final resolution in this matter …* "

28. The Tribunal finds that it is not prevented by this court decision to adjudicate the matter in dispute. Whether the "injunction" issued by the court has any effects in Switzerland is – first and foremost – a question of recognition. The latter is dealt with in Article 25 et seq. of the Swiss Private International Law Act ("PILA"). Article 25 PILA reads as follows:

> *"A foreign decision shall be recognized in Switzerland:*
> *a.If the judicial or administrative authorities of the State in which the decision was rendered had jurisdiction;*
> *b.If no ordinary appeal can be lodged against the decision or the decision is final; and*
> *c.If there are no grounds for refusal under Article 27."*

29. It is undisputed that an injunction or an order on provisional relief may be qualified as a "decision" within the meaning of Article 25 of the PILA (BSK-IPRG/DÄPPEN/MABILLARD, 3rd ed. 2013, Art. 25 N. 9). However, what is disputed is whether or not the provisional nature of such decisions prevents the application of Article 25 *et seq*. of the PILA (cf. WALTER/DOMEJ, Internationales Zivilprozessrecht in der Schweiz, 5th ed. 2012, § 9 I 2 c). The Swiss Federal Tribunal has left this question open (cf. BGer [18.3.2004] 5P.252/2003. E. 3.3). The legal literature is dived on this issue. However, the predominant view holds that decisions on interim relief / injunctions cannot make the object of recognition according to Article 25 *et seq* of the PILA (cf. OGer ZH ZR 2002, 259; STAEHELIN/STAEHELIN/GROLIMUND, Zivilprozessrecht, 22nd ed. 2013, § 28 Rn. 21; contra ZK-IPRG/MÜLLER-CHEN, 3rd ed. 2018, Art. 25 N 65 *et seq*.; CR-LDIP/BUCHER, 2011, Art. 25 N. 24 *et seq*.). The Tribunal follows the predominant view, because first, it appears that it complies with the view of the legislator at the time of the enactment of the PILA (cf. WALTER/DOMEJ, Internationales Zivilprozessrecht in der Schweiz, 5th ed. 2012, § 9 I 2 c). Second, Art. 25 lit. b PILA makes reference to "final" decisions. It appears, thus, that only final decision may be the object of recognition under Art. 25 PILA. An injunction, however, is not final within the above meaning by its very definition. Finally, also the fact that the PILA provides for a Swiss forum for provisional relief in Art. 10 PILA irrespective of any Swiss jurisdiction on the merits, rather speaks against a cumbersome recognition of foreign provisional measures. To conclude, therefore, the Tribunal finds that it is not bound by the injunction issued by the Juzgado Federal de San Juan.

30. It appears that a procedure before the Juzgado Federal de San Juan is still pending and that the matter in dispute may be similar to the one before this Tribunal. The question, thus, is whether this Tribunal is barred from adjudicating this matter based on *lis pendens*. Whether or not the matter in dispute before this Tribunal and the Juzgado Federal de San Juan is identical can be left unanswered. Even if this was true, the provisions on *lis pendens* would not apply. Art. 9 (1) PILA provides in this respect as follows:

> *"(1) If the same parties are engaged in proceedings abroad based on the same causes of action, the Swiss court shall stay the proceeding if it may be expected that the foreign court will, within a reasonable time, render a decision that will be recognizable in Switzerland."*

31. The provision, thus, only applies in case of parallel state court proceedings. This Tribunal, however, is not a state court. Instead, the proceeding before this Tribunal is an upstream dispute resolution mechanism to an arbitration before the CAS. Thus, the Tribunal finds that even if the

matter in dispute before the Juzgado Federal de San Juan and this Tribunal was identical, Article 186 (1bis) PILA would apply instead of Article 9 (1) PILA. Article 186 (1bis) of the PILA provides that the (arbitral) tribunal seized may decide the matter irrespective of any legal action pending before a State court relating to the same object between the same parties, unless noteworthy grounds require a suspension of the proceedings. The Single Judge finds that there are no noteworthy grounds in this case to suspend the proceedings.

VI. APPLICABLES RULES

32. Article 25 ADT Rules provides that "*the Single Judge shall apply the [UCI] ADR and the standards referenced therein as well as the UCI Constitution, the UCI Regulations and, subsidiarily, Swiss law*".

33. As to the other "*standards referenced therein*" mentioned in Article 25 ADT Rules, the Tribunal notes that Part E of the Introduction of the ADR provides as follows:

> *"Under the World Anti-Doping Program, WADA may release various types of documents, including (a) International Standards and related Technical Documents, and (b) Guidelines and Models of Best Practices.*
>
> *The UCI may, consistent with its responsibilities under the Code, choose to (a) directly incorporate some of these documents by reference into these Anti-Doping Rules, and/or (b) adopt Regulations implementing all or certain aspects of these documents for the sport of cycling.*
>
> *Compliance with an International Standard incorporated in these Anti-Doping Rules or with UCI Regulations (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the International Standard or UCI Regulations were performed properly.*
>
> *All documents binding upon Riders or other Persons subject to these Anti-Doping Rules are made available on the UCI Website, in their version effective and as amended from time to time".*

34. The Single Judge also notes that Article 7.2 ADR provides as follows:

> *"Upon receipt of an Adverse Analytical Finding, the UCI shall conduct a review to determine whether: (a) an applicable TUE has been granted or will be granted in accordance with Article 4.4 and the UCI TUE Regulations, or (b) there is any apparent departure from the UCI Testing & Investigations Regulations or International Standard for Laboratories that caused the Adverse Analytical Finding."*

35. Accordingly, in addition to the ADR, the Single Judge will take into consideration the UCI TUE Regulations, UCI Testing & Investigations Regulations and the International Standard for Laboratories (hereinafter referred to as "ISL") to the extent relevant or necessary.

VII. THE FINDINGS OF THE SINGLE JUDGE

36. The main issues for the Single Judge to decide are whether:

(1) the UCI has successfully established that the Rider committed an ADRV within the meaning of Articles 2.1 and 2.2 ADR; and if so,

(2) to decide upon the appropriate consequences of such an ADRV; and

(3) whether such consequences are disproportionate and contrary to human rights.

1. Did the Rider Commit an ADRV?

37. The UCI submits that the Rider committed an ADRV within the meaning of Article 2.1 and 2.2 ADR, which it derives from the analytical data in the AAF. The Rider objects to this conclusion.

a) The relevant legal framework

38. The relevant legal provisions with respect to the establishment of an ADRV read as follows:

"2.1 ***Presence of a Prohibited Substance or its Metabolites or Markers in a Rider's Sample***

2.1.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body. Riders are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.

[Comment to Article 2.1.1: An anti-doping rule violation is committed under this Article without regard to a Rider's Fault. This rule has been referred to in various CAS decisions as "Strict Liability". A Rider's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS.]

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Rider's A Sample where the Rider waives analysis of the B Sample and the B Sample is not analyzed; or, where the Rider's B Sample is analyzed and the analysis of the Rider's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Rider's A Sample; or, where the Rider's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

[Comment to Article 2.1.2: The Anti-Doping Organization with results management responsibility may, at its discretion, choose to have the B Sample analyzed even if the Rider does not request the analysis of the B Sample.]

2.1.3 Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Rider's Sample shall constitute an anti-doping rule violation.

2.1.4 As an exception to the general rule of Article 2.1, the Prohibited List or other International Standards or UCI Regulations incorporated in these Anti-Doping Rules may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.

2.2 ***Use or Attempted Use by a Rider of a Prohibited Substance or a Prohibited Method***

2.2.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.

2.2.2 The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.

[Comment to Article 2.2: It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable means. As noted in the Comment to Article 3.2, unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Rider, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the Rider Biological Passport, or other analytical which does not otherwise satisfy all the requirements to establish 'Presence' of a Prohibited Substance under Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample.]

[Comment to Article 2.2.2: Demonstrating the 'Attempted Use' of a Prohibited Substance or a Prohibited Method requires proof of intent on the Rider's part. The fact that intent may be required to prove this particular anti-doping rule violation does not undermine the Strict Liability principle established for violations of Article 2.1 and violations of Article 2.2 in respect of Use of a Prohibited Substance or Prohibited Method. A Rider's 'Use' of a Prohibited Substance constitutes an anti-doping rule violation unless such substance is not prohibited Out-of-Competition and the Rider's Use takes place Out-of-Competition. (However, the presence of a Prohibited Substance or its Metabolites or Markers in a Sample collected In-Competition is a violation of Article 2.1 regardless of when that substance might have been administered)]".

39. As to the burden and standard of proof, Article 3.1 ADR reads as follows:

> *"The UCI shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Rider or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability. …"*.

40. As to the methods of establishing facts and presumptions, Article 3.2 ADR provides:

> *"Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:*

[Comment to Article 3.2: For example, the UCI may establish an anti-doping rule violation under Article 2.2 based on the Rider's admissions, the credible testimony of third Persons, reliable documentary evidence, reliable analytical data from either an A or B Sample as provided in the Comments to Article 2.2, or conclusions drawn from the profile of a series of the Rider's blood or urine Samples, such as data from the Athlete Biological Passport.]

3.2.1 Analytical methods or decision limits approved by WADA after consultation within the relevant scientific community and which have been the subject of peer review are presumed to be scientifically valid. Any Rider or other Person seeking to rebut this presumption of scientific validity shall, as a condition precedent to any such challenge, first notify WADA of the challenge and the basis of the challenge.

CAS on its own initiative may also inform WADA of any such challenge. At WADA's request, the CAS panel shall appoint an appropriate scientific expert to assist the panel in its evaluation of the challenge. Within 10 days of WADA's receipt of such notice, and WADA's receipt of the CAS file, WADA shall also have the right to intervene as a party, appear amicus curiae, or otherwise provide evidence in such proceeding.

3.2.2 WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Rider or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding.

If the Rider or other Person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then the UCI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

[Comment to Article 3.2.2: The burden is on the Rider or other Person to establish, by a balance of probability, a departure from the International Standard for Laboratories that could reasonably have caused the Adverse Analytical Finding. If the Rider or other Person does so, the burden shifts to the UCI to prove to the comfortable satisfaction of the hearing panel that the departure did not cause the Adverse Analytical Finding.]

3.2.3 Departures from any other rule set forth in these Anti-Doping Rules, or any International Standard or UCI Regulation incorporated in these Anti-Doping Rules which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such evidence or results. If the Rider or other Person establishes a departure from any other rule set forth in these Anti-Doping Rules, or any International Standard or UCI Regulation incorporated in these Anti-Doping Rules which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding or other anti-doping rule violation, then the UCI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation".

b) Did the UCI establish that the Rider committed an ADRV?

41. In the present case, the analysis of both the Rider's A and B Samples at the Laboratory revealed the presence of endogenous Testosterone as well as at least one of the Adiols (5aAdiol and/or

5βAdiol) administered exogenously. Endogenous Testosterone, 5aAdiol and 5βAdiol administered exogenously are prohibited substances listed under Class S.1.1.b "Endogenous AAS when administered exogenously" on the 2018 WADA Prohibited List (hereinafter "Prohibited Substances"). The Prohibited Substances are prohibited both in- and out-of-competition. Article 4.1 ADR incorporates the WADA Prohibited List into the ADR. Thus – *prima facie* – the UCI has discharged its burden of proof with respect to an ADRV (Article 2.1 ADR) committed by the Rider according to Article 2.1.2 ADR.

42. The Rider argues that "[*i*]*t is not specified at any time which is allegedly ingested the banned substance. As well as the documentation package laboratory sample "A" […] says: "Testosterone does not meet all the criteria for identifying" and then establishes the character of endogenous the result"*. It is not quite clear what the Rider is aiming at with these submissions. It appears that the Rider's comment is based on the remark made by the Laboratory in the GC-MS analysis of the Rider's A Sample were it says as follows: "*Testosterone does not meet all the criteria of identification*". The Tribunal finds that this in no way invalidates the analytical results.

43. Testosterone is an anabolic steroid which can be produced naturally in the athlete's body (endogenously) or can be administered from a source outside of the athlete's body (exogenously). Endogenous levels of testosterone can differ according to the physiological or pathological condition of the athlete's body. Hence, it is not always easy to determine whether the steroid in question has come from an outside source.

44. There are, in principle, two techniques to assert the exogenous origin of an anabolic steroid. Gas Chromatography Mass Spectrometry (GC-MS) is used to determine the "steroid profile" (that is composed of several markers) and to determine the ratios between those markers (cf Art. 2 WADA TD2016/EAAS). Gas Chromatography – Combustion – Isotope Ratio Mass Spectrometry (GC-C-IRMS) is used to determine the $_{13}C/_{12}C$ value of the sample and is expressed in delta units per mil (‰). This value will be measured and compared to that of an endogenous reference steroid in the urine sample from another metabolic pathway that is not affected by the external administration of endogenous steroids or their precursors. This serves to define the basal $_{13}C/_{12}C$ ratio of the person. The results of the GC-C-IRMS analysis will be reported as consistent with the administration of a steroid when the $_{13}C/_{12}C$ ratio measured for the metabolite(s) differs significantly. The procedure to be followed is governed by the WADA TD2016IRMS.

45. Both techniques are completely independent of each other and are performed on different aliquots. The note on the A sample report according to which "Testosterone does not meet all the criteria of identification" refers only to the GC-MS analysis. This follows from the explanations provided by Prof Daniel Carreras (Director of the Madrid Laboratory) in his statement of 20 July 2018. However, whether or not Testosterone could be identified by GC-MS has no bearing whatsoever on whether or not the exogenous origin of the anabolic steroid could be established by GC-C-IRMS. Prof Daniel Carreras explains in this regard as follows:

> *"The fact that in this GC-MS quantification analysis, which is entirely independent of the GC/C/IRMS (different aliquot, different sample preparation procedure, different chromatographic conditions, different instruments), on of the Markers does not meet the identification criteria has no influence in the Adverse Analytical finding result, because this result is based not on this GC-MS quantification analysis but in the GC/C/IRMS analysis (as it is stated in TD2016EAAS)."*

46. The Single Judge finds these explanations convincing and rejects the Rider's allegation that the evidence by Prof Daniel Carreras must be dismissed because he is "the director of the laboratory" and, thus, there is some kind of conflict of interest.

47. In the present case, the GC-C-IRMS analysis results of the A Sample for testosterone and at least one of the Adiols (5aAdiol and/or 5bAdiol) were consistent with an exogenous origin. Moreover, the results were also consistent with the exogenous origins of both Adiols (5aAdiol and 5bAdiol). In addition, the analysis of the B Sample confirmed the exogenous origin of the Prohibited Substances found in the A Sample. The Panel further notes, that the results of the two techniques are not in contradiction with each other. It follows from Art. 1.0 of the TD2016EAAS that the scope of the GC-MS analytical method is limited. It is used for the steroidal module of the Athlete Biological Passport. The decisive analytical method to detect the presence of sythetic forms of endogenous AAS is GS-C-IRMS. (cf. Art. 1.0 TD 2016IRMS). The results obtained by the latter stand irrespective of the results obtained by the GC-MS analysis (cf. Art. 1.1.1 and Art. 3.0 TD2016IRMS).

48. The Rider, in addition, states: *"[…] I repeat not having used any illegal substance for concluding with the analysis results in question*." The Rider also finds that no banned substances were found, however "*higher values of testosterone index*" and that testosterone "*has been produced by the body naturally*". These submissions are clearly contradicted by the analysis report of the Laboratory. The latter established the presence of a Prohibited Substance (see supra) in the A and the B Sample. Contrary to the submissions of the Rider, the "higher values of testosterone" were not "produced naturally". The GC-C-IRMS analysis of the Rider's samples clearly shows, that the AAS were of exogenous origin.

49. The Single Judge further notes that the Laboratory is a WADA-accredited Laboratory and is, therefore, presumed to have conducted the analysis of the Samples and custodial procedures in accordance with the ISL. This follows from Article 3.2.2 ADR. The Rider alleges that the Laboratory carried out its analysis in an "untidy" manner, that the results were "framed" and, therefore, wrong. He supports this argument by stating that the results of a sample taken from him in March 2018 (during a competition in Uruguay) were negative. However, these submissions are insufficient to rebut the above presumption according to Article 3.2.2 ADR. The Rider neither alleged nor corroborated that there were any departures from the applicable ISL. General (and unsubstantiated) allegations about the reliability of the Laboratory are completely insufficient to cast doubt on the findings of the Laboratory. This is equally true for the reference to an analysis of a sample collected from the Rider more or less 2 months after the sample in question here. These results have no bearing on the findings for the January 2018 Sample. In conclusion, the Single Judge finds that the results of the Rider's A and B Sample analysis must stand.

2. What are the proper consequences of the ADRV?

50. The ADR provide for different types of consequences in case of an ADRV.

a) The Period of Ineligibility

(1) The Standard Period

51. If – as in the present case – the Rider's ADRV constitutes a first violation, Article 10.2 ADR applies, which reads as follows:

> *"The period of Ineligibility for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:*
> *10.2.1 The period of Ineligibility shall be four years where:*

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Rider or other Person can establish that the anti-doping rule violation was not intentional. …

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

10.2.3 As used in Articles 10.2 and 10.3, the term 'intentional' is meant to identify those Riders who cheat. The term therefore requires that the Rider or other Person engaged in conduct which he or she 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. […]".

52. According to Article 10.2 ADR in conjunction with Article 10.2.1.1, the standard period of ineligibility is 4 years, if the ADRV does not involve a Specified Substance and the Rider cannot established that the ADRV was not intentional. In the case at hand, the Rider's violation involves Prohibited Substances listed under Class S.1.1.b "Endogenous AAS when administered exogenously" on the 2018 WADA Prohibited List. These Prohibited Substances are not Specified Substances. Consequently, it is the Rider who bears the burden of proof to establish that the violation was not committed intentionally. According to the general rule set forth in Article 3.1 ADR, the standard of proof is by a balance of probability. The Rider has failed to submit any evidence to rebut the above presumption. He merely alleges "*not having used any illegal substance for concluding with the analysis results in question*" and that testosterone "*has been produced by the body naturally*". This, however, is completely insufficient to demonstrate that the ADRV occurred unintentionally, i.e. negligently. Therefore, the Single Judge finds that the standard period of ineligibility applies to the Rider, i.e. 4 years.

(2) Reductions

53. As a general matter, a Rider may be entitled to a reduction – or even elimination – of the period of ineligibility, if he establishes that one of the fault-related reductions enshrined in Articles 10.4 or 10.5 ADR apply. The application of a reduction based on both articles requires that the Rider establishes how the Prohibited Substance entered his or her system (see Appendix 1 ADR). In addition, Article 10.6 ADR sets out conditions under which a period of ineligibility may be eliminated, reduced or suspended for reasons other than fault.

54. In the present case, the Rider acted intentionally and, therefore, is – from the very outset – not eligible for any fault-related reductions. This is all the more true considering that he also failed to establish how the Prohibited Substance entered his system. Furthermore, he did not submit evidence which allows for the application of a reduction based on Article 10.6 ADR. To conclude, the Single Judge finds that the appropriate period of ineligibility is 4 years.

(3) Commencement of the Period of Ineligibility

55. In relation to the commencement of the period of ineligibility, Article 10.11 ADR provides as follows:

"Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed. […]

10.11.3.1 If a Provisional Suspension is imposed and respected by the Rider or other Person, then the Rider or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If a period of Ineligibility is served pursuant to a decision that is subsequently

appealed, then the Rider or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal. …".

56. Thus, as a general rule, the period of ineligibility shall start on the date of the final decision imposing such Ineligibility, with credit given for the period of any provisional suspension if and to the extent it was respected by the Rider. On 3 May 2018, the Rider was informed of a mandatory provisional suspension imposed on him. It is undisputed between the Parties that the Rider observed the terms of such suspension and that, therefore, he must receive credit for the time so served.

b) Disqualification

57. As for the automatic Disqualification of results, Article 9 ADR provides as follows:

"An anti-doping rule violation in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes".

58. Article 10.8 ADR provides as follows:

"In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Rider obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes".

59. Therefore, the results obtained by the Rider at the 2018 Vuelta a San Juan Internacional are disqualified. The Rider did not obtain further results since the positive sample was collected on 23 January 2018.

c) Mandatory Fine and Costs

60. Article 10.10 ADR provides as follows:

"In addition to the Consequences provided for in Article 10.1-10.9, violation under these Anti-Doping Rules shall be sanctioned with a fine as follows.

10.10.1.1 *A fine shall be imposed in case a Rider or other Person exercising a professional activity in cycling is found to have committed an intentional anti-doping rule violation within the meaning of Article 10.2.3.*

[Comments: 1. A member of a Team registered with the UCI shall be considered as exercising a professional activity in cycling. 2: Suspension of part of a period of Ineligibility has no influence on the application of this Article].

The amount of the fine shall be equal to the net annual income from cycling that the Rider or other Person was entitled to for the whole year in which the anti-doping violation occurred. In the Event that the anti-doping violation relates to more than one year, the amount of the fine shall be equal to the average of the net annual income from cycling that the Rider or other Person was entitled to during each year covered by the anti-doping rule violation.

[Comment: Income from cycling includes the earnings from all the contracts with the Team and the income from image rights, amongst others.]

The net income shall be deemed to be 70 (seventy) % of the corresponding gross income. The Rider or other Person shall have the burden of proof to establish that the applicable national income tax legislation provides otherwise.
Bearing in mind the seriousness of the offence, the quantum of the fine may be reduced where the circumstances so justify, including:

1. *Nature of anti-doping rule violation and circumstances giving rise to it;*
2. *Timing of the commission of the anti-doping rule violation;*
3. *Rider or other Person's financial situation;*
4. *Cost of living in the Rider or other Person's place of residence;*
5. *Rider or other Person's Cooperation during the proceedings and/or Substantial Assistance as per article 10.6.1.*

In all cases, no fine may exceed CHF 1,500,000.
For the purpose of this article, the UCI shall have the right to receive a copy of the full contracts and other related documents from the Rider or other Person, the auditor or relevant National Federation.

[Comment: No fine may be considered a basis for reducing the period of Ineligibility or other sanction which would otherwise be applicable under these Anti-Doping Rules]."

61. According to Article 10.10.1.1 ADR, a fine shall be imposed if a Rider exercising a professional activity in cycling is found to have committed an intentional ADRV within the meaning of Article 10.2.3 ADR. In the present case, the Rider is a professional. In addition, as held above, he failed to rebut the presumption that the ADRV was committed intentionally. The prerequisites for a fine are, therefore, fulfilled in the case at hand.

62. With respect to the calculation of the fine, the UCI submits that the Rider was entitled to an annual gross income from cycling of [redacted]. Therefore, according to the UCI, a mandatory fine of [redacted] should be imposed according to Article 10.10.1.1 ADR. The Rider has not contested the above submission. Consequently, the fine imposed on the Rider shall be [redacted].

63. In relation to the costs of the testing and the results management process, the Single Judge takes in account Article 10.10.2 ADR. The provision reads as follows:

"*10.10.2 Liability for Costs of the Procedures*

If the Rider or other Person is found to have committed an anti-doping rule violation, he or she shall bear, unless the UCI Anti-Doping Tribunal determines otherwise:

1. *The cost of the proceedings as determined by the UCI Anti-Doping Tribunal, if any.*
2. *The cost of the result management by the UCI; the amount of this cost shall be CHF 2'500, unless a higher amount is claimed by the UCI and determined by the UCI Anti-Doping Tribunal.*
3. *The cost of the B Sample analysis, where applicable.*
4. *The costs incurred for Out-of-Competition Testing; the amount of this cost shall be CHF 1'500, unless a higher amount is claimed by the UCI and determined by the UCI Anti-Doping Tribunal.*
5. *The cost for the A and/or B Sample laboratory documentation package where requested by the Rider.*

6. The cost for the documentation package of Samples analyzed for the Biological Passport, where applicable.

The National Federation of the Rider or other Person shall be jointly and severally liable for its payment to the UCI."

64. In application of the above provisions, the Single Judge holds that the Rider shall reimburse to the UCI the following amounts:

- CHF 2'500.- for costs of the results management (Article 10.10.2 (2));
- EUR 800.- (VAT excl.) for the costs of the B Sample analysis;
- EUR 500.- for the costs of the A Sample laboratory documentation package (Article 10.10.2 (6)).

3. Are the above consequences disproportionate and/or contrary to human rights?

65. The Rider alleges that *"the case warranting the disproportionate result by the laboratory and the attitude of the UCI to the presenter, [is] also disproportionately affecting fundamental human rights".* Also he states that his *"explanations must be taken into account by applying the principle of proportionality and human rights".*

66. If such allegation is to be understood to mean that the consequences of the ADRV are disproportionate and contrary to human rights, this cannot be accepted. The above consequences and findings are in accordance with the World Anti-Doping Code (hereinafter referred to as "WADC"). The latter has been drafted giving consideration to the principles of proportionality and human rights.[1] This also follows from the legal opinion provided by his Honour Jean-Paul Costa, former President of the European Court of Human Rights. According to this legal opinion the sanctions provided for in Article 10.2 ADR are compatible with the principles of international law and human rights.[2]

67. In any event, the Single Judge finds that the Rider's objections in relation to the principle of proportionality or human rights are not sufficiently substantiated. The Rider's general allegations do not suffice to set aside the clear application of the applicable rules. Therefore, the Single Judge concludes that in the case at hand neither the principle of proportionality nor any human rights have been violated.

VIII. COSTS OF THE PROCEEDINGS

68. Article 28 ADT Rules provides as follows:

1. The Tribunal shall determine in its judgment the costs of the proceedings as provided under Article 10.10.2 para. 1 ADR.

2. As a matter of principle the Judgment is rendered without costs.

3. Notwithstanding para. 1 above, the Tribunal may order the Defendant to pay a contribution toward the costs of the Tribunal. Whenever the hearing is held by videoconference, the maximum participation is CHF 7'500.

[1] See World Anti-Doping Code 2015, with 2019 amendments, p. 11.

[2] See Legal opinion regarding the draft 3.0 revision oft he World Anti-doping Code, authored by Jean Paul Costa (https://www.wada-ama.org/sites/default/files/resources/files/WADC-Legal-Opinion-on-Draft-2015-Code-3.0-EN.pdf), p. 6 et seq.

4. The Tribunal may also order the unsuccessful Party to pay a contribution toward the prevailing Party's costs and expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and experts. If the prevailing Party was represented by a legal representative the contribution shall also cover legal costs.

69. In application of Article 28.2 ADT Rules, the Tribunal decides that the present Judgment is rendered without costs. In light of all of the circumstances of this case, the Tribunal finds it appropriate to not order the Rider (as the unsuccessful party) to pay a contribution towards the UCI's costs.

IX. RULING

70. In the light of the above, the Tribunal decides as follows:

1. Mr. Javier has committed an Anti-Doping Rule Violation.

2. Mr. Javier is suspended for a period of Ineligibility of 4 years commencing on 3 May 2018.

3. The results obtained by Mr. Javier from 23 January 2018 until 3 May 2018 are disqualified.

4. Mr. Javier is ordered to pay to the UCI the amount of [redacted] as monetary fine.

5. Mr. Javier is ordered to pay to the UCI:

a) the amount of CHF 2'500 for the costs of results management;
b) the amount of EUR 800; and
c) the amount of EUR 500 for costs of the A Sample laboratory documentation package.

6. All other and/or further-reaching requests are dismissed.

7. This judgment is final and will be notified to:

a) Mr. Javier;
b) Comisión Nacional Antidopaje;
c) UCI; and
d) WADA

71. This Judgment may be appealed before the CAS pursuant Article 30.2 ADT Rules and Article 74 of the UCI Constitution. The time limit to file the appeal is governed by the provisions in Article 13.2.5 ADR.

_____

Ulrich HAAS
Single Judge