BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 01/24**

BETWEEN	**DRUG FREE SPORT NEW ZEALAND**
	Applicant
AND	**INOKE TURAGALAILAI**
	Respondent

MAJORITY DECISION OF THE SPORTS TRIBUNAL
3 July 2024

Parties	Hayden Tapper, Drug Free Sport New Zealand Adam McDonald, counsel for Applicant Inoke Turagalailai, Respondent Sarah Wroe, counsel for Respondent
Tribunal	John Macdonald, Chair Warwick Smith, Deputy Chair Ruth Aitken DNZM
Registrar	Helen Gould

1. Inoke Turagalailai (Mr Turagalailai) is a Fijian football player who was playing for the Fiji Under 23 Football Team in the Oceania Football Confederation Men's Olympic Tournament in New Zealand in September 2023.

2. As Mr Turagalailai was competing at an international level in New Zealand, he is bound to the Sports Anti-doping Rules 2023 (SADR) by Rule 1.1.5.4 of the SADR.

3. Mr Turagalailai was tested in competition by Drug Free Sport New Zealand on 9 September 2023. That test showed the presence of Carboxy-THC metabolite: 11-nor-delta-9-tetrahydrocannabinol carboxylic acid (commonly known as cannabis), a prohibited specified substance which is also a substance of abuse.

4. Mr Turagalailai accepted provisional suspension which was ordered by the Tribunal on 1 March 2024.

5. On 15 March 2024 DFSNZ brought proceedings alleging breaches of Rule 2.1 (Presence of a Prohibited Substance or its Metabolites of Markers) and Rule 2.2 (Use or Attempted Use).

6. Mr Turagalailai admits the anti-doping rule violations but maintains he did not intentionally take the substance to enhance his performance. He further admits that he took the substance on the morning of match day, which means that he took the substance 'in-competition', a factor that influences the level of sanction that can be imposed upon him.

7. Mr Turagalailai did not raise a defence to the alleged ADRVs but asked to be heard on the level of sanction, citing in particular, issues of proportionality and significant delay.

8. By admitting to taking the substance in-competition means that the provisions of Rule 10.2.4.1, which offer a reduced sanction in substance of abuse cases where the substance was taken out of competition and not for the purpose of enhancing performance, do not apply.

9. DFSNZ accepts that Mr Turagalailai did not take the substance intentionally to enhance his performance pursuant to Rule 10.2.4.2. meaning Rule

10.2.1 does not apply and Mr Turagalailai's sanction should be that which is set out in Rule 10.2.2, a period of ineligibility of two years.

10. Counsel for Mr Turagalailai, Ms Wroe, submits that a sanction of two years' ineligibility is out of proportion and the Tribunal should consider reducing the sanction duration so that it is more in line with previous cannabis cases heard by the Tribunal.

11. Ms Wroe further submits that any sanction imposed on Mr Turagalailai should be backdated to the date of the test because there had been a substantial delay between the test being taken and Mr Turagalailai being informed of the results, which was not due to any fault on his part.

12. Mr McDonald, counsel for DFSNZ, rejected that there had been a substantial delay and therefore the Tribunal should only backdate the sanction to the date of the Provisional Suspension Order (PSO) in accordance with Rule 10.13.

Issues

13. The Tribunal is being asked to determine two issues:

    1. Whether the period of ineligibility imposed on Mr Turagalailai should be reduced from two years in accordance with the principles of proportionality; and

    2. Whether the sanction should be backdated because of a substantial delay in the testing of the sample, which was not attributable to Mr Turagalailai.

Issue 1

<u>DFSNZ's position</u>

14. Mr McDonald submits that there is no proper basis for reducing the two-year period of ineligibility. Rules 10.5 and 10.6 are unavailable to Mr Turagalailai as he has admitted taking the substance knowingly, following anti-doping education provided by the Fiji Football Association. There is also no discretion for the Tribunal to consider proportionality because the

WADA Code 2021 (the Code) has been 'drafted giving consideration to the principles of proportionality and human rights'[1].

15. To reinforce his submission that proportionality is inherent in the sanction regime of the Code, in particular through the no fault and no significant fault defences which provide exceptions to strict liability, Mr McDonald relies on Court of Arbitration for Sport (CAS) jurisprudence which says that those provisions are the 'embodiments of the principle of proportionality'[2] and that an 'uncomfortable feeling' about the severity of the sanction provided for under the Code would be insufficient to invoke the principle of proportionality[3]. On that basis he submits that the two-year sanction for the use of a substance of abuse is a proportionate sanction because it is prescribed in the Code.

16. Mr McDonald referred to the *Puerta* case[4] in which obiter stated that the Code (in that case the 2003 Code) does not provide a general discretion to a tribunal. He further submitted that, for it to have the jurisdiction to strike down the Code for not producing a just and proportionate sanction, would be a disaster[5].

17. *Puerta* discussed the issue of a gap or lacuna in the 2003 Code which rendered the sanction for that athlete disproportionate. The Panel reduced the sanction for Mr Puerta on the basis that a gap in the Code had produced a disproportionate outcome, but it was not because of a general discretion to reduce sanctions. Mr McDonald submitted that there was no such gap in the present case.

18. Mr McDonald further submitted that the changes to the 2021 Code, in respect of substances of abuse, were deliberate and were implemented after significant consultation. He submitted that any amendments to the Code should be made by the legislative body rather than an adjudicative one.

---

[1] As at n 1.
[2] *Nabi v Estonian Center for Integrity in Sports* CAS 2021/A/8125 at [192].
[3] As above at [193].
[4] *Mariano Puerta v/ International Tennis Federation (ITF)* CAS 2006/A/1025.
[5] As above at [93].

Mr Turagalailai's position

19. Ms Wroe accepted that it is only in limited circumstances that the Code can be disturbed, but she submitted that it did not only have to be where there was a gap. She submitted that even in situations where the Code can properly be applied there can still be disproportionate outcomes.

20. Ms Wroe referred to the *FIA* case as an example of where the rules of the Code (in that case the 2009 Code) could be followed but the result was unjust and disproportionate.[6] She also referred to the recent *Valieva* case[7] to demonstrate that an existence of a discretion to consider the principles of proportionality had been confirmed by the CAS as recently as January 2024.

21. In her written synopsis of submissions Ms Wroe provided the Tribunal with a history of the treatment of cannabis under the Code. In the 2015 Code there was express provision to acknowledge that cannabis is commonly used for non-sport related purposes and that its use does not enhance sporting performance. Athletes who demonstrated that its use was not in the context of sport performance were able to establish no significant fault or negligence and thus be eligible for lower sanctions. This provision, however, was removed from the current Code at a time when the inclusion of cannabis on the Prohibited List was being reconsidered and was hotly debated. Therefore, although cannabis remains on the Prohibited List because it meets the health and spirit of sport criteria, it is widely accepted, that cannabis does not enhance sporting performance (see "Cannabis and sport: A World Anti-Doping Perspective" Hudzik T & ORS, Addiction, 2023:118:2040-2042).

22. The 2021 Code introduced new provisions for substance of abuse ADRVs to distinguish between substances that are used for the express intention of improving sporting performance, and those that are used socially for purposes outside a sporting context. Those provisions allowed for low sanctions (three months for out of competition use and one month if the athlete also completed a treatment programme).

---

[6] *I v FIA* CAS 2010/A/2268
[7] *WADA v RUSADA & Valieva* CAS 2023/A/9456

23. Ms Wroe submitted that these changes have produced a much stricter regime for athletes who use a substance of abuse in-competition, and, to the best of her knowledge, there is no explanation for such an outcome. Instead, she suggested that the focus of the commentary about substances of abuse had been on offering treatment to such athletes.

24. Ms Wroe further observed that a two-year sanction imposed on Mr Turagalailai, will make him the first athlete in New Zealand to receive such a sanction for a first violation for the use of cannabis, when the use is unrelated to sports performance.

25. Rather than set such a precedent, Ms Wroe invited the Tribunal to look at the level of sanction in the context of the principles of proportionality and on the principle of equal treatment, whereby similar cases should be treated in a similar manner. Ms Wroe provided a schedule of all the cannabis cases in New Zealand since 2005. While most were dealt with prior to the 2021 amendments to the Code, nonetheless she submits it demonstrates that the proposed two-year period of ineligibility would produce an unequal result.

26. Ms Wroe submitted that the effect of a two-year sanction on Mr Turagalailai would be immense, as football is his source of income, his means of socialising and, as he says 'life is meaningless' without football. She also noted that in his home village in Fiji, he had been subjected to ridicule due to his provisional suspension.

27. Finally, Ms Wroe submitted that a period of ineligibility of between six and nine months would be in line with other Tribunal cases and would be a proportionate result.

Discussion

<u>Cannabis on the prohibited list</u>

28. For a substance to be considered for inclusion on the Prohibited List under the Code, Rule 4.3.1 provides that it must meet any two of three criteria:

    (a) That it has the potential to enhance or enhances sport performance.

(b) That it represents an actual or potential health risk to the Athlete.

(c) That it violates the spirit of sport described in the introduction to the Code.

29. The long-held stance of DFSNZ is that cannabis does not meet the first criteria of enhancing sport performance, but it does meet the other two.

30. With reference to the actual or potential health risk to the athlete the majority takes that to mean the athlete who has committed the ADRV. It does not include other competitors. The concern also appears to be about the impact of sustained or long-term use of a banned substance, hence mention in the Code of substance abuse treatment programmes. The majority also does not see that the health of the athlete includes the concept of the safety of the athlete or of other competitors. Even if safety was an issue, it is hardly likely to have occurred in a game of football. In any event, if safety was to be included the majority would have expected that to be expressly stated.

31. As for the violation of the spirit of sport, it states in the Code at page 13, "Doping is fundamentally contrary to the spirit of sport." Obviously then the spirit of sport is linked directly to doping, as is the first criterion of enhancing performance.

32. As noted in Puerta (at [11.6.7]) the aim of the Code is to deter doping by sanctioning those who have cheated their fellow athletes and the sporting public at large. That is reflected in the introduction to the Code at page 11 with the listing of the various purposes of the Code. The first one listed is: "To protect the Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide...".

33. It seems unclear to the majority how the criteria listed under Rule 4.3 (as to whether a substance should be considered for inclusion on the Prohibited List) appear to have become the basis upon which the level of sanctions under the Code are determined. However, if the criteria are used for that purpose and in the context of the primary aim of deterring doping it is interesting to consider how the criteria under Rule 4.3 come into play. If the majority is permitted to view the matter from that perspective, then the actual or potential risk to Mr Turagalailai's health from smoking cannabis

on the morning of a match must be seen as being minimal. And, the extent to which playing a football match with cannabis in his system violates the spirit of sport, must be viewed in a similar way. In light of that the majority finds it is difficult to accept that a two-year ban could be justified in this case.

The Rules

34. Mr McDonald's submission that an uncomfortable feeling is insufficient to invoke the principles of proportionality is accepted. In this instance, though, the majority does not have an 'uncomfortable feeling'. Instead, it considers that a two-year sanction in the present circumstances, against a history of consistently lower sanctions, is not only unjust it is disproportionate.

35. Mr McDonald referred to p 9 of the Code which states that it has been drafted with consideration to proportionality and human rights and he therefore submitted that proportionality is built into the Code, particularly within the provisions for no fault and no significant fault.

36. The majority notes, however, that Rule 10.6.1.1, which provides for reductions in sanctions for athletes who bear no significant fault or negligence, expressly excludes substances of abuse. When questioned about this exclusion, Mr McDonald conceded that Rule 10.6.1.1 could have been better drafted but he submitted that the rule is better read that substances of abuse are addressed by rule 10.2.4. Consequently, substances of abuse are not removed from the no significant fault or negligence provisions, and therefore from a proportionate response.

37. It is clear to the majority that the provisions of Rule 10.6.1.1, when read in conjunction with Rule 10.4.2, do nothing to reduce the two-year sanction for an athlete who uses cannabis in-competition.

38. Ms Wroe submitted that Rule 10.6.1 removes the proportionality element from athletes. She also referred to rule 10.6.2 which enables athletes who are excluded from rule 10.6.1 to establish no significant fault or negligence. She notes that the reduction that can be applied under 10.6.2 cannot amount to less than half the original sanction, so the Code results in a disproportionately harsher regime for athletes who use a substance of

abuse on the day of competition, than for other athletes. Of course, in this instance the no significant fault or negligence defence is unavailable to Mr Turagalailai, because of his admission that he took the substance after midnight which was the day of competition.

39. Rule 10.4.2.2 has provided Mr Turagalailai with a means of reducing his sanction as the use of substance of abuse for purposes other than sport are deemed to be unintentional. It results in his sanction being reduced from four years to two years but just because he has benefitted from that provision in that way it does not mean that the only sanction available to him is a proportionate one. If it is widely accepted that cannabis has no performance enhancing effect, then it is difficult to understand why the express provision for treating cannabis differently from other substances of abuse has been removed from the 2021 Code. As it is the 2021 Code, with the introduction of Rule 10.4.2.1, clearly establishes a less onerous sanction regime for users of substances of abuse out-of-competition.

<u>In-competition and out-of-competition</u>

40. A further disparity is created by the provision that an athlete who uses a banned substance out-of-competition can voluntarily undertake a substance of abuse treatment programme and thereby receive a further reduction of two months. Yet for Mr Turagalailai, such a programme and consequent reduction in sanction is simply unavailable to him even though he might be precisely the person who needs it. Not only does that present as being disproportionate; it ignores one of the purposes of the Code which is to safeguard the health of the athlete.

41. When queried on why the time on the clock with a difference of mere minutes should produce two such divergent outcomes, Mr McDonald responded that a cut-off had to be drawn somewhere. If that is the answer, the majority views the distinction between in-competition and out- of-competition to be entirely arbitrary. It could also lead to unfair results as athletes more familiar with the Code might be tempted to falsely claim a banned substance was taken prior to midnight, knowing full well that DFSNZ is unlikely to have any evidence to the contrary.

42. The majority further notes that there has been no mention that the 2015 provision regarding cannabis use can only apply if the athlete uses cannabis out-of-competition; this further leads the majority to wonder why the current Code now has a regime that creates such a disparity in outcomes.

Proportionate outcome

43. Looking at these disparate outcomes, the majority wonders whether it was envisaged that an athlete would admit to smoking a cannabis cigarette on the morning of match day.

44. The majority perceives that the rigidity of the Code is designed to deal with drug cheats, those who seek an advantage by taking banned substances. Even if "Athletes who cheat" was removed by the 2021 amendments to the Code, the majority position of the Tribunal remains unchanged; a two-year ban for what Mr Turagalailai did is a disproportionate outcome.

45. For someone like Mr Turagalailai who is facing a two-year ban and is possibly in need of drug treatment, the Code neither mandates nor encourages him to undertake such treatment. Even if he did, there would be no reduction in sanction in return. That is despite the Code's apparent concern for the health of athletes.

46. Not only is there disparity between cases that are dissimilar resulting in a disproportionate outcome, there is also a disparity between what the Code dictates the majority should do, as opposed to what the majority has done in cannabis cases since its inception, as set out by Ms Wroe in her summary of cannabis cases.

47. The submissions presented to the majority by DFSNZ invite the majority to deal with the issue of sanction strictly in line with the Code, which in these circumstances would result in a period of ineligibility of two years. That would mean Mr Turagalailai would not be able to play sport or earn a living in his chosen profession, until 1 March 2026 (subject to backdating to the date of the provisional suspension order and possibly to an earlier date if the it is determined that there had been a substantial delay in the testing process).

48. Ordinarily, the majority would follow the strict regime of the Code and would impose a sanction in line with its provisions, while exercising any discretion available to it.

49. However, the majority accepts Ms Wroe's submission that while there is no discretion built into the relevant rules on sanction, in this case, it believes there is a discretion to consider the principles of proportionality, as was confirmed by the CAS in the *Valieva* case.

50. Ms Wroe referred to the case of the 12-year-old Go-Karter in *FIA which says at* paragraph 134:

> *The Panel feels indeed that, given the circumstances of this particular case, the fixed two-year sanction must be measured against the principle of proportionality. In other words, the Panel must check whether in the specific case of the Driver the sanction of ineligibility for two years is consistent with the principle of proportionality*.

51. At the same time the majority acknowledges that in the *Puerta* case, at [96], it says that in all but the very rare case the outcomes of ADRV cases are just and proportionate.

52. The majority takes comfort from these cases when it considers the reality of a strict application of the Code on a young man like Mr Turagalailai. First, it is reassured that it is recognised that there are rare cases where the principles of proportionality can be applied to avoid an otherwise unjust outcome, and second, in such cases it does have an obligation to ensure that the sanction it imposes is consistent with the principle of proportionality.

53. In the present case the majority is persuaded that it can be viewed as a rare case. What makes it rare, as in *Puerta*, are a combination of factors that have collided to produce an outcome that might not have been intended.

54. The combination of factors in the *Puerta* case were the two ADRVs which were not intentional and were not performance enhancing, but which under the Code meant that cumulative sanctions had to be imposed, resulting in

an 8-year ban. The panel was concerned about the sanction given that in each instance Mr Puerta had not intended to take the banned substances. It also accepted that he was not a cheat (at [11.7.22]). The panel considered the impact of an 8-year ban which would have meant the end of his tennis career and deprive him of his means of making a living. His parents were also financially dependent upon him. Ultimately it decided that the sanction to be applied according to the Code was out of proportion to his behaviour. Of course, that is precisely the conclusion that Ms Wroe invites the majority to reach in respect of Mr Turagalailai.

55. The combination of factors that make Mr Turagalailai's case rare start with the fact that cannabis is generally considered to be the least harmful and least serious of the substances of abuse, especially as it is not a performance enhancing substance. That in turn means that Mr Turagalailai, like Mr Puerta, does not fall into the category of a cheat. He did not cheat other athletes out of better results.

56. The *2021 Code Revision – Third Draft Summary of Major Changes* in relation to substances of abuse, appears to have had cocaine in mind in its redrafting. It is accepted that cocaine is a more serious or harmful substance than cannabis and it is also performance enhancing. Yet despite that, when it comes to sanction, the Code treats all substances of abuse as being equal. It means that if Mr Turagalailai had used cocaine in-competition rather than cannabis the sanction would have been precisely the same; a two-year ban.

57. A further concern to the majority is the impact of Rule 10.2.4 and the sanctions for in-competition use, as it appears to create disparity in another way. If an athlete uses a banned substance, such as cannabis or cocaine, prior to midnight on the day before competition, and it is not for performance enhancing purposes, it results in a three-month sanction, which could be further reduced to one month if the athlete completed a treatment programme. However, if the use came just after midnight, and therefore in-competition, it would result in a two-year ban. That is a significantly harsher sanction especially if, as in Mr Turagalailai's case, it involved cannabis, a non- performance enhancing substance.

58. Merely as an observation, in the majority's experience it is unusual that an athlete would admit using a banned substance on the day of competition. Yet that is precisely what Mr Turagalailai has done. It was also an admission made in circumstances where it was unlikely that DFSNZ would otherwise have had any evidence of in-competition use.

59. In those circumstances, while accepting that he received drug education in Fiji and was warned of the dangers of using substances such as cannabis the majority wonders whether he understood that if he did smoke cannabis on the morning of a match it could result in a two-year ban. The majority also notes that Mr Turagalailai does not receive any credit for his frank admission in the form of a reduction in sanction.

60. The consequences of an 8-year ban upon Mr Puerta were taken into account, as previously discussed. That included his economic liberty. In respect of Mr Turagalailai, a two-year ban is also likely to have a serious impact. His ability to make a living from playing football will cease to exist. It will also be particularly harsh given his passion for football, as is reflected in his comment that life without football will be meaningless.

61. To be clear, the majority view is that the case should be considered as being rare not only because of the financial impact on Mr Turagalailai and on how much football means to him, but also because of the disparities that the Code produces in terms of sanction as previously outlined.

62. In summary, while Mr Turagalailai should have known better, a two-year ban for smoking a cannabis cigarette on the morning of a game, a substance which has no performance enhancing effect and where, as a consequence, no therapeutic intervention is on offer to assist with any addiction issues he might have, is in the majority's view quite out of proportion. This is especially so if it means that he is prevented from earning a living, as was the concern in Puerta.

Conclusion on Issue 1:

63. Despite the wording of the Code, the majority considers that it can have regard to proportionality. Under Swiss law anti-doping rules are subject to the principles of proportionality and CAS jurisprudence would indicate that there is a general discretion to consider proportionality and, where the

circumstances of a particular case raise the issue of proportionality, the majority has a duty to ensure that any sanction it imposes is just and proportionate.

64. The majority views this to be a rare case. A two-year period of ineligibility would be unjust and disproportionate. We also have doubts that this level of sanction was one of the intended consequences of the redrafting of the Code in relation to substances of abuse.

65. The majority considers that a just and proportionate sanction would be an eight-month period of ineligibility, which is within the range suggested by Ms Wroe. This acknowledges Mr Turagalailai's breach of the rules, the potential risk of harm to his own health by smoking a cannabis cigarette on the morning of a game and the extent to which in so doing he might have violated the spirit of sport.

66. It also acknowledges the other matters previously discussed, which in the majority's assessment contribute to a disproportionate outcome. This includes the difference in sanctions for in-competition use of substances of abuse compared to out-of-competition use and the fact that substances of abuse are all treated the same.

Issue 2:

DFSNZ's position

67. Mr McDonald referred to the timeline outlined by Mr Tapper to submit to the Tribunal that there was no substantial delay in notifying Mr Turagalailai of his adverse analytical finding (AAF) and therefore there was no basis for backdating the period of ineligibility, other than to the date of the order for provisional suspension.

68. Mr McDonald submitted that in considering the issue of whether there had been a substantial delay the Tribunal must consider the four questions posed by the CAS[8] which are (i) how long was the delay; (ii) is any of that time attributable to the athlete; (iii) is the overall delay substantial; and (iv)

[8] CAS 2020/A/7526&7559

should the panel, having regard to all the circumstances, exercise its power to backdate the suspension period?

69. He further submitted that the Code does not define substantial delay but that the ordinary meaning of substantial should apply.

Mr Turagalailai's position

70. Ms Wroe submitted that Rule 10.13.1 provides the Tribunal with a discretion to start the period of ineligibility as early at the date of sample collection, in circumstances where a substantial delay was not attributable to the athlete.

71. Mr Turagalailai's sample was taken on 9 September 2023, and he was informed of his AAF on 16 February 2024, a period of just over five months. Ms Wroe submits that such passage of time was too long and constitutes a substantial delay.

72. Ms Wroe referenced several previous anti-doping cases, including one from USADA[9] which said that the rule makers have to be strict with themselves, and from UKAD which said the expectation should be a timeframe of 28 days from sample date to notification.[10]

73. Ms Wroe noted that there was a period of inactivity from 18 December 2023 to 19 January 2024, which was due to the Christmas shutdown of the DFSNZ office. She submitted that just because DFSNZ chose not to allocate resources over the Christmas period does not mean it is not relevant to the 'passage of time'.

Discussion

74. The issue of substantial delay is dealt with in Rule 10.13.1.

75. As part of his submissions, Mr McDonald suggested that there was no prejudice to Mr Turagalailai in the process followed by DFSNZ in relation to any perceived delay, especially as it might have allowed him to play out the rest of the season and that therefore there is no reason for the Tribunal to intervene. It must be noted that there is no onus on Mr Turagalailai to

[9] USA Shooting & Q. v Union Internationale de tir (UIT), CAS 94/129, award of 23 May 1995, para 34
[10] UKAD v Tete SR/092/2023

establish prejudice; the terms of rule 10.13.1 simply addresses substantial delay that is not attributable to the athlete.

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

Conclusion on Issue 2:

77. There was a substantial delay from the date of the sample being taken and Mr Turagalailai being notified of the AAF, with such delay not being attributable to the athlete. In those circumstances the Tribunal considers it would be reasonable to backdate any period of ineligibility to the date of the beginning of the Christmas shutdown period.

Orders

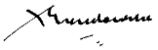
The Tribunal **orders** as follows:

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

(ii) Costs are not ordered, as none are sought, but they are reserved should DFSNZ wish to apply.

(iii) This determination should be the final determination by the Tribunal in this matter, and it may be published in the usual way.

Dated: 3 July 2024



John Macdonald
Chair

Ruth Aitken DNZM

BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 01/24**

BETWEEN	**DRUG FREE SPORT NEW ZEALAND**
	Applicant
AND	**INOKE TURAGALAILAI**
	Respondent

DISSENTING DECISION OF THE DEPUTY CHAIR
3 July 2024

---

1. I agree with the majority review in relation to Issue Two and consider that there was a substantial delay between the taking of Mr Turagalailai's sample and notifying him of the Adverse Analytical Finding.

2. I agree that the sanction imposed in this case should be backdated to 14 December 2023 when DFSNZ closed its office for the Christmas break.

3. I do not agree with the majority view on Issue One.

4. This is not a case where the WADA Code (or the SADR which incorporates it) itself allows for the exercise of any discretion on the sanction to be imposed. There is a mandatory requirement (Rule 10.2.4.2 of the SADR) that the Tribunal must impose a sanction of 2 years' ineligibility for in-competition possession or use of a substance of abuse, unless the athlete can establish that there has been no significant fault or negligence ("NSFN") on his or her part. If the athlete can establish NSFN, the effect of Rule 10.6.2 of the SADR is that the period of ineligibility may be below two years but must not be lower than 1 year.

5. In this case, Ms Wroe did not suggest that a defence of NSFN was available to Mr. TuragaIailai.[11] The result is that a minimum sanction of 1 year's ineligibility (or somewhere not much more than that) cannot be imposed in terms of the express wording of the SADR. The issue is accordingly whether some jurisdiction can be found outside the terms of the SADR, to impose a lesser sanction on the basis that to impose the sanction mandated by the SADR would be unjust and disproportionate.

6. The most recent relevant CAS case, being the Award dated 29 January, 2024 in the *Valieva* case[12], suggests that the scope for invoking any proportionality regime may be very limited. At [424] of the decision, the majority of the Panel cited with approval the following from the earlier CAS decision in CAS 2018/A/5546:

---

[11] I think she was clearly correct in taking that view, as it appears that he did receive education on drug use (including in relation to testing and the application of the WADA Code) before the team departed for New Zealand, and it was made clear to him that any drug use would be contrary to the team's culture. He apparently elected to make no enquiry about how his cannabis use might be treated under the WADA Code. Overall, his level of fault in the NSFN context could clearly not have been assessed as insignificant.

[12] *WADA & RUSADA* v *Valieva,* above n. 7.

> [*86*] *Additionally, the CAS jurisprudence since the coming into effect of the WADC 2015 is clearly hostile to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by the WADC (and there is only one example of its being applied under the previous version of the WADC). In CAS 2016/A/4534, when addressing the issue of proportionality, the Panel stated: "The WADC2015 was the product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end. It sought itself to fashion in a detailed and sophisticated way a proportionate response in pursuit of a legitimate aim….*[*87*] *In CAS 2017/A/5015 & CAS 2017/A/5110, the CAS Panel, with a further reference to CAS 2016/A/4643, confirmed the well-established perception that the WADC "has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into the assessment of length of sanction…...*[*89*] *The Panel is conscious of the much quoted legal adage "Hard cases make bad law", and the Panel cannot be tempted to breach the boundaries of the WADC…because their application in a particular case may bear harshly on a particular individual. Legal certainty is an important principle to depart from the WADC would be destructive of it and involve endless debate as to whether in the future such departure would be warranted. A trickle could thus become a torrent; and the exceptional mutate into the norm.*

7. Notwithstanding the strength of the views expressed by the majority of the Panel in the *Valieva* case, there is some authority for the proportionality doctrine in other CAS cases, and I am prepared to accept that, in rare and exceptional cases[13], this Tribunal has the power to decline to impose a sanction expressly required by the WADA Code, even where there is no perceived "gap", or "lacuna", in the relevant part of the Code.[14] This power

[13] See for example *Puerta* v *ITF* CAS 2006/A/1025, and *I* v *IFA* CAS 2010/2268.
[14] *I* v *IFA*, above note 12.

may be exercised where the sanction imposed would be "evidently and grossly disproportionate in comparison with the proved rule violation and if [the sanction] is considered as a violation of fundamental justice and fairness" [15]. In CAS 2009/A/2012, the sole arbitrator noted that, at least in the opinion of the Swiss Federal Tribunal, sports authorities will exceed their autonomy if the rules constitute "an attack on personal rights, the nature and scope of which is extremely serious and totally disproportionate to the behaviour penalised".[16]

8. I do not believe that test is met in this case. First, we are not here dealing with a rare, or exceptional case, such as the CAS panels had to address in *Puerta* and *I* v *FIA.* There is nothing particularly unusual or special about this case. Mr. Turagalailai knowingly used cannabis on the morning of the match (he describes himself as a regular user of cannabis at home in Fiji, including for the purpose of "de-stressing"), and he cannot point to any circumstances which might suggest that his level of fault was not significant.[17] Instead, the contention is that elements of the WADA Code which will potentially apply to many athletes (all those who are found to have used cannabis in-competition), cannot be applied as they were clearly intended to be applied. Mr.Turagalailai's argument appears to be that the minimum sanction prescribed by the SADR for *any* in-competition cannabis use (where the use is unrelated to sport performance) is likely to be disproportionate and unenforceable.

9. Secondly, I do not believe that in promulgating the amended WADA Code in 2021, WADA somehow overlooked the possibility that some athletes could find themselves in the position in which Mr.Turagalailai now finds himself. The 2021 amended WADA Code introduced a completely new sanctions regime for "Substances of Abuse", to deal with the perceived problem of an increasing number of cases involving the use of recreational drugs (primarily cocaine but including cannabis and others). There was a

---

[15] *FIFA and WADA* - CAS Advisory Opinion (CAS 2002/C/976 & 986). at [143].
[16] CAS 2009/A/2012, at [51].
[17] I do not accept that the factors listed by the majority (financial impact of a two years ban on Mr. Turagalailai, and the fact that the sport means everything to him), can be regarded as exceptional, or rare. Every professional or semi-professional athlete who is banned from competing will suffer financial loss, and all are likely, to a greater of lesser degree, to have put heart and soul into their chosen sport.

special track with a relatively minor sanction for out-of-competition use[18], but cases of in-competition use were deliberately dealt with more severely. For in-competition use of cannabis (or any of the other Substances of Abuse), the athlete would face a mandatory period of ineligibility of two years, subject to the possibility that that period might be reduced to somewhere between 1 year and 2 years if the athlete could establish NSFN on his or her part.[19] A previously existing provision that an athlete using a cannabinoid could establish NSFN merely by showing that the context of the use was unrelated to sport performance, was deleted from the Code. WADA's decision to make these changes, which imposed significantly greater penalties for in-competition use of cannabis, followed detailed consultation and consideration of submissions from stakeholders. It appears to have been a considered and deliberate one.

10. Why did WADA provide for significantly greater sanctions for in-competition use of Substances of Abuse? I do not think the purpose could have been to ensure that athletes would compete on an "even playing field", at least in cases where the athlete was able to show that the use was unrelated to sport performance. That is implicit in Rule 10.2.4.2, which provides that the mandatory period of ineligibility for in-competition use of 2 years is applicable *only* where the athlete can show that his or her use was unrelated to sport performance. Also, the previously included reference to "Athletes who cheat" in Article 10.3 of the WADA Code was deleted from the 2021 version of that Code.

11. Unfortunately, the reasons for establishing a separate track for in-competition use of substances of abuse that are unrelated to sport performance are not clear from the material presented to the Tribunal, apart from a general statement in a WADA summary of the various drafts of the new WADA 2021 Code stating that WADA "received considerable stakeholder feedback that sanctions for street drugs remain a particular problem under the Code. Cocaine is a particular problem…". But I think it may be inferred that WADA was concerned with protecting the health of athletes and/or the "spirit of sport" factor, both listed as "Fundamental

[18] A period of ineligibility of three months, which could be reduced to one month if the athlete undertook an approved treatment programme.
[19] Rule 10.6.2 of the Code.

Rationales" for the WADA Code and the SADR. Protecting the health of athletes has been acknowledged by the CAS to be a significant function of the WADA Code and the various national rules that incorporate its provisions - see for example the decision of the Court of Arbitration for Sport in *CAS 2018/A/5546*, which is cited at para [424] of the more recent *Valieva* case. The CAS panel in CAS 2018/A/5546 said at 88 "…*The WADC 2015 was designed not only to punish cheating, but to protect athletes' health."* See also *I* v *FIA* CAS, a case involving a 12 - year-old Go-karter who was competing in an under-15s competition, where the CAS panel said at [145]: "*According to the scientific evidence examined by the Panel, the prohibited substance was ingested on the day of the race and this could have endangered the safety of the Driver himself and of the other competitors*." [20]

12. So, depending on the sport, it could clearly be dangerous to have an athlete competing who is adversely affected by cannabis (Go-karting being an obvious example of such a sport). And the WADA Code was designed to apply to all sports. [21] The distinction between the sanctions for in-competition use and out-of-competition use of cannabis can be seen to make some sense if the target in the former case was to protect the physical well-being of the athlete in competition, while the target of the latter was to address recreational use and possible addiction issues.

13. The "spirit of sport" may also have been a factor in WADA's decision to make a distinction in the sanctions as between in-competition use and out-of-competition use of substances of abuse. The Introduction to the SADR refers under the heading "Fundamental rationale for the Code and these Rules" to the "spirit of sport" as the "*celebration of the human spirit, body*

---

[20] The *I* v *FIA* decision appears to confirm that "health" considerations may include safety in competition. I note too that some of the early New Zealand Sports Tribunal decisions included the safety of athletes as a relevant consideration in the exercise of the Tribunal's discretion on sanction in cannabis cases. See for example *Boxing New Zealand Inc*. v *Mene,* [2004] NZST 13, where the Tribunal said: "*Nor would the Tribunal be prepared to countenance the use of the drug at a time when it could impair the athlete's faculties and place other competitors or members of the public in any danger*." See also *Softball New Zealand* v *Karaitiana* (ST 12 / 06), where one of the discretionary factors listed was that the athlete's cannabis use should not have represented "*any danger to other competitors, officials or members of the public*."

[21] In CAS2009/A/2012, the CAS panel said at [43]: "*The purpose and intention of the WADC is, inter alia, to make the fight against doping more effective by harmonising the legal framework and to provide uniform sanctions to be applied in all sports."*

and mind. It is the essence of Olympism, and is reflected in the values we find in and through sport, including ….Respect for rules and laws…Community and solidarity." Private, out-of-competition, use of substances of abuse for recreational purposes is one thing, but when the use is brought into the sport in competition it may become more visible, whether to the public or to other competitors, including younger competitors.[22]

14. I acknowledge the apparently arbitrary results that may flow from the in-competition / out-of-competition distinction, as described at paragraphs 40-42 of the majority decision. But the distinction is a necessary one to give effect to the SADR as a whole (for example, prescribing which substances are prohibited only in competition, and which are prohibited both in and out of competition), and some cut-off point, where in-competition starts, must be selected. Further, a degree of arbitrariness is, I think, part of the price of ensuring that elite level athletes can compete safely and in the true spirit of sport on an even playing field - the greater the level of discretion the Code allows to national tribunals, the greater the scope for "rogue" national tribunals to abuse that discretion in favour of their own athletes. To guard against that danger, I think it is implicit in the WADA Code that those who wish to compete at the elite levels of sport must be taken to have accepted the need for some level of arbitrariness in the application of sanctions, and bought into the internationally recognized goal that the WADA Code sanctions should apply uniformly across all sports. The onus is very much on the athletes to ensure that they receive sufficient education to ensure they are not at risk of being caught by any "arbitrary" outcomes.

15. I think this case is a difficult one, where the line to be drawn between whether the sanction required by the SADR is proportionate or disproportionate is not clear. But in the end, I think the onus was on Mr.

---

[22] This concern may perhaps be illustrated by two decisions of this Tribunal. First, in *Softball New Zealand* v *Karaitiana*, above n.20, the representative of Softball New Zealand was said to have advised the Tribunal that his organization was: "*very concerned at the damage done to the sport by senior players being found to have breached the Anti-Doping Code through the use of cannabis and that the Board of Softball New Zealand would soon be considering the matter of more formally*." Secondly, in *Softball New Zealand* v *Cameron* (ST 3/09) the Tribunal said: "*The Tribunal notes that the time may now have arrived for the Tribunal to reconsider the sanctions being imposed and increase the period of ineligibility. There are indications that some national sports organizations believe that stiffer sanctions may eliminate what is seen as a blight on some sports*."

Turagalailai to show that a two years period of ineligibility would be disproportionate, and I do not think he has discharged that onus. What has happened, is that the 2021 WADA Code has introduced a completely new regime for sanctioning athletes who use substances of abuse, and the most substantial of the changes then introduced are those affecting in-competition users of substances of abuse such as cannabis, where the use is unrelated to sporting performance. This was a major international change, and it appears to have been driven by a perceived problem, presumably international, with "street drugs" in elite sports competitions. Given that background to the changes, I do not think much assistance can be gained from pre - 2021 decisions of this (New Zealand) Tribunal on sanctions for cannabis use, which for the most part do not appear to have been concerned with in-competition use.

16. The majority view is that a sanction of 8 months' ineligibility would be fair and proportionate in this case, but that is not a great deal short of the 1-year period that would have applied (as a minimum) if Mr. Turagalailai had been able to establish NSFN. The concept of proportionality cannot in my view be judged without considering the aim of the particular sanction, and I am not sure that I could describe a minimum 1-year period of ineligibility as totally or grossly disproportionate in the case of an athlete who has been at fault to some level (falling short of "significant" fault), where the overall aim appears to have been to protect athletes' health and the spirit of sport by keeping "street drugs" out of competitions. Nor can I say that, where there has been significant fault by the athlete, as in this case, a period of 2 years' ineligibility would be totally or grossly disproportionate when regard is had to the need for sanctions to provide an effective deterrent.[23]

17. This case is not an exceptional case, where the principle of proportionality has on occasion been applied by the CAS, and in my view Mr. Turagalailai has not discharged the onus of proving that the sanction mandated by the

[23] The WADA Anti-Doping Code 2021 states at page 9, under the heading "Purpose, Scope and Organization of the World Anti-Doping Program and the Code":
"*The purposes of the World Anti-Doping Code and the World Anti-Doping Program which supports it are……..Deterrence – to divert potential dopers, through ensuring that robust rules and sanctions are in place and salient for all stakeholders*"

SADR would be disproportionate. I would uphold DFSNZ's submission on Issue One and impose a period of ineligibility of 2 years.

Dated: 3 July 2024

Warwick Smith