CAS 2017/A/4937 Drug Free Sport New Zealand v. Karl Murray

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	The Hon. Dr Tricia Kavanagh, Arbitrator in Sydney, Australia
Arbitrators:	Sir David A R Williams QC, Arbitrator in Auckland, New Zealand
	The Hon. Barry Paterson QC, Arbitrator in Auckland, New Zealand
Ad hoc Clerk:	Ms Kaelah Ford, Solicitor in Sydney, Australia

in the arbitration between

DRUG FREE SPORT NEW ZEALAND, Auckland, New Zealand

Represented by Mr Isaac Hikaka and Mr Adam McDonald of Lee Salmon Long, Auckland, New Zealand

Appellant

and

KARL MURRAY, Auckland, New Zealand

Represented by Mr Aaron Lloyd of Minter Ellison Rudd Watts, Auckland, New Zealand

Respondent

CYCLING NEW ZEALAND, Cambridge, New Zealand

Represented by Andrew Matheson of Cycling New Zealand, Cambridge, New Zealand

Affected Party

I. INTRODUCTION

1. This appeal is brought by Drug Free Sport New Zealand ("DFSNZ" or the "Appellant") under the World Anti-Doping Agency ("WADA") Code 2015 against a Decision of the Sports Tribunal of New Zealand ("STNZ") made on 20 December 2016, which dismissed charges of breach of Sports Anti-Doping Rules 2016 (as amended) ("SADR") by Mr Karl Murray ("Mr Murray" or the "Respondent").

2. DFSNZ alleged Mr Murray committed Anti-Doping Rule Violations ("ADRV"):

   a. under SADR 10.12.1 and 10.12.3, by participating in the sport of Cycling when subject to a period of ineligibility; and

   b. in breach of SADR 2.5, by tampering with doping control by providing fraudulent information to DFSNZ.

II. PARTIES

3. DFSNZ is an independent crown entity and therefore the national anti-doping organisation responsible for implementing the anti-doping code in New Zealand, in accordance with the WADA Code. Section 16 of the *Sports Anti-Doping Act 2006* (NZ) (the "Act") gives the Board of DFSNZ power to proclaim sports anti-doping rules for New Zealand reflecting any amendments to the WADA Code. The New Zealand National Sporting Organisations, including for the sport of Cycling, have agreed that the DFSNZ exercises all powers under the Act to implement the anti-doping rules and policies in conformity with the WADA Code.

4. Mr Murray is an elite athlete who competes for Cycling New Zealand ("CNZ") and has at all material times been subject to the SADR.

5. CNZ is the National Sporting Organisation for the sport of Cycling in New Zealand, and an affected party. Mr Murray was a "licenced" rider under CNZ Rules. CNZ also had "carded" cyclists who are recognised as elite athletes and given extra support from CNZ.

III. FACTUAL BACKGROUND

A. Background Facts

6. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

7. The Panel had before it all the material that was available to the STNZ as well as additional material produced in writing or orally for the purposes of the appeal. The parties to this appeal have conveniently agreed as to the following background facts.

a. Mr Murray's first ban

- Mr Murray participated in the 2013 Tour of New Caledonia. On 22 October 2013 (at the end of the sixth stage of the tour), Mr Murray was selected for anti-doping control.

- On 28 October 2013, Mr Murray's samples arrived at the testing and analysis department of the Agence Française de Lutte Contre le Dopage ("AFLD"). The samples showed the presence of:

    - Nandrolone;

    - Noretiocholanolone; and

    - Testosterone.

- These substances, and/or their metabolities, are anabolic steroids which are prohibited substances.

- Mr Murray was notified of the results of the sample analysis and anti-doping rule violation proceedings were taken against Mr Murray before the Commission de Lutte Contre Le Dopage de Nouvelle Caledonie ("NCC"). Mr Murray defended the proceedings, claiming that the presence of testosterone could be explained by his consumption of the food supplement "Muscletech" that had been given to him by a member of his family.

- A hearing was held before the NCC on 8 April 2014. The NCC was not convinced by the explanations given by Mr Murray, and further noted that Mr Murray had no explanation for the presence of nandrolone in his sample.

- The NCC found that an anti-doping rule violation had been committed by Mr Murray and imposed on him a sanction of 2 years' ineligibility as from the date of the award, i.e. 23 April 2014.

- Though the decision of the NCC records that it be notified to the AFLD, it is not clear whether this occurred.

b. Recognition of ban

- In around late-February 2015, DFSNZ became aware of the ban imposed by NCC. DFSNZ relayed this information to the AFLD, the Union Cycliste Internationale ("UCI"), and to WADA. It also applied to the STNZ for recognition of the NCC decision under SADR 15.2 and for a provisional suspension of Mr Murray pending that hearing. A provisional suspension was imposed by the STNZ on 23 March 2015 for the anti-doping offence.

- In April 2015, AFLD and UCI recognised the decision of the NCC. It was therefore recognised under Article 15.1 of the WADA Code. The proceedings before the STNZ therefore became otiose and were discontinued.

- The period of ineligibility imposed ended on 22 April 2016.

c. The Alleged Breaches

8. Between April 2014 and February 2015, Mr Murray coached cyclists who were licenced members of CNZ, including "Miss A" and Ruby Livingstone. As part of his coaching, he used a programme called 'Training Peaks' to provide training programmes to Miss A and Ms Livingstone. However, after recognition of the ban by UCI and AFLD, Mr Murray had a number of communications with DFSNZ to clarify what activities he was able to carry out during his period of ineligibility.

9. It is relevant to note that prior to his anti-doping rule violation and sanction, Mr Murray was both competing as a cyclist and acting as a coach to some carded cyclists. He also conducted a bike sale and repair business.

10. This dispute is essentially therefore an assertion from DFSNZ that Mr Murray committed two further breaches of the anti-doping rules. The first breach is an allegation he breached his sanction period by coaching two (2) licenced cyclists, one of whom was a minor at the time, and provided them with technical support during his sanction period. The second breach was an allegation of tampering in that he fraudulently misled the investigation process related to his related coaching. The evidence is directed to the nature of Mr Murray's contacts with those athletes while he was sanctioned and ineligible under the rules to "participate" in any officially organised competition or activity in the sport of cycling. The credit of a number of witnesses along with a consideration of relevant documentation is at the heart of the appeal. The Panel has also had to give an interpretation of the effect of the relevant rules under which the alleged violations are pleaded.

11. The dispute was heard at first instance by the STNZ in accordance with the parties' obligations under the SADR.

B. Proceedings before the STNZ

12. In the hearing before the STNZ, Mr Murray raised jurisdictional issues in relation to both alleged breaches. First, he challenged the interpretation and meaning of SADR 10.12.1 which provision recites a number of prohibitions on athletes who are ineligible (that is serving a sanction) who, if they breach any of the prohibitions, would then be in breach of SADR 10.12.3. A challenge was also issued in relation to the second breach alleged against Mr Murray under SADR 2.5. Mr Murray proposed alternative interpretations of both the rules and disputed the interpretations of those rules relied upon by DFSNZ.

13. In its first decision of 2 August 2016 (the "Preliminary Decision") the STNZ dealt with the jurisdictional issues as a preliminary point. The STNZ determined:

"coaching which is directed to the purpose of participating in competition or activities (current or foreseeable future) authorised or organised by Cycling NZ falls within the scope of SADR 10.12.3." (Preliminary Decision at [13])

14. The matter then went to a full hearing of the evidence and the STNZ published its final decision on 20 December 2016 (the "Decision"). The application of DFSNZ for breach of the SADR by Mr Murray was dismissed as follows:

> *"[34] Overall, the evidence does not establish that Mr Murray was coaching Ms Livingstone while he was banned … and we otherwise prefer Ms Larner's evidence to the largely supposition and suspicion expressed by Ms Livingstone in her written briefs of evidence.*
>
> …
>
> *[39] Our conclusion is that we are not comfortably satisfied … that DFSNZ has proven that Mr Murray coached Janet Smith while banned. While there is certainly evidence to this effect, we do not find having heard and seen all the witnesses that the evidence is of the requisite "strong" quality to establish proof of what are serious allegations. Much of it is of the nature of suspicion, hearsay or supposition. …"*

15. Having dismissed the allegation under SADR 10.1.3, the STNZ then determined it did not have to consider the SADR 2.5 tampering allegation and ordered:

> *"[41] We accordingly dismiss all claims of breach brought by DFSNZ against Mr Murray."*

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

16. On 9 January 2017, the Appellant filed its application with the CAS in accordance with Article R47 *et seq*. of the Code of Sports-related Arbitration (the "CAS Code"). In its statement of appeal, the Appellant nominated Sir David A R Williams QC as arbitrator. The Appellant also named CNZ as an Affected Party in its statement of appeal. The Panel invited CNZ to make submissions and attend the hearing.

17. On 3 February 2017, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.

18. On 7 February 2017, the Respondent nominated The Hon. Barry Paterson QC as arbitrator.

19. On 2 March 2017, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, confirmed the Panel as follows:

President: The Hon. Dr Tricia Kavanagh, Arbitrator in Sydney, Australia

Arbitrators: Sir David A R Williams QC, Arbitrator in Auckland, New Zealand

The Hon. Barry Paterson QC, Arbitrator in Auckland, New Zealand

20. On 21 March 2017, the Respondent filed his Answer in accordance with Article R55 of the CAS Code.

21. On 29 May 2017, the Order of Procedure was agreed to and signed by the parties.

22. The hearing was held on 21, 22 and 23 June 2017 in Auckland, New Zealand. The Panel was assisted by the *Ad-Hoc Clerk,* Ms Kaelah Ford and at the hearing by Ms Jovana Nedeljkov. The following attendees participated in the hearing:

For the Appellant

- Mr Isaac Hikaka and Mr Adam McDonald of Lee Salmon Long

For the Respondent

Mr Aaron Lloyd of Minter Ellison Rudd Watts

For the Affected Party

- Mr Andrew Matheson of Cycling New Zealand

23. The following witnesses gave evidence before the Panel:

For the Appellant

- "Mrs B"[1]
- "Miss A"
- "Mr A"
- "Mrs A"
- Ms Ruby Livingstone
- Mr Ryan Wills
- Mr Graeme Steel

For Mr Murray

- Mr Karl Murray

[1] The Panel determined that as a witness in the case was a minor at the time of the breach and another minor was a named athlete in the hearing both should be given protection by anonymisation of their identities (SADR 14.3.6). A further issue arose in respect to their parents, also witnesses in the hearing. It was submitted given the ease with which information can be found online; the small cycling community in New Zealand; and the fact the surnames of the parents are the same as that of their children, if the parents' names are not anomynised their children would be readily identifiable. This would render the original anonymisation order on the names of the minors ineffective. Accordingly, the Panel ordered the minors be identified as "Miss A" and "Master B" and the parents of "Miss A" as "Mr A" and "Mrs A" and the mother of "Master B" as "Mrs B".

- Ms Rachael Larner
- Mr Cameron Blake

For CNZ

Acted as *Amicus Curiae*

24. Statements were also filed by the following witnesses and tendered at the hearing, however the witnesses were not required for cross examination:

- Mr Ross Machejefski
- "Master B"
- Mr Cameron Riches
- Mr Craig Palmer
- Mr Myron Simpson

25. At the start of the Hearing the parties confirmed that they had no objection to the composition of the Panel. At the conclusion of the hearing, the parties confirmed that their right to be heard had been fully respected.

V. SUBMISSIONS OF THE PARTIES

A. Submissions of the Appellant

a. Interpretation of SADR 10.12.1

26. DFSNZ supported the interpretation by the STNZ, in its Preliminary Decision, of the clauses under which the alleged breaches were laid.

27. It contended, as to SADR 10.12.1 (Coaching in breach of ineligibility):

- an athlete who is ineligible cannot participate in any role whatsoever in relation to either a competition or activity of the Referenced organisation (see *Russell v Canadian Centre for Ethics in Sport & Swim Natation Canada* (SDRCC DT 12-0177, 24 October 2012 at [59]-[61]);

- as a matter of fact, Mr Murray breached SADR 10.12.1 when he provided coaching, sporting advice, training advice or programmes, conditioning advice or programmes, or sports motivation to any athlete bound by the SADR in relation to any sporting activity of which they are a member of an organisation bound by the SADR; and

- as a matter of fact, Mr Murray breached SADR 10.12.1 when he provided coaching, sporting advice, training advice or programmes, conditioning advice or programmes, or sports motivation to any athlete bound by the SADR in relation to any competition authorised or organised by any signatory organisation.

28. DFSNZ further submitted this interpretation of the clause should be endorsed as it is consistent with:

- the wording of SADR 10.12.1, which is wide having regard to its ordinary meaning;

- the purpose and intent of the WADA Code, which is to create a regime where athletes can compete in an environment untainted by doping;

- the history of the provision, which has consistently had the intent of capturing coaching and related actions; and

- the practical realities of sport, whereby coaching and other assistance to athletes is provided in order for them to perform in competitions, but is often part of a long-term programme.

b. Interpretation of SADR 2.5

29. As to SADR 2.5 (Provision of False Information), DFSNZ submitted: Mr Murray subverted doping control by providing fraudulent information to the investigation conducted by DFSNZ into his activities at his second interview of 30 March 2016 which occurred after he was sanctioned.

30. The phrase "fraudulent information" has its common sense and ordinary meaning.

31. Under SADR 2.5, DFSNZ has the responsibility to pursue all anti-doping rule violations and to conduct appropriate investigations which, if they reveal conduct in breach of the WADA Code, require action against violation of the WADA Code. Therefore, Mr Murray's answers in his first interview were in breach of SADR 2.5.

i. *Submissions as to the Facts regarding breach SADR 2.5*

32. The DFSNZ further submitted the STNZ fell into error in the Decision in that it:

- failed to properly consider the evidence of witnesses;

- failed to properly apply the requisite standard of proof - comfortable satisfaction - when it in its reasoning it conflated the two separate alleged violations together in its application of the appropriate standard;

- failed to properly apply the standard when taking into its consideration the issue of sanction thereby inferring a higher standard of proof is required to sustain subsequent violations of the anti-doping code; and

- failed to consider the evidence as a whole both direct, credible and circumstantial evidence in its dismissal of the breach of SADR 10.12.3.

ii. *Relief sought*

33. In its Application for the Appeal, DFSNZ sought:

- a finding that Mr Murray violated his prohibition on participation during a period of ineligibility at various times during 2015 including by coaching CNZ members "Miss A" and Ruby Livingstone (the former being a minor at the time);

- a finding that Mr Murray violated SADR 2.5 by providing fraudulent information, including false and misleading information, to DFSNZ during an interview on 30 March 2016; and

- orders sanctioning Mr Murray in accordance with Rules 10.12.3, 10.12.1 and 10.7.1 of the SADR 2015.

B. Submissions of the Respondent

a. Submissions as to Interpretation of SADR 10.12.1

34. The Respondent rejected the interpretation of SADR 10.12.1 and 10.12.3 adopted by the STNZ and submitted that, as to SADR 10.12.1:

- the rule does not impose on any athlete who is sanctioned an obligation not to coach;

- the provision does not prohibit the coaching of "carded" or licenced athletes;

- the provision prohibits an athlete sanctioned from participating in any competition or activity authorised or organised by any organisation bound by the SADR ("*It is the competition or activity which needs to be authorised not the banned athlete's actions per se*");

- the error made in the Preliminary Decision of the STNZ was the finding that assisting an athlete in preparation for a competition amounts to participation in the competition itself; and

- an ineligible athlete is not prohibited from entering private arrangements with athletes who are members of a signatory organization.

b. Submissions as Interpretation of SADR 2.5

35. As to SADR 2.5, Mr Murray contended that in the investigation period he put his answers into context and they were therefore not misleading. He did not intend to mislead the investigators as he thought the DFSNZ's allegations against him concerned prohibited competition, not coaching.

36. In the alternative, the Respondent submitted:

- if his answers were found to be misleading, the Panel should consider the context in which they were given and where the athlete considered that he was being accused of competing in an authorised event;

- the answers were proffered in an investigative environment that was aggressive and therefore conducted ultra vires the Act, as the investigatory powers under the SADR must only be used to investigate genuine potential breaches of the SADR and no such breach was properly identified;

- in the investigation, conduct that would sustain a breach should be identified with specificity and should have been provided by the Appellant in the context of the interviews;

- the conduct of the interviews revealed a "fishing expedition" and the answers given should be seen in that context; and

- to privately coach an athlete not competing in an authorised competition or activity cannot be in breach of the Act.

c. Submissions as to the Facts

37. The Respondent submitted:

- none of the allegations made against the Respondent by DFSNZ amount to him breaching SADR 10.12.1;

- conversation by an ineligible athlete with a licenced athlete competing in an authorised competition does not inherently amount to a breach of the SADR nor is the coaching of a carded or licenced athlete outside of an authorised competition or event by the relevant authority;

- all alleged "coaching" of any athletes as described by the Appellant's witnesses was in terms which made it clear that it was privately arranged, and not arranged under the auspices of any WADA Code signatory or affiliated organisation;

- there was no allegation that during the effective period of his ban in New Zealand Mr Murray attended any CNZ (or any other WADA Code signatory or affiliated organisations) authorised or organised events;

- there was no direct evidence sufficient to satisfy the onus nor was there any evidence of any intent to mislead; and

- the Respondent submitted generally – the allegation of a breach of SADR 10.2.1, 10.12.3 and 2.5 should therefore be rejected by the Panel and the Appeal dismissed.

C. Submissions of the Affected Party

38. CNZ made no formal request for relief. It acted throughout as if amicus curiae.

VI. JURISDICTION

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

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

40. In the Introduction to the published SADR proclaimed under Section 16 of the Act, it is of relevance to note at [4]:

> *"While all provisions of the Code are mandatory in substance, the Code requires certain Articles to be implemented without substantive change by Signatories to the Code because of their central place in harmonising anti-doping measures. The provisions which have to be implemented without substantive change in these Rules are: […] Article 10 (Sanctions on Individuals), […] Article 13 (Appeals) (with the exception of Article 13.2.2, Article 13.6, and Article 13.7), […]. The Rules also provide for the application of International Standards established by WADA, in particular the Prohibited List, the International Standard for Testing and Investigations (and applicable WADA Guidelines for Sample Collection), the International Standard for Laboratories and the International Standard for Therapeutic Use Exemptions and the International Standard for the Protection of Privacy and Personal Information."*

41. No party objected to the jurisdiction of the CAS to hear this Appeal or objection to the relevant rules of the SADR: the challenge mounted was not to the relevant rules but their meaning and effect.

42. Since the issue of jurisdiction is procedural, the Panel considers SADR 13 has been adopted by CNZ as a signatory to the rules and the provision authorises and places obligations on the CNZ that its rules accord with the WADA Code which Code gives CAS jurisdiction to hear the Appeal. The Appellant has exhausted all legal remedies available to it prior to filing this Appeal. The Panel therefore considers it has jurisdiction to hear the appeal and this position is supported by the Order of Procedure, which was executed by the parties without objection.

VII. ADMISSIBILITY

43. Article R49 of the CAS Code provides as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties."*

44. As these proceedings involve an appeal against a decision of a tribunal brought on the basis of rules providing for an appeal to the CAS, in a disciplinary dispute rendered by the STNZ, they are considered and treated as appeal arbitration proceedings in a disciplinary case within the meaning of, and the purpose of, the CAS Code. The Decision was issued on 20 December 2016. The Statement of

Appeal was filed by DFSNZ within the time limit on 9 January 2017. The appeal is therefore admissible.

VIII. APPLICABLE LAW

45. Article R58 of the CAS Code provides as follows:

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

46. The Panel notes that, in accordance with the CAS jurisprudence, the substantive issues in this case are governed by the rules in effect at the time of the alleged anti-doping rule violation relied on by DFSNZ, namely, the SADR and the WADA Code.

47. The applicable regulations are the 2016 SADR in force at the time of the alleged doping violation, which themselves are based on the 2015 WADA Code. The Appellant is headquartered in New Zealand and, accordingly, New Zealand law applies to any substantive issue in the appeal which is not covered by the regulations, of which, however there is none. Insofar as the Panel is sitting in Auckland, nonetheless, it is deemed to be sitting in Lausanne and Swiss procedural law applies. All these propositions are agreed upon by the Parties.

IX. MERITS

A. Onus

48. As was held by the Panel in CAS 2015/A/4059:

> *"… as is well established in CAS jurisprudence, the right of appeal to CAS by reason of Article R 57 of the Code necessarily carries with it subordination to the de novo principle irrespective of any purported restrictions in the regulations of the body from which such an appeal is brought (see WADA v IIHF & Busch (CAS 2008/A/1564 at [79]), as is vouched for by Article 182 at [1] and [2] of Swiss PILA (see generally Reeb and Mavromati op. cit. pp. 505-508). For completeness, the Panel adds that, in reviewing the case in full a Panel is, of course, limited to the issues arising from the challenged decision and cannot go beyond the scope of the previous litigation (see WADA & UCI v Valverde & RFEC (CAS 2007/A/1396 & 1402)), but its scope of review is not limited to consideration of the evidence that was adduced before the body that issued the challenged decision. Rather, it can extend to all evidence submitted to the Panel (see WADA & FIFA v Cyprus Football Association and Others (CAS 2009/A/1817 & 1844 at [121])."*

49. It follows that this Panel may adopt the careful reasoning of the STNZ but only if it finds it persuasive.

50. The STNZ determined it had to assess whether the evidence was of the requisite "strong quality to establish proof of what (were) serious allegations". With respect, the emphasis must be on the seriousness of the allegation and in its consideration the Panel must be "comfortably satisfied" on the evidence each breach is proven. So if an allegation relates to the case of a minor (inherently a more serious breach), the breach may be of a more serious nature but the onus to be met is that of the Panel's "comfortable satisfaction" bearing in mind the seriousness of the allegation. Article 3.1 of the 2015 WADA Code (and SADR 2.1) provides *"this standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt"*. The Panel in CAS 2015/A/4059 rejected the proposition that "comfortable satisfaction" requires an assessment of the "strength" of the evidence (*"strong evidence" as was stated by the STNZ*). Rather a panel must be "comfortably satisfied within the ambit of the evidence that the allegation is proven beyond the balance of probability test but the panel does not require the application of the rigorous standard of beyond reasonable doubt. In CAS 2015/O/4128, the Panel considered an allegation of tampering and stated *"in judicial proceedings before a first instance or appeal body*" because it is a serious offence such conduct must meet a *"high threshold in order to be qualified as tampering"*.

51. Further analysis of a tribunal's obligation, where the weight of the evidence is an imperative, was given consideration in CAS 2015/A/4059 as follows:

> In *Attorney General for Jersey v Edmond-0 'Brien, in a decision of the Privy Council* (2006 1 WLR 1485), Lord Hoffman said:
>
> > *"It is in the nature of circumstantial evidence that single items of evidence may each be capable of an innocent explanation but, taken together, establish guilt beyond reasonable doubt."*

52. And the Panel further noted:

> *"Although that statement was articulated in the context of a criminal case, in the Panel's view, Lord Hoffmann's reasoning applies, mutatis mutandis, to the situation where a Tribunal is mandated to have 'comfortable satisfaction' before it can inculpate a sportsperson of a disciplinary offence, a fortiori where certain pieces of evidence are themselves suspicious."*

53. So the Panel must be "comfortably satisfied" commensurate with the seriousness of the breach.

B. SADR 10.12.1: Status during Ineligibility

54. The Respondent pressed as a ground of the Appeal, given Mr Murray's alleged activities (which were in context denied), that on a correct interpretation, SADR 10.12.1 does not prohibit the coaching of athletes. The Respondent submits that what the rule prohibits is coaching an athlete directly for an authorised

competition or activity. So an athlete could be coached but not "in direct connection with and just prior to the days of the competition" (see *Russell v Canadian Centre for Ethics in Sport & Swim Natation Canada (SDRCC DT 12-0177, 24 October 2012* ("*Russell*") at [60]). It was contended that assisting an athlete in preparation for a competition does not amount to participation in the competition.

55. Therefore, an essential first consideration for the Panel in the Appeal is the interpretation given to SADR 10.12.1 which relevantly states:

> *"No Athlete or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorised anti-doping education or rehabilitation programs) authorized or organised by, any Signatory or Signatory's member organisation, or a club or other member organisation of a Signatory's member organisation, or in Competitions authorised or organised by any professional league or any international- or national-level Event organisation or any elite or national-level sporting activity funded by a governmental agency."*

56. It is noteworthy that SADR 10.12.1 is in the same terms as Article 10.12.1 of the WADA Code.

57. The Respondent rejected the learned STNZ's interpretation of SADR 10.12.1 in the Decision. Mr Murray presses the submission that *an ineligible person is only quarantined from activity with an athlete who is directly in competition or directly linked to a competition.*

58. While the Respondent relies on the above statement based upon the reasoning in *Russell* at (60), it is necessary to review the full reasoning in *Russell* where a similar Canadian provision to SADR 10.12.1 was considered:

> *"[59] As a matter of strict interpretation, I find that someone subject to this expression of what is prohibited in the ban is barred from* ***participation in any role whatsoever*** *in relation to either* ***a competition*** *or* ***an activity*** *of the Referenced Organizations. There are essentially therefore two separate prohibitions here.*
>
> *[60] The first prohibition relates to participation in competition. Competition is the act of competing under the aegis of the Referenced Organizations. Therefore, any role in reference to the act of competing, which in the context of sport and swimming must include preparation in direct connection with and just prior to the days of the competition, is part of the expression of what is prohibited by the ban.*
>
> *[61] The second prohibition relates to participating in any role in an activity. Activity is defined in the Concise Oxford English Dictionary in various ways. The most applicable definition therein is "spheres of action" which on the facts of this case would mean a specified pursuit in which a person engages with respect to the Referenced Organisations. As such, any role of participation in the spheres of action under the aegis of the Referenced Organizations is another part*

> *of the expression of what is prohibited by the ban. These roles can occur disjunctively at either a competition or an activity; or, they can occur conjunctively, so that activity may occur at a competition while not being part of the act of competing as described above." (Emphasis in original)*

59. The Panel notes there has been little consideration by the CAS of the equivalent WADA Code provision 10.12.1 except that of the above decision rendered by the SDRCC Decision. The Panel rejects the view expressed in *Russell* that the provision requires the identification of a temporal connection to a competition (maybe days) between the ineligible person's coaching and the organised event in which the ineligible person is held, because of the coaching, to be a participant. An interpretation of the purpose and ambit of SADR 10.12.1 must be consistent with the practical realities of sport. Here we are dealing with how a coach as a support person, interacts with the licensed athlete in cycling. The coach readies the athlete by means of training programmes, technical analysis, motivation, strategic and tactical advice. The athlete acquires such skills over weeks, months and sometimes years in advance of a competition. The Panel is of the view the provision does not require an arbitrary determination as to whether the provision of assistance to an athlete by a support person requires a finding that the assistance had a temporal or physical connection to a particular event or competition. The provision has a broader reach. The ineligible person cannot participate "in any capacity" in an event or activity authorized or organised by a Signatory during the full period of ineligibility. Further, the provision is applicable to any participation by an ineligible person in any of a signatory's competitions and activities. We therefore reject the proposition, as opined in *Russell*, that the participation ban is disjunctive and only applies to a referenced organization's activities not their organised competition. An athlete serving a period of ineligibility is therefore prevented from having any involvement with sport which involvement impacts on clean athletes who are members of a signatory organisation.

60. It is the involvement (ie "participation") while sanctioned that is the breach and the provision read as a whole does not require a measure of how close or how far from an organised competition or activity to be the relevant consideration. Furthermore, the Panel does not accept the submission that the addition of the words "authorised or organised" by a Signatory to the Rules modifies the general rule such as to allow athletes banned from a sport to play any role within that sport during the sanction period.

61. The Panel is satisfied given the ordinary meaning of the words of SADR 10.12.1, it is the intention of the SADR to ensure all athletes can compete in a drug-free environment and not be exposed to the taint of doping during either their preparation for or participation in an organised event or the sport's organised activities. We are comforted in this analysis by the words of SADR 10.2 (see similar provision 2016 WADA Code Article 10.2) under which an athlete, once they are given notice, is prohibited from associating with any person who is serving a period of ineligibility. The commentary to this rule states "athletes… must not work with ineligible persons (on account of an anti-doping rule violation)" such as "coaches or trainers…". And the types of association are

identified as, amongst others, "obtaining training strategy, technique,…". Such would be coaching strategies.

C. Approach

62. It is not in issue that at the time of the alleged breaches Mr Murray was a person who had been declared ineligible and was serving his sanction. A coach is required to present "to young men and women as a trusted advisor and confidant" (*USADA v Stewart*, AAA No 77 190 110 10 (2010) at p 6). As such he owes a higher duty to the integrity of the anti-doping system than do even athletes. It is in this context that the allegations are given consideration (see *CAS 2016/O/4504).*

63. The particulars relied upon for the breach under SADR 10.12.1 can be summarised thus:

- Mr Murray provided training programmes, a bike seat set up and discussed training performance and racing strategy with Miss A, ie, coaching; and

- Mr Murray provided training programmes, a bike seat set up and the provision of an altitude tent and training performance and racing strategy with Ms Livingston.

64. The Clause therefore requires an analysis of Mr Murray's activities in the context of whether such activities, if proven, could be held to be participation in any activity or competition authorised by CNZ as a Signatory to the Rules.

D. SADR 10.12.1 and Application of the Facts as found on Appeal

65. It is alleged that Mr Murray during his period of ineligibility, under the provisions of Rule SADR 10.12.1, coached both Miss A and Ms Livingstone. The relevant period commenced on 23 March 2015 and continued until late April 2016.

66. The consideration of the facts has been difficult as witnesses were in conflict and often gave different views when reciting the same event. In that context, both parties attacked the credit of the key witnesses.

67. In early 2016, DFSNZ began an investigation into whether Mr Murray was coaching during his period of ineligibility. Its investigator interviewed Miss A on 21 February 2016 and she maintained that during the period of ineligibility she had nothing to do with Mr Murray. Ms Livingstone was also interviewed about that time by the DFSNZ investigator and she denied she had been coached by Mr Murray and said she was being coached by Ms Larner. In later interviews with the investigator both Miss A and Ms Livingstone changed their stories and agreed they had lied in their first interviews when they denied they had been coached by Mr Murray during his period of ineligibility.

68. In respect of the allegations involving Miss A, DFSNZ principally relied upon the evidence of Miss A, her parents and Mrs B. There was supporting evidence from Mr Wills and Mr Machejefski of CNZ but to establish its case DFSNZ needs to establish to the comfortable satisfaction of the Panel that the evidence given before it by Miss A, her parents and Mrs B was truthful.

69. During the relevant period Miss A was a secondary school student, a successful member of the New Zealand Junior Track Cycling team and had attended the Junior World Championships in Kazakhstan in August 2015. She was supported in her cycling career by her parents who were responsible for organising her coaching and the other support she needed. She had been coached by Mr Murray since 2014 and had considerable success under his coaching.

70. When it became apparent in February 2015 that Mr Murray would be unable to coach Miss A, Mr Murray recommended that Mr Wills coach her instead. This arrangement continued for some months. However, it was the evidence of Miss A and her parents that after a month or two they were not satisfied with Mr Wills' coaching for various reasons including the difficulty in contacting him while he was competing as a cyclist in Europe. During that period Miss A's performance standard declined. The family's evidence was that about the middle of 2015 her parents told Miss A that they would get Mr Murray to look at her training plan and give some guidance behind the scenes. He would not be her coach but would keep an eye on her training. Miss A was told that Mr Murray still had access to her Training Peaks account ("TP1").

71. Miss A's evidence, supported by her parents, was that later in 2015 her parents told Miss A that they had decided to get Mr Murray to write his own training programmes on a Training Peaks account for Miss A by putting the plans on TP1. They would only give Mr Wills access to a new Training Peaks account which he had set up (i.e. "TP2").

72. Miss A's evidence was that Mr Murray had coached her since about the middle of 2015. This coaching included Mr Murray writing training plans on a roughly weekly basis. He sometimes texted Miss A or her mother and spoke on the phone about such matters as how she was coping with the workloads and other matters such as her schooling. He did not come to races or any of her training rides and did not have a lot of direct contact. However, after he started putting the training plans on TP1, Miss A followed his programme which was aimed at training for the forthcoming World Junior Championships. In the build-up to those championships, she did come under the coaching of Mr Machejefski of CNZ.

73. When she returned from the Championships, Miss A was injured and was unable to compete in individual events in the New Zealand Secondary School Nationals. However, Mr Murray continued to set the training programmes although they were much lighter because of her injury. When Miss A started training again in October, her parents told her they wanted to stop using Mr Wills. The plan as understood by Miss A, as advised to her by her parents, was her father would become her official coach but he would be following Mr Murray's Training Peaks plan and this was what occurred in the three to four months from January 2016.

74. In the lead up to the New Zealand Track Championships in early 2016, Miss A was talking to Mr Murray more frequently on subjects such as how she was feeling and how the training was going. Miss A did not perform up to expectations at the NZ Track Championships and her evidence was that she phoned Mr Murray a couple of times to talk about what was going wrong with her performance. Her

father was at the Championships but he was not an experienced coach and she was really suffering by not having an expert with her at the Championships. Miss A told her parents that she was dissatisfied with the coaching arrangements between her father and Mr Murray and the family started looking for another coach. It was about that time that the family became aware of DFSNZ's investigation into Mr Murray for coaching during the period of ineligibility.

75. Miss A was then told by her parents that they would stop using Mr Murray in any capacity straight away. Some weeks later she attended an interview with DFSNZ. Her evidence was she was terrified she may have done something wrong. Her father told her what to say at the interview including that the family had nothing to do with Mr Murray after his ban and, after they stopped using Mr Wills, her father had done all the coaching. She said she asked her father whether he was really sure this was the right approach but he said it was the best way to protect her.

76. Mrs A's evidence was similar to that of her daughter. When Mr Murray was sanctioned Mr Wills was appointed Miss A's coach. Miss A and her parents subsequently became unhappy with Mr Wills' coaching. Mrs A phoned Mr Murray and in her words begged him to help. She said that initially he was reluctant. However, he then began advising on Miss A's training by texting training information and talking to Mrs A on the phone. Mrs A would visit Mr Murray's shop and discuss the training programme Mr Murray was setting up for Miss A. Mrs A said that she was also aware that her daughter was talking to Mr Murray on the telephone. During that time they were using two Training Peak accounts. One which CNZ and Mr Wills had access to and the other one on which Mr Murray loaded his training details.

77. Mrs A said during this initial period the parents were paying Mr Murray $45 per week for the coaching. This was paid in cash. These payments stopped when Miss A was under the CNZ umbrella from mid-2015 to September 2015.

78. In October 2015, Mr Wills' training role was terminated. From then onwards Mr Murray loaded training programmes direct into the original Training Peaks' account and stopped texting the information. When asked, Mrs A expressed the view that Mr A was coaching their daughter. When Mr Murray resumed his coaching he asked that an automatic payment of $45 per week be made to Ms Larner's bank account. Mrs A denied as claimed by Mr Murray and Ms Larner that these payments were for the hire of Ms Larner's time trial bike and said by that time Miss A had her own time trial bike and had not used Ms Larner's bike for months. She accepted that her daughter went to Ms Larner for massages about four times but denied that Ms Larner was her daughter's regular masseuse.

79. Mrs A's evidence was that after he resumed coaching Miss A she talked to Mr Murray a lot on the phone. These conversations were not all about training but did include discussions on Miss A's training. In January 2016, Mrs A heard about the investigation by DFSNZ into Mr Murray's activities and she discussed the position with Mr Murray. They mutually decided to terminate the arrangement. She says that Mr Murray phoned her and asked that she and her daughter lie for him and say that Mr A had been the coach. After the arrangement with Mr Murray was severed

they continued using training programmes which he had previously provided. Mrs A confirmed that she advised her daughter to lie to DFSNZ and say that she had not been coached by Mr Murray.

80. After Miss A's first interview there were further contacts by employees of DFSNZ. Mrs A and her husband were concerned about their daughter's welfare and they therefore contacted a lawyer to discuss the situation. Further evidence about the contact with the lawyer was given by Mr A and is noted below.

81. Mr A gave similar evidence to that of his wife and his daughter. He denied Mr Murray's claim that Mr Murray had not coached Miss A since February 2015 and from that date Mr A had done so by adjusting one of Mr Murray's old programmes. It was Mr A who set up the bank payment authority referred to above. The bank statement produced showed payments of $45 per week from 28 October 2015 to 3 February 2016.

82. It was Mr A's evidence that initially Mr Murray made some recommendations to increase mileage but then his assistance involved offering alternative programmes and texting those through to the As. Finally, this transitioned through to Mr Murray providing all the training. The advice given was by texts and phone calls to Mr A or his wife and Mr A said that his daughter had no direct contact with Mr Murray during this time. By May 2015 Mr Murray was coaching his daughter.

83. Mr A gave evidence of the discussion with the lawyer with whom he and his wife consulted. He was advised that he would have to give evidence on oath and he should tell the truth. It was the lawyer who wrote out a further statement from Miss A which acknowledged that she had not told the truth in her first interview with DFSNZ. The lawyer accompanied her to a meeting with DFSNZ.

84. Another witness was Mrs B, the mother of another junior cyclist who was coached by Mr Murray until he became ineligible to coach in early 2015 (the son noted as "Master B" hereinafter). At that stage, Mr Wills became her son's coach. She had no further contact with Mr Murray until October 2015 when she took a bike into his shop for repairs and he lent her a loan bike. He had observed her son's progress and was critical of Mr Wills' coaching. During the discussion he told Mrs B that Mr Wills was not coaching Miss A and that he, Mr Murray, was still coaching her. When asked how this had been kept secret, Mr Murray said they had two separate Training Peaks accounts, one for Mr Wills and CNZ and he had accessed the other one which he used. Mrs B's evidence was also that Mr Murray told her during that discussion that he coached Ms Livingstone and used Ms Larner as a front coach. He suggested to Mrs B that he could coach her son the same way. He also said that he talked to Miss A regularly using a cellphone and that the official position was that Mr A was the coach of Miss A.

85. Mrs B also produced a series of text messages between herself and Mr Murray which commenced after the meeting on 8 October 2015. In this series of text messages Mr Murray asked "did u tell him about our convo", Mrs B notes that her son "says he has heard that you are coaching through Rachel. He thinks Ryan told him that." And Mrs B responded at one stage by saying "might look suspicious if others (i.e., Miss A and may be Master B) start going to Rachel? especially as

Ryan seems to know that it is really you?" Mr Murray's response was that (Master B) didn't have to tell anyone who coaches him.

86. Ms Livingstone also gave evidence. She had given three statements to DFSNZ. She initially denied Mr Murray had coached her at the relevant time. When she heard of Mr Murray's ban she said she decided to change to Ms Larner as her coach and Ms Larner took over the existing account with Training Peaks and her training information was being loaded in the normal manner. That training was very much the same as she was used to with Mr Murray.

87. In a second statement, Ms Livingstone said she suspected that Mr Murray was loading the training schedules into the Training Peaks but was not certain of this. Ms Livingstone was working in Mr Murray's shop and in her second statement said she would talk in the shop quite regularly about her training and it was quite obvious to her during those conversations that Mr Murray was still providing the coaching information, through Ms Larner, to her Training Peaks account. Before her first interview with DFSNZ she spoke to Mr Murray and Ms Larner and Ms Larner told her what she had said in her interview with DFSNZ. They told her to deny that Mr Murray had any involvement in coaching her. She also produced a series of text exchanges between herself and Ms Larner in May 2016 and these are noted below.

88. In her third statement Ms Livingstone was quite explicit. She referred to Mr Murray coaching her during the ban when she said he would send her messages by text. She said she was worried about getting caught so she asked Mr Murray if she could just talk to Ms Larner and she would then message Ms Larner about her training. Ms Larner often did not respond to her questions and she would then feel frustrated and would send a message directly to Mr Murray who would advise her the training she should do. He also told her to delete the messages from him after any conversation if anything in them looked suspicious.

89. Her evidence was before she went to an interview with DFSNZ she was prepped by Mr Murray as to what she should say and was told to deny he was coaching her. He made her listen to his recording of his interview with DFSNZ and his lawyer and asked her to act like his lawyer had said, namely to be quite blunt and quite defensive.

90. After the interview with DFSNZ at which her father was present, her father and Ms Livingstone went back to see Mr Murray and told him what they had said in the interview. Mr Murray advised she should tell Ms Larner what had happened at the interview.

91. There was produced in evidence a series of text messages between Ms Larner and Ms Livingstone which commenced on 19 May 2016. It is not necessary to repeat this exchange in full. In the exchange, Ms Larner noted it would have helped if Ms Livingstone had been honest about the fact that she needed to stop Mr Murray from helping her. She said that Mr Murray now had no hope of defending himself. The exchange included:

"I have some sympathy for you. But honestly u and [Miss A] knew what u were doing and it makes me feel pretty sick that it has come down to a couple of girls that could have come out of this saving themselves."

92. In her evidence Ms Livingstone said she took total responsibility for being coached by Mr Murray. There are other comments in the emails which in this Panel's view can only be interpreted as Ms Larner castigating Ms Livingstone for advising that she had been coached by Mr Murray during the period of his ineligibility. They contain a suggestion from Ms Larner to Ms Livingston that her evidence had added a new charge to the case which Ms Larner said would probably get Mr Murray banned for life.

93. Mr Wills also gave evidence in support of DFSNZ. He said Mr Murray had suggested to Mrs B and Master B, in a meeting at which Mr Wills was present and which was held during Mr Murray's ban, that Mr Wills could take on coaching Master B with Mr Murray in the background providing advice as to the training programmes for Master B. Mr Wills initially agreed but then decided that this was wrong and did not proceed with the proposal. He in fact became Master B's coach. He also trained Miss A as noted above. Mr Wills said in evidence he removed Mr Murray from both Miss A's and Master B's Training Peak accounts. At times however he had doubts Miss A was following his training programme and thought at the time she was following someone else's, probably Mr Murray's. He had discussions with Mr Machejefski about his concerns that Miss A was not following his training programme. Because of their earlier discussion relating to Master B he thought that Mr Murray may still be providing training programmes for Miss A. It is noted that he did not provide any direct evidence that Mr Murray was in fact providing training programmes on Miss A's Training Peaks account.

94. Although he was not called as a witness, there was a statement from Mr Machejefski. He was involved with Mr Wills during the Junior World Championship period. He was concerned that Miss A was not following Mr Wills' training programmes at times and did suspect that Mr Murray may have been providing them. He was very surprised when advised that Mr Wills was no longer the coach of Miss A and that Mr A would be her coach. He said that Mr A did not have qualifications to coach Miss A.

95. Mr Steel, the Chief Executive Officer of DFSNZ, also gave evidence of discussions and correspondence with Mr Murray advising him of what he could and could not do during his period of ineligibility. This evidence is not directly relevant as to whether or not there was a breach of SADR 10.12.1.

96. An investigator from DFSNZ together with representatives of DFSNZ interviewed Mr Murray on two occasions before the application was made to the STNZ. Mr Murray was accompanied on each occasion by his lawyer. In the main, the interviews were not constructive with Mr Murray's lawyer challenging DFSNZ on whether such allegations amounted to coaching and further challenged whether coaching was an offence under the appropriate SADR. There were unhelpful arguments on what an independent witness may have meant when she used the

term "coaching". In respect of some matters Mr Murray was not allowed by his lawyer to answer questions.

97. The two interviews are however relevant in that the following matters were covered:

a. DFSNZ, in the second interview, stated it had credible evidence that Mr Murray was coaching Miss A and Ms Livingstone in violation of his ban. It was said this coaching was being done face-to-face or by email or by phone.

b. DFSNZ suggested to Mr Murray if he had violated his ban he may be able to reduce any possible sanction if he admitted the violation at the second interview. It was the first opportunity for him to do so.

c. It was suggested to Mr Murray that providing programmes on Training Peaks was a violation. He denied he had provided programmes on Training Peaks to either Miss A or Ms Livingstone.

d. Mr Murray admitted that he had used words to that effect when it was put to him that he had told Mrs B that he was coaching Miss A. He said he did this because he felt betrayed by Mr Wills and wanted to convince Mrs B that Mr Wills was not a suitable coach for her son. He hoped to take over Master B's coaching once his ban expired.

e. He claimed that he had turned away several approaches to coach because he knew that was contrary to his ban. This comment was perhaps inconsistent with the suggestion from his lawyer at interview that various matters did not amount to coaching.

98. Mr Murray gave evidence at the CAS appeal hearing and was cross-examined. His evidence was a denial of the evidence given by Miss A, her parents, Ms Livingstone and B. He denied he had substantial contact by phone with Miss A or that he knew Miss A had two Training Peak accounts or that he sent text messages to Miss A. From his communications with DFSNZ, Mr Murray was made aware that while he was ineligible he would not be able to fit a person for a bike (a technical assistance) or coach CNZ athletes. He had told DFSNZ, after the sanction was recognised in New Zealand, he was not coaching such athletes. Mr Murray acknowledged that he would have been breaching his ban if, during his period of ineligibility, he coached members of CNZ; he coached members of CNZ for specific events; if he had designed Training Peaks programmes for members of CNZ; if he had done a bike fit; and if he interacted with the cyclists during a bike fit of a CNZ member.

99. Mr Murray opined that there was a vendetta against him by DFSNZ but it is noted no evidence was relied upon to justify this allegation. When it was put to Mr Murray that he had told Mrs B that he was coaching Miss A he denied he told her that. He agreed however he had implied to her he was coaching Miss A. His evidence was Mrs B was also incorrect when she had reported he told her of Miss A's two Training Peak accounts; he was using Ms Larner as a front for coaching Ms Livingstone; he offered to use the same front to coach Mrs B's son. He

specifically denied telling Mrs B that Mr Wills was not going to coach Ms A and the story would be that Mr A was doing the coaching. He admitted he may have said Mrs B's son had to keep a secret and explained it was because he had intended to give the impression that he was coaching Miss A. He stated this was in effect a sales pitch from him so that he could coach the son when his ban expired.

100. In summary, Mr Murray denies all the allegations made by Miss A, her parents and Ms Livingstone against him. He admits that he did tell Mrs B that he was coaching Miss A but says he lied in doing so and the lie was because he wished to discredit Mr Wills and take over Mrs B's son's coaching once his ban expired.

101. Ms Larner gave evidence in support of Mr Murray and denied that she was a front for him in coaching Ms Livingstone. Her evidence was she was Ms Livingstone's coach for a period of approximately 12 months from March 2015. In respect of Miss A, she asserted it made no sense for payments to be made to her account for someone else's coaching. In her evidence she asserted the payments of $45 per month made by Mr and Mrs A to her account were payments for the hire by Miss A of Ms Larner's time trial bike. In respect of the altitude tent used by Ms Livingstone, it was Ms Larner's evidence that she was person who suggested to Ms Livingstone that she use the altitude tent.

102. While Ms Larner accepted under cross-examination it was possible that Mr Murray was providing coaching advice to Ms Livingstone without her knowledge, she opined it was very unlikely this was the case. She was aware of the training being done by Ms Livingstone because of the information on the Training Peak and had Ms Livingstone not been following her coaching training she would have detected this. She saw no evidence that Ms Livingstone was doing anything other than what she had prescribed in the training programmes.

103. Ms Larner also gave her explanation of the Facebook messages exchanges referred to above and did not agree that Ms Livingstone's statements in the texts were consistent with the fact Mr Murray was coaching her. In respect of those statements which appeared to be consistent, her position was that Ms Livingstone was not telling the truth. Particular statements which she identified as untrue included "*I take responsibility for being coached by Karl*" and "*Yes Karl gets a ban. But he knew his actions were wrong. Just like mine*." She explained her reference to "confess" in one of the messages was meant to mean a false confession.

104. Ms Larner further opined she was appalled at the way DFSNZ had bullied and manipulated Ms Livingstone into changing her testimony from what Ms Larner contended was the true story. Ms Livingston she asserted had told the truth in her first interview. She referred to Ms Livingston's second version as a confused and unverifiable version which she believed DFSNZ had constructed to serve its own version of the truth. She claimed that Ms Livingstone had more than once used the word "bullied" in reference to her first interview by the DFSNZ interviewer. It is noteworthy Ms Livingstone, in her evidence, denied use of that word and stated it was a word used by Ms Larner.

105. It is necessary for the Panel to determine in this *de novo* appeal whether the evidence led by DFSNZ cumulatively reveals the true circumstance surrounding the activities of Mr Murray and is sufficient to establish the allegation of a breach of SADR 10.12.1 to the Panel's comfortable satisfaction or alternatively, whether the evidence of Mr Murray and Ms Larner is the correct version of what occurred. DFSNZ says that its evidence ought to be preferred because that evidence, through its various witnesses, gave a consistent outline of the events. It argues consistency exists between the evidence of Miss A and her parents on the one hand and what Mr Murray told Mrs B on the other; between the evidence of Mr and Mrs A and the documentary evidence of Ms Larner's bank statements; between Ms Livingstone's evidence and what Mr Murray told Mrs B; Miss A's evidence and invoices in respect of bike fits; Mrs B's evidence regarding the departure of Mr Wills; Miss A and her parents direct evidence as to Mr Murray's involvements; and the suspicions held by Messrs Wills and Machejefski as to that involvement.

106. The summary of Mr Murray's position in respect of the SADR 10.12.1 allegation is:

a. The matters alleged by DFSNZ all fall outside of the prohibitions in the particular rule. None of the actions alleged amount to participation in an event or activity organised or authorised by a SADR bound organisation. This submission is dealt with in this Decision;

b. If this Panel takes a contrary view regarding the interpretation of SADR 10.12.1, there is insufficient evidence to support the allegations against the Respondent. Counsel for Mr Murray submitted that there are some features of this matter which should concern the Panel, namely:

i. DFSNZ's investigator was unwilling to enter into constructive dialogues regarding the investigation;

ii. A real risk that the investigator was intimidating to witnesses particularly Ms Livingstone;

iii. A 180 degree turn around in the evidence of Miss A and Ms Livingstone in circumstances where they were told they would not be prosecuted for their initial "false" statements. This effectively gave them a clear path forward so long as they stuck to their new evidence that Mr Murray was somehow involved in their coaching (even though neither gave any real evidence of that);

iv. Heavy reliance on supposition, hearsay and speculation; and

v. A failure by DFSNZ to disclose the identity of some persons who had been spoken to but whose evidence was consistent with Mr Murray's accounts until asked about them by name by counsel.

107. It was submitted on Mr Murray's behalf that there were four broad reasons why the appeal should be dismissed, namely:

a. There was little direct evidence of the main allegations of any consequence (that is no significant amount of direct evidence which is in any way reliable);

b. A distinct absence of any documentary or other independent evidence corroborating what the witnesses allege;

c. A credible explanation of what occurred in relation to both the coaching of Ms Livingstone and Miss A; and

d. The witnesses who appeared for DFSNZ had largely only second-hand evidence or supposition regarding Mr Murray's alleged activities except for some limited examples which were unsubstantiated or unreliable. It is contended that DFSNZ built a case around speculation, innuendo, hearsay and unsubstantiated allegations.

108. The Panel is of the view that some of the witnesses were not telling the truth. For DFSNZ to succeed on this appeal, it is necessary as a starting point for the Panel to accept as truthful and credible the evidence which Mr Murray and Ms Larner deny. Unless DFSNZ's evidence is so accepted, the appeal must fail. It is therefore necessary to make credibility findings in respect of the various witnesses.

109. Miss A was a vital witness. She is now a professional cyclist competing overseas and gave evidence by video-link. She admitted lying at her first interview with DFSNZ. She gave her evidence convincingly and on the face of it, it was credible. It was consistent with the evidence of her parents and Mrs B. Her evidence was: Mr Murray discussed with her the training programme before he changed it; she phoned Mr Murray before races and discussed specific tactics; she talked with Mr Murray by phone before her races at the Junior World Championships; she spoke with Mr Murray during the National Track Championships in January 2016.

110. At issue is whether Miss A's evidence should be disregarded because she lied in her first interview with the DFSNZ investigator. Having heard the evidence of Miss A and her parents, the Panel accepts in her first interview she did not tell the truth because she was encouraged by her parents not to do so. At that stage the parents believed Mr Murray had breached his ban by coaching. A combination of a sense of guilt and a desire to protect Mr Murray who they had encouraged to coach their daughter, and prompted by Mr Murray, they hoped the matter would go away if they denied he was coaching their daughter. They made a misguided decision to encourage their daughter to lie.

111. When it became obvious that DFSNZ was persisting in its investigation, the parents sought legal advice. As a result, the lawyer prepared a new statement for Miss A and accompanied her to her second interview with the DFSNZ investigator. The second statement was consistent with the evidence given by Miss A before this Panel. The Panel accepts while Miss A was sometimes unable to give accurate details of some events it does not accept that the general thrust of her evidence was speculation or supposition; nor does it accept that any inaccuracy diminished her evidence that Mr Murray coached her during his period of ineligibility.

112. On behalf of Mr Murray it was submitted that Miss A had been lied to by her parents. On behalf of Mr Murray, his counsel proposed a probable explanation was that Miss A's father was coaching her but had she known Miss A would have been unhappy about that so the parents lied to their daughter about Mr Murray's involvement. It was further propositioned Mr A was coaching Miss A by updating Mr Murray's training programmes. The Panel does not accept such possible explanations. All the evidence persuades the Panel the parents had a desire to see their daughter do well and required a good coach for her. Their view of Mr Wills' coaching was one of the reasons they terminated his contract. The father was not a competent coach and the parents would have known their daughter could not progress under coaching by him. The payments of $45 per week made by the parents went to Ms Larner's accounts were shown as being for "physio". The evidence is Ms Larner was not Miss A's regular physiotherapist and these payments were obviously not for physio. The submission that the parents conspired to deceive their daughter is rejected. The Panel also accepts the evidence of Miss A, supplemented by evidence from Mr Simpson, and finds Miss A did not have Ms Larner's bike at the relevant time and therefore the proposition the payments were for bike hire is rejected.

113. Mr Murray acknowledged that he lied to Mrs B but he rejected some of the statements which Mrs B asserted he made to her. Mr Murray said he had lied to Mrs B for two reasons: the first in an attempt to be able to coach Master B when his period of ineligibility expired and secondly because he was annoyed that Mr Wills was taking credit for Miss A's success. The Panel accepts Mrs B's evidence which is corroborated by text messages exchanged between herself and Mr Murray and referred to above. This evidence included Mr Murray's statement that Master B would need to keep secret that he coached Miss A and that he also coached Ms Livingstone. Again it is noteworthy his offer to coach Master B was not after the ban expired but was to commence in October 2015.

114. This whole incident has obviously taken its toll on Ms Livingston. She agreed that in her first interview she had lied. She gave her reason for then changing her evidence and telling the truth in her second interview. The Panel notes while the tone of her second statement was a little tenuous, her evidence before the Panel was clear and unwavering. She explained as follows: before the second interview DFSNZ had sent to her a letter advising that because of Mr Murray's ineligibility she should not be coached by him from the date of the letter. Then at the start of the second interview, a DFSNZ employee advised her if she had been coached by Mr Murray before she received the warning letter she would not be in trouble but had she continued to be coached by him after receipt of the letter then there would be repercussions. Her father was with her at this time and she asked for an opportunity to talk to him privately. She had just come from Mr Murray's shop before the interview where Mr Murray had advised her to stick to the original story which she had given at the first interview and not to back down or to give in. She said she discussed the matter with her father and told him her decision, namely: that this was the opportunity to just get out of this and look after herself for once and look after her career and not risk getting a six year ban. She said it was her opportunity to tell the truth and she explained that was why she decided to change her story and tell the truth.

115. An attempt was made to undermine the credibility of Ms Livingstone by referring to two petty events and, in respect of one event an independent witness was called. Ms Livingstone admitted one of incident but denied the other. Notwithstanding the attack on her credit, the Panel is of the view that the evidence Ms Livingston gave before it was truthful in respect of Mr Murray's involvement with her. Also accepted by the Panel is her version of the text exchange with Ms Larner.

116. The Panel's accepts, on the material issues Miss A, her parents, Ms Livingstone and Mrs B gave credible and truthful evidence. There was no evidence that DFSNZ bullied, threatened or intimidated Miss A. We accept Miss A along with Ms Livingstone was influenced before her second interview by the possibility of consequences for not telling the truth. The warnings from DFSNZ to each contributed to their decisions to tell the different story in their second interviews. Ms Livingstone was obviously very upset by the proposition there could be consequences but this Panel does not find that either were bullied or intimidated.

117. Despite Mr Murray's statements to the contrary, the Panel does not accept that his evidence before the Appeal Tribunal was truthful. The credibility of the DFSNZ evidence tells against Mr Murray and, despite his denials, it is accepted Mr Murray undertook the actions referred to in the paragraphs below. Mr Murray was paid for his services. Ms Larner's bank statements confirm the payments of $45 per week for the relevant period went into her bank account and the Panel accepts they were payments for Mr Murray.

118. It also follows that the Panel does not accept Ms Larner's evidence. In the Panel's view having fronted for her friend Mr Murray, she was involved and compromised and continued to try to support him in giving her evidence.

119. The Panel, to its comfortable satisfaction, finds that during his period of ineligibility, Mr Murray:

    a. wrote training programmes for Miss A and Ms Livingstone;

    b. provided training advice to Miss A and Ms Livingstone in part by means of loading these onto Training Peaks;

    c. provided advice on racing tactics and strategy to Miss A and Ms Livingstone;

    d. carried out bike fits for Miss A; and

    e. provided an altitude tent for Ms Livingstone.

120. The Panel is therefore comfortably satisfied that the activities of Mr Murray between late May 2015 to February 2016, during which period he was serving a sanction for an anti-doping rule violation and was an ineligible person, were in the nature of coaching and he thereby "participated" through this coaching of Miss A in the Junior World Championships (in Kazakhstan) in August 2015, in the New Zealand Track Cycling Championships in January 2016 and in the New Zealand Under 19 and Elite Track Champs in January 2016. Further, in his activities with Ms Livingstone he "participated" in the New Zealand Road Race Championships

in January 2016. It is of note that his coaching activities were directly addressing their performance in those events. All these competitions were authorised and organised by Signatory organisations. Most events were national and one was international. Further the evidence satisfied that Mr Murray knew of the prohibition on him to play no role "in any capacity" with an athlete in cycling during his period of sanction but in a clandestine manner he took money for coaching of Miss A and populated the Training Peaks programme in a secretive manner.

121. It is appropriate to comment on the Respondent's submissions using the same numerical references as above:

i. If there was a lack of constructive dialogue at the interview with Mr Murray, a substantial contributing factor was the approach taken by Mr Murray's solicitor at those interviews. Attempts by DFSNZ to explain its position were met by a confrontational response.

ii. On the facts found, both Miss A and Ms Livingstone changed their initially false stories because of the consequences of lying. They were stressed at the position they found themselves in. It is not accepted that they were bullied or intimidated by overbearing tactics on the part of a DFSNZ's investigator.

iii. The fact that both Miss A and Ms Livingstone decided to change their stories and to tell the truth does not undermine the truth.

iv. While the evidence did contain some supposition, hearsay and speculation, it also contained direct credible evidence on which the Panel has made its factual findings.

v. DFSNZ admitted that it did not disclose it had statements from the three witnesses but when requested did make those statements available. Mr Murray had the opportunity to call the givers of those statements to give evidence. He did not do so. The Panel does not see this failure affects its findings in any way.

122. The Panel is therefore comfortably satisfied Mr Murray has breached SADR 10.12.1 and SADR 10.12.3.

E. SADR 2.5: Prohibition against Tampering

123. DFSNZ further alleges that Mr Murray knowingly provided false information in his interview on 30 March 2016. As such, it says that he tampered with doping control in violation of SADR 2.5.

124. SADR 2.5 provides:

> *"Tampering, or Attempted Tampering, with any part of Doping Control Conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or attempting to interfere*

with a Doping Control official, providing fraudulent information to an Anti-Doping Organisation or intimidating or attempting to intimidate a potential witness.

125. This provision was amended in the 2015 WADA Code expressly and without limitation to include a prohibition on athletes or support persons providing to an anti-doping authority fraudulent information. Under the WADA Code the World Anti-Doping Agency develops International Standards for Testing and Investigation. Through SADR 1.3.1.3 these Standards are adopted into the rules of Signatory sports organisations. Article 12.3.5 of the Standard provides:

"Athletes and Athlete Support Personnel are required under Code Article 21 to cooperate with investigations conducted by Anti-Doping Organizations. If they fail to do so, disciplinary action should be taken against them under applicable rules. If their conduct amounts to subversion of the investigation process (e.g., by providing false, misleading or incomplete information, and/or by destroying potential evidence), the Anti-Doping Organization should bring proceedings against them for violation of Code Article 2.5 (Tampering or Attempted Tampering)."

126. On a reading of the words of SADR 2.5 the prohibition requires that a Doping Organisation should bring an allegation of tampering if an athlete's conduct is fraudently misleading. A breach of the provision therein contained has three parts: there must be "tampering"; which "subverts"; the "doping control process". Tampering is defined in the definition section as:

"Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing, misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring."

127. Subvert has its ordinary meaning "to undermine the authority (of an established institution)" (Oxford dictionary) and Doping Control is defined as:

"All steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as provision of whereabouts information, Sample collection and handling, laboratory analysis, TUEs, results management and hearings."

128. The Panel finds the phrase "tampering", i.e. fraudently misleading to subvert doping control, is intended to have a wide ambit and cover any circumstance related to any violation of the rules of anti-doping up to the finality of all appeals provisions. SADR 2.5 purposely construed covers the investigation period and an allegation of fraudulent misleading an investigation requires an intent to subvert the investigation.

129. The general application of the relevant principles are recited in CAS 2015/0/4128 as follows:

> *"[147] … whether certain behaviour qualifies as tampering must be assessed in the individual context. The behaviour must be such that it possibly impacts on the "Doping Control process". Whether this is the case depends on the stage of the specific "Doping Control process". In this context it must be noted that the athlete has a right to a first-instance hearing and a right to make submissions therein. Furthermore, the athlete has a right to appeal the first-instance decision and to make any submission that he or she deems appropriate to defend him or herself. In addition, the Athlete is allowed in his or her defence to concentrate on or advance in particular arguments that are beneficial to his cause. Exercising these procedural rights, therefore, does not constitute tampering from the very outset …*
>
> *[148] Furthermore, it should be noted that the adversarial procedure provided - in particular - before the CAS enables the other party to put the athlete's submission to a test by, for example, cross-examining the testimony given by the athlete and / or his or her witnesses and experts. The technical arrangement of the process before the first-instance tribunal and before the CAS are, thus, such that the outcome of the process is not easily affected by the submissions of one of the Parties. Instead, the adversarial system ensures, in principle, that false, inaccurate or incomplete testimony by one party can be rebutted by reliable evidence of the other party. The adversarial process is, thus, an important instrument in truth-finding. In summary, the Panel finds that in view of the above any behaviour of the athlete in the judicial proceeding before a first instance or appeal body must meet a high threshold in order to be qualified as tampering within the meaning of the above provision."*

130. The reasoning above in CAS 2015/0/4128 confirms the right of an athlete to advance a defence and the power of the adversarial system, that is CAS, to ensure accurate and truthful findings of fact and accurate application of relevant law to those facts. The Panel takes note that for conduct of a serious offence such as tampering, it must be proven to a high threshold within the onus of comfortable satisfaction.

F. SADR 2.5 and the Application of Facts as found on Appeal

131. DFSNZ alleges that the following statements made by Mr Murray at his interview on 30 March 2016 were false:

a. In response to a question of whether he had done Training Peaks with Miss A or Ms Livingstone.

b. The statement that he had not broken any SADR rules having regard to his knowledge of the rules.

c. His statement that he had had no contact with Miss A other than a very few occasional calls.

d. His statement that he lied to Mrs B.

e. His statement that he had no knowledge of two Training Peak accounts for Miss A.

132. Mr Murray's position is he did not knowingly intend to deceive the investigator. He contends the allegation that he was lying and trying to mislead is inconsistent with his approach both historically and during the interview. When the ban was recognised in New Zealand, he went to great lengths to engage positively with DFSNZ as to what he could and could not do. At the interview he was concerned about what definition of "coaching" DFSNZ was using given that the term does not appear in the SADR. When the investigator refused to give any meaningful account of what coaching meant Mr Murray confirmed, through his counsel, that all his answers would be in the context of an alleged breach of SADR 10.12.3 as he understood that to be, namely actions directed to matters authorised or organised by a signatory. All his answers were generally consistent with this approach.

133. In respect of the various factual allegations made by DFSNZ, Mr Murray's position is his statements relied upon by DFSNZ were consistent with the evidence, namely: he had minimal phone contact with Miss A; he did not give any guidance to Ms Larner regarding coaching Ms Livingston; he did not provide Training Peaks information to Miss A or Ms Livingstone; his statement he lied to Mrs B was correct; there is no direct evidence he wrote Training Peak programmes for anyone while banned; and there is no evidence that he had any knowledge of two Training Peak accounts. Finally, it was submitted that even if Mr Murray did give misleading information, this cannot be held against him given the way in which DFSNZ acted. Mr Murray through his counsel went to great lengths to try and understand the exact nature of the allegations put to him. When such information was not forthcoming he set out to explain his understanding of what DFSNZ could be investigating and sought to answer all questions expressed within that context.

134. It is necessary to consider some of the facts in the consideration of the second allegation brought under of a different rule, namely, SADR 2.5. Some facts already considered as relevant and significant to the consideration of the prior charge under SADR 10.12.1 may have a different weight when considering the evidence relied upon in this consideration. At the time the ban was recognised in New Zealand, Mr Murray understood that by continuing to coach Miss A and Ms Livingstone, he would be in breach of the ban. He arranged to continue coaching both of them but in a clandestine way. When DFSNZ began investigating, he took legal advice. At both interviews with DFSNZ his counsel took a very aggressive approach and endeavoured to persuade DFSNZ that it was wrong in its interpretation of SADR 10.12.1. In these circumstances, as made clear by his solicitor at the time, Mr Murray's replies were made on the basis that he was answering in the context of the definition of SADR 10.12.1 which his counsel was advocating. Further after the ban was recognised in New Zealand, Mr Murray enquired of DFSNZ what he could and could not do. However, it is his knowledge

at the time of the interview on 30 March 2016 which must be the basis for determining what, if any, fraudulent information he gave to the investigator.

135. The Panel has found some of the matters referred to above and relied upon by DFSNZ would have been untruthful if assessed against Mr Murray's knowledge before he sought legal advice. However, some of the answers of Mr Murray were made in the context of his lawyer's different interpretation of SADR 10.12.1. In that context they cannot be held to be untruthful notwithstanding, in the Panel's view, the alternative interpretation of the rule is incorrect. In respect of the allegations listed in the next paragraph, the Panel finds Mr Murray gave untruthful evidence to the investigator.

136. On the basis of the factual findings made in respect of the breach of SADR 10.12.1, there are three matters relied upon by DFSNZ which the Panel determines were untruthful answers given to the investigator, namely, he did not prepare and put information on to Miss A's and Ms Livingstone's Training Peaks; he lied to Mrs B (the finding is that what he told her was truthful); and he had no knowledge of two Training Peaks accounts for Miss A. These findings of fact are directly in contradiction to the statements made by Mr Murray during his interview and we rely with specificity on Mr Murray's words in the interview as follows:

137. To the question had he used Training Peaks with Ms A and Ms Livingston:

"Q: Yeah ok so what have you done have you, have you done Training Peaks with (Ms A) or (Ms Livingston).

A: No I haven't. I've followed the SADR Rules. I, I haven't breached any rules. Just because I told Mrs B what' I told her doesn't meant that it's true."

138. To the assertion that he lied to Mrs B he was asked:

"Q: Why did you say that?

A: Because I felt betrayed by Ryan and I, I guess I wanted, I wanted to take back what I had done passing those, those riders over to Ryan ... I guess I was essentially trying to convince (the B family) to, that well the mother at least anyway that, that he's not suitable."

"A: I, I told her that, that I was in, in some capacity but it was to, it was to achieve a goal which was to, to have her leave Ryan whether it was true or not I mean she obviously believed me.
Just because I told Mrs B what I told her doesn't mean that it's true."

139. That he had no knowledge of Ms A's two Training Peaks accounts he then said:

"Q: Karl, there's, were you aware that (Mrs A) set up two Training Peaks accounts for Michelle oh (Miss A).

A: I am not aware.

Q: Don't know anything about that?

A: Two Training Peaks no."

140. Given the above answers, the Panel is satisfied Mr Murray provided false information during the interview.

141. It is necessary here to consider the effect of falsely misleading doping control. We divert from a consideration as to Mr Murray's intent to comment on the change of the legal framework from the 2009 WADA Code to the 2015 WADA Code. Under the old rules (2009) for a first breach for doping the sanction was 2 years. Mr Murray was sanctioned for two (2) years under the 2009 WADA Code for taking prohibited substances. The SADR 10.12.1 and 10.12.3 violation counts as a continuation of the first anti-doping offence under the rules. Mr Murray's failure to observe the original period of ineligibility does not constitute therefore a new offence. Under SADR 10.12.3 the 10.12.3 breach requires a new period of ineligibility equal in length to the initial period of ineligibility which was, in this case, a two (2) year sanction. The change in the 2015 WADA Code had most sanctions for anti-doping violations increased from two (2) years to four (4) years. Therefore, a breach of SADR 2.5, if it were a first offence under the 2015 WADA Code, would attract a sanction of four (4) years and if it were a second violation it would double to a sanction of eight (8) years. The significant increase, a doubling of the old sanction period, not only reflects the deliberate nature of the conduct but also indicates such conduct by doping cheats is considered a serious violation.

142. Since the WADA Code rule changed in 2015, two particular cases have considered the charge of tampering. The resultant sanctions were determined on the individual facts in each case and can be distinguished. In *UK Anti-Doping Ltd v Dr Georgias Skafides*, before the UK Anti-Doping Panel, 22 February 2016, SR/NADP/507/2015, the doctor who had been a witness in doping proceedings admitted that the case advanced by him to the Panel on behalf of an athlete was founded on a false premise. He was also alleged to have attempted to interfere with a witness. The Doctor entered a plea to the violation of tampering and he was sanctioned. His conduct was clearly wilful and intent was not in issue. Further in CAS 2015/0/4128 the allegation was not only that Ms Jeptoo, the athlete, made a "sworn" statement asserting an "innocent" explanation for an adverse analytical finding but she also provided a "Medical Report" to corroborate that explanation which Report, it was found, the Athlete knew to be fabricated. The charge of tampering relied on both her sworn statement, which was intended to mislead and her conduct in relying upon a fabricated and false report. Again the behavior of the athlete was to purposely subvert the doping control process. It was said in CAS 2015/0/4128 that any behavior of an athlete in the (judicial) proceedings must meet a high threshold in order for such conduct to qualify as tampering within the meaning of the provision. We have already been satisfied the provision covers the investigation as well as hearings and the Panel is of the view the above rigorous standard of fairness, as outlined in CAS 2015/0/4128, is applicable to all steps in the doping control process.

143. Here it was first determined at the appeal stage that the denials were untruthful. In the initial hearing before the STNZ which hears all NZ anti-doping disputes, a most reputable Tribunal, the evidence relied upon by DFSNZ was considered "suspicious, hearsay and…supposition". The difficult question is can the Panel be comfortably satisfied under SADR 2.5 that there was an intention to subvert the doping control process in the telling of those lies or could they be perceived as simply the use of an athlete's right to challenge the CAS case. A lie, in itself, does not amount to fraud or to providing "fraudulent information". Are lies such as those told by Mr Murray sufficient to establish the serious accusation of tampering? The majority of the Panel is of the view there must be some consideration of the extent of the behaviour made to conceal the truth in order to be satisfied there was an intent to subvert. Simply disagreeing with DFSNZ's account of events cannot be enough to amount to a breach of the rule. Something more must be required.

144. It is the Panel's view that the correct test to apply is whether the purpose and intended effect of providing the misinformation was to subvert the doping control process. This view is supported by the wording of the SADR provision. "Tampering" is equated to "*... obstructing; misleading or engaging in any fraudulent conduct to alter results or* ***prevent normal procedures from occurring***". "Subversion" similarly requires that DFSNZ's authority in conducting its investigation into whether Mr Murray was coaching could have been undermined in some way by Mr Murray's denials. The Panel must determine whether the three lies identified as particulars of the asserted violation are sufficient to persuade that the athlete exceeded the boundaries of legitimate defence or, alternatively, that he had fraudulently tampered with the investigation. In the application of the high standard referred to in CAS 2015/0/4128 the threshold of legitimate defence is only trespassed where there is a "further element of deception present" and the administration of justice is thereby "put fundamentally in danger by the behavior of the athlete".

145. The Panel, by majority, determines the influence of the statements – "*No I haven't*", "*Just because I told [her] ... doesn't mean that it's true*" and "*I am not aware*" – would have had (or did have) or were intended to have on DFSNZ's investigation was so negligible as to arguably amount to having had no effect on the investigation at all, much less result in "subverting" the process. This is especially so where DFSNZ revealed that through Mrs B's statement and texts it was already aware of a potential Rule Violation and held some evidence in support of that view at the time Mr Murray made his denials. Mr Murray was given the full statement of Mrs B. It specified particulars of the allegation he was coaching and was given to him only after his denial of some of those particulars. DFSNZ did not allow Mr Murray, through his lawyer, to advance his defence which was an alternative reading of SADR 10.12.1. DFSNZ then proceeded to conduct a detailed investigation process including taking statements from a number of persons some of whom were called as witnesses. Some were named in Mrs B's statement and texts. Mr Murray was never given warning about the possible charge of fraudulent misleading the doping control investigation nor warned of the consequences of lying. The evidence reveals some witnesses were given that warning and changed their evidence after the DFSNZ collected other significant

evidence. It is not asserted Mr Murray in any way interfered with witnesses who were named in Mrs B's statement (although one witness inferred that possibility) nor was any interview conducted with Mr Murray after his initial denials which were made at his second interview. There is no allegation he lied at the first interview. Further, Mr Murray took his denials before the STNZ and the allegations were dismissed. While some of his statements in the 30 March 2016 interview have been rejected in this Appeal as untruthful, he was entitled to continue to press his defence. As said in CAS 2015/A/4059: even where certain pieces of evidence are themselves suspicious the Panel is still mandated to be comfortably satisfied before it inculpates an athlete for a disciplinary offence.

146. The Majority of the Panel is not comfortably satisfied that the three (3) lies he told at a voluntary interview, which were directly in response to an allegation he was coaching, - a separate offence - were given with the intent to fraudulently mislead the doping control process i.e. to undermine the power or authority of DFSNZ in its investigation. While he would make no concession as to the meaning of coaching and the associated restrictions placed on an athlete through a breach of SADR 10.12.1 (clearly on the advice of his lawyer), the balance of Mr Murray's interactions with DFSNZ, displayed the opposite intention to "subversion", as noted at above.

147. The nature of the comments made during the interview on 30 March 2016, against the backdrop of Mr Murray's otherwise prior willingness to co-operate with DFSNZ and his subsequent acceptance of the provisional suspension, leads the Panel, by majority, to conclude that DFSNZ has failed to establish a breach of SADR 2.5. There is no evidence of the "further element" required to persuade his intent was to subvert the investigation. The Panel, by majority, has considered the cumulative weight of the evidence but is not persuaded, to the degree of comfortable satisfaction, Mr Murray, in falsely answering three questions among many put to him by DFSNZ, had an intention to subvert the doping control investigation.

148. A member of the Panel is comfortably satisfied there was a violation of SADR 2.5

149. The Panel, by majority, is not comfortably satisfied, given the seriousness of the breach, that Mr Murray offended SADR 2.5 at the interview conducted on 30 March 2016. The alleged violation by Mr Murray under SADR 2.5 is therefore dismissed.

X. SANCTION

150. In CAS 2016/O/4504, in considering a sanction against a coach for breach it was said:

> "[144] … *athlete support personnel in general bear an even higher responsibility than athletes themselves in respect of doping considering the influence they usually exert on their athletes. Indeed, in an AAA arbitration, the panel reasoned that "[t]he cases are clear that athlete support personnel owe a higher duty to the integrity of the anti-doping*

> *system than even do athletes. The athlete support personnel suspensions are generally far more severe than those for athletes because of the position of trust and commitment to integrity expected of athlete support personnel". (USADA v Block, AAA No. 77 190 00154 10 (2011), para. 119).*
>
> [145] *These factors together warrant a significant period of ineligibility to be imposed on the Coach."*

151. The Panel must consider the consequences for Mr Murray's breach of SADR 10.12.1 and 10.12.3. SADR 10.12.3 states as follows:

> *"Where an* Athlete *or other* Person *who has been declared* Ineligible *violates the prohibition against participation during* Ineligibility *described in Rule 10.12.1, the results of such participation shall be* Disqualified *and a new period of Ineligibility equal in length to the original period of* Ineligibility *may be adjusted based on the* Athlete *or other* Person's *degree of* Fault *and other circumstances of the case."*

152. No circumstances put before the Panel requires the new period of ineligibility of two (2) years to be adjusted in accordance with the above Rule. The Respondent offered no prayers for relief if the Panel made a determination that Mr Murray breached SADR 10.12.1 and SADR 10.12.3.

153. The Panel has found Mr Murray's actions were a deliberate breach of his sanction and involved a minor. Therefore a period of ineligibility equal to the original period of ineligibility should be served.

154. Mr Murray's original period of ineligibility was two (2) years. Mr Murray voluntarily served a period of provisional suspension after that sanction was served from 23 March 2016 to 20 December 2016. He should be credited for the period of provisional suspension.

155. Mr Murray is sanctioned for a further two (2) year period commencing on the date of this Decision with credit for the period of his provisional suspension already served which would reduce the above period of sanction.

XI. COSTS

156. Both parties make application for costs under Article R65 of the CAS Code which states:

> *"*R65.1 *This Article R65 applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body. In case of objection by any party concerning the application of the present provision, the CAS Court Office may request that the arbitration costs be paid in advance pursuant to Article R64.2 pending a decision by the Panel on the issue.*

R65.2 *Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS.*

Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.— without which CAS shall not proceed and the appeal shall be deemed withdrawn.

If an arbitration procedure is terminated before a Panel has been constituted, the Division President shall rule on costs in the termination order. She/he may only order the payment of legal costs upon request of a party and after all parties have been given the opportunity to file written submissions on costs.

R65.3 *Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.*

R65.4 *If the circumstances so warrant, including the predominant economic nature of a disciplinary case or whether the federation which has rendered the challenged decision is not a signatory to the Agreement constituting ICAS, the President of the Appeals Arbitration Division may apply Article R64 to an appeals arbitration, either ex officio or upon request of the President of the Panel."*

157. In such a circumstance the proceeding shall be free (Article R65.2).

158. Mr Hikaka, joined by Mr Lloyd, submitted as the litigation is disciplinary in nature and involved Cycling New Zealand (a sports-body joined to the International Federation under contract) the parties are eligible to have the proceedings covered under the provisions of Article R65. He proposed it was Cycling New Zealand who rendered the Decision because, in adopting the SADR, Cycling New Zealand appointed the STNZ to make the determination. He further submitted on a proper reading of the provision the word "international", as used in R65.1, qualifies the word "federation" but it should not be read to qualify the following words "sports bodies". Mr Lloyd further submitted that as the parties, before the litigation commenced, had agreed the matter would be proceeding in accordance with Article R65 it would be unfair now to award costs.

159. The parties may have reached such an agreement as to the application of Article R65 in this litigation as it is a fact Mr Murray first tested positive in New Caledonia in October 2013. The New Caledonia Commission subjected him to a ban. That ban was finally recognised by the international body of cycling, the UCI, who banned him from competition for 2 years and notified DFSNZ in March 2015. This automatically extended the ban to New Zealand. It was only after the ban was

in place in New Zealand that DFSNZ in 2016 investigated his activities and brought forward the two allegations, namely: that Mr Murray was in breach of his 2 year ban by coaching two cyclists in New Zealand and in further breach by tampering, namely lying to mislead the DFSNZ investigation.

160. The Panel recognises the circumstances which gave rise to Mr Murray's initial ban on participation in 2013. However, the Panel is satisfied that the 2016 charges (coaching and tampering) were solely domestic allegations and under contractual/legislative arrangement litigated before STNZ and brought by DFSNZ as an independent body. It is correct that one element of those 2016 charges was the allegation that Mr Murray was coaching contrary to a ban recognised by the UCI. This does not, however, negate the fact that the purpose of DFSNZ's investigation was to ascertain whether there had been a violation of the SADR, as per its statutory mandate. Even though this appeal to CAS involved the same parties as the initial 2013 ban, the current asserted breaches were not brought on behalf of the international federation, the UCI. Therefore the Panel cannot accept the submission that the appeal proceedings were "international" because of the earlier connection with the UCI.

161. The Panel also rejects the literal interpretation of the provision advanced by the parties that "international" should not be read as qualifying the phrase "sports bodies". To do so would be to adopt a strained interpretation of Article R65.1. The Panel finds that the proper interpretation of Article R65.1 is that it refers to both international federations and international sports bodies.

162. Since 2012, CAS national bodies, acting by delegation of power in a doping case between an athlete and the national federation, such as before this Panel, are not free of charge (see "The Code of Arbitration for Sport, Commentary, Cases and Materials", Despina Mavromati and Matthieu Reeb, Wolters and Kluwer, The Netherlands 2015 at 641 also *Floyd Landis v USADA* (CAS 2007/A/1394) award 27 June 2008). Given the circumstances above, we do not accept that it would be unfair to the athlete to give an order in accordance with the rules. The Panel therefore is unable to accept the submission that the litigation is covered by Article R65 and therefore free to the parties. While agreeing the matter is of a disciplinary nature the Appellant appeals a decision of the STNZ which was sitting on delegation from a national sports body, Cycling New Zealand.

163. The Panel rules that Article R64 of the CAS Code is relevant to these proceedings and particularly R64.3, R64.4 and R64.5, which state as follows:

> "R64.3 *Each party shall pay for the costs of its own witnesses, experts and interpreters.*
>
> *If the Panel appoints an expert or an interpreter, or orders the examination of a witness, it shall issue directions with respect to an advance of costs, if appropriate.*
>
> R64.4 *At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:*

- *the CAS Court Office fee,*
- *the administrative costs of the CAS calculated in accordance with the CAS scale,*
- *the costs and fees of the arbitrators,*
- *the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale,*
- *the contribution towards the expenses of the CAS, and*
- *the costs of witnesses, experts and interpreters.*

R64.5 *In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties."*

164. In the present case, the Panel determined that Mr Murray was in breach of SADR 10.12.3. In this regard, the DFSNZ's claims against Mr Murray were partially confirmed as Mr Murray was able to successfully refute the remainder of the DFSNZ's allegations against him. Therefore, in consideration of ultimate outcome of the procedure, the Panel determines that the parties shall split the arbitration costs associated with the procedure in equal shares (50/50).

165. Separately, as it relates to the legal fees and costs expended by the parties, the Panel notes that while DSFNZ waived any claim towards reimbursement of its legal fees, it requested the reimbursement of NZ $7,000 associated with transcription costs. In response, Mr Murray noted his precarious financial situation and the Panel recognizes the disparity in financial resources between the parties. Consequently, in consideration of the foregoing, the Panel determines that Mr Murray shall pay NZ $3,500 to DSFNZ as a contribution the expenses it incurred in this procedure.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal as to breach of SADR 10.12.1 and 10.12.3 filed by Drug Free Sport New Zealand on 9 January 2017 is upheld. The appeal as to a breach of SADR 2.5 is dismissed.

2. The Decision rendered by the Sports Tribunal of New Zealand of 20 December 2016 is set aside.

3. Karl Murray is sanctioned for a period of two (2) years for a breach of Sports Anti-doping Rules New Zealand from the date of the Decision, with credit applied for the period of provisional period of ineligibility served.

4. The Court Office fee of CHF 1000 (one thousand Swiss Francs), paid by the Appellant, is to be retained by the CAS.

5. The costs of the arbitration, to be determined and served on the parties by the CAS Court Office, shall be paid in equal shares (50/50) by Drug Free Sport New Zealand and Mr Karl Murray.

6. Karl Murray is ordered to pay NZ$3,500.00 to Drug Free Sport New Zealand as his total amount of contribution towards the expenses incurred in connection with these arbitration proceedings.

7. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 15 December 2017

THE COURT OF ARBITRATION FOR SPORT

The Hon. Dr Tricia Kavanagh
President of the Panel

Sir David A R Williams QC
Arbitrator

The Hon. Barry Paterson QC
Arbitrator

Ms Kaelah Ford
Ad hoc Clerk