

**IN THE MATTER OF PROCEEDINGS BROUGHT
UNDER THE ANTI-DOPING RULES OF
THE RUGBY FOOTBALL UNION**

Before:

William Norris QC (Chair)

Professor Dorian Haskard

Sir Richard McLaughlin

B E T W E E N:

RUGBY FOOTBALL UNION (RFU)

Anti-Doping Organisation

and

ASHLEY JOHNSON

Respondent

DECISION

Introduction

1. Mr Ashley Johnson (hereafter "**the Player**") is a full-time professional Rugby Union player, registered with Wasps RFC. On 7 February 2018, he provided an Out-of-Competition sample of urine at Wasps' training ground. It was found to contain hydrochlorothiazide, which is a Prohibited Substance on the World Anti-Doping Agency Prohibited List ("**the Prohibited List**"), listed under "S5 DIURETICS AND MASKING AGENTS". Since hydrochlorothiazide is in class S5, it is deemed a Specified Substance.
2. The Player requested analysis of the B Sample. On 27 March 2018, that B Sample was tested at the Drug Control Centre, King's College London under the supervision of Ihar Nekrashevich, an expert sent along by the Player. The B Sample also tested positive for hydrochlorothiazide.
3. Since the Anti-Doping Rule Violation was admitted, the main issues were: first, whether the presence of such prohibited substance was a result of the Player's intentional act; second, if not, whether he had acted without significant fault or negligence; third, what should be the period of any Ineligibility imposed; fourth, when should any suspension commence?
4. The hearing to determine those issues was held in London on 12 July 2018. The RFU was represented by James Segan of counsel, and the Player by Adam Lewis QC.
5. We would wish to express our thanks to Counsel and to those who instructed them for the clarity, thoroughness and moderation of their submissions, both written and oral.

6. The Tribunal was provided with a considerable volume of written material, contained in two files¹. We heard oral evidence from the Player and from his wife, Mrs Chrizaan Johnson. We also had a Statement from the RFU's Legal Counsel, Stuart Tennant, which exhibited a number of relevant exhibits, including an email chain between the RFU and Professor David Cowan of King's College London. The material provided by the Player included Witness Statements from Mr Dan Baugh (D/286-288)² and from Mr Ali James (D/289-291)³.

The Facts in Summary

7. The Player was born in South Africa on 16 May 1986 and was, therefore, aged 31 when he provided the sample which subsequently tested positive. He plays as a flanker (and sometimes as a hooker) for Wasps and has done so since 2012. He has settled in this country and lives with his wife and children in Coventry. Prior to 2012, he had played for the Free State Cheetahs, a Rugby Union team based in Bloemfontein. He has won three caps for his national side.
8. The Player told us, and we accept, that he is always careful to manage his weight and that this can present rather more of a challenge out of season. It is for that reason that he took what is accepted to be a legitimate supplement named "*Nutrilean*". This was provided by his club and was, since 2015, primarily sourced from EQN Nutrition. It is a certified product and, for the avoidance of doubt, it should be made entirely clear that this product had absolutely nothing to do with the adverse finding in the sample that the Player subsequently provided. Nevertheless, given what is said to be the likely source of the presence of a Prohibited Substance in the Player's system (his wife's 'Fat Burner' called 'the Secret') one notes that publicity material for Nutrilean describes it as a "*powerful fat loss formula*" which those who use it will "*burn fat fast*" (P/203).

¹ We shall refer to the Prosecution Bundle as "P/" and the Defence file as "D/".

² Mr Baugh was, at the material time, Head of Strength & Conditioning at Wasps, who was familiar with the supplements provided to his players, and who, on learning of the Anti-Doping Rule violation, told the Player to go home and collect all the supplements that there were in the house.

³ Mr James is Head of Physiotherapy & Medical Services at Wasps. He describes Mr Johnson as a "*very diligent and conscientious person by nature*" who always "*conduct(s) himself very professionally*".

9. Because Nutrilean is a legitimate and certified product, the Player's use of it is consistent with what he told us was his understanding of his obligations as a player, as explained to him during the anti-doping education that he will have had throughout his career.
10. When the Player provided the sample of urine on 7 February 2018, he was required to complete a Doping Control Form (P/7). The section headed "*DECLARATION OF MEDICATION*" required him to "*provide details of any prescription / non-prescription medication **or supplements...***" (our emphasis) "*...taken in the last seven days, including dosage where possible...*".
11. The Player declared two forms of medication that he was taking, but did not make any reference to supplements. That was careless, but insignificant. He told us that he had concentrated on the heading for the relevant section "*DECLARATION OF MEDICATION*", rather than upon the text. We accept that and, in our view, nothing turns on his failure to declare that he also took a legitimate supplement, Nutrilean.
12. As we have already noted, analysis of the sample (as recorded at P/4-5) returned an Adverse Analytical Finding for the presence of a Prohibited Substance or its metabolites or markers: that was a Prohibited Substance called Hydrochlorothiazide which is essentially a diuretic. It is prohibited because, as is well known, diuretics can constitute masking agents for rather more serious (and performance enhancing) substances.
13. Nevertheless, we should also make it clear that such a diuretic could not possibly improve a player's performance and would be very much more likely to harm it. That is because diuretics lead to short-term weight loss in a generally unhealthy way and may have adverse side effects, including headache, nausea and gout.
14. The RFU corresponded by email with Professor Cowan about the nature of the substance involved. That exchange appears at P/76-80. It includes a reference to the possible presence of another substance, Sibutramine, which would be prohibited In-Competition. However, Professor Cowan replied on 8 June 2018 (P/77), saying

that his team had checked the analytical data for the relevant sample and could find no evidence of the presence of such other substance. Accordingly, we are concerned exclusively with Hydrochlorothiazide which was found to have been present both in the sample provided by the Player when tested and in a capsule of '*The Secret*' which Mrs Johnson was taking to lose weight.

15. As to Hydrochlorothiazide, Professor Cowan made it crystal clear (P/76) that this was classified by WADA under the category of Diuretics / Masking Agents. He explained their prohibition on the basis that a diuretic can reduce the concentration of drugs in urine, which might "*help to escape detection of the use of another Prohibited Substance*".
16. How then did the Prohibited Substance get into the Player's system? The explanation offered by the Player himself is that he must have mistakenly taken his wife's weight loss pill or pills.
17. Both the Player and Mrs Johnson explained that they each took Omega 3 Fish Oil, provided by *Nu U Nutrition*: Mrs Johnson, who was keen to reduce her weight after having children, started taking "*The Secret*" capsules in late November 2017. She kept them in a container with a blue lid, which was very similar to the container with a blue lid (but marked AJ), in which her husband kept his Nutrilean capsules and his own fish oil tablets.
18. We accept that evidence. We were told that their respective pills would have been taken at breakfast, having been laid out on a worktop in the kitchen. Somehow, the Player mistook his wife's pills for his own Nutrilean. Both were similar and were on the worktop next to very similar containers.
19. It goes almost without saying that having different pills in similar boxes and laying them out on a top quite close to each other gave rise to an obvious risk that some kind of muddle would happen, as we find as a fact occurred in the present case.

20. That is an issue to which we must return when considering whether the Player was guilty of "*Significant Fault*" or "*Negligence*" in managing his pill-taking regime. We should, however, be clear: in ordinary language, this arrangement ran an obvious risk that some kind of muddle would occur and it was careless on the part of the Player and Mrs Johnson to have created and taken that risk⁴.
21. In the course of his evidence, the Panel asked the Player to consider whether or not he agreed there was such a risk. He told us that he realised that there was indeed a very significant risk he would consume the wrong tablet. In our view, that was an entirely realistic concession, although we acknowledge that Mr Lewis QC sought to qualify our note of what the witness had actually said by suggesting that he might have been speaking with hindsight⁵. We are not sure that there was any such misunderstanding but, in any case, we are entirely clear that the Player should have realised at the time that there was a risk. His recognition of that, whether in hindsight or otherwise, is realistic and does him credit.
22. In the light of the foregoing, we find that:
- (i) the source of the Prohibited Substance was the Player's consumption of pills which were, in fact, "*The Secret*" Fat Burner pills that were his wife's; The burden was on the Player to prove that and he has discharged that burden
 - (ii) he took his wife's pills, believing that he was taking his own Nutrilean; so that
 - (iii) he has inadvertently consumed pills that have given rise to an "*Adverse Analytical Finding*";
 - (iv) doing that was careless, even allowing for what was said to be the "*generally chaotic*" circumstances in which the family breakfasted⁶.

⁴ The layout on the worktop showing the pills and pots is best illustrated in the photograph at D/163.

⁵ On the further basis that English is the Player's second language – his first language being Afrikaans.

⁶ "*Chaotic circumstances*" are hardly an excuse: the more chaotic the circumstance is, the greater the risk that pills might get mixed up.

Consequences; the Regulatory Framework

23. Against that factual background, the issues that arise concern the Player's intention⁷ and what period of Ineligibility should be applied if we were to find that the Player acted without "*Significant Fault or Negligence*". We shall, therefore, set out the relevant parts of the regulatory framework.

24. As a registered and full time professional rugby union player, there can be no question as to the jurisdiction of this Panel. Rugby Football Union ("RFU") Regulations 20.5.1 and 20.5.2 adopt World Rugby Regulation 21 and the Prohibited List. The material provisions are:

- (i) World Rugby Regulation 21.2.1 provides that the following is an Anti-Doping Rule violation:

"Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample."

- (ii) World Rugby Regulation 21.2.1.2 provides:

"Sufficient proof of an anti-doping rule violation under Regulation 21.2.1 is established by any of the following: ... where the Player's B Sample is analysed and the analysis of the Player's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Player's A Sample..."

- (iii) World Rugby Regulation 21.2.1.3 provides:

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

⁷ Although we have found the act was unintentional – but see further below.

(iv) WRR 21.4.2.2 provides:

“...all Prohibited Substances shall be Specified Substances except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List”. The Prohibited Substance hydrochlorothiazide is not within the exceptions and is thus a Specified Substance. It is prohibited both in and out of competition.”

25. All issues of Ineligibility depend upon establishing, in the first instance, whether the Anti-Doping Rule Violation was intentional (in context, a deliberate or reckless act) and, if not intentional, whether there should be no period of Ineligibility imposed because (per Regulation 21.10.4) the Player has been guilty of “*no fault or negligence*” – which the Player does not contend would be an appropriate finding here⁸ or whether there should be a reduction for “*No Significant Fault or Negligence*”.

26. The relevant provisions are, under WRR 21.10.2 to 21.10.2.1.1:

21.10.2 Ineligibility for Presence... of a Prohibited Substance...

The period of ineligibility for a violation of Regulations 21.2.1 (Presence) ... shall be as follows, subject to a potential reduction or suspension pursuant to Regulations 21.10.4 or 21.10.6:

21.10.2.1 The period of Ineligibility shall be four years where: ...

21.10.2.1.2 The anti-doping rule violation involves a Specific Substance and... the... Union... handling the case... can establish that the anti-doping rule violation was intentional.

21.10.2.2 If Regulation 21.10.2.1 does not apply, the period of Ineligibility shall be two years.”

27. The use of the word “*intentional*” in those provisions is (as is made clear by WRR 21.10.2.3) intended to identify cheats although, as we have said, what is meant by

⁸ See paragraph 8.10 of the Defence Brief at D/23.

a "cheat" includes those who act recklessly – see *WADA v TFF & Ahmet Kuru* (CAS 2016/A/4512). Accordingly, as WRR 21.10.2.3 provides, this requires the governing body to establish that the Player engaged in conduct when he "...knew that there was a significant risk that the conduct might constitute or result in anti-doping rule violation and manifestly disregarded that risk".

28. If the Player in the present case had been found to have acted intentionally within that definition, then the base period of Ineligibility would be four years.

Intentional Act?

29. When the parties helpfully provided us with a list of issues for decision at the outset of the hearing, the RFU wished to keep open the issue of intention on the basis that a possible explanation for what occurred is that the Player, who was admittedly trying to manage his own weight, might have chosen deliberately to take his wife's pills or might even have got her to order them for him.
30. Some objection was taken to this approach on the basis that the RFU had, as it were, chosen to keep its options open. Nevertheless, the Panel considers that it was, in fact, an entirely legitimate approach for the RFU and for Mr Segan to take. In our view, they were entitled to investigate the matter in cross-examination of both the Player and his wife and then decide whether to advance a positive case of intentional conduct or otherwise.
31. That is exactly what happened: we had a short break after the evidence and, after taking instructions, Mr Segan came back and told us that the RFU was not going to pursue a case of intentional conduct. We consider that was a responsible and appropriate course to have taken and a realistic decision in all the circumstances. The issue, then, is whether we find this is a case in which the Player can say he acted with "No Significant Fault or Negligence".

No Significant Fault or Negligence: the issue

32. There are various provisions of WRR 21.10.5 that we should set out:

“21.10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Regulations 21.2.1 (Presence), 21.2.2 (Use or Attempted Use) or 21.2.6 (Possession).

21.10.5.1.1 Specified Substances

Where the anti-doping rule violation involves a Specified Substance, and the Player or other Person can establish No Significant Fault or Negligence, then the period of ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Player’s or other Person’s degree of Fault.

21.10.5.1.2 Contaminated Products

In cases where the Player or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Player’s or other Person’s degree of Fault. [See Comment 31]

21.10.5.2 Application of No Significant Fault or Negligence beyond the Application of Regulation 21.10.5.1

If a Player or other Person establishes in an individual case where Regulation 21.10.5.1 is not applicable that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Regulation 21.10.6, the otherwise applicable period of Ineligibility may be reduced based on the Player or other Person’s degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Regulation may be no less than eight years. [See Comment 32].”

33. Two further provisions are relevant. First, given that we have found that it was Mrs Johnson's "*The Secret*" which was, in fact, the source of the Prohibited Substance, the presence of Hydrochlorothiazide within it does mean that it was a "*contaminated product*", as defined within the rules⁹.
34. The second relevant definition is that which is provided in Appendix 1 to WRR 21, in relation to "*fault*".

"15. Fault is **any breach of duty or any lack of care appropriate to a particular situation**. Factors to be taken into consideration in assessing a Player or other Person's degree of Fault include, for example, **the Player's or other Person's experience**, whether the Player or other Person is a Minor, special considerations such as impairment, **the degree of risk that should have been perceived by the Player and the level of care and investigation exercised by the Player in relation to what should have been the perceived level of risk**. In assessing the Player's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Player's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that a Player would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Player only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Regulation 21.10.5.1 or 21.10.5.2."

No Significant Fault or Negligence: Discussion

35. How the concept of "*No Significant Fault or Negligence*" is to be interpreted and applied has given rise to considerable discussion in various cases. Many of them were cited to us. On what one might call a strictly literal analysis, any fault which is not to be characterised as *de minimis* would, by definition, become "*significant*". But to apply so literal an interpretation would defeat the intention of those who drafted the rule which was to provide a flexibility of sanction depending on findings

⁹ See D/86 "Contaminated Product": A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable internet search."

of fact as to the degree of fault in the particular case – see, for example Cilic v ITF (CAS 2013/A/2237); International Ski Federation (FIS) v Therese Johaug and Norwegian OPC (CAS 2017/A/5015); Therese Johaug v NIF (CAS 2017/A/5110); and Maria Sharapova v ITF (CAS 2016/A/4643).

36. The strictly literal approach would remove any flexibility in sanction that might otherwise have been provided by WRR 21.10.5.1.1: unless fault were nil (in which case a different provision would be engaged) fault would either be *de minimis* or it would be significant and, if the latter, there would be no scope for reducing the sanction from two years to less.
37. We do not think that that was ever the intention, nor is it the appropriate interpretation of the Code. Indeed, we find support for our less literal and more purposive interpretation, both in articles by Professor Haas¹⁰ and in WADA's announcement of the 2015 Code (D/350) and in the case of FIFA v WADA (CAS 2005/C/976 and 986).
38. We also note that our approach here is consistent with that taken by the National Anti-Doping Panel (chaired by Robert Englehart QC) in UK Anti-Doping v Robbie Turley (SR/NADP/909/2017).
39. In short, our approach to this particular provision is to interpret the adjective "*significant*" purposively as opposed to doing so in a strict or literal way. By doing so, and by avoiding the "*more than de minimis*" restrictive analysis, we think that a Panel is able to achieve the object of the 2015 WADA Code. That is to consider degrees of fault and negligence¹¹ and so to decide the appropriate sanction (between nil and two years) which reflects the degree of fault and the importance of the Anti-Doping Rule Violation in the particular case.

¹⁰ Also the Chair of the Panel in Cilic: Professor Haas' article is at D/302

¹¹ Fault and negligence being more or less synonymous in context.

No Significant Fault or Negligence: Conclusions

40. Against that test as explained, we have no hesitation in saying that the Player acted carelessly. He knew the critical importance of checking what went into his system. He had extensive anti-doping education. He is a world-class player. Like any player in his position, he knows he has to be very careful as to what he eats or drinks.
41. All he knew about his wife's pills were that they were a weight loss product – admittedly, a weight loss product for women, as he explained. But he knew he should not have taken her pills deliberately because to do so would run the risk of an adverse finding. Even if he had studied the contents as listed on the container, he could not possibly have persuaded himself that he would not be taking a chance if he deliberately took one of those pills. After all, these were pills she had bought over the internet from an unidentified, or at least unspecified, producer. All sensible people (and certainly every informed and responsible sportsperson) would regard such a product as exactly the sort of thing to avoid.
42. It is probably correct to approach the case as though this product, because of the absence of any reference to hydrochlorothiazide in the list of contents on the side, qualifies as a "*contaminated product*" under the Rules. But we think anyone relying overmuch on such a list of contents would be taking a clear risk and, in any case, the Player was not concerned with what may have been on the list as these were not his pills and he was not intending to take them.
43. We were not impressed by Mr Lewis QC's suggestion that the Player was extraordinarily unlucky to find that he had committed an Anti-Doping Rule Violation when his double misfortune included, first, taking his wife's pills by mistake; and, second, those pills being "*contaminated*". As a matter of fact, we think that the risks of both those eventualities were quite considerable, which is why we characterise his arrangements for pill taking as careless. Nevertheless, bearing in mind the approach we have taken to the words "*No Significant Fault or Negligence*", we do not find that his carelessness can properly be characterised as "*significant*" in the purposive sense in which we interpret the provision.

Proportionality

44. The concept of "*proportionality*" is now well known in the context of anti-doping sanctions, as is apparent from the 2015 iteration of the WADA Code and from cases such as *FIFA v WADA*.
45. In our view, the way in which we have interpreted WRR 21.10.5.1.1 is in accordance with such principles.
46. The principle of proportionality has to be applied alongside other provisions of the Code. For example, it is argued on behalf of the Player that any substantial period of Ineligibility would have catastrophic consequences for him personally and for his family, and as such was a material consideration to be applied. The problem with attaching weight to that contention is that to do so would be fairly and squarely at odds with the definition of "*fault*" in Appendix 1 to WRR Regulation 21.
47. That provision says that, in assessing fault and considering the Player's departure from "*the expected standard of behaviour*", it would be immaterial if the consequence of the Ineligibility imposed would mean that the Player might lose large sums or would be adversely affected in his career.
48. In our view, apart from supporting the purposive approach we have taken to interpreting "*No Significant Fault or Negligence*", the concept of proportionality here means no more and no less than that the sanction imposed should reflect the degree of carelessness in all the circumstances, including the Player's own background. It can be assumed that any period of Ineligibility would have a serious effect upon any player. So what we must look for is the appropriate period of Ineligibility (if any) without deciding such a period by reference to adverse or indeed positive consequences for the Player¹².

¹² When we say "*positive consequences*", we have in mind the fact that a period of ineligibility covering the out-of-season period is likely to have fewer adverse consequences than one imposed in the middle of the season.

Sanctions in Other Cases

49. Our attention was drawn to a number of other cases, including *Cilic*, *Johaug*, *Sharapova* and *Robert Lee v USADA* (CAS 2016/A/4371). We have also referred to the case of *UK Anti-Doping v Robbie Turley* and we will also mention the cases of *ITF v Errani* (SR/Adhocsport/812/2017) *FINA v Cielo* (CAS 2011/A/2495) and the decision of the FA Regulatory Commission in May 2011 in the case of *Kolo Toure*.
50. Although consistency of decision-making is desirable, it is simply impossible to deduce authoritative guidance, let alone precedent, from whatever sanction may or may not have been regarded as appropriate by a different tribunal in a different case with very different circumstances. Without re-trying old cases, there is always the risk that we think that another tribunal was more or less generous than we might have been but without knowing the full picture. In the end, it is for this Panel to decide what it considers to be the appropriate penalty in all the particular circumstances of this case.

Sanction & Commencement

51. This is, as we accept, a case of a “*specified*” substance and of a “*contaminated*” product. We also acknowledge that it is common ground that the Player did not act intentionally and that, therefore, it is accepted that he acted carelessly. In our view, an appropriate sanction would be one of six months Ineligibility.
52. The next issue is whether the suspension should commence on the date of sample collection (7 February 2018) or on the 16 March 2018, when the Player was notified (P/1-3) of his Provisional Suspension.
53. The RFU contends that the commencement date of any period of Ineligibility ought to be backdated to the date of Provisional Suspension – that is 16th March 2018 (see WRR 21.10.11.3.1 and 21.10.11.3.3). The RFU does not, however, accept that it would be right to backdate the sanction further to that of sample collection on 7

February 2010, which is a discretion which would be engaged (WRR 21.10.11.2) if the Player made a timely admission. Mr Segan points out that the Player actually played in four Premiership matches after the date of sample collection – 11, 18 and 24 February, and 4 March 2018.

54. As regards the fact that the Player played between the date of sample collection and suspension, we accept that this is a consideration¹³ but we do not think that the fact that someone has played in that interim is necessarily decisive against backdating, not least because there would be many cases where a player has continued to play during that period. In short, we regard it as a consideration, but no more than that, and within our discretion we attach rather more importance to the fact that the Player has, in our view, made a timely admission. We must also look at the totality of our sanction.
55. In the context of promptness of an admission, our attention was drawn to an exchange between the parties and, in particular, to Mr Tenant's email of 28 March 2018 to the Player's legal representatives. Our view is that the Player did make a prompt admission (which is to be encouraged) for which he should be given due credit. Accordingly, we backdate the six month suspension that we impose so that it will have commenced on 7 February 2018.

Conclusion

56. For the reasons set out above, we find that:
- (i) The Anti-Doping Rule violation has been established; but that
 - (ii) we are satisfied there was No Significant Fault or Negligence; and that
 - (iii) the Player should serve a period of Ineligibility of six months from 7 February 2018; and that
 - (iv) neither party has sought an Order for Costs.

¹³ It's also one that the NADP took into account in RFU v Dean Ashfield.

57. In accordance with RFU Regulation 20 and WRR 21.13, parties entitled to appeal may file a Notice of Appeal against this decision within applicable times contained within the regulations.

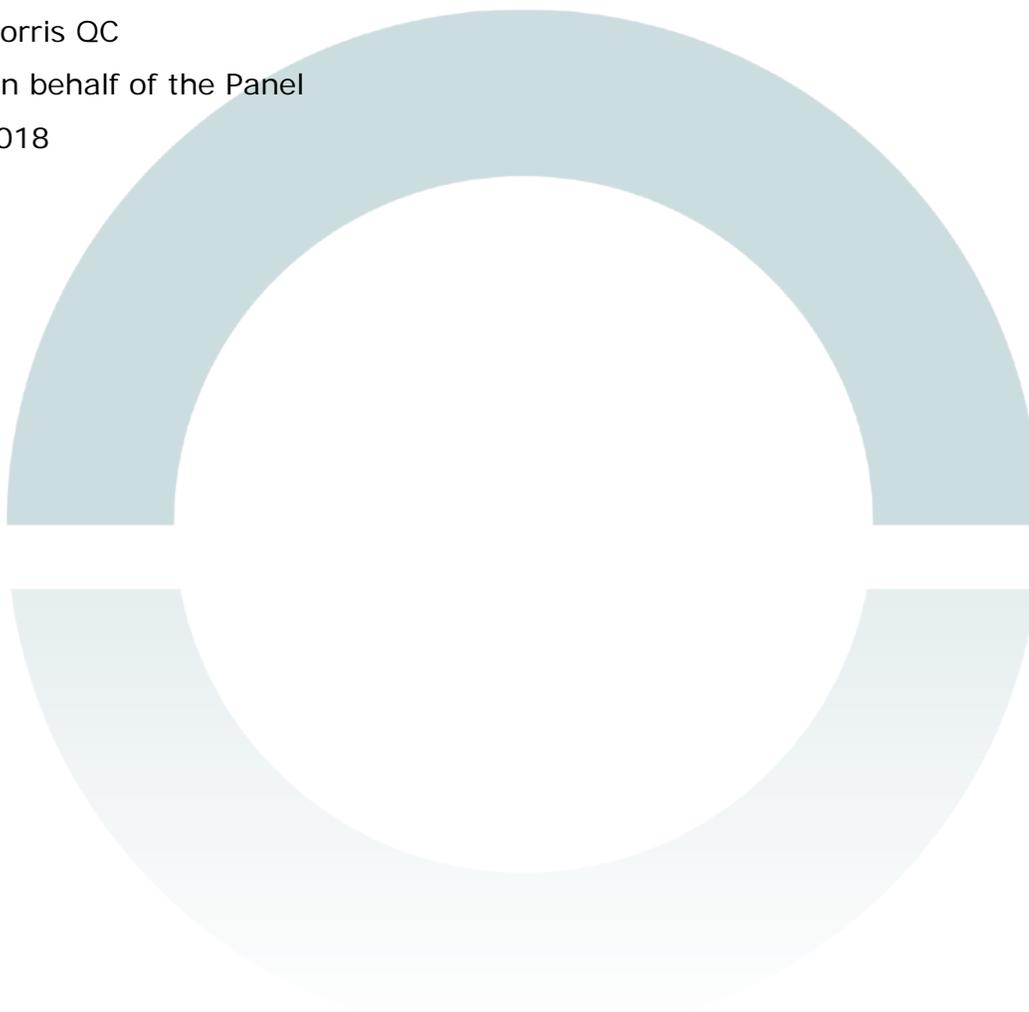


William Norris QC

For and on behalf of the Panel

23 July 2018

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