



# CASE 15 – Appeal Decision

**NATIONAL ANTI-DOPING PANEL**

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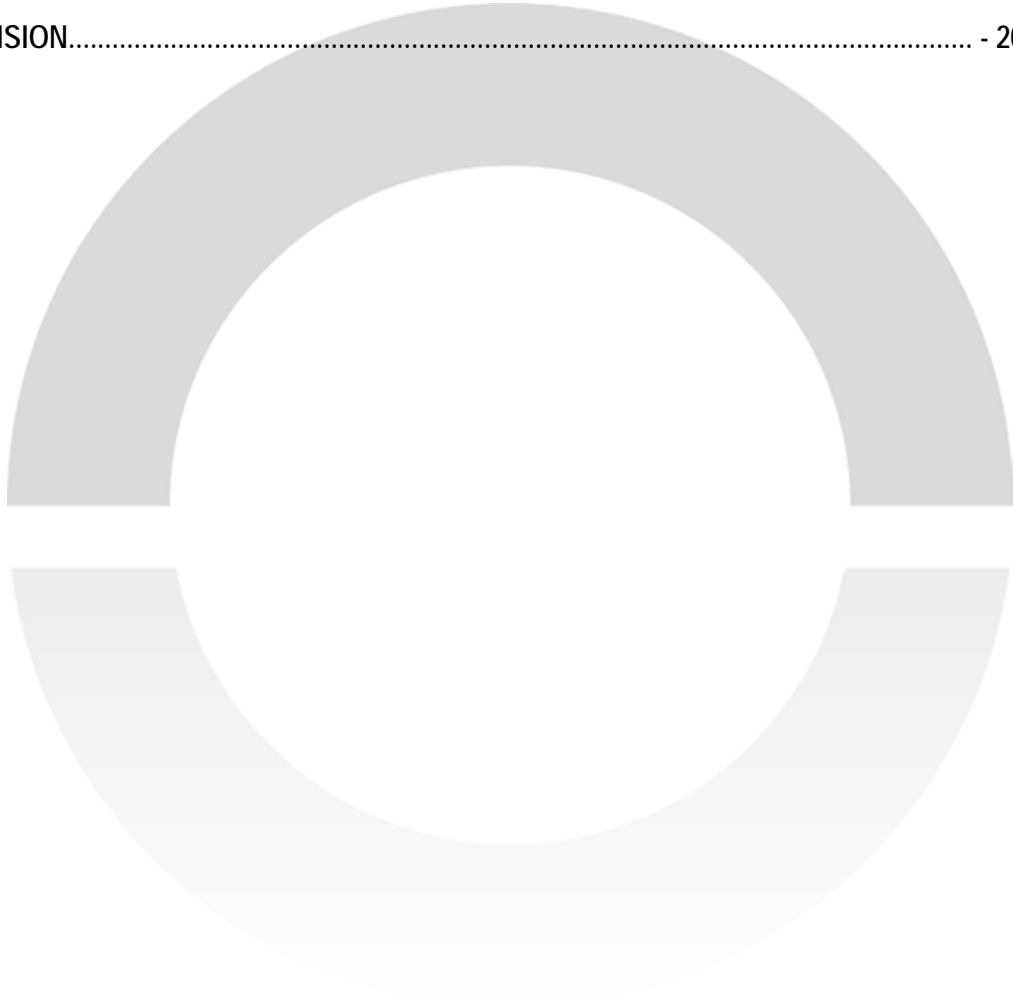
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## 1. INTRODUCTION

- 1.1. This is the Final Decision of the Appeal Tribunal of the National Anti-Doping Panel (“the Appeal Tribunal”) convened under Article 13.4 of the UK Anti-Doping Rules and Article 12 of the NADP Rules.
- 1.2. The Appeal is by UK Anti-Doping (“UKAD”), the United Kingdom’s national Anti-Doping Organisation, against the Decision of the National Anti-Doping Panel (“the NADP” and “the NADP Decision” respectively) dated 27 November 2012. In the NADP Decision the NADP held that an Anti-Doping Rule Violation (“ADRV”) contrary to Article 2.1 of the UK Anti-Doping Rules had been established, and imposed a sanction of one year’s ineligibility on the Respondent, Athlete I. In coming to that Decision, the NADP held that Athlete I was not able to satisfy the conditions in Article 10.4 of the World Anti-Doping Code (“the WADC”), but that, following the decision of the CAS Panel in Kutrovsky, he could bring himself within Article 10.5.2 of the WADC, and was entitled to a reduced sanction of 1 year’s ineligibility on the basis that he had established that he bore No Significant Fault or Negligence.
- 1.3. The grounds of UKAD’s appeal are that, in summary, the Tribunal failed to analyse properly the approach to the construction of Article 10.4 of the Anti-Doping Rules. UKAD submitted that, contrary to the NADP Decision, Athlete I could bring himself within Article 10.4 of the WADC, but that, again contrary to the NADP Decision, he could not satisfy the provisions of Article 10.5.2 so as to entitle him to a reduced sanction on the basis of No Significant Fault or Negligence.
- 1.4. Athlete I was represented at the hearing by Mr Louis Weston, who was instructed late as a result of the inability of Mr Nicholas Cotter to attend the hearing. Both Mr Weston and Mr Cotter acted *pro bono*. The Appeal Tribunal would like to place on record its thanks to Mr Cotter for his very helpful Skeleton Argument and to Mr Weston for accepting instructions at the last minute and for making clear and helpful submissions.
- 1.5. Mr Weston supported UKAD’s submissions in relation to Article 10.4, but submitted that, in the event that the Appeal Tribunal concluded that Athlete I could not bring himself within Article 10.4, he was able to satisfy the provisions of Article 10.5.2. Mr Weston also urged upon the Appeal Tribunal that, in the event that it concluded that Athlete I could not bring himself within Article 10.5.2, nonetheless the Appeal Tribunal should not increase the sanction on Athlete I.

- 1.6. For the reasons set out in this Decision, the Appeal Tribunal has concluded that the NADP correctly held that Athlete I did not satisfy the conditions in Article 10.4, and rejects UKAD's appeal in respect of that part of the NADP Decision. The Appeal Tribunal has also concluded that the NADP was in error in concluding that Athlete I could satisfy the provisions of Article 10.5.2.
- 1.7. Those conclusions should mean that the sanction of 2 years ineligibility is to be imposed on Athlete I. However, the Appeal Tribunal was persuaded by Mr Weston that it should not upset the sanction in fact imposed by the NADP on Athlete I. This was on the basis that the NADP Decision is to be read as concluding that Athlete I bore No Significant Fault or Negligence. The Appeal Tribunal disagreed with this conclusion. If it had been considering this case as a first instance tribunal, the Appeal Tribunal would undoubtedly have come to a different decision. Nevertheless, it is to be borne in mind that this is an appeal rather than an original decision. Athlete I 's period of ineligibility is due to expire within a few weeks. The Appeal Tribunal has determined, albeit with considerable misgiving, that justice would be served if the actual result of the NADP Decision, rather than its reasoning, were permitted to stand.
- 1.8. The Appeal Tribunal wishes to make it clear, however, that what is effectively an act of mercy on its part is entirely exceptional. It should never be treated as a precedent. A 2 year period of ineligibility is mandatory unless there is cogent evidence that the athlete bore No Significant Fault or Negligence. The evidence in this case goes nowhere near establishing that that was the case. Athlete I was undoubtedly at fault. Facts similar to those in the present case should never again lead to a finding of No Significant Fault or Negligence.

## 2. THE FACTS AND THE APPEAL HEARING

- 2.1. The facts of the case are not in dispute, and the Appeal Tribunal will adopt gratefully the statement of the facts contained in Paragraphs 1.2 to 1.6 and Paragraphs 5.1 to 5.12 of the NADP Decision. In the circumstances, it is unnecessary to set out those facts in this Award.
- 2.2. The hearing of the appeal took place at the offices of Sport Resolutions at 1 Salisbury Square, London EC4 on 8 February 2013. In addition to the members of the Tribunal the hearing was attended by Graham Arthur (UKAD Director of Legal), Ms Hannah McLean (UKAD), Athlete I, Mr Louis Weston (Counsel for Athlete I), Witness A (Athlete I's father), Richard Harry (Dispute Resolution Manager, Sport Resolutions (UK)) and other members of the staff of Sport Resolutions.
- 2.3. The issue before the NADP was stated in Paragraph 3 of the NADP Decision in the following terms:

*"3.1 In the light of the Respondent's admission of the relevant Anti-Doping Violation, the only live issue for determination by the Tribunal was the question of sanction in respect of the admitted Charge. On its face, that may appear to be a relatively simple question, but the reality is rather different, as is more fully explained below.*

*3.2 Article 10.2 of the UKAD Rules provides that for an anti-doping Rule Violation under Article 2.1 that is the Participant's first violation (as is the position in the instant case), a period of Ineligibility of 2 years shall be imposed, unless the conditions for eliminating or reducing the period of Ineligibility are met (in accordance with Article 10.4 of the UKAD Rules – Elimination or Reduction under Specified Circumstances) or Article 10.5 – Elimination of Reduction based on Exceptional Circumstances)."*

- 2.4 Before dealing with the substance of the appeal, the Appeal Tribunal will set out the Rules relevant to the appeal.

### 3. THE RULES

3.1. The UK Anti-Doping Rules provide as follows:

#### ***“Article 1.3 Core Responsibilities***

*1.3.1 It is the personal responsibility of each Athlete (which may not be delegated to any other Person):*

- a. to acquaint him/herself, and to ensure that each Person (including medical personnel) from whom he/she takes advice is acquainted, with all of the requirements of these Rules, including (without limitation) being aware of what constitutes an Anti-Doping Rule Violation and of what substances and methods are on the Prohibited List; and*
- b. to comply with these Rules in all respects, including:*
  - i. taking full responsibility for what he/she ingests and uses ...*

#### ***Article 2: Anti-Doping Rule Violations***

*Each of the acts or omissions set out in Articles 2.1 to 2.8 shall constitute an Anti-Doping Rule Violation under these Rules:*

***2.1. The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample, unless the Athlete establishes that the presence is consistent with a TUE granted in accordance with Article 4.***

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

#### ***Article 3: The Prohibited List***

##### ***3.3 Specified Substances***

*3.3.1 For the purposes of these Rules, the term “Specified Substances” shall*

mean all Prohibited Substances classified as such in the Prohibited List.

## **Article 10: Ineligibility Sanctions for Individuals**

### **10.4 Elimination or Reduction of the Period of Ineligibility under Specified Circumstances**

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

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

### **10.5 Elimination or Reduction of Ineligibility Based on Exceptional Circumstances**

10.5.1 If a participant establishes in an individual case that he/she bears No Fault or Negligence for the Anti-Doping Rule Violation charged, the otherwise applicable period of ineligibility shall be eliminated. When the Anti-Doping Rule Violation charged is an Article 2.1 violation, the athlete must also establish how the Prohibited Substance entered his/her system in order to have the period of ineligibility eliminated ...

10.5.2 If a participant establishes in an individual case that he/she bears No Significant fault or negligence for the Anti-Doping Rule Violation charged, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable ... When the Anti-Doping Rules Violation charged is an Article 2.1 violation, the Athlete must also establish how the Prohibited Substance entered his/her system in order to have the period of Ineligibility reduced."

- 3.2. Accordingly, in order to take advantage of Article 10.4, the onus is upon Athlete I to establish:
- (i) how the Specified Substance entered his body;
  - (ii) that it was not intended to enhance his sport performance or to mask the Use of a performance enhancing substance; and
  - (iii) to adduce corroborating evidence of the absence of an intent to enhance his sport performance or mask the Use of a performance enhancing substance.

3.3. It is common ground that the substance found in Athlete I 's Sample was Methylhexanamine ("MHA"), a Prohibited Substance classified as a Specified Substance on the Prohibited List: see Article 3.31 set out above.

3.4. For the purposes of Article 10.5, the terms "*No Fault or Negligence*" and "*No Significant Fault or Negligence*" are defined in Appendix One to the UKAD Rules as follows:

***"No Fault or Negligence:***

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

***No Significant Fault or Negligence:***

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

3.5. It is common ground that the UK Anti-Doping Rules are identical in all material respects with the WADC.



#### 4. THE ISSUES ON THE APPEAL

- 4.1. The issues on the appeal can be as shortly stated by the Appeal Tribunal as they were by the NADP. They are, first, whether Athlete I has established on the balance of probability that he did not take the Specified Substance in order to enhance his sport performance (or to mask the use of a performance-enhancing substance) for the purposes of Article 10.4, and, secondly whether Athlete I is entitled to either the elimination of any sanction or the reduction of the sanction under Article 10.5.2 of the Anti-Doping Rules.

#### 5. DISCUSSION

- 5.1. The starting point of any discussion of breaches of the UK Anti-Doping Rules or of the WADC is Article 2. The terms of Article 2 have been set out above, but are set out again for the convenience of the reader:

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

- 5.2. The WADC was first adopted in 2003 and became effective in 2004. The latest revision of the WADC came into effect on 1 January 2009. The UK Anti-Doping Rules are intended to implement the WADC: see Article 1.1 of the UK Anti-Doping Rules.
- 5.3. The dates upon which the WADC came into effect are important because the time must surely by now have come when it is not open to any athlete, save perhaps in very exceptional circumstances, to contend that he or she is unaware of the WADC or of Anti-Doping Rules generally. It follows that it will not be an acceptable excuse, save in the rarest of cases, for an athlete to rely upon a lack of education by the relevant national governing body or international federation. There have been enough high profile anti-doping cases over the last 10 years, even before the latest scandal involving Lance Armstrong, for every athlete to be aware of the WADC, Anti-Doping Rules generally and the sanctions imposed for breaches of the WADC.

- 5.4. As has been stated, the facts in the present case are not in dispute, and were described fully in the NADP Decision. Athlete I was trying to make weight for a fight which was due to take place on 30 March 2012. He was struggling to lose the weight required, and so purchased the product "*Rocket Fuel*" from a shop in a local town, Cwmbran. The shop was called "*Supplements Central*", and *Rocket Fuel* was recommended to Athlete I by a shop assistant. He started taking the supplement 5 days before the fight and stopped taking the supplement 1 day before the fight.
- 5.5. In its written submissions to the Tribunal UKAD stated, in Paragraph 6.1, that it regretted "*the complexity that now envelopes the application of Rule 10.4*". It also stated, in Paragraph 6.8 that it feels "*that simplicity is best*". The Appeal Tribunal agrees with UKAD, but the very lengthy and convoluted reasoning contained in UKAD's submissions demonstrates, in the Appeal Tribunal's view, why there is such confusion about the application of Article 10.4.
- 5.6. The Article, the terms of which appear above, is written in the simplest terms, and should produce little difficulty or controversy in construction.
- 5.7. Unfortunately, a series of decisions by CAS has served to complicate the construction of Article 10.4 unnecessarily. Nowhere is that better seen than by the series of decisions of which *Foggo*, *Oliveira*, *Kutrovsky* and *Qerimaj* are most frequently cited.
- 5.8. It was surprising to the Appeal Tribunal to find that UKAD complicated the construction of Article 10.4 by drawing the distinction between the use of a Specified Substance "*Out of Competition*" and its use "*In Competition*". Of course, the use of a Prohibited Substance in competition is always banned, but there can be no reason why the use of a Specified Substance out of competition may not also lead to an ADRV if, on the facts, a tribunal concludes that its use was "*intended to enhance the athlete's sport performance*". That is a question of fact, which will be decided on the facts of the particular case. Certainly, the words of Article 10.4 lend no weight to the distinction sought to be drawn by UKAD in its submission.
- 5.9. It must be remembered that Article 10.4 does not provide a defence to an ADRV. Before Article 10.4 becomes relevant, an ADRV has been committed. Article 10 deals with "*Sanctions on Individuals*", and Article 10.4 provides an opportunity for an athlete to eliminate or reduce the sanction for the ADRV that he or she has committed.

- 5.10. Knowledge of the specific Prohibited Substance is not required in order for an athlete to commit an ADRV. It is simply the presence of the Prohibited Substance in the athlete's body, found to be present in the athlete's Sample, that completes the ADRV. As the Commentary to Article 2 of the WADC makes clear *"..the violation occurs whether or not the Athlete intentionally or unintentionally Used a Prohibited Substance or was negligent or at fault."*
- 5.11. The fact that knowledge of the specific Prohibited Substance is not a requisite of an Anti-Doping Rule Violation makes it difficult to understand the conclusions of a number of CAS Panels that the athlete must know what Prohibited Substance he or she has taken before he can be held to have taken it with the intent to enhance his or her sport performance. Such conclusions betray a confused thought process. It is difficult to understand why it should be thought to be relevant that an athlete does not know what Prohibited (Specified) Substance he or she has used for the purpose of Article 10.4 when it is not relevant to the commission of the ADRV. It is the intent that the athlete had in using the Prohibited (Specified) Substance that is relevant under Article 10.4.
- 5.12. Knowledge of the specific Prohibited Substance could only be a relevant consideration if Article 10.4 provided a defence to an Anti-Doping Rule Violation, which it does not. As it does not, such knowledge is not a relevant consideration.
- 5.13. As has been said, the wording of Article 10.4 is simplicity itself. It does not refer to use out of competition or in competition. It simply refers to use *"intended to enhance the athlete's sport performance"*. The Appeal Tribunal can see no reason why on a plain reading of Article 10.4 those words should not be given their natural and ordinary meaning, namely, that the use of a Specified Substance may lead to a reduced sanction if the athlete establishes that he or she did not intend to enhance his or her sport performance by using it.
- 5.14. It must be remembered in any discussion about Article 10.4 that a Specified Substance is simply a Prohibited Substance which has been designated as a Specified Substance. An athlete who has a Prohibited Substance in his bodily sample has committed an Anti-Doping Rule Violation. That is the starting point. Article 10.4 allows the elimination or reduction of the sanction for the Anti-Doping Rule Violation if the athlete can establish how the Specified (*semble*, Prohibited) Substance entered his body; that the Specified Substance was not intended to enhance his sport performance; and he produces corroborating evidence which establishes the absence of intent to enhance sport performance.

- 5.15. Throughout the hearing the Appeal Tribunal was left with the clear impression that UKAD held the view that because Specified Substances could be used out of competition without resulting in an Anti-Doping Rule Violation, they could never be used to enhance sport performance. This view seemed to inform UKAD's approach to the construction of Article 10.4 to such an extent that it seemed reluctant even to test the athlete's evidence of intent (or lack of it), or, as importantly, the evidence that was relied upon by the athlete as corroborating evidence.
- 5.16. It is not the role of a national Anti-Doping Organisation to force its own view of the intent of a provision of the WADC, which is intended to harmonise the fight against doping worldwide, when that view is inconsistent with the plain words of the WADC and their natural and ordinary meaning. If national Anti-Doping Organisations are able to act in that unilateral manner, there will be no harmonisation of the fight against doping and there will, as a result and as has been seen, be a plethora of inconsistent incomprehensible decisions. Athletes, international federations and national governing bodies will be left confused, and the fight against doping will be seriously damaged. Nowhere can that be better seen than in the application of Article 10.4.
- 5.17. The role of a national Anti-Doping Organisation and of Anti-Doping Tribunals is to apply loyally the plain words of the WADC, and, if they disagree with the result produced by those words, work to have the WADC amended. It is not the role of a national Anti-Doping Organisation to apply its own view simply because it believes that that view better fits what it believes to be the justice of any particular case.
- 5.18. During the course of his submissions to the Appeal Tribunal Mr Arthur accepted that UKAD's approach to Article 10.4 was inconsistent with the approach of USADA and ASADA (the Australian Sports Anti-Doping Authority), two national organisations that are at the forefront of the fight against doping. It seems to the Appeal Tribunal that such a difference of approach is a cause for concern in respect of a code, the WADC, which is intended to be applied consistently worldwide. Mr Arthur conceded that the approach of USADA and ASADA is perfectly consistent with the plain words of Article 10.4 and with their natural and ordinary meaning, but he insisted that the UKAD approach is to be preferred.
- 5.19. The Appeal Tribunal agrees with the approach of USADA and ASADA, but goes further. In the Appeal Tribunal's view that approach is the only approach that respects the simplicity of the language of the

WADC and which respects fully the natural and ordinary meaning of the words of Article 10.4. By contrast, the UKAD approach glosses the language of Article 10.4 unnecessarily, and appears designed to produce a result which UKAD believes is just whilst ignoring the natural and ordinary meaning of the words and failing to respect the simplicity of the language used. It is an approach which the Appeal Tribunal believes should be abandoned.

- 5.20. The WADC links the *use* of the Specified Substance to the *intent* to enhance sport performance. The timing of the use may provide evidence which, viewed objectively, would lead an Anti-Doping Tribunal to conclude that the necessary intent was not present, but it can do no more than that. But the mere fact that a Specified Substance can be used out of competition (and would not then lead to an ADRV under Article 2 unless it showed up in the athlete's Sample) is nothing to the point, and proves nothing. As was pointed out to Mr Arthur during the course of the hearing, under the WADC "*out of competition*" means any time longer than 12 hours prior to a competition so that if an athlete uses a Specified Substance 13 hours before a competition he or she would not, on UKAD's approach, have the intent to enhance sport performance. Such an outcome would, the Appeal Tribunal believes, be met with scorn and disbelief.
- 5.21. The issue for any Anti-Doping Organisation and Tribunal is not one of the time at which the Specified Substance was used, it is whether or not it was used with the intent to enhance sport performance.
- 5.22. There may, of course, be cases in which the primary use of the Specified Substance was not with the intent to enhance sport performance, but for another reason. Nonetheless, the use may enhance the athlete's sport performance. If, for example, an athlete has a toothache and takes a pill which contains a Specified Substance to cure the toothache, the Anti-Doping Rule Violation will have been committed and the athlete will face a sanction. And it could, no doubt, be argued that the taking of the pill was with the intent to enhance sport performance because an athlete without toothache is likely to perform better than an athlete with a toothache.
- 5.23. But, such use would not, in the Appeal Tribunal's view, inevitably lead to the conclusion that the use was with the necessary intent. The dominant purpose for the use was in order to cure the toothache, not to enhance sport performance. The dominant purpose, or, as is sometimes put, the closest connection or proximate cause, test is a useful test to apply in such a situation, but, at the end of the day, the Anti-Doping Panel simply has to assess objectively on all of the evidence whether it is satisfied that the athlete has established that the use was not with the intent to enhance sport performance.

- 5.24. If that approach is taken there will be no need for Anti-Doping Tribunals to become involved in debates as to whether there has been a “direct” or “indirect” intent to enhance sport performance: see, for example, the CAS Panel in *Qerimaj*. Such a distinction is artificial, and is simply not consistent with the WADC. Furthermore, such a distinction leads to arid debates, which have a greater resemblance to angels dancing on the head of a pin than they do to real legal debate, and are unhelpful to athletes and those who have to apply the WADC. It is surely in the interests of athletes that the WADC is simple to understand, and of Anti-Doping Tribunals that it is straightforward to apply.
- 5.25. The Appeal Tribunal will now turn to the appeal before it. The primary question for the Appeal Tribunal is whether Athlete I was intending to enhance his sport performance when he used the supplement containing the Specified Substance in order to help him make weight for the fight.
- 5.26. He was taking the Specified Substance, MHA, for a period of 4 days, in order to assist him in making the weight for the fight. He started taking the Specified Substance on the Monday of the week in which the weigh-in for the fight was due to take place on Friday. He stopped taking it on the Thursday morning, the day before the weigh-in. He took it in order to help him make the weight for the fight. If he had failed to make the weight, he would have been unable to fight.
- 5.27. During the hearing there was considerable discussion about whether taking a Specified Substance in order to enable an athlete to make weight was taking it with the intention of enhancing sport performance. Mr Arthur submitted that the NADP Appeal Tribunal Decision in *The Anti-Doping Commission of the International Boxing Association v [REDACTED] ([REDACTED])* was wrong in this respect. The Appeal Tribunal rejects that submission. If Athlete I had not made the weight he would not have been able to take part in the fight. Making the weight was an essential part of Athlete I’s sport performance. As the Appeal Tribunal said in [REDACTED]

*“... the Respondent intended by ingesting the Specified Substance to enhance her sport performance. She intended to ensure she was able to perform. The intention to ensure her performance must be regarded as an intention to enhance sports performance. The Appeal Tribunal concluded that the Arbitrator was in error when he restricted the extent of sport performance to the actual process of performing in the relevant athletic pursuit. The phrase “enhance the Athlete’s sport performance” in Article 10.4.1 has a wider meaning which includes the ability to perform at all.”*

The Appeal Tribunal respectfully agrees with and adopts those words.

- 5.28. If Athlete I 's use had been, let us say, 2 weeks before the fight, the Appeal Tribunal could see the force of a submission that it was not intended to enhance his sport performance. However, the proximity of the use to the date of the weigh-in and the fight, makes it clear to the Appeal Tribunal that Athlete I 's intention was to enhance his sport performance. After all, if he had not made the weight he would not have been able to take part in the fight.
- 5.29. Accordingly, the Appeal Tribunal has concluded that although Athlete I established how the Specified Substance entered his body, he had not satisfied the Appeal Tribunal to its comfortable satisfaction that the use of the Specified Substance was not intended to enhance his sport performance. Accordingly, Article 10.4 has no application.
- 5.30. The Appeal Tribunal interposes at this stage of its Decision the comment that, as was made clear to Mr Arthur during the course of his submissions, in its view the "*corroborating evidence*" of Athlete I 's father fell far short of being corroborating evidence at all. However, the Appeal Tribunal will accept the NADP Decision that Athlete I 's father's evidence could be treated as corroborating evidence. It trusts that in future UKAD will test such evidence more rigorously than it appears to have done in the present case.
- 5.31. As has been indicated above, a series of confused and confusing decisions of the CAS has succeeded in turning the simple terms of Article 10.4 into a philosophical conundrum. The Appeal Tribunal does not intend to analyse those decisions in detail, save for the case of *Oliveira*, which set some Tribunals down the wrong path.
- 5.32. In *Flavia Oliveira v. USADA* (CAS 2010/A/2107) the relevant facts were that Ms Oliveira was an international elite-level cyclist. Unfortunately, she suffered from severe allergies, and for several years took over-the-counter and prescription medicines. These medicines caused her to feel fatigued, and so she searched for a product that would combat that fatigue. She conducted her own research to find a product which did not contain a prohibited substance. She found a product called Hyperdrive.
- 5.33. Ms. Oliveira competed in the Giro del Trentino Donne in Italy, and was selected for doping control. Her

urine sample was found to contain oxilofrine, which was then a prohibited substance, but which by the date of the hearing on USADA's case against Ms. Oliveira was a specified substance. Accordingly, the application of the *lex mitior* required the CAS Panel to deal with the case as if Ms. Oliveira had taken a specified substance.

- 5.34. At first instance, the sole arbitrator decided that he did not have to decide whether Ms. Oliveira had taken the specified substance with the intent of enhancing her sport performance because her degree of fault was sufficiently high to mean that she was not entitled to the elimination or reduction of the sanction that he had to impose on her. However, he said that he very much doubted whether Ms. Oliveira intended to cheat or gain an illegal advantage in her competitive performance. In that statement, one finds the genesis of the confusion which followed.
- 5.35. Ms. Oliveira appealed, and the CAS Panel allowed the appeal and reduced the sanction from 2 years to 18 months.
- 5.36. If one stands back at this stage and asks the question: "Was Ms. Oliveira intending to enhance her sport performance by taking Hyperdrive?" there can be no doubt that the answer would be in the affirmative. Indeed, the question permits only of an affirmative answer. She was taking the product in order to reduce the fatigue which her medication caused her. It is obvious that a tired cyclist is unlikely to perform as well as a fresh cyclist. It must, therefore, follow that Ms. Oliveira's intention in taking Hyperdrive was to enhance her sport performance. The man in the street would, if asked the question posed above, have answered: "of course she was".
- 5.37. On the appeal, the CAS Panel failed to apply the plain words of Article 10.4: see, in particular, Paragraphs 9.14-9.17 of the CAS Award.
- 5.38. This Panel finds the reasoning of the CAS Panel in *Oliveira*, in the paragraphs to which reference has been made, impenetrable. There is no ambiguity in the language of Article 10.4. The first paragraph of the Article simply places the burden on the athlete to establish (1) how the specified substance entered his or her body and (2) that the use of the specified substance was not intended to enhance his or her sport performance.
- 5.39. In the present case, as in *Oliveira*, the first requirement is satisfied, and there is no allegation of intent to mask. Thus, the only issue in *Oliveira* was whether Ms. Oliveira took Hyperdrive with the intent of



enhancing her sport performance.

- 5.40. There is no ambiguity in the second paragraph of Article 10.4, which is concerned with the production by the athlete of corroborating evidence in addition to the athlete's own word. An Anti-Doping Tribunal faced with a plea that Article 10.4 applies must, therefore, decide whether the athlete's evidence satisfies it that the athlete did not intend to enhance his or her sporting performance. If the athlete establishes that fact, then he or she must adduce corroborative evidence which comfortably satisfies the Tribunal.
- 5.41. This Appeal Tribunal has concluded that the CAS Panel in *Oliveira* made the construction of Article 10.4 unnecessarily confused and that the *Oliveira* decision should be ignored. Unfortunately, the decision in *Oliveira* set the debate on the construction of Article 10.4 down the wrong path. Fortunately, the CAS Panel in *Foggo* applied the correct construction, as did the CAS Panel in *Kutrovsky*, but in *Qerimaj* another CAS Panel continued down the *Oliveira* path, and it can be seen from the long list of cases cited to the NADP how confused the debate has become.
- 5.42. In *Qerimaj* the CAS Panel introduced yet more complications to the construction of Article 10.4 of the WADC. It introduced the concepts of "indirect" and "direct" use of a Prohibited/Specified Substance. It is not necessary for the Appeal Tribunal to lengthen an already lengthy Award by analysing the CAS Panel's approach in *Qerimaj*. Suffice it to say that the Appeal Tribunal is of the view that *Qerimaj* and *Oliveira* should not in future be followed.
- 5.43. The Appeal Tribunal has, therefore, concluded that UKAD's appeal against the NADP Decision that Athlete I could not rely upon Article 10.4 of the WADC fails and must be dismissed.
- 5.44. The Appeal Tribunal next turns to UKAD's appeal against the NADP Decision that Athlete I could rely upon Article 10.5.2 (No Significant Fault or Negligence) to reduce the sanction on him.
- 5.45. The debate on Article 10.5.2 is a far simpler debate than that on Article 10.4. There was some discussion during the hearing about whether an athlete who had failed to satisfy the requirements of Article 10.4 could, in the alternative, rely upon Article 10.5.2 (or even Article 10.5.1 in an appropriate case). The CAS Panel in *Kutrovsky* had permitted the athlete to do so.

- 5.46. The Appeal Tribunal sees no reason why, in an appropriate case, an athlete should not be able to do so. The athlete may fail to satisfy an Anti-Doping Tribunal that he or she is entitled to rely upon Article 10.4 for a number of reasons. He or she may not be able to establish how the Specified Substance entered his or her body; or he or she might not be able to satisfy the Anti-Doping Tribunal that he or she did not have the intent to enhance sport performance; or he or she may be unable to adduce corroborating evidence of the absence of intent. In the first and third of those situations the Appeal Tribunal cannot see any reason in principle why an athlete should not rely upon Article 10.5.2. In the second situation there may be greater difficulty because it might be said that the failure to satisfy the Anti-Doping Tribunal that he or she did not have the intent to enhance sport performance would carry with it the implication that there had been such an intent. But each case will decide on its particular facts, and the Appeal Tribunal would not wish to rule out the possibility of an athlete relying upon Article 10.5.2 even in the second situation.
- 5.47. In Athlete I 's case the NADP concluded that Athlete I 's fault was not *"egregious"*, which the Appeal Tribunal takes to be a synonym for *"Significant"*, and reduced the sanction from 2 years to 12 months.
- 5.48. The Appeal Tribunal disagrees with the NADP Decision. In the Appeal Tribunal's view, Athlete I fails by a substantial margin to satisfy it that his fault or negligence was, when all of the circumstances are considered, not significant.
- 5.49. In Paragraph 7.24.12-13 of the NADP Decision the NADP described Athlete I as acting *"naively rather than in a calculating manner"*. Athlete I had given *"essentially an honest account"*, and had been *"candid, co-operative and straightforward"*. The Appeal Tribunal is prepared to accept all of those descriptions of Athlete I 's behaviour, but is bound to say that it finds none of them sufficient to warrant a reduction in the sanction from 2 years to 12 months. Indeed, there is no warrant for any reduction from a 2 year sanction.
- 5.50. In the Appeal Tribunal's view, Athlete I exhibited a high degree of fault in acting in the way that he did. He was extremely careless, and his behaviour warranted a 2 year sanction. As the Appeal Tribunal has made clear, the fact that he is a young and unsophisticated man is no excuse. It will be a very rare case in which an athlete can nowadays pray in aid a lack of education about the dangers of doping.

5.51. In the Appeal Tribunal's view, Athlete I has been extremely lucky to escape the inevitability of a 2 year sanction. It is highly unlikely that any athlete will benefit in such a way in the future.

## 6. DECISION

6.1 For the reasons stated in this Award, UKAD's appeal is dismissed.

6.2 This Decision can be challenged by the relevant International Federation or by WADA by appeal to CAS.

This Decision was made in London on 14 February 2013

Robert Englehart QC

A handwritten signature in black ink, appearing to read 'Peter Leaver', is centered within a large, light gray circular graphic that has a thick, broken outer ring and a thinner inner ring.

David Casement QC

Peter Leaver QC  
(Chairman)



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