

Case 7 – Presence of Prohibited Substance – Appeal to Case 6 Decision

Key words

De novo; Intent; Conduct; Balance of Probability; Method of Ingestion; [Doping](#)

Summary

Player C was charged under Article 2.1 of the UK Anti-Doping Rules for presence of the Prohibited Substance dehydrocholormethyltestosterone (“DT”). The athlete argued that the likely source of the DT was a product he bought online called ‘M-Sten’. UKAD appealed the decision of a National Anti-Doping Panel tribunal which determined Player C had committed an Anti-Doping Rule Violation (ADRV), that the ADRV was not intentional and imposed a period of Ineligibility of two years.

Background Facts

Player C, a rugby player, was charged with presence of the Prohibited Substance, DT. Player C was diagnosed with dyslexia and dyspraxia in 2010. It was argued that the source of the DT was a product called ‘M-Sten’, which the Player C bought from Amazon. Player C accepted that ‘M-Sten’ contained a Prohibited Substance however, he contended that he was not aware of the presence of a Prohibited Substance in the product when he ingested the product.

The appeal was made pursuant to Rule 13 of the NADP Procedural Rules. The appeal tribunal’s role was to review the decision and determine whether it was erroneous. A re-hearing, or *de novo* appeal, will be allowed only where required “*in order to do justice*”.

Reasoning and Decision of the Tribunal

UKAD argued that the first instance tribunal was wrong to find on the balance of probabilities that: (1) Player C's ingestion of dehydrocholormethyltestosterone ("DT") was probably caused by the product he consumed, M-Sten; and (2) that Player C had discharged his burden of proof in relation in establishing that he had not acted intentionally when committing the ADRV. UKAD's application to adduce further expert evidence was refused as the appeal tribunal could not consider evidence that had not been produced before the first instance tribunal.

The appeal tribunal gave considerable attention to the interpretation of the word "intentional" as set out in Articles 10.2.1 and 10.2.3 of the WADA code. UKAD's position was that fault could only be determined by the tribunal if the athlete explained the method of ingestion. Player C's counsel, on the other hand, argued that article 10.2.3 does not require the athlete to establish how the prohibited substance entered his body, and that the athlete only needs to demonstrate that he did not engage in conduct which he knew constituted a violation or knew there was a significant risk that it would. In considering these points the tribunal concluded that Article 10.2.3 requires an assessment of all the evidence about the conduct that resulted in the violation.

The appeal tribunal considered whether the first instance tribunal erred in principle in the findings as to the probable cause of ingestion and whether the ADRV was intentional. On review of the decision, the appeal tribunal concluded that the first instance tribunal was entitled to find, based on the totality of the evidence, that 'M-Sten' was the probable source of the DT. In respect of the finding that conduct was not intentional the appeal tribunal noted that these were pure findings of fact relating to the reliability of the evidence adduced by the athlete at the first instance hearing. For these reasons, the appeal was dismissed.

Learning points

- Where Art 10.2.1. ADR applies, the evidential burden is on the athlete to put forward an explanation of the conduct which the athlete asserts resulted, or might have resulted, in the violation. If they cannot do this to

the appropriate standard of proof (the balance of probability) then there is no evidence from which the panel can conclude that the violation was unintentional.

