

NATIONAL ANTI-DOPING PANEL

Before:

Christopher Quinlan QC

Dr Barry O'Driscoll

Lorraine Johnson

BETWEEN:

UK Anti-Doping

National Anti-Doping Organisation

-and-

Terry Dunstan

Respondent

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE BRITISH BOXING
BOARD OF CONTROL'S ANTI-DOPING REGULATIONS 2010-2011**

FINAL DECISION OF THE ANTI-DOPING TRIBUNAL

Introduction

1. This is the final decision of the Anti-Doping Tribunal ('the Tribunal') convened pursuant to Article 5.1 of the National Anti-Doping Panel Procedural Rules ('NADPPR') to hear and determine a charge brought against Terry Dunstan (the Respondent) for the commission of a doping offence in breach of Article 2.1 of the British Boxing Board of Control's ('BBBoC') Anti-Doping Rules ('ADR') 2010-2011.
2. By Article 2.1, ADR it is an anti-doping violation to provide a sample that shows "the presence of a Prohibited Substance or its Metabolites or Markers".
3. The Respondent was born on 21 October 1968. He started boxing at the age of fourteen years and is a professional boxer. He was first issued with a BBBoC licence on 11 November 1992. He renewed that licence many times. On 14 October 2010 he

was granted licence number 1272110, valid until 1 August 2011. Accordingly as at 2 July 2011, he was bound by the ADR.

4. On the 2 July 2011 the athlete participated in a professional boxing match in Hamburg, Germany. The match was on the undercard of the world heavyweight championship bout between Wladimir Klitschko and David Haye. It was televised. He was stopped in the first round and lost the match.
5. After that bout he was selected for an in-competition doping control and accordingly provided a urine sample coded 3662251 ('the sample'). The sample was sent to the World Anti-Doping Agency ('WADA') accredited laboratory at the German Sports University, Cologne, Germany for analysis. The sample he provided was found to contain ephedrine, in a concentration (17.5 µg/ml) over the threshold limit for that substance (11 µg/ml).
6. Ephedrine is a Prohibited Substance in the WADA 2011 Prohibited List, listed in S6.b (Specified Stimulant). It is a 'Specified Substance'.
7. United Kingdom Anti-Doping Limited ('UKAD') is the National Anti-Doping Organisation for the United Kingdom and the Results Management Authority for the BBBoC.
8. The Tribunal held a hearing of the charge on 3 November 2011. The hearing was attended (in addition to the Tribunal) by
 - The Respondent
 - Tony Wyatt, Respondent's Counsel
 - Reaz Tayab, witness
 - Pervaz Khan, witness
 - Graham Arthur, Legal Director, UKAD
 - Jason Torrance, Paralegal, UKAD
 - Emma Price, member of UKAD testing team
 - Richard Harry, Dispute Resolution Manager, Sport Resolutions (UK)
 - Jenefer Lincoln, Sport Resolutions (UK)
 - Kazuki Shishido, observing

9. This document constitutes our final reasoned decision, reached after due consideration of the evidence, submissions and Arbitral Awards placed before us.

Procedural History

10. The Respondent was charged with a doping offence by letter dated 9 September 2011. The letter set out the details of the alleged doping offence and a summary of the facts and the evidence relied upon by UKAD. The letter also imposed a provisional suspension with effect from 10 September 2011.
11. The letter further informed him that he should reply to the letter indicating whether he wished to admit or deny the offence; whether he wished the B sample to be analysed pursuant to Article 7.6 ADR; to show cause why he should not be provisionally suspended; and to make submissions as to sanction.
12. By an email dated 16 September 2011 (timed 12.13), sent to Jason Torrance (UKAD) by Lorna Rainey (the wife of the Respondent's trainer) she stated that the Respondent did not wish to have the B sample analysed. By that express relinquishment, he waived his right to have the B sample tested.
13. On 11 October 2011 the Tribunal Chairman Christopher Quinlan QC conducted a Directions Hearing by telephone conference call. The Respondent was not present but consented to that hearing proceeding in his absence, his interests being represented by his legal representative Mr Ben Bansal. By consent, the Chairman issued procedural directions, which were promulgated in writing and dated 11 October 2011. Those Directions were varied following application by UKAD for further time in which to submit its response to the Respondent's case.

Determination of the Charge

14. ADR Article 2.1 provides that a doping offence shall be constituted by:
- "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 ('Therapeutic Use Exemption') granted in accordance with Article 4."*

15. The A sample taken from the Respondent on 2 July 2011 (3662251) contained ephedrine at a concentration of 17.5 µg/ml, which is greater than the threshold limit for that substance of 11 µg/ml. Ephedrine is a prohibited substance listed in S6.b (Specified Stimulant) WADA 2011 Prohibited List.
16. The Respondent does not possess a Therapeutic Use Exemption.
17. During the Directions hearing on 11 October Mr Bansal indicated that the Respondent would deny the offence. The Respondent's Counsel's written submissions dated 27 October 2010 contained an "acceptance" (on behalf of the Respondent) that the presence of ephedrine in the sample constituted a breach of ADR 2.1. The Respondent admitted the anti-doping violation before the Tribunal on 3 November 2011.

The Issues

18. Article 10.2 of the Rules provides-

"For an Anti-Doping Rule Violation under Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and/or Prohibited Method) that is the Participant's first violation, a period of Ineligibility of two years shall be imposed, unless the conditions for eliminating or reducing the period of ineligibility (as specified in Article 10.4 and/or Article 10.5) or the conditions for increasing the period of Ineligibility (as specified in Article 10.6) are met."

19. This is the Respondent's first violation.
20. The Respondent relied upon ADR Article 10.4 and Article 10.5.
21. Article 10.5.1 provides for an elimination or reduction of the period of ineligibility where the athlete can establish that he/she bears no fault or negligence.
22. Article 10.5.2 provides
"If a Participant establishes in an individual case that he or 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 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 reduced."

23. Therefore, the issues arising under Article 10.5 are:

- a. Whether the Respondent can establish how the Specified Substance (ephedrine) entered his body; and
- b. Whether the Respondent can establish either (i) no fault or negligence or (ii) no significant fault or negligence.

24. Article 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 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."

25. ADR Article 10.4.2 provides

"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."

26. The burden rests upon the Respondent to establish ADR Article 10.4. If he succeeds in so doing, his degree of fault shall be the criterion by which any reduction of the period of Ineligibility is assessed.

27. Therefore, the issues in this case arising under Article 10.4 are:

- a. Whether the Respondent can establish how the Specified Substance (ephedrine) entered his body;
- b. Whether the Respondent can establish (with corroborating evidence in addition to his own word) that, when he ingested the Specific Substance, he had no intent to enhance his sporting performance or to mask the use of a performance enhancing substance; and
- c. An assessment of sanction by reference to the Respondent's degree of fault.

The Respondent's Case

28. The Respondent is a professional boxer. In a long career he has been both British and European cruiserweight champion. Lorna Rainey offered him the fight approximately four weeks before 2 July. He trained at his regular gym, the Lions' Den Gym in Chadwell Heath, Essex. When he was offered the fight he weighed 15st 10lbs; he lost 3 to 4lbs a day to make the 14st 4lbs weight limit. He did so following a strict training regime and diet. He also took a 'fat burner', namely "apple cider vinegar" tablets which he stopped taking a week before the fight.
29. He travelled to Germany with his trainer Howard Rainey and his 'second' "Jumbo" on Thursday 30 June. He was supported by a group of friends who travelled out the following day, Friday. That group included Pervaz Khan ('PK') and Reaz Tayab ('RT'), both of whom gave evidence before the Tribunal. The Respondent said he met them at their hotel at about 3.00pm; he went to collect t-shirts for his team.
30. There were six or seven of them in all and RT made some herbal tea. The Respondent drinks a lot of herbal tea and has done so for twenty years. He does not drink coffee or "normal tea". He said a "couple [of them] had the snuffles", as did he. RT offered him a cup of herbal tea, just as an office worker might offer another a "cup of tea". In his written statement he stated "...I asked him [RT] what it was as it was without milk and he told me that it was a herbal green tea. I didn't like the taste and asked him to put two spoons of sugar in the tea. I drank the tea which took me a bit of time as it was a large mug of tea"
31. He was knocked out in the first round. Before he went to hospital, he provided the urine sample. He did not declare the tea (or any other substance) on the doping

control form because it was (so far as he was concerned) just a cup of herbal tea and he thought no more of it.

32. He said he was in training in Spain in September with PK and RT (and others) when he was informed of the adverse analytical finding. In his witness statement (which was not challenged) Jason Torrance, UKAD Paralegal Officer said he spoke to the Respondent by telephone at approximately 12.25pm on 9 September. During that conversation Mr Torrance recalled the Respondent saying words to the effect that he "did not do drugs". When asked if he took any medicines and supplements he said something to this effect: "I have been using natural supplements, like herbal supplements, red bull and fat burners". He said one was a Chinese supplement called, he thought, Guarana. He said he did not know the name of the 'fat burner'.
33. In his written statement the Respondent said after he returned from Spain he spoke to RT about the herbal tea drink. It was then that RT told him he put Do Do Chesteze in it to "combat the flu before it kicks in". RT told him he had been doing so "for years". He said he asked RT to check the ingredient and after doing so told him ephedrine was present in both the tea and the Do Do Chesteze.
34. UKAD, through Mr Arthur, tested the Respondent's account in cross-examination. He had taken the fat burner for the last four years but had no trouble making the weight for the 2 July bout. RT offered him the tea and everyone drank the same tea. He had the tea as a beverage and not because he "wasn't feeling well". He said his mother drank Yogi tea and he had had it before. He said he did not like it and asked RT to put sugar in it.
35. Questioned by the Tribunal, he said he had been tested nine or ten times before 2 July. He had "a bit of cold" before the fight. He said he never took milk in his tea as he drank herbal tea. He tasted the tea and asked RT for sugar. He said RT put sugar or honey in it. He took two "gulps" or "sips" (he used both words) and then "left it"; it tasted peculiar. Asked about the conversation with Mr Torrance he said he could not recall the detail; the fat burner was "apple cider vinegar tablets", which he stopped a week before the fight.
36. Reaz Tayab gave evidence. He has known the Respondent for approximately two years. He said about eight of them travelled to Germany to watch the fight. It was a

long journey and wet on the 2 July. The Respondent visited him and the others at approximately 5.00pm on the afternoon of 2 July. He said the Respondent was “a bit under the weather” as were a number of the others. Therefore, he fixed a tea-based drink. He was shown a box of Yogi Breathe Deep tea and said that was the tea he made. He often travelled with it because he often got “ill” (with cold-like symptoms) following flights and/or when staying in air-conditioned hotel rooms. It and the Do Do Chesteze helps “clear [his] chest”. He crushed three or four Do Do Chesteze tablets and put them into the teapot. It was a drink that was first given to him some time ago by a “trainer” to help “clear [him] up”. It was something he had seen prepared by others in the gym. He did not look at the ingredients of Do Do Chesteze and said he had no reason to think the Respondent should not be taking them.

37. He prepared the tea drink and then gave it to his friends, including the Respondent, he thought it “would make him better”. He did not tell him what he had done; he just told him “it was herbal tea and said it might well help it”.

38. Mr Arthur questioned him. He said he had seen “people who train” and “people who fight” put Do Do Chesteze into herbal tea. He thought it “was the norm”. The Respondent had a cough and was rubbing his nose and “did not look his normal self”. He made the tea without asking his friends and distributed it, including to the Respondent without thinking “anything of it”. He heard about the adverse analytical finding when in Spain. He recalled the Respondent asking him in Spain what he had put in the tea. In response to a final question from Mr Arthur, he said his account was true.

39. Questioned by the Tribunal he said he poured six cups of tea. He did not know how much the Respondent drank and he, the Respondent, did not mention the tea to him nor could he recall him saying anything about it. He said he made the drink to help those who were “under the weather” but did not tell any of them what he was doing or what he had done. He could not explain why he, in effect, dispensed medication to friends without telling them. He had been around professional boxers for some years and knew they were subject to anti-doping testing. It did not occur to him, he said, to tell the Respondent what he was doing. He said he had a vague conversation with the Respondent in Spain during which he told him he put a cold remedy in the tea. He had a “more detailed conversation” with him a week later when they were both in England.

40. Pervaz Khan gave evidence. He trains with the Respondent at the said gym. He travelled with the others to watch the fight. He said he recalled RT making the herbal tea. In his written statement he recalled RT made the tea to "help with the cold": he said they all got caught in the wet weather and "were feeling under the weather". He believed they all had some tea. He was with the others in Spain (they were staying in his villa) when it "came out that [RT] might have put some herbal stuff in the tea".
41. Questioned by Mr Arthur he said he could not say "everyone was under the weather". He said RT said (about the tea), "get that down you, it'll make you feel good". He was pretty sure he "became aware in Spain" that "it was probably something [RT] put in the drink" which caused the adverse analytical finding. He repeated that before he left Spain he knew "it" (the adverse analytical finding) came about as a result of RT putting something in the tea.
42. The Tribunal was provided with witness statements from two other persons who were said to be in Germany with PK and RT, together with a statement from a pharmacist. Those witnesses did not attend the hearing and Mr Wyatt did not rely on any of them. Accordingly, the Tribunal disregarded the content of those statements.
43. For the sake of completeness, UKAD relied upon written reports from Professor Vivian James and Michael Stow. The Respondent did not take issue with the content of either report. Professor James observed that ephedrine is a central nervous system stimulant, which, inter alia, elevates mood and combats fatigue; it is used to achieve weight loss. He comments upon the concentration of the ephedrine in the sample but that opinion was based upon the Respondent having taken a single tablet of Do Do Chestezze, together with a herbal preparation containing up to approximately 3mg of ephedrine. That was not the evidence before the Tribunal. In any event, he observed that it is not possible from the urinary data to draw any conclusion as to the dose of ephedrine actually ingested.
44. Michael Stow stated that ephedrine is not used or known to possess the ability to be a masking agent of other Prohibited Substances.

Tribunal's Decision

45. Articles 10.4.1, 10.5.1 and 10.5.2 each require the Respondent to establish how the Prohibited Substance entered his system. The standard of proof is the balance of probabilities (ADR Article 8.3.2). If the Respondent cannot establish to that standard how the ephedrine entered his system then he cannot succeed in eliminating the otherwise minimum period of Ineligibility by Article 10.5.1 or reducing the otherwise minimum period of Ineligibility by application of Articles 10.4.1 or 10.5.2.
46. In *WADA v International Federation of Associated Wrestling Styles, Maria Stadnyik and Azerbaijan Wrestling Federation* (CAS 2007/A/1399) the CAS Arbitral Panel observed (in a 'spiking case') that "how a Prohibited Substance entered an athlete's system is a fundamental precondition to the defence of no significant fault or negligence".
47. The Respondent's case is that the ephedrine in the sample came from his drinking the tea made by RT. He said he had not knowingly taken it, either in the tea or in any other way or by any other method. He asserted that the tea was the source of the ephedrine for these reasons -
- a. After he was informed of the adverse analytical finding, RT told him he had put a medicinal product called Do Do Chesteze in the herbal tea before he gave it to him. Ephedrine is a listed ingredient of Do Do Chesteze.
 - b. The herbal tea in question was 'Yogi Breathe Deep' which might ordinarily contain ephedrine. It was not listed as an ingredient on any of the Yogi Breathe Deep boxes adduced (by UKAD and on behalf of the Respondent) in the hearing. However, the Tribunal was shown a two-page advertisement for 'Yogi Tea' from the website of what was said to be an American supplier: it revealed that the said "Yogi Tea" contains Ephedra.
 - c. He relied upon RT's evidence.
 - d. He knew of no other actual or potential source of the ephedrine.
48. In its written submissions, UKAD reserved its position on the 'route of ingestion' issue until the evidence had been heard and tested. It accepted that Do Do Chesteze contains ephedrine. It accepted that *ordinarily* (i.e. without anything being added to it) 'Yogi Breathe Deep' tea might contain ephedrine. During his closing submissions, Mr Arthur described the evidence of PK and RT as "vague and inconsistent". Pressed

by the Tribunal as to whether UKAD had a positive case on this important issue, he did not advance one.

49. At the heart of the Respondent's explanation is the evidence of RT. It is the principal evidence upon which the Respondent relied in order to establish how the Prohibited Substance entered his system. The Respondent's case is that he does not know how the ephedrine came to be in the sample, other than what RT told him. RT's reliability and credibility is central to the question of whether the Respondent has proved, on the balance of probabilities, how the ephedrine entered his system. PK's evidence did not assist on that issue.

50. The Tribunal is not satisfied on the balance of probabilities that the ephedrine entered his system in the way the Respondent claimed. The Tribunal did not find RT a credible and reliable witness and rejects his assertion that he crushed and added Do Do Chesteze tablets to a herbal tea drink:

- a. RT claimed he prepared the tea to help the Respondent and others who were "under the weather". His account to the Tribunal was that he did not tell the Respondent he added Do Do Chesteze. Putting to one side for a moment the sheer improbability that they were all (or a number of them) suffering from cold-like symptoms (notwithstanding it was, we were told, wet), the Tribunal found it incredible that he would not tell the Respondent he had done so. He could not explain why he did not tell him (or any other person in the room) that he was, in effect, administering a medicine, without informing him or them. If it was for the Respondent's or their benefit, why not say so? That he thought there was no reason why the Respondent should not take Do Do Chesteze is no answer to the point. Rather, one would have expected him to mention it in such circumstances.
- b. Further, that account is the more incredible when one remembers that RT has been interested in boxing and been around boxers for some years. He knows the Respondent, like all professional boxers, is at risk of anti-doping testing. He knew a few hours later he was to participate in a televised bout. We did not consider it credible that in those circumstances he would secretly (i.e. without telling him) administer medication.

- c. Further we did not consider credible his account that he crushed the tablets and mixed the drinks, effectively in secret. He told no other nor was he (so far as the evidence demonstrates) seen by any other.
- d. Further, the Respondent's and RT's evidence was inconsistent.
 - i. RT told the Tribunal that when he handed the tea to him, he said, "it might well help". The Respondent's evidence was that he was offered it as a cup of tea; it was a beverage, pure and simple. That was also inconsistent with PK's recollection.
 - ii. The Respondent said he took a sip or gulp and asked for sugar; RT could not recall him saying any such thing.
 - iii. In his written statement the Respondent said he drank the tea, which took some time because it was a large mug. In his oral account, he said he took only two sips or gulps and did not like the taste. The other evidence was that it tasted as one might expect herbal tea to taste: there was no evidence that the others thought it abnormal. It was not a tea new to the Respondent: he had drunk it before and his mother drank it.
- e. The evidence of the timing and circumstances of the apparent confession by RT was inconsistent. The burden of RT and PK's evidence was that RT told the Respondent in Spain that he put something in the tea. The Respondent (in his statement) said it was after he returned to the United Kingdom.
- f. The evidence of Professor James did not assist on the source of the ephedrine. It did not assist on the dose. As for the timing of ingestion Professor James expressed an opinion but the factual basis for that opinion was materially different from the Respondent's evidence: the Professor was not asked to comment on the concentration of urinary ephedrine based on two sips or gulps of a tea drink, volume unknown (but sufficient for six cups), in which three or four Do Do Chesteze tablets had been crushed.

51. As for the tea *alone* being the source of the ephedrine, the Tribunal entertained very real and substantial doubt as to whether there was ever a sharing of tea as described. However, even accepting that it probably happened, the evidence before the Tribunal did not establish that the tea used by RT probably contained (without the Do Do Chesteze) ephedrine. RT identified a Yogi Breathe Deep box as being "the tea" he brewed. If it was that particular brand, there was no evidence that it contained ephedrine. The Yogi tea advertised on an American supplier's website

appears to contain ephedrine. However there was no evidence that that was the tea RT used. Accordingly, even if there was a sharing of tea in the hotel room, it has not been established that the tea alone was the probable source of the ephedrine.

52. Consequently the Respondent failed to discharge the burden of proving how the Prohibited Substance entered his system and so he cannot succeed in eliminating the otherwise minimum period of Ineligibility by Article 10.5.1 or reducing the otherwise minimum period of Ineligibility by application of Articles 10.4.1 or 10.5.2.

Ineligibility

53. The period of ineligibility imposed on the Respondent is two (2) years.

54. In accordance with ADR Article 10.9.3 the period of ineligibility shall start on 10 September 2011.

55. The Respondent's status during the period of ineligibility is as provided in ADR Article 10.10.

Summary

56. For the reasons set out above, the Tribunal makes the following decision

- i. A Doping Offence contrary to ADR Article 2.1 has been established.
- ii. The period of ineligibility imposed is two (2) years from 10 September 2011.

Right of Appeal

57. In accordance with ADR Article 13.4.1 the Respondent may appeal against this decision by lodging a Notice of Appeal within 21 days of receipt hereof.

Christopher Quinlan QC, Chairman

Dr Barry O'Driscoll

Lorraine Johnson

A handwritten signature in black ink, appearing to be 'Chibwe' or similar, written in a cursive style.

Signed on behalf of the Tribunal

7 November 2011