

NATIONAL ANTI-DOPING PANEL

*Before:*

Christopher Quinlan QC

Professor Peter Sever

Lorraine Johnson

BETWEEN:

UK Anti-Doping

*National Anti-Doping Organisation*

-and-

Dillian Whyte

*Respondent*

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

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FINAL DECISION OF THE ANTI-DOPING TRIBUNAL  
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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 Dillian Whyte (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').
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 11 April 1988 and is twenty-four years of age. He started boxing in 2009 and became a professional boxer in 2011. Accordingly he was bound by the ADR.
4. On the 13 October 2012 the Respondent participated in a professional heavyweight boxing match against Sandor Balogh staged at the Bluewater centre, Kent. The match was on the undercard of the European Super Middleweight bout involving James DeGale MBE. It was televised. The Respondent won the fight.
5. After the bout he was selected for an in-competition doping control and accordingly provided a urine sample coded A1096011 ('the sample'). The sample was sent to the World Anti-Doping Agency ('WADA') accredited laboratory at King's College, London for analysis. The sample he provided was found to contain methylhexanamine, a Prohibited Substance in the WADA 2012 Prohibited List, listed in S6.b (Specified Stimulants). It is a 'Specified Substance'.
6. United Kingdom Anti-Doping Limited ('UKAD') is the National Anti-Doping Organisation for the United Kingdom and the Results Management Authority for the BBBoC.
7. The Tribunal held a hearing of the charge on 9 January 2013. The hearing was attended (in addition to the Tribunal) by
  - ... The Respondent
  - ... Nick De Marco and Tom Mountford, Respondent's Counsel
  - ... Liz Ellen and Bradley Wynn, Respondent's representatives
  - ... Joseph Long, Respondent's manager and witness
  - ... Christopher Okoh, Respondent's manager and coach
  - ... Graham Arthur, Legal Director, UKAD
  - ... Jason Torrance, Paralegal, UKAD
  - ... Nicola Newman, UKAD
  - ... Richard Harry, Dispute Resolution Manager, Sport Resolutions (UK)
  - ... Jenefer Lincoln, Sport Resolutions (UK)
  - ... Chris Lavey, Sport Resolutions (UK)
  - ... Fukutaro Senga, observing
8. This document constitutes our final reasoned decision, reached after due consideration of the evidence, submissions and Arbitral Awards placed before us.

## Procedural History

9. The Respondent was charged with a doping offence by letter dated 5 November 2012. 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 "immediate effect".
10. The letter further informed him that he should reply to the letter indicating whether he wished to admit or dispute the charge; 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.
11. By an email dated 6 November 2012 (timed 12.35), sent to Hannah McLean (UKAD) Joseph Long ('JL') 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. He also stated that: "*we...can confirm that product jack3d was took [sic] by Dillian as a pre-workout supplement in the two weeks leading up to his bout*". The request (made in that email) was for "a sanction rather than a hearing initially".
12. On 18 December 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 manager JL. By consent, the Chairman issued procedural directions, which were promulgated in writing and dated 19 December 2012.

## Determination of the Charge

13. ADR Article 2.1 provides that an anti-doping rule violation 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."*

14. The A sample taken from the Respondent on 13 October 2012 (A1096011) contained methylhexaneamine, in a concentration of approximately 15 micrograms per millilitre. Methylhexaneamine is a Prohibited Substance, listed in S6.b (Specified Stimulants). It is a 'Specified Substance'.

15. The Respondent does not possess a Therapeutic Use Exemption.
16. During the Directions hearing on 19 December JL indicated that the Respondent would admit the offence. The Respondent's Counsels' written submissions dated 4 January 2012 stated: "As the Respondent has admitted the Charge under [AD]Rule 2.1, the present hearing is concerned with the appropriate sanction to be imposed" (paragraph 7). The Respondent admitted the anti-doping violation before the Tribunal on 9 January 2013.

### The Issues

17. 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."*

18. This is the Respondent's first violation.

19. The Respondent relied upon ADR Article 10.4 and Article 10.5.2.

20. 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."*

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

- a. Whether the Respondent can establish how the Specified Substance (methylhexaneamine) entered his body; and

- b. Whether the Respondent can establish either (i) no fault or negligence or (ii) no significant fault or negligence.

22. 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."*

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."*

23. 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.
24. Therefore, the issues in this case arising under Article 10.4 are:
  - a. Whether the Respondent can establish how the Specified Substance (methylnhexaneamine) entered his body;
  - b. Whether the Respondent can establish (with corroborating evidence in addition to his own word) that, when he ingested the Specified 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

25. The Respondent started kickboxing when aged fifteen years. He moved to amateur boxing in 2009 and registered as a professional in mid-2011; his first professional bout was on 13 May 2011.

26. He said he had not received any anti-doping education or information. The extent of his knowledge, he said, was that athletes were not permitted to take "*growth hormones or steroids*". He had "*some limited awareness that some supplements might contain substances such as testosterone*". He was unaware of methylhexanamine. He said it "*never occurred to him*" that a pre-workout drink or fat burner would contain a prohibited substance. Such information as the BBBoC supplied was sent directly to his licensed manager, Christopher Okoh ('CO'). None of that material was supplied to him; he relied largely upon his managers and coach.
27. He takes supplements, principally fat burner products and energy drinks. He is sponsored by a company named Muscle Fury ('MF') that provides products of that kind. Shortly after that arrangement started, JL asked MF's Chief Executive Officer (Mike Williams) to ensure the supplied products did not contain any Prohibited Substance. In consequence JL informed the Respondent that he must stop taking a MF supplied product which contained a "prohibited stimulant". He did so.
28. On 15 September 2012 the Respondent was selected for an anti-doping test, when he fought at York Hall, London. That was his ninth professional fight and the first time he had been tested.
29. About two weeks before the 13 October fight, Daniel Strauss ('DS') recommended Jack3d. The Respondent knew and respected DS, a Jiu-Jitsu athlete who competes in international competitions. He said DS suggested he try it as he thought he was "*looking down*". He told the Tribunal he had seen DS and others use it. He said he told DS that he had been tested. He tried it there and then and it "*made me feel less tired during the training session*". DS told him he bought it from a shop in Barnet called Xtreme Mass Food.
30. Thereafter, he went to the said shop but said he did not ask specifically for Jack3d. He told the shopkeeper he was a professional boxer and "*wanted something to help me get through my [training] sessions*". He was directed to three products, one of which was Jack3d. He bought and started taking Jack3d. He said he told JL and CO he was using the product. He relied on them to tell him if he should not use it. They never told him to stop. The Respondent took Jack3d thereafter up to and including the day of the fight. He trained three times a day and used Jack3d before each evening training session.

31. In his statement, which UKAD did not challenge, DS said International Brazilian Ju-Jitsu "*does not have an anti-doping regime*". He added it was not an issue he "*paid much attention to*" though stated he did not condone doping. In that statement he said he used Jack3d and in September 2012 suggested that the Respondent use it as he said he was tired. He suggested he use it to "*boost his energy levels*". He also records that the Respondent did so and reported to him that he "*found it gave him more energy*".
32. The Respondent relied upon a further witness statement, not challenged by UKAD, from Nicholas Brooks ('NB'). He uses the same Mill Hill gym as the Respondent and DS. He has known the Respondent since 2007 and they train together. He used Jack3d until mid-November 2012 when he discovered it was "*banned*".
33. The Respondent was tested immediately after the fight, which he won. On the doping control form he listed "*Maxi Force, high energy drink, fat burner, vitamin, BCCA protein, carb drinks, vitamins and joint care*". He told the Tribunal that "high energy drink" was a reference to Jack3d; he said he could not recall its name, but showed the doping control official the tub of Jack3d which was in his kit bag. UKAD expressly did not challenge that evidence.
34. Mr Arthur, asked the Respondent questions. Such knowledge as he said he had about the anti-doping regime came from people in the gyms. He did as his "team" advised him. The MF product they told him to stop taking was a pre-workout tablet. The fight on 13 October was one he expected to win; his opponent had won three of his thirty fights. He said he did not ask MF for a product to help with his tiredness because he "*looked up*" to DS and trusted his recommendation.
35. The Respondent said that on the day of the fight, he used four/five scoops of Jack3d to make up a large drink. He drank from it during the evening, as he waited to fight: it gave him "a bit of energy". He could not recall if he showed CO and/or JL the Jack3d tub but thought JL saw it when he stayed with him overnight 12/13 October. He did not undertake any research or checks to establish what Jack3d contained; he did not read the ingredients list on the label. He never asked anyone if it contained a prohibited or banned substance. He relied upon the recommendations from DS and the shopkeeper. He was never told by JL and/or CO to stop taking it and "*thought it must be fine*".
36. Joseph Long gave evidence. He adopted as true and accurate his written statement. He confirmed there was an occasion about twelve months ago when the Respondent was advised to stop using a MF product. He said

he asked Mike Williams to check his products against a list of prohibited substances given to him by CO. He also confirmed that the Respondent told him he was using Jack3d. He was unaware of that product, that it contained a Prohibited Substance and knew nothing, he said, of previous anti-doping cases (including recent boxing cases) in which athletes had used the product and thereby committed anti-doping rule violations. Due to pressures connected with arranging the Respondent's bout, he "*neglected*" to check Jack3d, either with Mike Williams or at all. CO made no such checks.

37. Mr Arthur questioned him. He said he saw the Jack3d tub the day before the fight. He had previously asked Mike Williams to check a product the Respondent acquired and used following a training camp in Denver.
38. For the sake of completeness, Graham Arthur and Hannah McLean interviewed the Respondent in the presence of JL on 8 November 2012. The Tribunal was provided with an agreed transcript of that interview.

### **Tribunal's Decision**

#### **How the Specified Substance entered his body**

39. Articles 10.4.1 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).
40. The only evidence of the source of the methylhexaneamine was the Respondent's admitted taking of Jack3d. 1,3-dimethylamylamine is listed on the product label as an ingredient. 1,3-dimethylamylamine is a synonym of methylhexaneamine. UKAD "accepted" the Jack3d was the source of the methylhexaneamine.
41. The Tribunal was satisfied that the methylhexaneamine present in the Player's sample came from his ingestion of Jack3d.

### **ADR 10.4**

#### **Intention to enhance sport performance or to mask the use of a performance enhancing substance**

42. There was no suggestion of an intention to mask the use of a performance enhancing substance. The live issue was whether the Respondent could establish to the Tribunal's comfortable satisfaction, supported by



corroborating evidence, that he did not consume the Specified Substance intending to enhance sport performance.

43. The commentary to Article 10.4 World Anti-Doping Code 2009 ('WADC'), from which ADR 10.4 derives, provides:

*"Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include: the fact that the nature of the Specified Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete's open Use or disclosure of his or her Use of the Specified Substance; and a contemporaneous medical records file substantiating the non sport-related prescription for the Specified Substance. Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance."*

44. The Respondent accepted that his intention in taking Jack3d was to give him energy before evening training sessions and on the day of and before the fight. In their written submissions his Counsel accepted that *"on a literal interpretation his consumption of the Jack3d product was to his enhance his sport performance"*. The Tribunal agrees: the Respondent intended by his use of Jack3d to enhance his sport performance.

45. However, the Respondent's case was that he did not know Jack3d contained methylhexanamine or any Specified Substance. It followed therefore that since he did not know that by using Jack3d he was consuming a Specified Substance, he could not have intended to use it to enhance his sport performance. That submission is consistent with the decision of the CAS in *Flavia Oliveira v. USADA*, CAS 2010/A/2107 (10 December 2010) but inconsistent with the subsequent CAS decision in *Kurt Foggo v. National Rugby League*, CAS/A2/2011 (3 May 2011), where the court declined to follow *Oliveira*.

46. In *Oliveira* the Panel opined that the said words in WADC Article 10.4 did not require the athlete to *"...to prove that she did not take the product...with the intent to enhance sport performance"*<sup>1</sup>. The Panel concluded that they require *"[the athlete] only to prove her ingestion of [the Specified Substance] was not intended to enhance sport performance"*<sup>2</sup> The effect of that approach is that the intent relates to the Specified Substance and not to the product in which it is contained (for example Jack3d).

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<sup>1</sup> paragraph 9.14

<sup>2</sup> paragraph 9.17

47. In *Foggo* the Panel ruled that the effect of Article 10.4 was "to require the athlete to show that the ingestion of the product [for example the supplement] which contained the Specified Substance was not intended to enhance his sport performance"<sup>3</sup>. This approach, found [obiter] support in the *UKAD v Martin Gleeson*, 13 June 2011 in which the Panel (whilst expressly not deciding the point) regarded the *Oliveira* approach as "a difficult proposition in the light of the general law, the wording of the Article construed as a whole, the policy of the WADA code and the reasoning in those two cases".
48. There is a growing body of sports arbitration jurisprudence on this topic. It divides along *Oliveira* and *Foggo* lines. On 12 September 2012 CAS delivered its decision in *Erkand Qerimaj v International Weightlifting Federation* CAS 2012/A/2822. The case concerned a weightlifter who used a supplement called Body Surge which, unknown to him, contained methylhexaneamine. It was identified in an in-competition sample. The athlete used the supplement to prevent injuries and help muscle recovery during training.
49. The Panel found he used the product to enhance sport performance<sup>4</sup>. It expressed itself "in principle prepared to follow the approach taken"<sup>5</sup> in *Oliveira*. "Intent" should be interpreted in "a broad sense". It can be established if an athlete knowingly ingests a Prohibited Substance: he then acts with "direct intent". However, "it suffices to qualify the athlete's behaviour as intentional, if the latter acts with indirect intent only, i.e. if the athlete's behaviour is primarily focused on one result, but in case a collateral result materializes, the latter would equally be accepted by the athlete"<sup>6</sup>. Such indirect intent is determined by the surrounding circumstances
50. More recently, a different constitution of CAS decided (by majority) *Dimitar Kutrovsky v International Tennis Federation* CAS 2012/A/2804 (3 October 2012) in accordance with the *Foggo* approach. Kutrovsky was a twenty-five year old professional tennis player. He provided an in-competition sample containing methylhexaneamine. The accepted source of the methylhexaneamine was Jack3d which he used to alleviate fatigue.

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<sup>3</sup> paragraph 46

<sup>4</sup> paragraph 8.4

<sup>5</sup> paragraph 8.9

<sup>6</sup> paragraph 8.14

51. The majority of the Panel found that "*an athlete's knowledge or lack of knowledge that he has ingested a specified substance is relevant to the issue of intent but cannot, pace Oliveira, of itself decide it*"<sup>7</sup>. Further, the majority found the second condition of Article 10.4 requires the athlete to establish that "*in taking the specified substance in the form in which he took it, he did not intend to enhance his performance*"<sup>8</sup>.
52. The different approaches can have significant consequences. If the *Oliveria/Qerimaj* approach prevails, ADR 10.4 is, all other matters being satisfied, capable of applying to the Respondent's case. If *Foggo/Kutrovsky* is followed it is accepted that on the facts of this case the Tribunal is bound to conclude ADR 10.4 does not apply and the sanction is two years ineligibility, subject to any application of ADR 10.5.
53. The Respondent relied on *Qerimaj*. He submitted that he did not have direct intent as he did not know Jack3d contained methylhexanamine. He could not properly be found to have acted with "indirect intent" for he "quite reasonably" relied upon those around him, DS and the man in the shop.
54. Mr Arthur submitted that there was a "regrettable absence of clarity as to which approach prevails". On behalf of the UKAD, he agreed with the Respondent in inviting the Tribunal to follow *Qerimaj*. In his closing submissions Mr Arthur, when asked, submitted that the Respondent had "*probably done enough to get within Qerimaj*" by which he meant the Respondent had "*probably*" not acted with indirect intent.
55. However, both parties expressly acknowledged that as it was a "*legal issue*" it was open to the Tribunal to take a different view. It was, said Mr Arthur, "*ultimately a decision for the Panel*" as to which approach it adopted. Mr De Marco expressly agreed with UKAD observing that the Tribunal was "*at liberty to disregard [the parties] and reach [its] own decision*" on the correct approach, though observed that such a decision (i.e. to disregard the parties) would be "*surprising*".
56. The CAS decisions have equal status. Neither approach takes precedence. As the Panel in *Kutrovsky* observed the "*conflict in the jurisprudence is unsatisfactory for those who have to apply and adjudicate upon cases in the Second Condition of Article 10.4 is in play*". They also noted that the latest draft of the proposed amendments to the WADA Code, which would be effective from 1 January 2015, favours the *Foggo* approach.

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<sup>7</sup> paragraph 9.15

<sup>8</sup> paragraph 9.15.1

57. For the reasons articulated in that Arbitral Award the Tribunal prefers the *Kutrovsky* approach. Applying that interpretation of ADR 10.4 to the facts of this case, the Respondent fails to comfortably satisfy the Tribunal that he did not take the Specified Substance in Jack3d to enhance his sport performance. Indeed, that was the very purpose for his ingestion of Jack3d, and so, *pace Kutrovsky*, the ingestion of methylhexaneamine.
58. However, given the invitation of the parties to apply *Qerimaj*, the Tribunal considered its application to the facts of this case. Accepting that he did not know Jack3d contained methylhexaneamine then, *pace* the *Qerimaj* interpretation, he could not be found to have acted with direct intent.
59. What of the *Qerimaj* "indirect intent"? The Tribunal does not consider Mr Arthur's submission that the Respondent had "*probably done enough*" to be a concession by UKAD that he discharged the burden to prove he was not reckless. In any event, it is a live issue for the Tribunal to resolve. As the Tribunal understands the reasoning in *Qerimaj* that Panel identified three distinct states of mind: intent ("direct intent"), reckless ("indirect intent") and negligence. An athlete within the first two falls outwith the scope of Article 10.4; the negligent one may come within it. Assessing where the individual athlete falls on the culpability spectrum is a judgement by reference to all the circumstances. It involves an assessment of the risk taken by the athlete: "*the more risky the behaviour is in which an athlete engages the higher is the standard of proof for the absence of fault*"<sup>9</sup>.
60. Applying the *Qerimaj* concept of indirect intent to the factual findings in the instant case the Tribunal is not comfortably satisfied that he did not have indirect intent:
- a. The Respondent is personally responsible for what he ingests. He cannot delegate that responsibility to another. Further, it is his responsibility to acquaint himself with the ADR. He is a professional athlete.
  - b. The parties agreed that he had not received any anti-doping education. But, he knew something of it: he had been tested very recently. Further, he had previously been told to stop taking a product because it contained a Prohibited Substance and, did so.
  - c. The accepted evidence that he told his managers and coach only takes him so far. He did not wait for them to inform him it was "safe". They never did, not least because they never carried out research or checks. An accurate characterisation of the evidence is this: he told them he was taking the product

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<sup>9</sup> paragraph 8.11(3)

and they never told him to stop.

- d. In deciding to use Jack3d he relied upon the recommendations of DS and the male working in the shop. It was not reasonable for him to do so. He looked up to DS who is (as he knew) an international athlete. He is, though (as it turns out) one who had never "*paid much attention*" to the anti-doping regime. The assertion in DS's statement that "*I had no idea that it contained any banned substance*" is not the same as a positive declaration that it did not. Further, the Respondent did not assert in his written statement or in his testimony that DS did give him that assurance. That DS knew he was a professional boxer and subject to an anti-doping regime is not the same. Similarly, he did not speak of receiving any such positive assurance from the man in the shop. Even if he had, it would, in the Tribunal's judgment have been reckless to act on assurances from such people 'remote' to him. They are 'remote' in the sense that neither has any personal or professional relationship with him, such as his manager or coach would. He knew nothing of the extent of their knowledge, if any, of the WADA regime.
- e. He told the Tribunal that prior to purchasing the product, he did not read the ingredients on the label. He carried out no researches on the product, using the Internet or otherwise. As JL told the Tribunal, "seconds" researching Jack3d on the Internet after the adverse finding revealed it contained a Prohibited Substance.
- f. He could have asked JL and/or CO to obtain a product or advice from his sponsor MF. It is surprising that he did not.
- g. The nature of the product is highly relevant. The Panel in *Qerimaj* noted:  
*"...the question if and so to what extent the athlete is obliged to do research on a product and its contents is also determined by the purpose of the product. The more the product is likely to be used in a sport/training related context, in other words to enhance sport performance, and the more it is processed, the likelier it is that it contains prohibited/specified substances. It is beyond the scope of the Panel...to establish a graduated system of the duty of care an athlete has to take for every single product (food, medication, supplements) that he ingests in order to be able to claim not having had intent. However, in the case of a food supplement like Body Surge, that is taken in a sport/training related context the athlete has a certain level of precautionary measures in order not to qualify his behaviour as reckless, i.e. with indirect intent"*<sup>10</sup>.
- Qerimaj* was adjudged to have done sufficient for his behaviour not to be reckless. He relied upon assurances from his personal trainer, a former weightlifter.

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<sup>10</sup> paragraph 8.15

Jack3d is a manufactured pre-workout supplement. Its purpose is to enhance sport performance. The Respondent was taking it for that purpose and doing so right up until shortly before he fought. The connection between his taking of the product containing the Specified Substance and the competition was immediate. Notwithstanding his 'open use' of it and the fact he brought it to the attention of the doping control officer (in general terms on the form and expressly by showing him the tub – which UKAD accepted he did), the circumstances required that he exercised greater precautionary measures. He failed to satisfy the Tribunal that he had done so.

61. Accordingly the Tribunal is not comfortably satisfied, *per Qerimaj*, that the Respondent did not intend to enhance sport performance through the use of the Specified Substance.

#### **ADR 10.5.2**

62. If the Tribunal was against the Respondent on ADR 10.4, then he relied upon ADR 10.5.2. ("No Significant Fault or Negligence") in accordance with the unanimous part of the *Kutrovsky* decision. To succeed under Article 10.5.2, he would have to establish that his fault or negligence was not significant in relationship to the anti-doping violation.
63. In his written submissions Mr Arthur argued that if the Respondent failed on ADR 10.4 it was "*difficult, albeit not impossible*" for him to rely on ADR 10.5.2, adding that "*we wish to make it very clear that we do not accept that the Athlete can or should benefit from Article 10.5.2 in this case*".
64. As recorded in paragraph 61 hereof, the Respondent's enquiries about the contents of Jack3d were wholly inadequate. He did not seek medical or other expert advice on the product's contents. He relied on the advice of the shop attendant and his friend from the gym. He did not rely on advice from CO or JL for he received none. Consequently the Respondent failed to discharge the burden of establishing that he was not significantly at fault and so cannot succeed in reducing the otherwise minimum period of Ineligibility by application of Article 10.5.2.

#### **Ineligibility**

65. By operation of ADR 9.1 the Respondent's result from the 13 October bout are disqualified with all resulting consequences.

66. The period of ineligibility imposed on the Respondent is two (2) years.
67. The athlete immediately acknowledged the anti-doping rule violation. Therefore and in accordance with ADR Article 10.9.2 (and *UKAD v Barrett*, 9 October 2012) the period of ineligibility shall start on 13 October 2012 and expire at midnight on 12 October 2014.
68. The Respondent's status during the period of ineligibility is as provided in ADR Article 10.10.

### Summary

69. 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 13 October 2012.
  - iii. The Respondent's results from the 13 October bout are disqualified.

### Right of Appeal

70. 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**

On behalf of the Tribunal

22 January 2013



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