SPORT RESOLUTIONS (UK)

SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/0000120071

NATIONAL ANTI-DOPING PANEL

Before:

Paul Gilroy QC
(Chairman)
Dr Kitrina Douglas
(Specialist Member)
Dr Terry Crystal
(Specialist Member)

Between:

UK Anti-Doping — Anti-Doping Organisation

and

Ryan Llewellyn — Respondent

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF THE WELSH AMATEUR BOXING ASSOCIATION AGAINST RYAN LLEWELLYN

FINAL DECISION OF THE ANTI-DOPING TRIBUNAL

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1. INTRODUCTION

1.1 This is the Final Decision of the Anti-Doping Tribunal convened under Article 8 of the UK Anti-Doping ("UKAD") Rules to determine a charge (the "Charge") brought against Ryan Llewellyn (the "Respondent") in respect of the commission of a Doping Offence contrary to Article 2.1 of the UKAD Rules (Presence of a Prohibited Substance in an Athlete's Sample).

1.2 The Welsh Amateur Boxing Association ("WABA") is the National Governing Body ("NGB") for amateur boxing in Wales. It is a National Member Federation of the International Amateur Boxing Association ("IABA"), and a home nation member of the British Amateur Boxing Association ("BABA"). By resolution of the Board of Directors of WABA, as from 16 July 2009, the Anti-Doping Rules of WABA are the UKAD Rules published by the Drug Free Sport Directorate of UK Sport (or its successor) as amended from time to time, which Rules shall take effect and be construed as the Anti-Doping Rules of WABA. References in this Decision to the "Anti-Doping Rules" or the "Rules" are, unless otherwise stated, references to the UKAD Rules.

1.3 Article 1.2.1 of the UKAD Rules provides that the Rules apply (inter alia) to all athletes who are members of WABA and/or of member or affiliate organisations or licensees of WABA (including any clubs, teams, associations or leagues).

1.4 At all relevant times, the Respondent was a licensed member of WABA and bound by its Anti-Doping Rules.

1.5 Article 2.1 of the UKAD Rules makes it a Doping Offence for an Athlete (as defined) to have the presence of a Prohibited Substance or its Metabolites or their Markers in his/her sample unless the Athlete establishes that the presence is consistent with a Therapeutic Use Exemption ("TUE") granted in accordance with Article 4.

1.6 The facts upon which the Charge is based can be summarised as follows:

1.6.1 On 30 March 2012, the Respondent was, pursuant to the UKAD Rules, selected for an In-Competition Doping Control at the Welsh Senior Boxing Championships.

1.6.2 The Respondent provided a sample (the "Sample"), which was sent to the World Anti-Doping Agency ("WADA") accredited Drug Control Centre at Harlow (the "DCC") for analysis. Following analysis, the DCC produced an Adverse Analytical Finding in respect of the Sample (dated 30 April 2012). This declared that a Prohibited Substance was present in the Sample, namely Methylhexaneamine, ("MHA").

1.6.3 MHA is a Prohibited Substance included in the WADA 2012 Prohibited List under Section 6(b) ("Specified Stimulants"). It is a "Specified Substance".

1.6.4 By letter dated 11 May 2012, (the "Charge Letter"), UKAD gave the Respondent formal notice that he was being charged with an Anti-Doping Rule Violation contrary to Article 2.1 of the UKAD Rules, namely the Presence of a Prohibited Substance or its Metabolites or their Markers in an Athlete's sample. The Charge Letter explained the basis of (a) the Charge, and (b) UKAD's authority to proceed with the Charge.

1.6.5 By e-mail dated 16 May 2012, and a letter of the same date, the Respondent notified UKAD that he did not require his B Sample to be analysed as he accepted the accuracy of the Adverse Analytical Finding in relation to his A Sample, and waived his right to analysis of his B Sample.

1.6.6 The Respondent does not (and did not at the relevant time) have a TUE that would justify the presence of the relevant Prohibited Substance.

1.7 This document constitutes the Final reasoned Decision of the Tribunal, reached after due consideration of the evidence heard and the submissions made by the parties attending at the Hearing. The Tribunal was unanimous in its findings.

2. PROCEDURAL HISTORY

2.1 In the Charge Letter of 11 May 2012, the Respondent was informed that with immediate effect he was provisionally suspended from participation in all competitions, events or other activities

organised, convened, authorised or recognised by his club and/or WABA pending the resolution of the Charge.

2.2 As a boxer under the jurisdiction of WABA at the time the Sample was collected, the Respondent was subject to and bound to comply at all times with the UKAD Rules.

2.3 UKAD is the National Anti-Doping Organisation for the UK. In accordance with Article 7.1.2 of the Anti-Doping Rules, UKAD has responsibility for results management in respect of this matter and for prosecuting the material Anti-Doping Rule Violation against the Respondent.

2.4 By waiving his right to have his B Sample analysed as indicated above, the Respondent is deemed to have accepted the Charge.

2.5 The Chairman of the Tribunal issued directions for the procedural management of this case on 8 August 2012, and in so doing recorded that the Respondent would not be contesting the Anti-Doping Violation in the Charge Letter, and that at the Hearing of this matter he would be offering mitigation as to the appropriate level of sanction. Directions were given for the convening of the final Hearing, including the filing by UKAD of a written summary of its case against the Respondent and the cross-filing by the Respondent of his witness statement and the statements of any witnesses upon whose testimony he intended to rely, followed by the mutual exchange of Skeleton Arguments. Those directions were subsequently varied, on 14 and 29 August 2012 respectively.

2.6 The Tribunal, made up of Paul Gilroy QC, Dr Kitrina Douglas and Dr Terry Crystal, held a Hearing on the Charge in Cardiff on 28 September 2012. In addition to the members of the Tribunal, the Hearing was attended by the Respondent, Anthony Llewellyn, (the Respondent's father), Graham Arthur (UKAD Director of Legal, presenting the case on behalf of UKAD), Jason Torrance (Paralegal Officer, UKAD), Stephen McGuinn (Testing Officer, UKAD), and Richard Harry (Dispute Resolution Manager, Sport Resolutions (UK)).

2.7 For the purposes of the Hearing, the Tribunal and the parties were provided with copies of the following documents (references to "CAS" are references to the Court of Arbitration for Sport):

2.7.1 Doping Control Form dated 30 March 2012;

2.7.2 Analytical Report dated 30 April 2012;

2.7.3 Documentation Pack to accompany the Analytical Report dated 3 May 2012;

2.7.4 Charge Letter dated 11 May 2012;

2.7.5 WADA Anti-Doping Code (2009 Edition);

2.7.6 Welsh Amateur Boxing Association Anti-Doping Rules;

2.7.7 e-mail dated 10 September 2012 from James Thomas (Performance Director - WABA) to Jason Torrance (UKAD) containing membership and licensing information relating to the Respondent;

2.7.8 e-mail and letter dated 16 May 2012 from the Respondent to UKAD;

2.7.9 e-mail dated 16 July 2012 from the Respondent to UKAD;

2.7.10 Letter dated 17 July 2012 from UKAD to National Anti-Doping Panel ("NADP") containing Request for Arbitration;

2.7.11 Directions Order dated 8 August 2012;

2.7.12 Variation of Directions Order by e-mail dated 14 August 2012;

2.7.13 Variation of Directions Order by e-mail dated 29 August 2012;

2.7.14 Witness statement of the Respondent together with attachment - served 5 September 2012;

2.7.15 e-mail dated 5 September 2012 from the Respondent's father, Anthony Llewellyn, to UKAD, served 5 September 2012 (essentially a witness statement from Mr Llewellyn Senior);

2.7.16 ***CAS 2001/A/330 R Fédération Internationale des Sociétés d' Aviron (FISA)*** (23 November 2001);

2.7.17 ***Anti-Doping Commission of the International Boxing Association v Jade Mellor (NADP Appeal Tribunal)*** (16 November 2009);

2.7.18 ***CAS 2010/A/2107 Flavia Oliveira v United States Anti-Doping Agency*** (6 December 2010);

2.7.19 ***CAS A2/2011 Kurt Foggo v National Rugby League*** (3 May 2011);

2.7.20 ***CAS 2011/A/2495 FINA v César Augusto Sielo Filho & CBDA***; ***CAS 2011/A/2496 FINA v Nicholas Araujo Dias dos Santos & CBDA***; ***CAS 2011/A/2497 FINA v Henrique Ribeiro Marques Barbosa & CBDA***; ***CAS 2011/A/2498 FINA v Vinicus Rocha Barbosa Waked & CBDA*** (29 July 2011);

2.7.21 ***CAS 2011/A/2518 Robert Kendrick v International Tennis Federation*** (10 November 2011);

2.7.22 ***International Rugby Board v Duncan Murray*** (22 December 2011);

2.7.23 ***CAS 2011/A/2645 Union Cycliste Internationale (UCI) v Alexander Kolobnef & Russian Cycling Federation*** (29 February 2012);

2.7.24 ***International Tennis Federation v Dimitar Kutrovsky*** (Decision of the Independent Anti-Doping Tribunal - Tim Kerr QC, Chairman sitting alone) (15 May 2012);

2.7.25 ***CAS 2012/A/2756 James Armstrong v World Curling Federation*** (21 September 2012);

2.7.26 Expert Opinion dated 25 September 2012 of Professor Peter Sever (Professor of Clinical Pharmacology & Therapeutics, Imperial College, London);

2.7.27 Certificate of Analysis of "Rocket Fuel" Supplement (HFL Sport Science - 17 September 2012);

2.7.28 Skeleton Argument dated 31 August 2011 of UKAD;

2.8 On 3 October 2012, CAS handed down its decision in ***CAS 2012/A/2804 Dimitar Kutrovsky v the International Tennis Federation***, (the appeal against the decision at first instance referred to at paragraph 2.7.24 above). In view of the potential implications of that decision for the purposes of the present case, the parties were invited to make supplementary submissions in the light of that decision if so advised. The Respondent provided written supplementary submissions on 19 October 2012. UKAD did so on 22 October 2012.

2.9 The Tribunal reconvened by way of a telephone conference on 29 October 2012 to consider the parties supplementary submissions. In its supplementary submissions, UKAD referred to another case: ***CAS 2012/A/2822 Erkand Qerimaj v International Weightlifting Federation (IWF)***. That decision was handed down by CAS on 12 September 2012, but neither the parties nor the Tribunal were aware of its existence at the time of the Hearing on 28 September 2012. During the course of its deliberations on 29 October 2012, the Tribunal concluded that it was not necessary to further adjourn this matter to enable the Respondent to make further submissions in relation to the decision in ***Qerimaj***.

2.10 In the body of this Decision, the cases identified above will be referred to by name alone and without reference to their full citation. Any cases not referred to above will be given their full citation.

3. THE ISSUES

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 two years shall be imposed, unless the conditions for eliminating or reducing the period of Ineligibility are met (in accordance with Articles 10.4 of the UKAD Rules - Elimination or Reduction under Specified Circumstances, or Article 10.5 - Elimination or Reduction based on Exceptional Circumstances).

4. THE RULES

4.1 The UKAD Rules provide as follows:

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……

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 the Period 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 Charge, the otherwise applicable period of ineligibility shall be eliminated. When the Anti-Doping Rule Violation Charge is an Article 2.1 violation, the athlete must also establish how the Prohibited Substance entered his/her system in order to have a 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 Charge, then the period of ineligibility may be reduced, but the reduced period of Ineligibility may not be less than 1-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.

4.2 Accordingly, in order to take advantage of Article 10.4, the onus is upon the Respondent to establish, in essence:

(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) corroborating evidence of the absence of an intent to enhance his sport performance or mask the Use of a performance enhancing substance.

4.3 For the purposes of Article 10.5, the terms *"No Fault or Negligence"* and *"No Significant Fault or Negligence"* are defined in the Appendix 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.

4.4 Accordingly, in order to take advantage of either Article 10.5.1 or Article 10.5.2, the onus is upon the Respondent to establish:

(i) that he bears "No Fault or Negligence", or "No Significant Fault or Negligence" (as applicable), and

(ii) how the Prohibited Substance entered his system.

5. THE TRIBUNAL'S DECISION

5.1 The Respondent gave evidence. He is currently 20 years of age (date of birth 18 June 1992). At the time of the relevant Anti-Doping Violation he was 19. He is an electrician by occupation. In late March 2012, he was preparing to participate in the Welsh Senior Championships. The Respondent's account is that he was attempting to lose weight for a fight which was due to take place on 30 March 2012, the date upon which he was selected for the material In-Competition Doping Control. He needed to make 52 kilograms for the fight. He maintained that he had made the weight 4 weeks previously without the use of weight loss tablets. According to the Respondent, as a result of a busy work schedule which involved working long shifts leading up to the fight, he was not able to train as much as he needed to, and was therefore struggling to lose the weight required.

5.2 Whilst shopping in Cwmbran the weekend before his Championship fight, the Respondent purchased the product "Rocket Fuel", described as a Dietary Supplement, from a shop called "Supplements Central". The product was recommended to him by a shop assistant, who informed him that it was said to increase the body temperature naturally, causing sweating and weight loss. He started taking the supplement 5 days before the fight. Initially, he did not notice any particular weight loss and was having trouble sleeping at night. He stopped taking the supplement on Thursday 29 March 2012, one day before the fight. The Respondent did not realise that the product contained MHA. He bought it under the impression that it was simply a fat burner which would assist in losing weight. In his letter to UKAD of 16 May 2012, in which he admitted the Charge, the Respondent stated:

"I would very much like to have the opportunity to converse my situation with you and possibly reduce the suspension time of my sporting participation. Being my first offence within WABA, I would highly appreciate the information that I have given from my personal account and the printed web pages to make a difference to your decision".

5.3 The container of "Rocket Fuel" purchased by the Respondent bore the international "tri-foil" symbol for radiation (black on a yellow background), which is posted where radioactive materials are handled or where radiation-producing equipment is used. It is used as a warning to protect people from being exposed to radioactivity. The label on the container contained the descriptions: *"nuclear powered nutrition"* and "*deadly fat burner"*.

5.4 The Respondent's father, Anthony Llewellyn, also provided the Tribunal with a written and oral account in relation to the Respondent's consumption of "Rocket Fuel" tablets before his fight. Mr Llewellyn Snr was informed that his son was in the final of the Welsh Senior Championships and that he was due to fight in the final on Friday 30 March 2012. The Respondent informed Mr Llewellyn Snr that he was struggling with his weight and after training, his trainer, Keith Jeffries, advised him to withdraw from the Championships as he was finding it hard to make the target weight.

5.5 Mr Llewellyn Snr agreed with the Respondent's trainer, as he did not want his son to "over-train" to make the weight for the fight. Mr Llewellyn Snr was aware that over the course of the weekend before the fight, the Respondent had been into town and bought the relevant product from "Supplements Central". The Respondent informed his father of what he had been told of the product's fat burning effects.

5.6 Mr Llewellyn Snr was aware that his son took the first two tablets the next day, one in the morning and the second in the evening. He repeated this on the Monday and Tuesday, and on the Wednesday informed his father that he was having trouble sleeping and that he was feeling nauseous in work and at night, and that he thought that this was because of the tablets so he stopped taking them at night, and for the Wednesday and Thursday he only took them in the morning. Mr Llewellyn Snr was sure that the last tablet his son took was on the Thursday morning as he (Mr Llewellyn Snr) put away the tablets in the medicine cabinet at home because his son said he did not need them any more, and that he was meeting his trainer on the Friday morning to have a final weigh-in before the official weigh-in for the fight, and that if he was still overweight he would be training to make the weight.

5.7 Mr Llewellyn Snr told the Tribunal that his son always strove to achieve the highest standards of integrity in his sport, stating:

"I know my Son would (in) no way take any tablets to enhance his performance. He only took some to lose weight".

5.8 The Respondent informed the Tribunal that he has received no education or training in relation to anti-doping matters, from WABA or any Boxing Club, whether at training camps or otherwise.

5.9 By a Certificate of Analysis dated 17 September 2012, HFL Sport Science confirmed to UKAD that a sample test of the product "Rocket Fuel" had confirmed that MHA was found to be present.

5.10 By a Report dated 25 September 2012, Professor Peter Sever (Professor of Clinical Pharmacology & Therapeutics at Imperial College, London) confirmed that

"The account given by the athlete that he used the supplement the day before the dope test is compatible with the findings and concentration of MHA in the urine".

5.11 The Respondent maintained that he was unaware that supplement use was a risk. It was his position that at the time he purchased the relevant product he had simply spoken to the shop assistant to enquire about it, and had read the label which contained no information concerning Prohibited Substances.

5.12 The Respondent emphasised that he had co-operated with UKAD throughout this matter. At no stage had he denied taking MHA.

6. DETERMINATION OF THE CHARGE

6.1 The Respondent has been charged with a Doping Offence under Article 2.1 of the UKAD Rules.

6.2 The Respondent accepted that the Prohibited Substance was present in the Sample and further that he did not have a TUE granted in accordance with Article 4.

6.3 Accordingly, the Tribunal found that the Respondent committed an Anti-Doping Violation contrary to Article 2.1 of the UKAD Rules.

7. CONSEQUENCES

7.1 The only basis upon which the Respondent can avoid the otherwise mandatory sanction of a period of Ineligibility of two years, is to bring his case within Article 10.4 or Article 10.5 of the UKAD Rules.

7.2 In order to be able to invoke Article 10.4.1 of the UKAD Rules, the Respondent must first of all establish, on the balance of probabilities, how MHA entered his system.

7.3 For the purposes of this case, UKAD obtained a sample of "Rocket Fuel", and noted that it has "geranium stem" listed as one of its ingredients. Geranium stem contains geranium oil, which is acknowledged by UKAD and others to be a source of MHA.

7.4 UKAD accepted that the MHA found in the Respondent's system came from the "Rocket Fuel" tablets he took in the days leading to his Championship fight on 30 March 2012. Essentially, UKAD accepted the Respondent's factual account as set out at paragraphs 5.1 to 5.3 above. The Tribunal also accepted that account.

7.5 UKAD also accepted that the Respondent did not use MHA to mask the use of another Prohibited Substance. The Tribunal also accepted that this was the case. There was no evidence to suggest that he had done so.

7.6 A central issue for the Tribunal to resolve in this matter was whether or not the Respondent could show that his use of MHA was

"not intended to enhance (his) sport performance".

It was only by this route that the Respondent could satisfy an essential element of Article 10.4 of the UKAD Rules as the basis of an argument to avoid the imposition of a two year period of Ineligibilty.

7.7 The Tribunal accepted the Respondent's explanation that he took "Rocket Fuel" to help him to achieve the qualifying weight as at the date of the weigh-in for his Championship fight, and that he did not know that it contained MHA. He did not believe that in doing so he would perform better in the ring. The matter does not end there, however. The Respondent did believe that if he did not take the "Rocket Fuel" tablets he might not be able to enter the ring on the night in question in the first place.

7.8 Precisely what is meant by the words

"sport performance",

and

"not intended to enhance the Athlete's sport performance"

for the purposes of Article 10.4 and its equivalent in other anti-doping rules, has vexed a number of national and international anti-doping tribunals.

7.9 In ***Anti-Doping Commission of the International Boxing Association v Jade Mellor***, dealt with by the NADP Appeal Tribunal in November 2009, a female boxer tested positive for a diuretic. On the morning of her fight, she weighed in over the weight limit for her class, which she attributed to water retention. She used the diuretic to relieve that retention. The Appeal Tribunal determined that by ingesting the Specified Substance she intended to enhance her sport performance, in the sense that she intended to ensure she was able to perform. The Appeal Tribunal concluded that the decision at first instance in that case - that for the purposes of Article 10.4.1 of the UKAD Rules the meaning of *"sport performance"* was restricted to the action or process of performing in the relevant athletic pursuit itself - was wrong, and that the words *"to enhance the Athlete's sport performance"* have a wider meaning, including the ability to perform at all.

7.10 UKAD submitted that in the instant case, this Tribunal did not necessarily have to adopt the same conclusions as those reached in the appeal in ***Mellor***, for the following reasons:

7.10.4 MHA is a stimulant. The use of a stimulant Out-of-Competition might help training, but not actual performance, because stimulants have a short term impact.

7.10.5 The Commentary to Article 10.4 of the WADA Code refers to the presence of Specified Substances (like MHA) in a Sample as *"being susceptible to a credible, non-doping explanation"*. The use of MHA (particularly if that use is unwitting) to make weight may have a credible, non-doping explanation if that use does not constitute "doping".

7.10.6 "Doping" is defined in the WADA Code as being the occurrence of one of the anti-doping rule violations listed in Article 2 of the Code. The Commentary to Article 2.2 of the WADA Code says that an *"Athlete's Use of a Prohibited Substance constitutes an anti-doping rule violation unless such substance is not prohibited Out-of-Competition and the Athlete's Use takes place Out-of-Competition"*. Using MHA Out-of-Competition is not doping.

7.10.7 Article 4.2.1 of the WADA Code states that certain Prohibited Substances are prohibited at all times because *"of their potential to enhance performance in future Competitions"*. If a substance does not have this potential, then it is *"prohibited In-Competition only"*. MHA is prohibited In-Competition only. If its use Out-of-Competition had the potential to enhance performance in future Competitions, it would be prohibited at all times.

7.10.8 The WADA experts who determine which substances should be prohibited at all times, or just In-Competition, are aware that stimulants such as MHA are included in fitness supplements and when and how they are used by athletes. They know that they are used to enhance training. If they felt that this was akin to doping they would reflect this in the status of the substances.

7.10.9 In ***Mellor***, the relevant substance was bumetanide, listed in the 2009 WADA Code as an S5 diuretic. Bumetanide was (and still is) banned at all times. The relevant use in that case would have constituted an anti-doping rule violation under Article 2.2 of the WADA Code. The Appeal Tribunal in ***Mellor*** was therefore quite right to conclude that the deliberate use of a substance to make weight was equivalent to an attempt to enhance sporting performance, given that (a) the substance was banned at all times; (b) its use per se

constituted an anti-doping rule violation, and (c) intent is presumed under the wording of Article 2.2. None of those components are present in the instant case.

7.11 It was the Respondent's case that he could not have intended to enhance his sport performance because he was unaware that the supplement he consumed contained a "Prohibited Substance", with the consequence that he could not, therefore, have intended to ingest that substance. He maintained that he could not be found to have intended to enhance his sport performance through the ingestion of a "Specified Substance" unless he was aware that he had ingested the substance in question.

7.12 Arguments to that effect were successfully deployed by an athlete in the CAS appeal of ***Flavia Oliveira v United States Anti-Doping Agency ("USADA")***, a decision handed down in December 2010. In that case, a cyclist argued that because she did not know that the product she had consumed contained a Prohibited Substance at the time she ingested it:

"It (was) impossible for (her) to have intended to use (the Prohibited Substance) at all let alone use it for performance enhancement".

In response, USADA contended that the athlete had taken the relevant product, which was marketed as a stimulant to increase energy, in order to help combat fatigue caused by medications to treat her allergies, and to maintain her stamina during training sessions and competitions, and that she had admitted to ingesting the product as part of her normal routine before the particular race in which her In-Competition sample tested positive, which proved her intent to enhance her sport performance even if she did not know that the product in question contained a banned substance when she took it.

7.13 It was held that Article 10.4 of the WADA Code (which is for all material purposes the same as its equivalent in the UKAD Rules) required an athlete only to prove that her ingestion of the relevant substance was not intended to enhance her sport performance, and that the athlete concerned had not intended to enhance her sport performance by unknowingly ingesting the relevant substance.

7.14 In May 2011, however, a separately constituted CAS Panel, in the matter of ***Kurt Foggo v National Rugby League***, which concerned a contracted Rugby League player in Australia, rejected this approach, stating (at paragraph 47 of its Decision):

"With respect, we do not agree with the approach taken by the Panel in…Oliveira….in our view…. (WADC 10.4) would not be satisfied if an athlete believes that the ingestion of the substance will enhance his or her sport performance although the athlete does not know that the substance contains a banned ingredient. The athlete must demonstrate that the substance 'was not intended to enhance' the athlete's performance. The mere fact that the athlete did not know that the substance contained a prohibited ingredient does not establish absence of intent. We accept the Respondent's submissions that Oliveira should not be followed".

7.15 When the issue resurfaced in the first instance matter of ***International Tennis Federation v Dimitar Kutrovsky*** in May 2012, the Chairman (sitting alone) observed (at paragraph 6.9 of his Decision):

"The sports arbitration community is split over what has become known as the Foggo/Oliveira debate".

Having reviewed the available decisions from several lower instance sports Tribunals other than CAS, and indeed two other CAS decisions, ***CAS/2010/A/2229 WADA v FIB and Berrios***, and ***CAS/2011/A/2645 UCI v Kolobnev***, the Chairman in ***Kutrovsky*** commented (at paragraph 71):

"While the Oliveira approach currently has the edge in the CAS case law, I would not say it is yet firmly established jurisprudence. There is no hierarchy of CAS decisions and no obvious way it can pronounce one or other of the decisions authoritative and the other wrong; yet they cannot both be right. Unless the issue is resolved by an amendment to the 2009 WADA Code, future case law will have to determine which approach wins out in the end".

7.16 The Chairman held that in the circumstances it would be undesirable for a first instance Tribunal to attempt to resolve conflicting CAS authority unless there was no other way of deciding the case. He concluded that the player knew that he was ingesting the relevant product, and knew that it contained an ingredient which *in fact* was prohibited, which was enough to prevent the automatic application of the equivalent of Article 10.4.1 of the UKAD Rules. He concluded that it did not assist the player that he did not know that the ingredient was prohibited, nor that it appeared in the Prohibited List under a different name. He determined that the question was whether on the facts the player could show, with corroborating evidence over and above his own word, to the Chairman's comfortable satisfaction, that he did not intend to use the substance to enhance his sport performance. The issue was one of intention, concerned with the player's state of mind, but an objective evaluation of the facts was required in order to reach the correct conclusion about what the player's state of mind was. A line needed to be drawn. On one side of that line were cases where the connection between use of the product and participation in competition was sufficiently remote to enable the player to satisfy the test. On the other side were cases where the connection between use of the product and taking part in competition was too close. In essence, the Chairman accepted the arguments of the anti-doping agency and rejected the player's submissions on this issue and concluded that he had no discretion to reduce the otherwise mandatory 2 year period of ineligibility unless the player could succeed in showing a lack of fault in accordance with Article 10.5 of the relevant rules (which for all material purposes are the same as the UKAD Rules).

7.17 The first instance decision in ***Kutrovsky*** was handed down on 15 May 2012. On 12 September 2012, CAS published its decision in ***Erkand Qerimaj v International Weightlifting Federation (IWF)***. In that case, which, as stated above, was not known to the Tribunal in the instant case at the time of the hearing on 28 September 2012, the athlete, an international weightlifter, used a supplement called "Body Surge" before a weightlifting competition. Unknown to him, Body Surge, a creatine supplement, contained MHA. The CAS Panel observed (at paragraph 4.2.4):

"The Appellant took the product in order to prevent injuries and help muscle recovery during training. In the hearing the Appellant further submitted that in the weeks before competitions he, like most weightlifters, would go on a diet to be able to maintain his weight category (77 kilograms). He would eat very little, soup and salads, and still lift 20 tons every day. In order to replace the lost energy, and still keep his weight within the weight category mentioned supra, he supplemented food by taking Body Surge".

7.18 The Panel also stated (at paragraph 8.4):

"….the Appellant stated that he took the Supplement prior to competitions to lose weight in order to maintain his weight category. Hence, the Appellant used the Supplement to enable him to compete in a weight category that provided for better chances of success in competitions. If of course he had failed to maintain his weight category, he would have had to compete in a higher weight category against heavier and therefore probably stronger athletes".

7.19 In its Supplementary Submissions, UKAD observed that it appeared from the decision in ***Qerimaj*** that the athlete used MHA Out-of-Competition to (at least in part) make his weight, yet he was still

found to fall within Article 10.4. Whereas in the appeal in ***Mellor*** it was held that using a banned substance to make weight is the same as enhancing performance, that case concerned the use of a substance that was banned at all times which meant that its actual use was doping whereas in the instant case the actual use was not doping, which, according to UKAD represented a significant difference and indeed this was the position in ***Qerimaj***. UKAD therefore questioned whether the position in ***Qerimaj*** supported a conclusion that the instant case was distinguishable from ***Mello***r.

7.20 The Panel in ***Qerimaj*** stated (at paragraph 8.9 of its Decision) that it was:

*"prepared to follow the approach taken by the arbitral tribunal in **Oliveira**",*

and concluded that whether or not to follow a broad or restrictive interpretation of the equivalent of Article 10.4 of the UKAD Rules must be decided depending on the purpose of the rules. It found (at paragraph 8.11):

"The underlying rationale of [Article 10.4] is that - as the commentary puts it - 'there is a greater likelihood that specified substances, as opposed to other prohibited substances, could be susceptible to a credible non-doping explanation' and that the latter warrants - in principle - a lesser sanction. What [Article 10.4] wants to account for is, in principle, that in relation to specified substances there is a certain general risk in day to day life that these substances are taken inadvertently by an athlete. The question is what happens if the risk at stage is not a 'general' but a [very] specific one that the athlete has deliberately chosen to take".

The appeal Panel in ***Qerimaj*** rejected the submission of the anti-doping agency that Article 10.4 was not intended for such cases, and held that the athlete was entitled to invoke it, subject to producing corroborating evidence that established to the comfortable satisfaction of the Panel the absence of an intent to enhance sport performance through consuming MHA.

7.21 As stated above, the first instance decision in ***Kutrovsky*** was the subject of an appeal. Referring to the ***Oliveira/Foggo*** debate (at paragraph 9.14 onwards of its Decision) the appeal Panel in ***Kutrovsky*** observed that it was conscious of the radical difference in outcome on this issue in the various cases and confirmed that it as an appeal Panel was itself

"split on this issue",

stating (at paragraph 9.14):

*"Nonetheless, this conflict in the jurisprudence is unsatisfactory for those who have to apply and adjudicate upon cases in which the Second Condition of Article 10.4 is in play. The Panel is aware that (i) as presently envisaged in the latest draft to the proposed amendments to the WADA Code) which would be effective from 1 January 2015, the conflict may possibly be resolved in favour of **Foggo**, and (ii) there is another case pending before CAS in which the issue may also be decided one way or the other. Nonetheless, the Panel considers that given that Kutrovsky has relied on **Oliveira** in his appeal and that more than two years will elapse before 1 January 2015, it must address the issue. The Panel does so on the basis of the 2009 (WADA Code) version which is currently in force".*

7.22 The ***Kutrovsky*** appeal Panel stated that by a majority it was of the view 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 of itself be determinative of that issue. It further stated (at paragraph 9.15):

"The majority of the Panel is also of the view that the evidence submitted as to why the athlete did not know the product contained a substance which is a specified substance will prove relevant in the evaluation of his degree of fault should no intent to enhance performance be found".

Having concluded that the ***Foggo*** approach was to be preferred to that adopted in ***Oliveira***, with the consequence that the athlete in question could not avail himself of Article 10.4.1 of the WADA Code, the Panel went on to state (at paragraph 9.48 of its Decision):

"The Panel is of the opinion that even if Kutrovsky has failed to prove, to the comfortable satisfaction of the Panel, that he did not intend to enhance his sport performance by taking [the relevant product], his ignorance that [the relevant product] contained a specified substance allows the application of Article 10.5.2 (of the WADA Code). The Panel must examine the reasons why Kutrovsky was ignorant that [the relevant product] contained a specified substance and then determine whether the two year sanction may be reduced if he bears no significant negligence".

The Panel asked itself whether Mr Kutrovsky had failed to realise that the relevant product contained MHA, and whether he bore "significant negligence" in failing to realise this. Adopting that approach, it found that he was not at significant fault in failing to realise this, stating (at paragraph 9.55) that:

"Absent circumstances evidencing a high degree of fault bordering on serious indifference, recklessness or extreme carelessness, a 24-month sanction would be at the upper end of the range of sanctions to be imposed in a case falling within Article 10.5.2 (of the WADA Code)".

7.23 The Panel noted that a 12 month sanction is the mandatory minimum, stating that Article 10.5.2 of the WADA Code permitted a reduction of the period of ineligibility but that the minimum period was one year. In the case under consideration the Panel held that there was:

"….more than the minimum lack of significant fault present so it must assess a penalty, greater than 12 months but, since the fault was not egregious, one substantially less than 24 months"

It concluded that the appropriate sanction would be a period of Ineligibility of 15 months.

<u>Conclusions in relation to Consequences</u>

7.24 Drawing on all of the available jurisprudence, the Tribunal reached the following conclusions:

7.24.4 In the light of the outcome of the appeal in ***Kutrovsky***, it seems clear that, at least for present purposes, the ***Foggo*** approach prevails over that which was adopted in ***Oliveira***.

7.24.5 The Tribunal in the instant case was unable to follow ***Qerimaj***, given that the essence of that decision was that ***Oliveira*** was to be preferred to ***Foggo***, which is directly the opposite conclusion to that reached by the Appeal panel in ***Kutrovsky***.

7.24.6 Whether or not ***Mellor*** was distinguishable on the basis canvassed by UKAD before the Tribunal (see paragraph 7.10 above) was, in the circumstances, of no materiality to the Tribunal's Decision.

7.24.7 The Tribunal in the instant case therefore concluded that the Respondent was not able to avail himself of Article 10.4.1 of the UKAD Rules.

7.24.8 On that basis, the requirement for corroboration under Article 10.4.2 falls away. For the avoidance of doubt, however, the Tribunal was satisfied that the Respondent's account (a) when and why he used the "Rocket Fuel", and (b) the assertion that the amount of MHA

found in his Sample was consistent with Out-of-Competition use, was satisfactorily corroborated (as to matter (a) by the evidence of his father, and as to (b) by the report of Professor Sever.

7.24.9 The Tribunal is only given discretion to mitigate the Consequence prescribed by Article 10.2 in two narrow circumstances:

(i) where the Athlete or Player establishes No Fault or Negligence in accordance with Article 10.5.1 of the UKAD Rules, no period of Ineligibility will be imposed, and

(ii) where the Athlete establishes No Significant Fault or Negligence in accordance with Article 10.5.2 of the UKAD Rules, the period of Ineligibility may be reduced by no more than one half.

7.24.10 The burden of establishing No Fault or Negligence or No Significant Fault or Negligence lies upon the Respondent.

7.24.11 Having adopted the approach of the CAS appeal Panel in ***Kutrovsky*** to the application of Article 10.4.1, the Tribunal in the instant case felt compelled to adopt the approach of the CAS appeal Panel in ***Kutrovsky*** to the application of Article 10.5.2, and concluded that the Respondent was eligible for a reduced sanction under that provision. Whilst the commentary to the Code states that Article 10.5.2 is supposed to apply in *"exceptional cases"*, the Panel in the instant case found it hard to see how the Respondent in the instant case acted with any greater degree of fault or negligence than Mr Kutrovsky did.

7.24.12 The Respondent acted naively rather than in a calculating manner. He provided an account that was essentially an honest account. When confronted that his actions amounted to an Anti-Doping Violation, he was candid, co-operative and straightforward, both with UKAD and the Tribunal. He was lacking in education concerning doping. He was not sophisticated in the ways of such matters.

7.24.13 As stated in the ***Kutrovsky*** appeal decision, in the absence of circumstances evidencing a high degree of fault bordering on serious indifference, recklessness or extreme carelessness, a two year sanction would be at the upper end of the range of sanctions to be imposed in a case falling within Article 10.5.2.

7.24.14 Here, as in the case of ***Kutrovsky***, the fault was not egregious, with the consequence that a period of Ineligibility of substantially less than 24 months is appropriate.

7.24.15 Nonetheless, whilst the starkly descriptive terminology on the label of the "Rocket Fuel" container purchased by the Respondent was clearly by way of marketing "hype", any prudent athlete purchasing a supplement bearing label containing such would proceed with caution before unquestionably consuming such a product. The Tribunal was also mindful of the "Core Responsibilities" contained within Article 1.3.2 of the UKAD Rules.

7.24.16 The Respondent was banned on a provisional basis on 31 March 2012. The Tribunal has a discretion to backdate the imposition of any period of ineligibility to the date of the provisional suspension. The Tribunal agrees with that approach and the period of ineligibility in this case is one of 12 months backdated to 31 March 2012.

7.24.17 In accordance with Article 10.9.3 of the UKAD Rules, the period of Ineligibility shall run from 31 March 2012 and shall end at midnight on 30 March 2013.

7.24.18 During the period of Ineligibility, in accordance with Article 10.1 of the UKAD Rules, the Respondent shall not be permitted to participate in any capacity in a competition or other activity (other than authorised Anti-Doping Education or Rehabilitation programmes) organised, convened or authorised by the WABA or any body that is a member of, or affiliated to, or licenced by WABA.

8. SUMMARY

8.1 Accordingly, for the reasons stated above, the Tribunal makes the following Decision:

8.1.1 A Doping Offence contrary to Article 2.1 of the UKAD Rules has been established.

8.1.2 The Respondent shall not, until midnight on 30 March 2013 be permitted to participate in any capacity in a competition or other activity (other than authorised Anti-Doping Education or Rehabilitation programmes) organised, convened or authorised by the WABA or any body that is a member of, or affiliated to, or licenced by WABA.

9. RIGHTS OF APPEAL

9.1 In accordance with Article 13.4 of the UKAD Rules, the following parties shall have the right to appeal against this decision to the NADP:

9.1.1 the Respondent;

9.1.2 WABA;

9.1.3 UKAD;

9.1.4 the International Federation, and

9.1.5 WADA.

9.2 In the absence of any such appeal, this decision shall be final and binding on all of the above Persons.

9.3 The Respondent, WABA and UKAD have 21 days from receipt of this decision within which to lodge an appeal.

9.4 The International Federation has 10 days from receipt of this decision to request the file and then 21 days after receipt of that file to lodge an appeal.

9.5 WADA has the later of:

9.5.1 21 days after the last day that any other party could appeal (including the International Federation), or

9.5.2 21 days after WADA request the file,

within which to lodge an appeal.

9.6 Any party wishing to exercise such rights must file a Notice of Appeal with the NADP in accordance with the time limits prescribed above.

10. FOOTNOTE

10.1 The Tribunal notes with concern the fact that a boxer of sufficient ability to be competing in the Welsh Senior Boxing Championships should have received no education or training in relation to anti-doping matters, from WABA or any Boxing Club, whether at training camps or otherwise.

10.2 The Tribunal invites WABA to consider this Decision with a view to ensuring that anti-doping education and awareness is given due prominence in the sport it governs.

Paul Gilroy QC
Dr Kitrina Douglas
Dr Terry Crystal

Signed on behalf of the Tribunal on: 27 November 2012

Sport Resolutions (UK)
1 Salisbury Square
London EC4Y 8AE

T: +44 (0)20 7036 1966
F: +44 (0)20 7936 2602

Email: resolve@sportresolutions.co.uk
Website: www.sportresolutions.co.uk