

**IN THE MATTER OF DISCIPLINARY PROCEEDINGS**

**THE IRISH RUGBY FOOTBALL UNION  
AND**

**DECISION OF THE IRISH SPORT ANTI-DOPING DISCIPLINARY PANEL  
DATED 19 DECEMBER 2011**

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**Admission of Violation**

1. Mr IS-1525 is a [...] rugby player and [...] Rugby Club. On 21 October 2011 he was charged with an alleged anti-doping violation under Rule 2.1 of the Irish Anti Doping Rules (the "**Rules**"), due to the presence of a Prohibited Substance in a urine sample given by him on [...] 2011. Defined terms in the Rules carry the same meaning in this decision.
2. Mr IS-1525's sample contained methylhexanemine (dimethylpentylamine) or its Metabolite or Marker (hereafter referred to as "**MHA**"). Article 3.1.1 of the Rules adopts and incorporates the World Anti-Doping Agency International Standard for the Prohibited List ("**the Prohibited List**") as amended from time to time. MHA is listed on the Prohibited List 2011 as being prohibited In-Competition under category S6.b: Specified Stimulants. MHA is a Specified Substance for the purpose of the Rules.
3. The Irish Rugby Football Union (the "**IRFU**"), as the relevant National Governing Body, imposed a provisional suspension on Mr IS-1525 pursuant to Rule 7.6 of the Rules on 25 October 2011.
4. By email dated 26 October 2011, Mr IS-1525 admitted the Rule violation, which is his first violation and waived his right to have his B Sample analysed. Therefore, the question for the Panel to determine in this case is the sanction to be imposed on Mr IS-1525 for the admitted violation.
5. Mr IS-1525 requested an expedited hearing, which took place on 23 November 2011. In advance of the hearing his advisors and the IRFU's advisors each filed written submissions. Mr IS-1525 was represented by Mr [...], Mr [...], [...] and Mr [...], [...], solicitors and the IRFU by Mr

Gary Rice and Mr Aidan Healy, Beauchamps solicitors. Mr IS-1525 gave evidence, as did [...] team manager Mr [...] and his team mate Mr [...], on his behalf. Other parties in attendance at the hearing were Mr Gordon Black for the IRFU, Dr Una May for the Irish Sports Council, Ms June Menton secretary to the Panel and Ms Nicola Carroll BL shadowing the secretary. The Panel is grateful to the parties' advisors for their co-operation at the hearing and for the clarity of their written and oral submissions.

6. This document constitutes the Panel's reasoned decision, reached after due consideration of the evidence, submissions and case law.

### **Issues for determination**

7. Article 10.1 of the Rules provides a sanction of two years Ineligibility for a first violation of the Rules unless the conditions for eliminating or reducing the period of Ineligibility, as provided for in Articles 10.3 and 10.4, are met.
8. This case turns on the possible application of Article 10.3 of the Rules. Article 10.3 provides that the sanction of two years Ineligibility in Article 10.1 can be reduced or eliminated in certain circumstances where an Athlete has taken a Specified Substance:

*"10.3.1 Where a Participant can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Article 10.1 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.*

*10.3.2 To justify any elimination or reduction, the Participant must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of intent to enhance 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."*

9. The burden of proof under Article 10.3 rests on the Athlete, so the issues which the Panel must determine are:
  - (a) whether Mr IS-1525 has explained how MHA entered his body; and

- (b) whether Mr IS-1525 has established that his ingestion of MHA was not intended to enhance his sport performance or mask the Use of a performance enhancing substance; in doing so he must produce corroborating evidence in addition to his own word which establishes to the comfortable satisfaction of the Panel the absence of intent to enhance sport performance or mask the Use of a performance-enhancing substance.

If the Panel is satisfied that Mr IS-1525 has met these requirements the Panel can consider:

- (c) what degree of fault should be attributed to Mr IS-1525 and whether this merits any reduction in the two years Ineligibility.

### **The Player's Evidence**

10. The Panel considered Mr IS-1525's evidence carefully and found him to be a credible and honest witness. He fairly answered the questions put to him, without hesitation, including questions unfavourable to him.
11. Mr IS-1525 readily acknowledged the anti-doping violation and attributed it to the unintentional ingestion of MHA in a sports supplement 1MR. The circumstances in which Mr IS-1525 was taking 1MR and then gave the relevant sample are as follows.
12. Mr IS-1525 has played rugby for Ireland at schools and under-21 level. He played professional rugby for 6 years, initially with [...] and latterly with [...]. He retired from [...] and came home to Ireland to set up his own [...] business, [...]. On his return to Ireland he re-joined [...] Rugby Football Club for the [...] season and [...] Club for the [...] season.
13. When he was a professional player, Mr IS-1525 relied entirely on his club staff to advise him on his diet, what supplements he should take and his training regime. He has been tested quite a number of times, initially when at school, then when playing at under-21 level and with [...] in Ireland and during [...]. He never failed a test prior to the test leading to this case.
14. In setting up his business in Ireland and training and playing with his club, Mr IS-1525 said that he lacked energy. He found the transition from being a professional rugby player to an amateur player with a day job quite difficult. He found his working days in his new business (which he runs on his own) long and when combined with club training twice a week, and an extra weights or fitness session and matches, he found

the regime quite taxing. Between the [...] and the [...] season there was a change of coaches in the club and the training levels increased as the players and new coaches set higher goals. Mr IS-1525 found this tough as his work had also increased, due to his business becoming busier.

15. In [...] 2011 Mr IS-1525 enquired about 1MR in a nutrition/supplement shop [...]. Prior to this Mr IS-1525 had seen 1MR used by his team mates and had asked them about it. They said it was a good energy drink and he thought it was fine to use it. 1MR is described on its label as “*Ultra Concentrated Pre-Workout Powder*” and is used to make a drink when diluted with water or other liquid; it is a stimulant. Mr IS-1525 explained his energy was low and he wanted something to help him and the shop employee proposed to him that he start taking 1MR, so he bought it. He said he “*had a breeze through the contents...without really reading into them or seeing anything that [he] considered a banned substance.*”
16. Mr IS-1525 began to take 1MR before training sessions, mixed with an amino acid, L-Glutamine, and continued to take it before most training sessions and games for the remainder of the [...] season and the current season. L-Glutamine is a recovery aid, rather than an energy booster. Mr IS-1525 began taking amino acids when [...] and continued that practise when he returned to Ireland.
17. On [...] 2011 Mr IS-1525 and his team mates were warned, by the team manager [...], that there would be In-Competition Testing after the match on [...] 2011. In the changing rooms on the morning of the match Mr IS-1525 made up his ‘shaker’ drink with one scoop of 1MR and one scoop of L-Glutamine with 300 millilitres of water and drank the shaker. He did so in view of his team mates and one of them, [...], took Mr IS-1525’s container of 1MR and reviewed it and asked Mr IS-1525 about it.
18. After the match Mr IS-1525 was chosen to give a urine sample. When completing the Doping Control Form, in the box for declaration of medications and supplements taken in the previous 14 days, he listed the following:

Substance	Dosage	Route	When Taken
Amino Energy	Powder 2 scoops	Oral	Today
Centran? [multivitamins]	Tablet	Oral	Today
Cod Liver Oil	Tablet	Oral	Today



19. Mr IS-1525 explained that he thought 'Amino Energy' was a good description for his pre match drink, as it contained one scoop of L-Glutamine (hence the reference to Amino) and one scoop of 1MR (hence the reference to Energy). He acknowledged that in hindsight it would have been clearer to name each product. His intention though was to disclose what he had taken.
20. The label on the 1MR container lists 1,3-Dimethylamylamine as an ingredient. Mr IS-1525 acknowledged that is a synonym for MHA but he did not know that prior to learning of the alleged (now admitted) violation.
21. Mr IS-1525 admitted his obligation to take care to avoid ingesting any Specified Substance and fault for not checking whether the listed ingredients of 1MR were prohibited. Mr IS-1525 acknowledged that he could have readily established the position before taking 1MR, as he did once he was made aware of the alleged violation. Mr IS-1525 accepted that he took 1MR to boost his low energy levels and that in taking any supplement he was under a heightened duty of care to ensure it contained no Prohibited or Specified Substances. Mr IS-1525 said that he had no intention to enhance his sports performance by the ingestion of MHA.
22. Since the date of notification of the alleged (now admitted) violation Mr IS-1525 has acted responsibly. He advised his club of the notification. He immediately researched the position and having established that 1MR contained MHA he promptly admitted the violation. He is remorseful about the violation as it will lead to a period of Ineligibility and be a blight on his career.

## **Submissions and Findings**

### **(a) How the MHA entered Mr IS-1525 's body**

23. Mr IS-1525 's counsel submitted that in line with the decision in *Flavia Oliveira v. United States Anti-Doping Agency*<sup>1</sup> Mr IS-1525 's explanation of his use of the supplement 1MR established how the Specified Substance MHA entered his body under Rule 10.3.1. The IRFU agreed.
24. In that case, the Ms Oliveira had taken a sports supplement, Hyperdrive 3.0+. The CAS Panel agreed with the decision under appeal that on the balance of probabilities, the Specified Substance had entered the Ms Oliveira's body as a result of her ingestion of Hyperdrive 3.0+. The CAS Panel quoted the original decision at

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<sup>1</sup> CAS 2010/A/2107, paragraph 9.3 – 9.8

paragraph 9.5:

*"The current label of the product lists methylsynephrine as one of the ingredients and the parties have stipulated that methylsynephrine is the chemical equivalent of oxilofrine. While no direct evidence was introduced (that) the Hyperdrive 3.0+ capsules that Ms. Oliveira was consuming at the time of her positive test in fact contained methylsynephrine, it appears that they did. No evidence was introduced that methylsynephrine has only recently been added as an ingredient to Hyperdrive 3.0+ or that the manufacturer had any reason to list methylsynephrine as an ingredient if it was not actually included in the product's composition. Although Ms. Oliveira was taking other supplements, medications and vitamins at the time of collection of the sample that tested positive, there is no indication that any of those substances contained oxilofrine. Indeed, the unrebutted testimony of Ms. Oliveira was that while she continued to take those other substances without interruption, she did not consume any Hyperdrive 3.0+ on July 2 and July 7, 2009, days on which she also provided samples but did not test positive for oxilofrine or any other prohibited substance. While the issue is not free from doubt, the reasonable inferences to be drawn from the evidence make it more probably than not (sic) that Hyperdrive 3.0+ was the source of the oxilofrine from which Ms. Oliveira tested positive." (emphasis added)*

25. The Panel accepts that Mr IS-1525 has discharged the onus on him of showing, on the balance of probabilities, how the Specified Substance entered his body, namely through his ingestion of 1MR.

**(b) Intention to Enhance Sports Performance or Mask Use of a Performance-Enhancing Substance**

26. There was no suggestion Mr IS-1525 had any intention to mask the Use of a performance-enhancing substance by ingesting MHA. The IRFU's solicitor referred to *UKAD v Laing*<sup>2</sup> in which the scientific evidence showed that MHA is not a substance used to mask the Use of a performance-enhancing substance.

27. So the burden on Mr IS-1525 under this heading was to show to the comfortable satisfaction of the Panel that he did not intend to enhance his sports performance by ingesting the Specified Substance, MHA.

28. Mr IS-1525's counsel submitted that his client must show he did not intend to enhance

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<sup>2</sup> UK National Anti-Doping Panel - 28 June 2011

his sport performance by ingesting the Specified Substance, rather than by ingesting the supplement in which it was contained, relying on *Oliveira*<sup>3</sup>. There CAS considered Article 10.4 of the WADA Code, (which is reflected in Article 10.3 of the Rules) and stated as follows:

*"9.14 The Panel does not read clause two of Article 10.4 as requiring Oliveira to prove that she did not take the product (i.e., Hyperdrive 3.0+) with the intent to enhance sport performance. If the Panel adopted that construction, an Athlete's usage of nutritional supplements, which are generally taken for performance-enhancing purposes, but which is not per se prohibited by the WADC, would render Article 10.4 inapplicable even if the particular supplement that is the source of a positive test result contained only a Specified Substance. Although an Athlete assumes the risk that a nutritional supplement may be mislabelled or contaminated and is strictly liable for ingesting any banned substance, Article 10.4 of the WADC distinguishes between Specified and Prohibited Substances for the purposes of determining an Athlete's period of ineligibility. Article 10.4 provides a broader range of flexibility (i.e., zero to two years ineligibility) in determining the appropriate sanction for an Athlete's Use of a Specified Substance because 'there is greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation.' See comment to Article 10.4"* (emphasis added)

29. The IRFU's solicitor accepted this submission (that intent to enhance performance by ingestion of the Specified Substance is relevant, rather than by ingestion of the supplement in which it is contained) but pointed out that it is inconsistent with the subsequent decision of CAS in *Foggo v NRL*<sup>4</sup>. (*Foggo* was not opened to the Panel as it was not available). The IRFU's solicitor helpfully identified a number of later cases in which the question was also considered and the approach taken in *Oliveira* was mirrored.
30. For example in *Kumara*<sup>5</sup> three Sri Lankan rugby players had taken a supplement called Hemorage, without knowing it contained MHA. In that case the IRB Panel found that:

*"It has been established that, in assessing intent to enhance sport performance, it is not necessary for the Players to establish that their Use of*

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<sup>3</sup> In particular paragraphs 9.9 – 9.21

<sup>4</sup> CAS A2/2011

<sup>5</sup> IRB v. Gurusinghe, Swarnathilake and Kumara, 18 September 2011 at paragraph 61.

*Hemorage was not intended to enhance sport performance. The nutritional programmes followed by an Athlete can, in a strict sense, be said to be intended to enhance their sport performance. Although an Athlete assumes the risk that a nutritional supplement may be mislabelled or contaminated and is strictly liable for ingesting any banned substance, Regulation 21 (and Article 10.4 of the WADC) distinguishes between Specified and Prohibited Substances for the purposes of determining an Athlete's period of Ineligibility. In the case of Specified Substances, a different sanctioning regime applies because of the greater likelihood that such substances "could be susceptible to a credible, non-doping explanation". Accordingly, what the players must do is establish that their ingestion of the Specified Substance was not intended to enhance their sport performance." (emphasis added)*

31. A similar view was taken in the cases of *UKAD v Wallader*<sup>6</sup> and *UKAD v Dooler*<sup>7</sup>.
32. While it would be appropriate for the apparent conflict of CAS authority to be resolved by that body, the Panel accepts the parties' submission, based on the cases cited, that the relevant burden of proof on Mr IS-1525 was to show that he did not intend to enhance his sport performance by ingesting the Specified Substance, MHA, (rather than by ingesting the supplement 1MR in which it was contained).
33. Mr IS-1525's counsel contended that as there was no evidence Mr IS-1525 knew he was consuming MHA there could be no finding of intent to enhance his performance through such consumption. The IRFU's solicitor argued that Mr IS-1525 could not simply say he did not know (when he could and should have known) that 1MR contained a Specified Substance, as that is not enough to prove an absence of intent to enhance his sporting performance by consuming such a Specified Substance. Mr IS-1525's counsel countered that the Panel could not find intent by Mr IS-1525 to enhance sporting performance simply because of his lack of knowledge of the ingredients of 1MR including MHA but could consider his recklessness or carelessness about checking the ingredients in determining his degree of fault under Article 10.3.2.
34. On this point the Panel favours the submission made on Mr IS-1525's behalf and as a principle it is supported by *Kumara*. There 3 Sri Lankan players, who had basic English, each acknowledged a general understanding that the use of performance enhancing drugs in sport is prohibited and that Athletes are responsible for the

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<sup>6</sup> UK National Anti-Doping Panel 29th October 2010.

<sup>7</sup> UK National Anti-Doping Panel 24 November 2010.

substances that enter their body. Notwithstanding that they were found to have made "no attempt ...to verify that the supplement did not contain any Prohibited Substances" (the very criticism made of Mr IS-1525 ) the IRB found that there were circumstances which constituted corroborating evidence of their lack of intention to enhance their sporting performance by ingesting MHA. So absence of enquiry by the Players was not determinative of the intention issue.

35. The Panel accepts Mr IS-1525 's evidence, that he did not know 1MR contained MHA when he took 1MR prima facie supports a finding he had no intention of enhancing his sporting performance by ingesting MHA. However that on its own is not enough to satisfy Article 10.3.2, given Mr IS-1525 's obligation to adduce corroborating evidence, in addition to his own word, to the comfortable satisfaction of the Panel, of his lack of intention to enhance his sporting performance.

***Corroborating Evidence that no intention to enhance sporting performance***

36. The IRFU's solicitor contended Mr IS-1525 had failed to adduce any relevant corroborating evidence of his lack of intention to enhance his performance through ingestion of a Specified Substance. He relied on the following comment to Article 10.4 of the Code (the equivalent of Article 10.3 of the Rules):

*"However, there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation. This Article applies only in those cases where the hearing panel is comfortably satisfied by the objective circumstances of the case that the Athlete in taking or Possessing a Prohibited Substance did not intend to enhance his or her sport performance. 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 intent to enhance sport performance. While the absence of intent to enhance sport performance must be established to the comfortable satisfaction of the hearing panel, the Athlete may establish how the Specified Substance entered the body by a balance of probability."* (emphasis added)

37. The IRFU's solicitor contended that the authorities require more than one circumstance to be present for absence of intent to be corroborated. He gave the following examples.
38. In *Oliveira* the corroborating evidence included medical evidence that Ms Oliveira began taking anti-histamines to combat allergies, one of side effects of which was fatigue; the reasons she contends she began taking Hyperdrive 3.0+. There was also corroborating evidence from her husband regarding her allergies and fatigue.
39. In *Laing*<sup>8</sup>, the tribunal dealt with the question of corroborating evidence by summarising other cases as follows:

*"the Respondent took the Nox Pump in private (unlike the Athletes in Dooler, Wallader and Steenkamp). Further, unlike the Athletes in Wallader and Dooler, the Respondent did not declare it on the Doping Control Form. He gave different and contradictory explanations for the failure: he forgot or decided it was not necessary because it was a high-energy drink. Unlike the Athlete in Duckworth, there is no evidence he told anyone that he had purchased or intended to or did take it as he said; there is no evidence anyone knew he possessed it.*

*"Further this was not (unlike Ralepelle & Basson) a contaminated supplement; MHA is an ingredient of Nox Pump. The Respondent (unlike Wihongi) did not take the supplement believing it to do something of a quite different nature. For these reasons the Tribunal concludes that the Respondent has not produced corroborating evidence which establishes to our comfortable satisfaction the absence of intent to enhance sport performance. Accordingly, the Respondent is not able to invoke ADR Article 10.4.1."*

40. In *Wihongi*<sup>9</sup> the Athlete was a professional rugby player for Sale. At half-time in a match the player inadvertently drank from the bottle containing the Anabolic Nitro, which had been mixed for another player. The manufacturer admitted that the supplement was contaminated. The RFU Panel found he intended to drink water and not a drink which contained a performance enhancing substance. All of the above was corroborated by evidence from other players and the club doctor and the Panel held that *"the totality of such evidence leaves us comfortably satisfied that the substance was not taken in an attempt to enhance the player's sporting performance."*

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<sup>8</sup> See paragraphs 46 and 49.

<sup>9</sup> RFU Panel 16th March 2011.

41. The case of *UK Anti-Doping v. Dooler*,<sup>10</sup> involved MHA and the supplement Nox Pump. The factors combined which were deemed to be corroborating evidence were the fact the Athlete disclosed taking Nox Pump on the Doping Control Form, the evidence of others that he had told them he was taking Nox Pump, the evidence he did not know the supplement contained MHA (he had researched it) and the evidence that he took the supplement to recover after matches and not to enhance sporting performance.
42. In *UKAD v Wallader*<sup>11</sup> the corroborating evidence included computer records produced by the Athlete showing her research of the ingredients of the supplement, the evidence of her coach who sourced the supplements from a supplements company as a form of sponsorship for his Athlete, the timing of her taking of the supplement (two days before the competition) and the fact she declared it on the Doping Control Form.
43. In the case of *Steenkamp*<sup>12</sup> the substance was MHA and the supplement USN Anabolic Nitro. The Athlete played semi-professional rugby for Rotherham. The supplement was suggested to him by a fitness instructor. He told the retailer who sold the supplement he was a semi-professional rugby player. He googled each of the ingredients. The supplement in question was in fact contaminated and this was verified by the manufacturer. As regards intent to enhance sport performance and corroborating evidence the RFU Panel found:

*"That he did not know Anabolic Nitro contained MHA is a factor to be taken into account by the Panel when determining whether the player intended, by his consumption of the specified substance, to enhance his sport performance. In this case the player did not in any event take Anabolic Nitro with a view to enhancing his sport performance. Rather, he had taken Anabolic Nitro with the intention of alleviating fatigue caused by his arduous lifestyle and its logistical demands."*
44. In concluding on this point the IRFU's solicitor noted that in demonstrating corroboration existed, in most cases the Athlete had proved some level of enquiry about the content of the substance taken.
45. Mr IS-1525's counsel submitted that under Article 10.4 of the Code the Panel must be comfortably satisfied by the objective circumstances of the case that Mr IS-1525 did

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<sup>10</sup> UK National Anti Doping Panel - 24 November 2010

<sup>11</sup> UK National Anti-Doping Panel - 29th October 2010.

<sup>12</sup> RFU Panel 22nd March 2011.

not intend to enhance his performance by taking MHA. He further submitted that the corroborating evidence of the kind highlighted in Article 10.4 of the Code was not an exclusive list and was an 'inclusionary' list. The Panel agrees.

46. Mr IS-1525's counsel invited the Panel to rely on his client's clear evidence and to focus on whether it is correct and supported by independent evidence on the basis the Panel must decide the case on its own facts.
47. The Panel considered a number of objective circumstances in combination as corroborative of Mr IS-1525's evidence of lack of intention to enhance his sporting performance through ingestion of MHA:
  - (a) Mr IS-1525's gave clear evidence that he took 1MR to boost his energy levels due to fatigue from work and rugby commitments, did not know 1MR contained MHA when he ingested 1MR and had no intention to enhance his performance by ingesting MHA. Mr IS-1525's also gave clear evidence about passing previous tests. All his evidence was consistent with a lack of intent to enhance sporting performance through ingestion of a Specified Substance.
  - (b) Mr IS-1525's evidence that his team was warned two days prior to the match about the possibility of testing on match day was corroborated by Mr IS-1525's evidence of that warning. If Mr IS-1525 was knowingly taking a Specified Substance to enhance his sporting performance he would not have taken it on match day in the knowledge he risked being tested and caught.
  - (c) Mr IS-1525's evidence that he took 1MR openly in front of his team mates, making up the drink while in the dressing room was corroborated by his team mate Mr [...] 's evidence of that fact. (Like the player in *Dooler* and in contrast to the player in *Laing*).
  - (d) Mr IS-1525's disclosure of his use of an energy supplement on the Anti Doping Form (as is evident from the form) in the expression 'Amino Energy' where Amino referred an amino acid L- Glutamine, a recovery aid and Energy referred to 1MR, which Mr IS-1525 regarded as an energy drink and his evidence that he intended to disclose his use of both substances. (Like the player in *Dooler* and in contrast to the player in *Laing and Steenkamp*). His evidence in this regard was plausible.
48. Having carefully considered the evidence, submissions and guiding principles in the Code and cases the Panel is comfortably satisfied that Mr IS-1525 has demonstrated and corroborated that he did not intend to take the Specified Substance MHA, found



in his sample, to enhance his sporting performance.

**(c) Degree of Fault**

49. As Mr IS-1525 has satisfied the Panel that he meets the requirements of Article 10.3.1 and 10.3.2 of the Rules, the Panel must now determine his degree of fault in deciding whether, and if so to what extent, the 2 year Ineligibility should be reduced.

50. Article 2.1.1 of the Rules makes each Athlete personally responsible for what is in his or her body:

*"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body and Athlete is responsible for any Prohibited Substance or any of its Metabolites or Markers found to be present in his or her Sample. Accordingly, it is not necessary that intent, fault, negligence or knowing Use of an Athlete on an Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1; nor is an Athlete's lack of intent, fault, negligence or knowledge a valid defence to an allegation that an anti-doping rule violation has been committed under Article 2.1".*

**Mr IS-1525 's Submissions**

51. Mr IS-1525's written submissions noted that in line with *Oliveira*<sup>13</sup>:

*"9.31.....The Panel must impose an appropriate sanction that furthers the WADC's objective of proportionate and consistent sanctions for doping offences based on an Athlete's level of fault under the totality of circumstances... The Panel's analysis of this issue is guided by the Comment to Article 10.4 [of the Code] that provides '[i]n assessing the Athlete's or other Person's degree of fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour."*

*"9.32.....To resolve this issue, the Panel must determine whether the nature and degree of [the Athlete's] unreasonable conduct under the circumstances was so high that a two-year period of ineligibility is proportionate and consistent with other similar cases." (emphasis added)*

52. Mr IS-1525 's counsel referred to other cases involving rugby players who ingested MHA and noted the range of findings on degree of fault from a reprimand up to 9

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<sup>13</sup> in particular paragraph 9.31 thereof.

months Ineligibility. In *Kumara* the Players' fault was described as "*palpable*". When considering the degree of fault under the applicable rules, the Panel stated that:

*"84 While there are valid concerns about the adequacy of the anti-doping education received by the Players, and in particular, the availability of information in their own language, the Players' fault in the present case is palpable. Indeed, having regard to the factual circumstances described by other cases involving MHA and similar substances, the degree of fault attributable to these Players is a high one."*

53. The Panel went on to conclude:

*"87. ...the fact is that they made no efforts of any sort to verify what they were taking. One would have thought that at the very least they would have asked someone for advice...*

*88. If there was no-one to take advice from, they should have refrained from using the product.*

*89. Having regard to all the circumstances, it is our view that the degree of fault displayed by each of these Players warrants a coding sanction and that each of them should, accordingly, serve a period of Ineligibility of 9 months running from the date of their provisional suspensions." (emphasis added)*

54. *Duckworth v. UK AD*<sup>14</sup> is similar in nature. In that case, the Athlete, who was a twenty-one year old professional rugby league player, who had been professional for six years, had also taken a sports supplement containing MHA. The Athlete had made enquiries concerning the ingredients (which Mr IS-1525 did not do). In that case, the Panel imposed a period of ineligibility of 6 months.

55. At the hearing Mr IS-1525's counsel placed significant emphasis on the CAS decision of *Kendrick v. ITF*<sup>15</sup> in which CAS reduced from 12 months to 8 months the Ineligibility of a professional tennis player for taking MHA. At the time of the hearing the written decision was not available but it has since been provided. The decision set out 7 points found in Mr Kendrick's favour and 6 points found against him in assessing his degree of fault:

*"10.20 In the Panel's view, circumstances favourable to Kendrick's position include the following:*

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<sup>14</sup> 12 October 2010

<sup>15</sup> (CAS 2011/1/2518),

- a. *The manufacturer of Zija XM3 appears to have lied about its properties. The representations that the product was approved by the "World Anti-Doping Association" and that Apolo Ohno used it were false.*
- b. *Kendrick's anti-doping rule violation occurred at a very stressful time for him. The birth of his first child was imminent and he was preparing to participate in his swansong year as a top level professional tennis player before retiring from the sport.*
- c. *Kendrick did undertake some Internet research in respect of the product prior to use.*
- d. *Although Kendrick acknowledged that he could have consulted a doctor, he did not have his own personal doctor from whom he could have obtained immediate advice and plausibly (albeit wrongly) did not notice the discrepancy in the name "World Anti-Doping Association" (as opposed to "World Anti-Doping Agency"). He took further comfort from the references, in the online information he consulted, to the FDA (Food and Drug Administration), IOC (International Olympic Committee) and the names of various athletes who were said to use the product.*
- e. *Kendrick, upon reflection, did not recall seeing an Internet article "Zija - Why I Don't Like It" (having said to the ITF tribunal that "I probably read that" - see para 3.15 - and having heard and seen him we assess him as an honest witness and again accept what he says on this point.).*
- f. *Kendrick immediately accepted a provision suspension after learning of his positive test.*
- g. *He had character references from distinguished contemporary competitors about his awareness of the importance of the need to eliminate doping from tennis.*

10.21 *Circumstances adverse to Kendrick include the following:*

- a. *The Internet research which Kendrick undertook was inadequate, particularly for an experienced professional athlete who represented that he took great care not to ingest prohibited substances.*
- b. *Kendrick both failed to consult the wallet card that had been provided to him by the ITF and failed to make any or sufficient efforts to contact the ITF's hotline.*
- c. *Kendrick used a product which he received from someone who was not his own coach and which was contained in an unmarked wrapper.*

- d. *Kendrick relied on unqualified people for advice on whether the supplement he used was "safe" or not. In conducting superficial Internet searches he was content to rely on "puff pieces" without any critical consideration of what he was reviewing.*
- e. *While the stress which Kendrick was under may explain why he departed from the applicable standard of care, it does not reduce that standard of care.*
- f. *He failed to disclose his use of Zija on the Doping Control Form which he completed at the time of testing."*

Mr IS-1525's counsel contended his client should be treated at least as favourably as Mr Kendrick as the facts are similar, both men are of a similar age but Mr Kendrick is an elite professional and Mr IS-1525 client is not. The Panel agrees.

### ***IRFU's Submissions***

56. The IRFU's solicitor did not contend for any particular period of Ineligibility but referred the Panel to cases highlighting sanctions of between 3 and 18 months and invited the Panel to consider Mr IS-1525's conduct in light of those cases. The IRFU's solicitor contended that if Mr IS-1525's lack of knowledge of (and indeed curiosity about) 1MR's ingredients was accepted by the Panel as evidencing a lack of intent to enhance his sporting performance by ingesting MHA, it must also be accepted as clear evidence of a high degree of fault under Article 10.3. The Panel agrees.
57. The IRFU's submissions noted that the date MHA was first added to the Prohibited List (2010) should not be regarded as relevant to the issue of Mr IS-1525's degree of fault as Mr IS-1525 made no efforts to investigate the substances listed as ingredients on the supplement. The Panel agrees.
58. The IRFU's submissions highlighted that in *Oliveira*, the elite cyclist was banned for 18 months. That was notwithstanding the fact she had read the ingredients of the first supplements she bought and made some enquiries but she had not checked the manufacturer's website which had important information on the substance.
59. In *Kumara*, where the players were banned for 9 months, the IRFU's solicitor noted that while the players were criticised for not checking the ingredients of the supplement which they took (containing MHA) English was not the players' first language, suggesting had it been the Ineligibility would have been longer.
60. In its written submissions the IRFU made eight general points in relation to Mr IS-1525's degree of fault:

- (i) A significant number of the cases cited related to rugby players;
- (ii) In November 2010, two South African international rugby players tested positive for MHA after a match against Ireland in the Aviva Stadium. This was much publicised;
- (iii) The Irish Sports Council has issued a warning specifically as regards MHA-[http://www.irishsportsCouncil.ie/Anti-Doping/Medicines\\_TUEs/Medical\\_Advisory\\_Notes\\_/Methylhexanamine/](http://www.irishsportsCouncil.ie/Anti-Doping/Medicines_TUEs/Medical_Advisory_Notes_/Methylhexanamine/)
- (iv) The RFU website contains a similar warning - <http://www.rfu.com/TheGame/AntiDoping/Methylhexaneamine.aspx>
- (v) There is detailed information on the IRFU website ([www.irishrugby.ie/nutrition/supplements\\_and\\_young\\_player.php](http://www.irishrugby.ie/nutrition/supplements_and_young_player.php)) in relation to sports supplements, as well as links to relevant websites;
- (vi) In addition, the Real Winner - ([www.isc.realwinner.org/](http://www.isc.realwinner.org/)) is a very useful tool in education of Athletes as regards anti-doping;
- (vii) On 14 December 2010 a letter was sent to all Division One Club Honorary Secretaries (including Mr IS-1525 's club) by the Anti-Doping Officer of the IRFU enclosing the WADA Prohibited List 2011. On [...] 2011 an email was sent to all Division One Club Honorary Secretaries requesting that they complete and return the Anti-Doping Team Whereabouts Form as a matter of urgency. On [...] 2011 a follow-up email was sent to 9 clubs, including Mr IS-1525 's club, requesting return of Team Whereabouts Form. This was received on [...] 2011.
- (viii) Mr IS-1525 was a professional rugby player for six years and while he may contend that he left nutrition and his training regime to club staff, this emphasises that he knew that expertise was required when it comes to matters such as supplements and nutrition. He made no efforts to avail himself of any expertise in this case, be it medical expertise or otherwise, as regards the taking of IMR.

61. The validity of these eight points was not challenged by or on behalf Mr IS-1525 .

### **Appropriate Period of Ineligibility**

62. The Panel regards the facts of this case as the most important factor in determining

Mr IS-1525's degree of fault. As with the *Kendrick* case there are points in Mr IS-1525's favour and points against him.

63. In Mr IS-1525's his favour:

- (a) He bought the product in a shop and not on the black market.
- (b) He did not knowingly take MHA, rather he took 1MR to assist him with a feeling of fatigue from his work and sporting schedule.
- (c) He took 1MR openly in front of team mates and sought to disclose the ingestion of MR1 on his anti-doping form.
- (d) He is not an elite professional, but now an amateur player.
- (e) He has passed anti-doping tests in the past.
- (f) He immediately accepted the provisional suspension once he learnt of his violation.

64. Against Mr IS-1525 :

- (a) He gave evidence that he was fully aware he was responsible for what he ingests. Yet he did not ask the shop assistant if the product contained Prohibited or Specified Substances.
- (b) He failed to read and heed the warnings on the 1MR container that it might contain banned substances and made no effort whatsoever to check the ingredients of 1MR, which would have readily allowed him to establish the unsuitability of those ingredients for use In-Competition.
- (c) He took no independent medical advice about 1MR and simply listened to team mates.
- (d) He continued to take the product beyond the maximum period of 8 weeks recommended on the container and had been using it for almost 8 months when he committed the violation.
- (e) When warned about the In-Competition test he still failed to check the ingredients of 1MR.
- (f) While no longer a professional player, he had been one for 6 years up to mid 2009 and was fully cognisant of the anti-doping regime. As [...]

[...] he is a senior respected figure who should be leading by example.

65. While the points at paragraph 63 evidence to the Panel the Mr IS-1525 did not knowingly or intentionally take MHA, they do not support a finding that he was conscientious about discharging his duties under Article 2.1 of the Rules. The points at paragraph 64 evidence a high level of carelessness by Mr IS-1525 and disregard of his responsibilities about what he ingests.
66. In addition to the facts of the case, the Panel has carefully considered the submissions and cases cited with a view to ensuring the period of Ineligibility it chooses is, in so far as it possible, both proportionate and consistent with other similar cases.
67. Given that English is Mr IS-1525 's first language, he spent time as a professional player, his clear understanding of the anti-doping regime, his prior experience of it through previous testing, [...] in the club, and his complete failure to read and then enquire into the ingredients disclosed on the 1MR container over a prolonged period, the Panel regards Mr IS-1525 as more culpable than the players in *Kumara*, who received a sanction of 9 months Ineligibility.
68. The Panel believes Mr IS-1525 's case is both similar to and distinguishable from Mr Kendrick's case in several important respects. On the points in favour of Mr Kendrick (at paragraph 55 above) (a)-(e) and (g) have no application to Mr IS-1525. On the points against Mr Kendrick about his enquiries being limited ((a), (b) and (d)) Mr IS-1525's were less extensive and more inadequate.
69. While Mr Kendrick is still an elite professional Athlete with access to guidance on anti-doping and Mr IS-1525 is now an amateur, Mr IS-1525 has been a professional Athlete for 6 years gaining a full understanding of anti-doping obligations and he still has ready access to information sources which would have guided him on the suitability of 1MR. Mr Kendrick took the supplement once for one tournament, at a stressful time when his partner was 36 weeks pregnant and to counter the fatigue of jet lag from a single trip to Europe. Mr IS-1525 took it over a prolonged period of almost 8 months to assist with ongoing low energy levels, both in advance of training and in advance of matches. Mr Kendrick made some enquiry about the product both from the person who supplied it and carried out some independent searches on the internet. Mr IS-1525 did neither, yet admitted he could have readily.
70. The *Oliveira* case, in which the Athlete made enquiries about the substance, could be

seen to support an 18 month Ineligibility for Mr IS-1525. Balancing that decision with the cases relating to rugby players and the need for proportionality and consistency of decisions in similar cases the Panel concludes that 12 months Ineligibility is appropriate.

### **The Panel's Ruling**

71. Accordingly, for the reasons given above, the Panel:
- (a) Finds that on [...] 2011 Mr IS-1525 committed an anti-doping rule violation, due to the presence of methylhexanemine (dimethylpentylamine) (MHA) in his bodily sample, which is a Specified Substance under the Rules.
  - (b) Finds that Mr IS-1525 has succeeded in establishing on a balance of probability how MHA entered his body.
  - (c) Finds that Mr IS-1525 has established to the comfortable satisfaction of the Panel that his use of MHA was not intended to enhance sport performance or mask the Use of a performance enhancing substance.
  - (d) Declares Mr IS-1525 ineligible for a period of 12 months commencing [...] 2011 (pursuant to Article 10.7.2 of the Rules) and expiring on [...] [...] 2012 from participating in any capacity in any match, event or activity (other than authorised anti-doping education or rehabilitation programmes) covered by Article 10.8.1.1 of the Rules.
72. This decision may be appealed in accordance with Article 13 of the Rules and Mr IS-1525's attention is directed to the time within which the process must be initiated.

Dated 19 December 2011



**Helen Kilroy, Sean McCague, Martin Walsh**

**Irish Sport Anti-Doping Disciplinary Panel**