

## **IRISH SPORT ANTI-DOPING DISCIPLINARY PANEL**

### **THE IRISH TUG OF WAR ASSOCIATION**

**AND**

**the Athlete's IS-1505, IS-1504 and IS-1503**

**DECISION DATED 17 SEPTEMBER 2012**

1. This panel of the Irish Sports Anti-Doping Disciplinary Panel (the "**Panel**") was convened under Article 8.3 of the Irish Anti-Doping Rules, 2009 version (the "**Rules**") to hear and determine cases brought against each of IS-1505, IS-1504 and IS-1503 (together the "**Athletes**") by their National Governing Body, the Irish Tug of War Association (the "**ITOWA**").
2. The ITOWA alleged that the Athletes had committed an Anti-Doping Rule violation in breach of Article 2.1 of the Rules as a Specified Substance, methylhexaneamine (dimethylpentylamine) or its Metabolite or Marker (hereafter referred to as "**MHA**") was found in a sample of urine given by each of them In – Competition Testing on [...] 2012 .
3. This document constitutes the Panel's reasoned decision, reached after due consideration of the evidence before it, written and oral submissions and case law. Defined terms in the Rules carry the same meaning in this Decision, which is set out as follows: (A) Procedural history – page 1, (B) Athletes' evidence – page 3, (C) ITOWA's evidence – page 10, (D) Submissions and findings – page 12, (E) Recommendations – page 23 and (F) Panel's Ruling – page 23.

#### **(A) Procedural History**

4. The Athletes are members of [...] Club, [...] [...] . On [...] 2012 the Athletes were selected for In-Competition Testing, having just competed for their club at an event in [...] .
5. The Athletes' "A" samples were analysed by the Institute for Biochemistry, German Sport University, Cologne (the "**Institute**") and found to contain MHA. MHA is listed on the World Anti-Doping Agency International Standard for the Prohibited List 2011 (the "**Prohibited List**") as being prohibited In-Competition

under Category S6.B: Specified Stimulants. Article 3.1.1 of the Rules adopts and incorporates the Prohibited List as amended from time to time. MHA is a Specified Substance for the purpose of the Rules.

6. The Institute's adverse analytical findings were furnished to the Irish Sports Council, which conducted a review pursuant to Article 7.2 of the Rules on 10 August 2012. The Irish Sports Council certified that its review did not reveal the existence of a valid and applicable therapeutic use exemption ("**TUE**") for the Athletes or any departure from the International Standard for Testing for Laboratories in force at the time of testing or analysis which might have caused the adverse analytical finding.
7. By letter dated 13 August 2012 the Irish Sports Council notified the Athletes of the results of the adverse analytical findings. The letter identified the alleged anti-doping violation under Article 2.1 of the Rules and the Athletes' right to have their "B" samples tested to determine whether they disclosed the same substance as found in their "A" samples. The Athletes were informed of their right to admit or deny the alleged violation, that the Panel would determine if there had been a violation and the consequences or sanctions to be imposed if there had and of their right to be heard before the Panel.
8. By letter dated 21 August 2012 the ITOWA provisionally suspended the Athletes, pursuant to Article 7.6 of the Rules.
9. By letters dated 23 August 2012 the Athletes admitted the rule violations and waived their right to have their "B" Samples analysed.
10. Given the Athletes' admission of the violation of the Rules the question for determination by the Panel is the sanction to be imposed on each Athlete for the admitted violation. In each case this is a first violation for the Athletes. 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. (No case was made by the ITOWA for an increase in sanction under Article 10.5).
11. The Athletes requested an expedited hearing and in advance of the hearing the Athletes' and the ITOWA's advisers filed written submissions.
12. In his written submissions the Athletes' solicitor indicated that the Athletes would seek to demonstrate satisfaction of the conditions in Article 10.3 (which permits

either a total elimination or a partial reduction of the Period of Ineligibility for Specified Substances under specific circumstances) and the conditions in Article 10.4 (which permits either a total elimination or a maximum possible reduction of the Period of Ineligibility to 12 months in exceptional circumstances). In his written submissions the ITOWA's solicitor set out the conditions and the burdens of proof to be met by the Athletes under Articles 10.3 and 10.4.

13. The hearing took place on 29 August 2012. The Athletes were represented by Mr [...] and Mr [...] of [...] Solicitors and the ITOWA by Mr Gary Rice and Mr Eoghan O'Hargain of Beauchamps Solicitors. Each of the Athletes gave evidence, as did one of their club mates on their behalf, Mr A . Mr Dan McCarthy, the incoming President of the ITOWA and Ms Martha Buckley, the Doping Control Officer of the ITOWA gave evidence on behalf of the ITOWA. Other parties in attendance at the hearing were Mr Dave Collins of the ITOWA, Mr Cathal McKeever of the Tug of War Federation (the "TOWF"), Ms Siobhan Leonard of the Irish Sports Council and Ms Vivienne Meacham BL, Secretary to the Panel. The Panel is grateful to the parties' advisors for their co-operation at the hearing and for their written and oral submissions and to Ms Meacham for her work co-ordinating the hearing.

**(B) The Athletes' Evidence**

14. At the request of ITOWA's solicitor and with the agreement of the Athletes and their solicitor, the Athletes were not present to hear each other before giving their own evidence. In their questioning the solicitors for the Athletes and the ITOWA covered the same ground with each Athlete and portion of their responses, which are common, can be summarised as follows.
15. The Athletes were very shocked when first notified by the Irish Sports Council of the alleged (now admitted) violation as they were not aware they had consumed MHA. When Dr Una May explained that MHA could be found in sports supplements they researched the position and established that they had consumed a sports supplement called 'Nox Pump (Pre-Training Formula) by DY Dorian Yates Nutrition' ("**Nox Pump**") on the day of testing. One of its ingredients is a geranium oil/ geranamine, which is another name for MHA. The fact that Nox Pump contains MHA was easy to establish once the Athletes checked the ingredients on the internet.
16. In Tug of War each team usually has a water boy with them at competitions. The

water boy's job is to keep the team rehydrated with water and to provide tack (glue) for their hands and towels if needed. The water boy comes onto the field with the team during competition and can provide water. There are a number of ends in a pull and there is a chance to take water between ends. The water boy stands out of the way beside the referee during the pulls. After the pulls against an opponent are complete (and before the team begins against another opponent) the water boy assists the team by providing whatever they might need in terms of drinks or food. Each team member normally brings their own drinks too (energy drinks and/or water).

17. The Athletes' club has a water bottle rack and team water bottles, which the water boy uses. The rack holds eight water bottles (there are eight pullers on a team). The club water bottles are blue in colour and are not transparent. They have a yellow plastic lid with mouthpiece through which the contents can be squeezed out and drunk without the lid being opened.
18. The team and the water boy stored their belongings, including sports bags, food and drinks in a team gazebo tent on the day of the testing. The tent was open sided and therefore open to the public/other teams. It was located in the field where the competition took place.
19. On [...] 2012 a sachet of Nox Pump was mixed into one of the team's eight blue water bottles. While the Athletes did not see the drink being mixed, when they recently enquired they were told by the team's water boy, fellow club member, Mr A , that he mixed it before the semi final. He did so at the team tent.
20. Before drinking from the bottle the Athletes did not know that it contained Nox Pump and thought it contained water. They each took either one or two mouthfuls from the relevant bottle. When selected for the testing they each disclosed to the doping control officer details of non prescribed medication and supplements which they had taken within the previous 14 days. None of them listed the Nox Pump as they did not know that was what they had drunk.
21. The Athletes would not have drunk from the bottle had they known it contained a Specified Substance and they had no intention to enhance their sporting performance or to mask the use of a performance enhancing substance through consumption of the drink. The Athletes accept it was careless to consume a drink they had not prepared and where they had not checked its contents but it



occurred in the heat of competition when they were focussed on and discussing the next pull. They very much regret the violation, which was unintentional and inadvertent.

IS-1505      *'s evidence*

22. Mr IS-1505      gave the following evidence in addition to that summarised above.
23. He is [...] years of age and has been pulling since [...] . He has competed at national and international level, enjoying significant success and winning medals at European and World Championships. He is an amateur sportsman. With others he established his current club and has worked on a voluntary basis to promote the sport in his club and in other clubs, travelling long distances to do so. He is a very experienced puller.
24. His first encounter with anti-doping testing in Tug of War was in 2008, when he was tested at a World Championships and he was tested again the following year at the National Championships. His tests were clear. He has limited anti-doping knowledge and did not know much about an athlete's responsibility in respect of supplements or products they consume. He accepted on cross examination that he received the Irish Sport Council's wallet card of Prohibited Substances at the start of each year, which he said he could use when going to the doctor to check medications. However he had received no education about what he should or should not drink and was not really aware of the risk of contamination in supplements, although he took quite a few.
25. When he was notified by Dr Una May of the Irish Sports Council of the violation, he thought it was a hoax call and was very shocked, as he could not understand how he could have failed the test. She explained possible sources of MHA and that led him to ask his team mates what they had been drinking and ask the team water boy, Mr A      , whether he had put anything into the team water bottles. Mr A      confirmed that he had poured one sachet of an "energy drink" Nox Pump into one of the team water bottles. Mr A      got the sachet from the "puller's bag", which Mr IS-1505 clarified was his team mate Mr [...] B's bag. Mr A      was with Mr B      when he bought the Nox Pump at a sports shop in [...] in [...] . Mr B      apparently asked the shop assistant if the drink was legal from a doping perspective and was told by the shop assistant that it was.

26. Mr IS-1505 visited the sport shop in [...] for the first time in [...] 2012 and spoke to the owner of the shop and the young assistant who sold the product to Mr B . The owner said he had stopped selling the product once he learnt it contained a banned substance (following enquiry from the Medicines Board). The shop owner gave a letter for the hearing saying Mr IS-1505 had bought the substance there and did not know at the time it contained a banned substance and the shop no longer sold it as it contained DMAA, which is another name for MHA. Mr IS-1505 said that although the letter referred to him as the purchaser that was an error (the letter was to be addressed to him and he thought the shop owner was confused) and he confirmed he had not bought any Nox Pump.
27. Mr IS-1505 described the water boy's job as being to give the pullers what they need on the day in terms of tack for their hands, towels, and water (in the team's 8 water bottles) to hydrate during pulls and tea, coffee or food and other refreshments between pulls:
- "A water boy basically keeps the pullers hydrated with water and he also does tack. We can put tack in our hands for grip. So he comes onto the field with us. You know [he] has the water bottles and then in between a pull like that he can give you water and we can get tack in our hands ....he is part of the team all day. He is with you to keep you rehydrated all day because we can't carry water bottles ourselves on to the field".*
28. Mr IS-1505 initially said that he did not recall taking the drink on the day of testing but he believed from what Mr B said it was around the time of the semi final, as that is when Mr B said he mixed it. On cross examination he confirmed that it did not taste like water and was "like a sugary drink", "it was really sweet". He insisted he only took a mouthful (or possibly 2) when challenged that the level of MHA found in his sample suggested he had taken more over a longer period. He admitted that he did not ask any questions about it when he tasted it and did not stop drinking it. He was busy concentrating on the pull but admitted it was unusual to have something other than water in the team bottle and he regretted not asking about it. When challenged that he was not surprised when he tasted it (inferring he knew exactly what it was) he denied that he knew. When challenged that the test was a targeted one, as there had been a complaint about his club's win in [...] in [...] 2012, Mr IS-1505 denied that he or his team mates had taken Nox Pump at the [...] event or indeed ever before in competition or training.
29. Mr IS-1505 accepted that he was in the habit of taking quite a few pills, drinks and supplements, as evidenced by the disclosures on his doping control form. He

disclosed using Berroca (a multivitamin drink), maxi muscle protein (a protein shake), Gluco (a joint care tablet), creatine tablet, red bull and an energy supplement drink. He did not disclose that he had taken Nox Pump on the form. The energy supplement drink referred to was a Lucozade sport energy drink he had brought himself that day. He listed what he could think of "off the top of his head" when asked to do so by the doping control officer but did not think he needed to list the drink which he now knew contained Nox Pump.

Mr IS-1504 's evidence

30. Mr IS-1504 gave the following evidence in addition to that summarised above.
31. Mr IS-1504 is [...] years old and similarly has pulled since [...] , helped found the Athletes' club and has worked hard at promoting the sport for many years. He is an amateur sportsman. He has competed nationally and internationally for club and country, enjoying medal success at World and European Championships. He is a very experienced puller.
32. He has never been tested before. He is aware of failed tests by a Spanish and Swiss team in Tug of War and an Irish bowler. He is aware from his experience internationally that you need to be very careful in what you take, which is why all he takes are multivitamins (which he regards as a supplement) and he keeps a good diet. On cross examination he admitted he is aware of the risks of taking supplements and admitted receiving the Irish Sports Council's wallet card. He has no education though on the substances on the card or the fact they can have different names.
33. When notified of the violation he subsequently established from Mr A that one of the team water bottles contained an energy drink "that they had mixed up into one of the bottles before the semi final" in the team's gazebo tent. He did not see the drink being made up "I never seen the water man mixing up the drinks and he had it mixed when I came back from the pull". He recalls tasting the drink on the day and believed it was a multivitamin drink. He drank a mouthful before the semi final.
34. On the anti-doping form he declared multi vitamin, vitamin C, protein shake and glucosamine. He did not declare the Nox Pump drink on the anti-doping form as he did not know he had consumed it and thought he had consumed a multivitamin drink.

35. Under cross examination (when challenged that the level of MHA found in his sample suggested he had taken more than a mouthful over a longer period) he was adamant he took one mouthful, though it was the end of the bottle and might have been more concentrated if not properly mixed. So if his reading in his sample was high (which he did not know) that might explain it. He admitted that he did not ask any questions about it when he tasted it, as the water boy "*is not going to be there to do anything bad for the club, so why would he give you anything knowingly....you have faith in your men around you*". While he expected to taste water, he said he assumed it was a multi vitamin drink, which he was used to drinking and which the water boy might have made up.
36. When challenged that it was a targeted test, based on the team's win in [...] having lost earlier in the day to the same team, he refuted that he or any of the team had taken Nox Pump that day. That day he drank from his own water bottle as he had mouth ulcers and he did not share in a common bottle. His club were [...] and had to do a big sauna to make the weight for [...], so it took them a while to 'get going' in [...] which they did. In his view there was nothing surprising about the result.

Mr IS-1503 's evidence

37. Mr IS-1503 gave the following evidence in addition to that summarised above.
38. Mr IS-1503 is [...] years of age and [...]. He is an amateur sportsman. He has never been tested before. He has limited anti-doping knowledge. While he receives the anti-doping wallet card he feels you need to be "*nearly tutored*" to understand it. He accepts he has a responsibility to inform himself about anti-doping.
39. He was shocked when notified of the violation and could not understand how it was in his system. He never heard of MHA before. He was warming up as a substitute before the semi final and came back from a run and took a sip of the drink from a team water bottle. He recalls tasting the drink on the day and believed it was like a dilute "*fruit drink*" or an "*isotonic drink*". He was not surprised when he took the drink as it tasted like a fruit drink and had no reason to think there was anything banned in the drink. He did not declare it on the anti-doping form as he did not think he needed to. He disclosed red bull, deep heat patch and an isotonic drink.

40. He has never taken anything to enhance his performance; he is always fit so there would be no need to. He said if a sports drink was not "okay" (in terms of being banned from an anti-doping perspective) he thought it should not be possible to buy it in a shop. He drank it in the heat of the moment expecting it be water or a fruit drink and thought it was a fruit drink. He thought he took one mouthful, but possibly two.
41. When challenged that it was a targeted test, based on the team's win in [...] having lost earlier in the day to the same team, he said they came in as [...] [...] . He said the water bottles that day contained water and nothing else.

Mr A 's evidence

42. Mr A was with Mr. B in [...] when he bought the Nox Pump. Mr B bought it in a shop in [...] . He was looking for an "energy drink" or "something with caffeine". He heard Mr B ask twice if it was legal from a doping point of view and if he was drug tested "would it pass the requirement test and the bloke behind the counter said it definitely would". Mr A read it was legal on the box but he did not study the ingredients on the day he mixed the drink.
43. On the day of testing he was the team's water boy and filled the 8 team blue water bottles at home, using tap water. He also bought extra water and brought it to the competition in case they needed more. The team had an open sided gazebo tent where it kept its bags and met between pulls. Members of the public sheltered in the tent at some points in the day as it was raining.
44. At some point during the day, he thinks before the semi final pull, he saw two sachets of Nox Pump in the side pouch of Mr B's bag, which was in the tent. He made one up into a half full team water bottle, as he thought that would be about right in terms of amount of water. He did not though read the instructions on the sachet. He did not tell the team that he had put Nox Pump in the bottle; rather he simply put the bottle back into the bottle rack. He thought the product was legal and there was no problem with what he had done. He thought "you might just get some energy off it when you are coming to the final stages of the day". He did it on his own initiative and without being told to by Mr B or anyone else to do it. He thinks Mr IS-1503 asked after he drank it what it was and that Mr IS-1505 was looking for water after he drank it.

45. He was not at the [...] pull.
46. On cross examination he admitted Nox Pump is a pre training product and not described on the box as for use In Competition. He missed the warnings that the product was not FDA approved and the list of ingredients including geranamine. He could not say if Mr B bought it for himself or the team but he thought it would give energy, like coffee would.

*"Q. After it was bought in [...] who kept it? A. Mr B . Q. Why were you with him that day? A. I was in a sports shop buying a Tug-of-War belt. Q. And why did he buy it? A. I can't answer that question to be honest with you. As I say he was looking for an energy drink and I was standing beside him when he was talking to the bloke behind the counter and that is what he produced. Q. Did he explain to you why he was, did he say it is for me, it is for the team? A. Well sometimes say the water boy would go and get coffee on a day of a pull and it is not very easy say for a water boy to bring back six or seven cups of coffee. Q. Sorry, did he buy it for himself or for the team? A. I don't know to be honest with you. He paid for it out of his own pocket as far as I know anyway".*

#### Written evidence

47. The Athlete's solicitor handed in two letters as evidence, one from a local club, [...], commending Mr IS-1505 for his voluntary work in the club. The second was from a Mr [...] Managing director of the sports shop [...] and read:

*"In [...] 2012 IS-1505 purchased a product from one of my employees called Dy Nox Pump. A month later this product became illegal to sell due to an ingredient DMAA. IS-1505 was unaware of this when he bought the product because the ban came in on [...] 2012. This is a genuine mistake since he was not advised and had no club doctor/nutritionist to advise what would be okay to consume while in competition."*

48. The Athletes wrote a letter on 13 August 2012 in which they stated:

*"On the day of [...] at the 640 the pullers were all drinking water and were then given a sip from an energy drink to replace lost salts etc from the hard day's pulling, we have since found out that this contained Geranium Root Extract, which we think is the cause of the failed result as we can find nothing else that may have caused this. In hindsight we can see this was a serious error of judgement on our behalf taking a drink when as individuals we hadn't supplied this".*

#### **(C) ITOWA's Evidence**

*Dan McCarthy*

49. Mr McCarthy is the incoming president of the ITOWA. He gave the following

evidence in relation to the [...] competition, at which the Athletes and their team competed on [...] 2012, and what occurred thereafter.

50. Mr McCarthy refereed the final which the Athletes' team won. On his return journey to Cork he received a telephone call from an individual (who had competed on one of the other teams in [...] ) who expressed concerns regarding the performance of the Athletes' team on the day. The individual alleged that in his opinion the team must have taken some substance because from the round robin (which they lost to the team that they beat in the final) to the final they had improved in their power. Mr McCarthy referred the individual to the Doping Control Officer for the ITOWA. Mr McCarty has never received a call like this before.
51. On cross-examination Mr McCarthy confirmed that he knew Mr IS-1505 and Mr IS-1504 down through the years. He described them as a big asset to the ITOWA, as they bring great enthusiasm to the sport and have foresight as to its future. He acknowledged the efforts they made travelling around to schools and other clubs promoting the sport. He acknowledged a period of Ineligibility for the Athletes would be damaging for the sport.

*Martha Buckley*

52. Ms Martha Buckley is the Doping Control Officer of the ITOWA. Annually Ms Buckley gives the coach in each club an Irish Sports Council wallet card for onward distribution to their members. At the annual AGM of the Association (there are about 40 clubs affiliated and 900 Athletes) she passes on to Athletes any information she has education wise from the Irish Sports Council. Each Sunday she meets clubs and Athletes in the field at competitions and if there is any new information to pass on from the Irish Sports Council in terms of literature on doping she gives it to the coaches, for onward transmission in the clubs and they sign for it.
53. In relation to the current case Ms Buckley said that she received a call on the evening of [...] 2012 from an individual adamant that they wanted the Athletes' team tested. She asked the same questions as Mr McCarthy, namely had the individual seen the team take anything and she received the same answers. Each year the ITOWA has four people tested as part of its normal anti-doping procedure. She made arrangements with the Irish Sports Council to have three individuals from the Athletes' team tested to clear up the allegation once



and for all. She arranged this with the assistance of Dr Una May from the Irish Sports Council.

54. On cross-examination Ms Buckley said it is better to give documentation to clubs in hard copy and to ask them to sign to evidence receipt of it rather than sending it by email. When asked whether the association runs any event or course or social function where someone gives a lecture about substances and supplements she said that did not occur and rather the Association relies upon the Irish Sports Council to provide it with relevant anti-doping information, which it passes on. She confirm that at this years AGM that in presenting her report she emphasised that each Athlete is responsible for what goes into their mouth, no one else is responsible and no excuses would be accepted. She said and has always said to them that if they have any queries about whether they can take something they should ask her and she will provide an answer. She confirmed that prior to this case fourteen members of the ITOWA have been tested and all those tests have been clear.
55. On re-direct Ms Buckley quoted from the Irish Sports Council wallet card two sections the first of which read:

*"Athletes are held to the standard of strict liability which means that you are responsible for any Prohibited Substance found in your system"*

And the second of which read:

*"Methylhexaneamine has been found in nutritional supplements, typically those that are designed to increase energy or aid weight loss and is referred to by a number of alternative names including 1.3. Dimethylpentylamine.....DMAA, forthan, forthane, foradrene, Geranamine and Geranium Oil".*

#### **(D) Submissions and Findings**

##### *Possible Application of Article 10.3*

56. 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.

57. Article 10.3.1 provides:

*"Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances*

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."*

58. Article 10.3.2 provides:

"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."*

59. The burden of proof under Article 10.3 rests on the Athletes. They must establish how MHA entered their body and that their ingestion of MHA was not intended to enhance their sport performance or mask the Use of a performance enhancing substance on the balance of probabilities. In doing so they must produce corroborating evidence, in addition to their 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. Only if the Panel is satisfied that the Athletes have met these requirements can the Panel consider what degree of fault should be attributed to the Athletes and whether this merits any reduction in the two years Ineligibility.

(a) *How the MHA entered the Athletes' bodies*

60. The Athletes' solicitor submitted that in line with the decision in *Flavia Oliveira v. United States Anti-Doping Agency*<sup>1</sup> the Athletes' explanation of their ingestion of the supplement Dy Nox Pump established how the Specified Substance MHA entered their bodies under Rule 10.3.1. The ITOWA's solicitor agreed. The Panel accepts that the Athletes have discharged the onus on them of showing, on the balance of probabilities, how the Specified Substance entered their body, namely through their ingestion of Nox Pump contained in a blue team water bottle on [...] 2012.

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

---

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

61. The Athletes' 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. The ITOWA's solicitor agreed. The Panel accepts that the Athletes have discharged the onus on them of showing, on the balance of probabilities, that they had no intention to mask the Use of a performance-enhancing substance by ingesting MHA.
62. The next onus on the Athletes was to show to the comfortable satisfaction of the Panel that they did not intend to enhance their sports performance by ingesting the Specified Substance, MHA. As noted in Article 8.4.1 of the Rules the burden of comfortable satisfaction is higher than balance of probability but less than beyond a reasonable doubt.
63. In the written submissions the ITOWA's solicitors submitted that it is sufficient for the Athletes to show they did not intend to enhance their sport performance by ingesting the Specified Substance, rather than by ingesting the supplement, Nox Pump in which it was contained, (relying on *Oliveira*, which was applied by the Irish Sport Anti-Doping Panels in *IRFU v Carroll*<sup>3</sup> and *FAI v Grimes*<sup>4</sup>. As noted in the ITOWA's submission there is a conflicting line of international authority that intent in relation to the supplement should be determinative but that conflict has not yet been determined by CAS). The Panel accepts the ITOWA's submission that intent in relation to ingestion of the Specified Substance is determinative.
64. The Athletes' solicitor noted his clients' evidence that they had not bought or mixed the Nox Pump and were not aware it contained MHA when they drank it. That lack of knowledge was evidenced (he said) by their shock and surprise when they were told of the alleged anti-doping violation. The Athletes' solicitor contended that as the Athletes did not know they were consuming MHA there could be no finding of intent to enhance their performance through such consumption. The Panel accepts the Athletes' evidence that they did not know the drink they consumed contained MHA when they took it. Prima facie (per *Oliveira*) that supports a finding they had no intention of enhancing their sporting performance by ingesting MHA. However that on its own is not enough to satisfy Article 10.3.2, given the Athletes' obligation to adduce corroborating evidence, in addition to their own word to establish to the comfortable satisfaction of the Panel their lack of intention to enhance their sporting performance.

---

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

<sup>3</sup> Irish Sports Anti-Doping Panel - 19 December 2011

<sup>4</sup> Irish Sports Anti-Doping Panel - 30 July 2012

65. The Athletes' solicitor noted a number of circumstances which he submitted, supported the Athlete's evidence that they had no intention to enhance their sporting performance by ingestion of the drink. Mr A confirmed they did not buy the product or know it was in the bottle as he did not tell them. The Gazebo tent where Mr A mixed up the drink was open and visible to the public and the drink was consumed in an open area. Mr A confirmed that the team water bottles usually contained water.
66. The ITOWA's solicitor submitted that the Athletes had failed to adduce corroborating evidence (in addition to their own word) of lack of intention to enhance their sporting performance through ingestion of a Specified Substance. He submitted the time of ingestion (mid-competition) of a substance banned In Competition as it could benefit performance (because it is a stimulant) created a high burden on the Athletes in this case to demonstrate lack of intent. In this regard he referred to the following comment on Article 10.4 of the WADA Code (the "**Code**") (the equivalent of Article 10.3 of the Rules):

*"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."*

67. In relation to the guidance commentary in the Code CAS has stated:

*"[a]lthough these comments are not binding upon the Panel, they form a body of information which can be taken into account when interpreting the rules and regulations in the [Code]"<sup>5</sup>.*

68. The ITOWA's solicitor submitted that the Athletes' cases are distinguishable from the precedent cases relating to the ingestion of MHA and the types of evidence which (found in combination) in those cases constituted corroboration of the athlete's lack of intent. This was not a case where the Athletes had given evidence of reasons for taking Nox Pump over a period of time, such as in other cases where it was taken to relieve fatigue. In most other cases the athlete had proved some level of prior enquiry about the content of the substance taken and here none had been made by the Athletes (on their own evidence), even after

---

<sup>5</sup> WADA v/FAW & James, CAS 2007/A/1364 para. 7.9.

consumption. Nor had the Athletes made any disclosure of the consumption of Nox Pump on their anti-doping forms, which might be regarded as evidence they thought it was not prohibited, (although ITOWA's solicitor suggested no credit should be given for disclosure of consumption of the drink rather than the Specified Substance contained within it). In various authorities where Athletes successfully invoked Article 10.3 (*Carroll, Grimes, Dooler, Dodson*) he submitted the Athletes gave evidence as to why they used the relevant sports drink (which contained the Specified Substance), they were open about its use and that evidence was independently corroborated. He submitted the precedent cases, in so far as they address what might constitute corroborating evidence, are therefore distinguishable on the facts from the Athletes' cases.

69. Two decisions involved digestion of MHA mid competition and in both Article 10.3 was nevertheless successfully invoked. The case of *UK Anti-Doping v. Dooler*,<sup>6</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 for fatigue, the evidence he did not know the supplement contained MHA (he had researched it) and the evidence that he took the supplement at half time, (he was typically substituted shortly thereafter), with a view to aiding recovery after matches and not to enhance sporting performance.
70. The ITOWA's solicitor provided the second decision in *Wihongi*<sup>7</sup> after the hearing. The player was a professional rugby player. At half-time in a match the player inadvertently drank from the bottle containing the Anabolic Nitro, which had been mixed for another player. Pre-season the player had tried the drink but did not like it and decided not to use it during the season. So he usually drank water at half time. While Anabolic Nitro did not list any Prohibited Substances in its ingredients (and was therefore legal) the manufacturer admitted that the supplement in question was contaminated. The RFU Panel found the player intended to drink water and not a drink which contained a performance enhancing substance. All of the above was clearly corroborated by evidence from other players and the club doctor and experts who described how he screwed his face up and threw the bottle down after he tasted it, his normal drink patterns and the contamination of a lawful product. The Panel held that "*the totality of such*

---

<sup>6</sup> UK National Anti Doping Panel – 24 November 2010

<sup>7</sup> RFU Panel - 16 March 2011.

*evidence leaves us comfortably satisfied that the substance was not taken in an attempt to enhance the player's sporting performance."*

71. While the precedents do provide helpful guidance to the Panel on how the Rules and Code have been interpreted in the past, both sides' solicitors acknowledged that the jurisprudence confirms the Panel must decide each Athletes' case on its own the particular facts and must seek to reach a decision that is proportionate to the Athletes' level of fault under the totality of the circumstances (*Oliveira*<sup>8</sup>).
72. In relation to the issue of who purchased the product, the potentially corroborating evidence is conflicting. The letter from the sports shop in [...] indicated it was Mr IS-1505 (although he denied this) and Mr A gave evidence that it was purchased by Mr B. While the Panel thinks it more likely that Mr B made the purchase, unfortunately neither the shop assistant who sold the product nor Mr B gave evidence, and Mr A said he did not know if Mr B bought it for himself or use by the team.
73. In relation to enquiries made about the legality of the product, Mr B, who allegedly made the enquiries, did not give evidence. Nor did the shop assistant who allegedly gave the advice. Mr IS-1505 gave evidence that he requested a letter from the shop owner confirming that such advice was given but the letter did not so confirm. Rather it highlighted the product had since been taken off the market by the shop as it contained an 'illegal substance' DMAA or MHA.
74. In relation to the veracity of the Athletes' evidence about how much they had consumed, the ITOWA's solicitor submitted that the concentrations found in each of the Athlete's samples were high and inconsistent with the level of drink which the Athletes gave evidence they had consumed. In that regard he provided an email from Dr Hans Guyer dated (29 August 2012), Deputy Head of the Institute and an article on MHA written by the Swiss Anti-Doping Unit<sup>9</sup>. The article tested two Athletes who took a known quantity of MHA in test circumstances and measured the concentrations of MHA found in their urine samples over a period of time following ingestion. Relying on the article Dr Guyer submitted that if a sachet of Nox Pump containing 40 mgs of MHA the Athletes would have had to consume approximately 200 millilitres and 66 millilitres of Nox Pump drink to reach the concentrations of MHA of 15 ug/ml (microgram/millilitre) found in [...]

---

<sup>8</sup> In particular paragraph 9.31 thereof.

<sup>9</sup> Published in the Journal of Chromatography, Authors Laurent Perrenoud, Christophe Saudan, Martial Saugy of the University Centre of Legal Medicine Genève and Lausanne.

IS-1504's sample and 5 ug/ml found in IS-1505 and IS-1503's readings. Dr Guyer's email acknowledged that the measure of MHA in each sachet of Nox Pump has never in fact been quantified. The ingredients on the reverse of each sachet do not assist in clarifying the position. In response the Athletes' solicitor noted that Dr Guyer's comments were based on a number of assumptions, including the level of MHA in one sachet, which could not be proved and he invited the Panel to therefore disregard Dr Guyer's submission.

75. Given the unproved assumption (about level of MHA in a NOX Pump sachet) on which Dr Guyer's email is based the Panel does not feel it appropriate to accept the email as proving the contention that the concentrations of MHA found in the Athletes' sample were higher than they ought to have been if the Athletes' evidence about their level of consumption and timing of consumption was correct. That said the Panel notes there was no corroborating medical evidence adduced by the Athletes to support their evidence about levels of consumption or that suggested the levels found in their samples were too low to have any bearing on their performance.
76. While the test on [...] 2012 was a targeted test, the ITOWA's solicitor acknowledged that the complaint made about the Athletes' team after their win in [...] could have been made by a disgruntled opponent and was not based on any evidence of an anti-doping violation. The Panel takes a neutral view of this fact. Similarly, although none of the Athletes listed consumption of Nox Pump on their doping control form (and doing so would have supported a lack of intent argument), the Panel accepts the reason given, namely that they did not know what they had consumed was Nox Pump.
77. Mr A was the only witness to give evidence to support the Athletes' own word that they had no intention to enhance sporting performance. For a number of reasons the Panel found aspects of Mr A's evidence implausible and therefore unreliable. While Mr A contended that he regarded the drink as legal and fine to take, he did not tell his team that he had mixed a sachet and put it into one of the team water bottles. Instead he simply replaced it in the rack with the other seven water bottles, where it could not be identified. Mr A's intention in making up the sachet of Nox Pump was (as noted in paragraph 44 above) to provide some form of energy boost or stimulation to the Athletes as they were going into the final pulls, yet he apparently did not identify the energy drink to them. In the Panel's view his explanations were not



consistent with his declared belief that the product was fine to take.

78. Having carefully considered the evidence adduced at the hearing, submissions for the parties, guiding principles in the Code and precedent cases, the Panel is not comfortably satisfied that the Athletes have corroborated (in addition to their own word) their lack of intent to enhance their sporting performance by taking MHA.

(c) *Degree of Fault*

79. As the Athletes have not satisfied the Panel that they meet the requirements of Article 10.3.2 of the Rules, the issue of degree of fault under 10.3.2 does not arise.

*Possible application of Article 10.4*

80. Article 10.4 refers to the Elimination or Reduction of Period of Ineligibility based on Exceptional Circumstances whether the substance consumed was a Prohibited Substance or Specified Substance. Article 10.4.1 provides for the elimination of an otherwise applicable period of Ineligibility where the Athlete demonstrates 'No Fault or Negligence' and Article 10.4.2 provides for the reduction of an otherwise applicable period of Ineligibility where the Athlete demonstrates 'No Significant Fault or Negligence'.

81. 'No Fault or Negligence' is defined in the Rules as:

*"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,"*

82. The Athletes' solicitor accepted that Article 10.4.1 is not relevant as the Athletes cannot demonstrate No Fault or Negligence, having consumed a drink which they did not prepare and without making any enquiry as to its contents.

83. Article 10.4.2 applies where an Athlete has 'No Significant Fault or Negligence' which is defined in the Rules as:

*"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 relationship to the anti-doping rule violation".*

84. The relevant section of Article 10.4.2 provides that:

*"If a Participant establishes in an individual case that he or she bears No*

*Significant Fault or Negligence, then the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one half of the period of Ineligibility otherwise applicable..... When a prohibited substance or its Markers or Metabolites is detected in an Athlete's sample in violation of Article 2.1 the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced".*

85. The ITOWA's solicitor submitted in writing that if the Panel is not adequately convinced that the Athletes did not intend to enhance their performance for the purposes of 10.3, it is difficult to see how the Panel could be convinced that the Athletes bear No Significant Fault or Negligence for purposes of Article 10.4.2. The Panel's finding under Article 10.3.2 was of a lack of corroboration (in addition to their own word) of the Athletes' absence of intention to enhance their sporting performance through ingesting MHA to the Panel's comfortable satisfaction and the Panel notes the test and the burden of proof under Article 10.4.2 are different. The Panel believes that Article 10.4.2 does have a potential application in this case as the Athletes have demonstrated how the MHA was ingested and so it should consider whether the Athletes meet the test of No Significant Fault or Negligence in the circumstances of the case.

86. 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".*

87. The ITOWA's solicitor provided helpful written submissions on this issue and cases where Article 10.4 was applied (which he read at the hearing). The issue here is whether the fault or negligence of the Athletes was 'Significant'. This term is not defined by the Rules, but the Code provides guidance as to how 'Significant Fault or Negligence' in equivalent Articles 10.5.1 and 10.5.2 of the Code should be interpreted. It notes that a finding of No Significant Fault or Negligence is "meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases".<sup>10</sup> The Code provides examples of what facts might qualify as No Significant Fault or Negligence. These are

---

<sup>10</sup> Code commentary to Articles 10.5.1 and 10.5.2, page 56.

circumstances such as a positive test resulting from a mislabelled vitamin, sabotage of food or a drink by an associate or administration of the prohibited substance by the athlete's physician or trainer without disclosure to the athlete. The Code further notes that

*"For purposes of assessing the Athletes' fault under Article 10.5.1 and 10.5.2 the evidence considered must be specific and relevant to explain the Athletes'... departure from the expected standard of behavior".<sup>11</sup>*

88. The Court of Arbitration for Sport has stated that,

*"Only if circumstances indicate that the departure of the athlete from the required conduct under the duty of utmost care was not significant, the sanctioning body may apply art. 10.5.2 of the [Code] and depart from the standard sanction."<sup>12</sup>*

89. In *Nielsen*, the Court of Arbitration for Sport discussed the word 'Significant':

*"That word [significant] in its context connotes a lack of serious or substantial fault or blameworthiness, so that the rigorous application of these very strict anti-doping rules is tempered in the case of an excusable and understandable failure to have foreseen or prevented the doping offence where the conduct of the player was not culpable, but failed to meet the standard of utmost caution. However, the circumstances have to be truly exceptional so as to prevent the principle of strict liability being eroded."<sup>13</sup> (emphasis added)*

90. In relation to interference with drinks the Code notes an athlete's strict liability for what they ingest but the possibility of a finding of No Significant Fault or Negligence as follows:

*"...(c) sabotage of the Athlete' food and drink by a spouse, coach or other person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence" (emphasis added).*

91. The Athlete's solicitor submitted that the circumstances in which the Athletes ingested Nox Pump did not involve Significant Fault or Negligence, as they expected the team water bottles to contain water or possibly a multivitamin drink. They and their team mates are amateur sportsmen, without the financial resources for advice on nutrition, and they reasonably relied on a team mate, the

---

<sup>11</sup> Code commentary to Articles 10.5.1 and 10.5.2 at page 57.

<sup>12</sup> *FIFA & WADA CAS 2005/C/976 and 986* at para 75.

<sup>13</sup> *ITF v/ Neilson* Anti-Doping Tribunal decision 5 June 2006 paras 16, 18

water boy, to fill the water bottles with water and not to purchase drinks without making appropriate enquiry about their contents. Unlike some of the athletes in other cases, they did not purchase the product and did not consume the product for a period of time without making enquiry, rather they carelessly ingested it in circumstances where they did not expect to drink it.

92. On the facts of this case as tested by cross-examination, there is an established protocol in Tug of War competitions for teams to have a water boy, who is responsible to provide water and other help to the pullers during the competition. In this case the Athletes' club had team water bottles, which the water boy filled with water at the start of the day and refilled as necessary during the competition. He was allowed to bring those water bottles to the Athletes during competition as they were not entitled to bring their own water bottles onto the field of competition. If the Athletes wanted to have energy drinks during the day of competition they brought them themselves. The Athletes trusted the water boy as a team mate not to do anything inappropriate. The bottles were not transparent so the Athletes could not see before drinking that the bottle contained Nox Pump. In all the circumstances the Panel think it is understandable that the Athletes drank from the water bottles without hesitation. That is particularly so as the Athletes are competing in an amateur arena, display little awareness of risk of doping violations and none of them has received much by way of anti-doping education. So their perception of risk in drinking from the team bottles was low.
93. Where team water bottles are in use an athlete could exercise extreme caution (as envisaged by Article 10.4.1) by always supervising the filling of the bottles but this is not necessarily feasible where bottles are refilled during competition. Equally an athlete could exercise extreme caution by always checking before drinking from a team water bottle during competition. The Panel does not believe in the specific circumstances of this case that it would have been realistic for the Athletes to open and check the contents of the team water bottles each time they went to take a sip over the course of the competition. (This is the same for players in many sports when they take a drink of water from a team water bottle while on the field of play). While the Athletes were undoubtedly careless in drinking something they did not prepare themselves, the Panel do not think their conduct in drinking from a bottle in the specific circumstances in which they did entailed significant blameworthiness (such circumstances are already described in

this Decision and include Mr A putting the Nox Pump into a half empty bottle before the semi final).

94. In the specific and relevant circumstances of this case the Panel does not regard the Athletes as guilty of Significant Fault or Negligence. Balancing the Athletes' strict liability and lack of Significant Fault and Negligence, and the need for proportionality, the Panel believe a reduced period of Ineligibility of 18 months should apply.

**(E) Recommendations**

95. The role of the water boy, as described in this case, is one which does not assist best practise in anti-doping control. The Panel recommend that the ITOWA and TOW Federation consider what protocols or rules could be put in place to ensure athletes are not at risk of ingesting a drink which they have not prepared and cannot easily check. Possibilities include prescribing that only clear bottles are used as team bottles so athletes can see and check the contents before consumption or in the alternative that there be a designated and identified bottle for each team member, which they are responsible to fill.
96. The role of education and the need to heighten awareness of anti-doping responsibilities is highlighted by this case. While the ITOWA ensures members receive the Irish Sports Council's wallet card and addresses the issue at its AGM, the Panel recommends that further consideration be given to what additional education support might be provided to clubs and their members to ensure members have a clear understanding of their responsibilities to avoid doping violations.

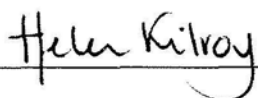
**(F) The Panel's Ruling**

97. For the reasons given above, the Panel makes the following ruling as to sanctions in respect of the admitted violation by the Athletes on [...] 2012 due to the presence of MHA (methylhexanemine (dimethylpentylamine)) in their bodily samples, a Specified Substance under the Rules.
- (a) A period of Ineligibility of 18 months is imposed on the Athletes under Article 10.4.2.
- (b) The period of Ineligibility shall commence on [...] 2012 (pursuant to Article 10.7.2 of the Rules in light of the Athletes' timely admission of the

violations) and expire on [...] 2014 and precludes the Athletes 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.

- (c) The results of the Athletes on [...] 2012 are automatically disqualified as are any results of the Athletes since that date in accordance with Article 9 of the Rules (and Articles 9.2.1 and 9.2.2 in particular).

98. This Decision may be appealed in accordance with Article 13 of the Rules and the Athletes' attention is directed to the time within which the process must be initiated under Article 13.4, namely fourteen (14) days from the date of this Decision by filing a notice of appeal with the Chair of the Irish Sport Anti-Doping Disciplinary Panel care of the Irish Sports Council.



**Helen Kilroy Solicitor (Chairperson)**

**Warren Deutrom**

**Dr Pat O'Neill**

**Irish Sport Anti-Doping Disciplinary Panel**