

**At the Head Office of the Malta Sports Council  
Cottonera Sports Complex, Cospicua, Malta**

**Decision of the National Anti-Doping Appeal Panel**

**Appeal Case Reference: 02/2015/ NADAP**

**Between**

**Eman Xuereb  
(ID Card No 183883M – Basketball Player – Malta Basketball Association) – (Appellant)**

**Vs**

**Anti-Doping Commission (Malta) – (Respondent)**

The National Anti-Doping Appeal Panel (hereinafter referred to as the 'Appeal Panel' made up of:

- Dr Carmel Cascun BA FCII MJur LLD – Chairman
- Dr Stephen Zammit MD – Member
- Dr Maria Cassar BPharm, MBA, PhD – Member

Before the commencement of the proceedings Dr Marisa Cassar and Dr Stephen Zammit declared to the Chairman that they are not aware of any circumstance or conflict that could negatively affect their impartiality with respect to any of the parties involved in this appeal. A similar declaration was made by the Chairman of the Appeal Panel.

**1. Preliminaries**

1.1 The request to convene the Appeal Panel by the NADO was made on the 20<sup>th</sup> May 2015, following receipt of Notice of Appeal filed by the Appellant through his advocate Dr Roberto Montalto of the 19<sup>th</sup> May 2015.

1.2 This Notice of Appeal was filed following the decision handed down against the athlete Eman Xuereb on the 29<sup>th</sup> April 2015 by the National Ant-Doping Disciplinary Panel (hereinafter referred to as the First Panel).

1.3 The Appeal Panel when considering this Appeal took note principally of the following which form part of the process file:

- a. Authorisation Letter issued by the NADO on the 2/11/2014 to carry out 'in competition' the doping test (Test Mission Code : 1C 015/14);Doping Control Form duly completed and signed on the 02/11/2014;
- b. Chain of Custody Form dated 02/11/2014;
- c. TNT Consignment Note dated 05/11/2014;



d. Email message from Dr Manolis Lyris PhD on 02/12/2014 of the Olympic Athletic Center of Athens 'Spyros Louis' containing Analysis Report No. 12464\_2 which report *inter alia* states:

- Event/Status of Control: In Competition Testing
- Federation: NADO of Malta
- Sport: Basketball
- Date of Reception: 07/11/2014
- Chain of Custody Status: According to WADA specifications
- Sample Code: A469915
- Sex: Male
- Result : AAF (Adverse Analytical Finding)
- Substance Identified: Cocaine
- Note: Cocaine is a stimulant. The presence of benzoylecgonine, cocaine metabolite, was confirmed at the above sample.

e. Notification of Adverse Analytical Finding (Ref No. ITSTEMAXUE-14/3) by the Chairperson ADC (Malta) on the 02/12/2014 to athlete Eman Xuereb. Mr Xuereb was also informed that he had breached Art 2.1 of the WADA Code and Art. 3.3 of Legal Notice 281 of 2011;

f. Report of Adverse Analytical Finding issued by NADO (Malta) Ref No. ITSTEMAXUE-14/4;

g. Letter by the Chairperson ADC (Malta) on 02/12/2014 to the President of the Malta Basketball Association informing him of the Adverse Analytical Finding – Ref No. ITSTEMAXUE-14/7;

h. Receipt of Letter of Acceptance for Provisional Suspension signed (undated) by Eman Xuereb;

i. Letter of Provisional Suspension issued by The Secretary General of the Malta Basketball Association on the 02/12/2014 to Mr Eman Xuereb;

j. Email message by the NADO Coordinator on 02/12/2014 to Dr Manolis Lyris asking for details to carry out the analysis of the 'B' Sample;

k. Email message by the NADO Coordinator on the 05/12/2014 cancelling the analysis of the 'B' Sample;

l. The minutes of the First Panel's proceedings during its sitting on the 9<sup>th</sup> April 2015;

m. The decision of the delivered by the First Panel on the 29<sup>th</sup> April 2015, which final conclusion states:

Quote

*"On the basis of the foregoing, the National Anti-Doping Disciplinary Panel decides this anti-doping case brought by the National Anti-Doping Commission against the athlete Mr Eman Xuereb by finding:*

*That Eman Xuereb has breached the Anti-Doping Regulations, 2011 Art(3(3) and the WADA Code Art 2.1 as the prohibited substance 'cocaine' or its metabolites had been found in Eman Xuereb's urine sample A that had been collected from him on the 2<sup>nd</sup> November 2014.*

*And therefore the National Anti-Doping Disciplinary Panel as provided by the Anti-Doping Regulations, 2011 Art 11(2) and the WADA Code Art 10.2 is imposing on the athlete Eman Xuereb a suspension of ineligibility from any sports activities for*



*a period of two (2) years commencing from the date of his provisional suspension on the 2<sup>nd</sup> December 2014."*

Unquote

- o. An email message sent on the 02/06/2015 by Dr Roberto Montalto, counsel for Eman Xuereb, wherein Dr Montalto specified the following ground for appeal:

Quote

*".....the disciplinary board ignored completely our main argument regarding the reduction of punishment. In fact even though extensive submissions were made about the application of a far shorter period of suspension (or no suspension at all) basing on the argument that the substance in this case was definitely not tak[ing]en to enhance performance in competition and this as contemplated in the relative regulations, these submissions were not delved into by the board and thus we are requesting a review of the said arguments by the appellate board."*

Unquote

- p. The notices of the Hearing of Appeal dated 10/06/2015, 03/07/2015 and 18/08/2015 which appointed the appeal hearing for the 28/08/2015 due to unavailability /other commitments of the athlete and/or his counsel;
- q. The minutes of the proceedings before the Appeal Panel on the 28/08/2015, particularly the oral submissions by the counsel to the Athlete Eman Xuereb and by the Chairperson of the ADC (Malta).

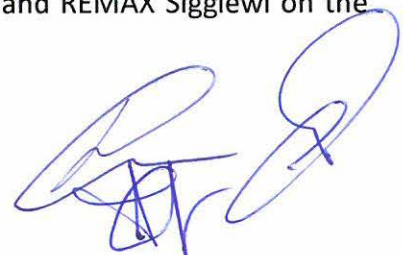
An appeal hearing was held on the 28<sup>th</sup> August 2015 at 2.30 pm. Thereafter the Appeal Panel adjourned to discuss and decide the Appeal 'in camera' on the 11<sup>th</sup> September 2015.

The Appeal Panel for this case decided to apply the 2009 WADA Code and Anti-Doping Regulations, 2011 (LN 281 of 2011) notwithstanding LN17 of 2015 which came into force on the 1<sup>st</sup> January 2015. This in view of the fact that the alleged breach by the athlete Eman Xuereb was discovered on the 2<sup>nd</sup> November 2014, and also for Reg 11(2)(a) in LN17/2015 provides for severer period of ineligibility than Reg 11(2) in LN281/2011.

## **2. The Merits**

2.1 It is to be said at outset that the athlete Eman Xuereb did not contest the anti-doping test result and the adverse analytical finding as reported by Dr Manolis Lyris from the Wada accredited Laboratory of the Olympic Athletic Center of Athens 'Spyros Louis' that 'cocaine' substance was found in Eman Xuereb's urine when tested 'in competition' on the 2<sup>nd</sup> November 2015.

2.2 Through his counsel the athlete Eman Xuereb alleged that the substance got into his system as a result of having consumed a cigarette along with a group of friends at a party which contained cannabis. He added that later on, and without the athlete's knowledge, the athlete found out that the cigarette contained traces of cocaine. He claimed that this has happened days prior to the carrying out of the anti-doping test immediately after the basketball match between BUPA and REMAX Siggiewi on the 02/11/2015.



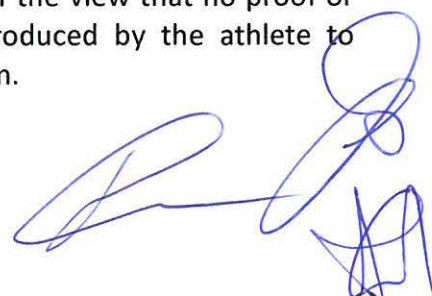
2.3 On the basis of the foregoing the Appeal Panel has no doubt that the athlete has committed an anti-doping violation in terms of Reg 3 [and specifically Reg 3(3)(a)] of the Anti-Doping Regulations , 2011 (Legal Notice 281 of 2011), and Art 2.1 [and specifically Art 2.1.2] of the WADA Code, 2009. Moreover Reg 3(2) of LN 281/2011 provides that *“It is each athlete’s personal duty to ensure that no prohibited substance enters his body. Athletes are responsible for any prohibited substance or use or its metabolites or markers found to be present in their samples”* and which continues by *“Accordingly it is not necessary that intent, fault, negligence or knowing use on the athlete’s part be demonstrated in order to establish an anti-doping violation under this sub-regulation and sub-regulations (3) to (6).”*

2.4 The substance found in the urine Sample ‘A’ of the athlete Eman Xuereb was analysed and certified by the Olympic Athletic Center of Athens as being ‘cocaine’ (with the note: *Cocaine is a stimulant. The presence of benzoylecgonine, cocaine metabolite, was confirmed at the above sample*). According to the WADA 2013 Prohibited List (and also the WADA 2015 Prohibited List) ‘cocaine’ is a prohibited substance ‘in-competition’ falling within the class of ‘non-specified stimulants’. Therefore the athlete Mr Eman Xuereb, at some time prior to the basketball match of the 02/11/2015, had ingested a prohibited substance.

2.5 During the appeal hearing the Counsel for the appellant whilst admitting the ingestion of a prohibited substance by his client he argued with some emphasis that when the substance was ingested it was not consumed by Mr Xuereb with the intention to enhance his performance in the sport practised by him. According to Mr Xuereb’s counsel, the appellant did not deserve the maximum period of ineligibility of two (2) years as imposed on the athlete by the First Panel. In fact the counsel to the appellant argued that in this instance the sanction which should have been (be) imposed is that as provided in terms of Reg 11(4) and not Reg 11(2) of LN281/2011.

2.6 On the issue of “the absence of the athlete’s intention to enhance performance”, the counsel to the appellant argued that during the hearing before the First Panel the circumstances under which the prohibited substance was ingested by the athlete were accepted then and therefore, according to the counsel, this was a settled matter. This was protested by the representative of the ADC on the basis that no evidence or collaboration was put forward or produced by the athlete Eman Xuereb in support of the circumstances as related by him, including as to how, where and when the prohibited substance entered his body.

2.7 The Appeal Panel having considered the submissions made by both the Appellant and by the Respondent,(apart from existence of the Mr Xuereb’s responsibility for an anti-doping violation as already stated in para 2.3 above) is of the view that no proof or collaboration evidence whatsoever was provided or produced by the athlete to establish how the prohibited substance entered his system.




2.8 Furthermore it is to be pointed out that since the prohibited substance (in this case 'cocaine') discovered in Mr Xuereb's urine sample is a non-specified substance, it is the Appeal Panel's opinion that Reg 11(4) in LN 281/2011 does not apply to the case under review, and therefore if one were to consider whether there is any basis for the mitigation of the period of ineligibility imposed in terms of Reg 11(2) then one would have to look at Reg 11(5) (a),(b). However Reg 11(5)(a),(b) require the athlete to establish how the prohibited substance entered his system on order to have the period of ineligibility eliminated or reduced whether the athlete bears no fault or negligence OR no significant fault or negligence. Nevertheless no proof or collaboration evidence has been provided / produced by the appellant to the satisfaction of the Appeal Panel to establish how the prohibited substance has entered his system at the material time.


2.9 Apart from existence of the Mr Xuereb's responsibility for ant anti-doping violation as already stated in para 2.3 above, even if the Appeal Panel were to accept the story of the ingestion of the prohibited substance as related by the athlete, the act of smoking an alleged cannabis cigarette is itself a reproachful one. And this in addition to the fact that cannabinoids are prohibited substances as well. However as cannabis was not detected in Xuereb's urine sample, this somehow jars with the version of the events as given by the athlete.


### 3. The Decision

Therefore on the basis of the forgoing the National Anti-Doping Appeal Panel determines the appeal:

- By rejecting the appeal filed by the Appellant on the 19<sup>th</sup> May 2015 and the 2<sup>nd</sup> June 2015, and
- By confirming the findings and decision of the National Anti-Doping Disciplinary Panel (Reference 01/2015/NADDP) of the 29<sup>th</sup> April 2015 wherein it was held that the athlete Mr Eman Xuereb had violated Regulation 3(3) of the Anti-Doping Regulations, 2011 (LN281/2011 – Sports Act Chapter 455, Laws of Malta) with the imposition of a period of ineligibility from any sports activities for a period of two (2) years in terms of Regulation 11(2) of LN281/2011, which period of ineligibility commencing from the date of Eman Xuereb's provisional suspension on the 2<sup>nd</sup> December 2014.

  
Dr Carmel Cascun  
Chairman

  
Dr Stephen Zammit  
Member

  
Dr Marisa Cassar  
Member

This 20<sup>th</sup> day of September, 2015

At Cospicua, Malta