

Decision of the National Anti-Doping Appeal Panel

At the National Swimming Pool Complex, Msida, Malta

Appeal Case Reference: 02/2018/NADAP

Between

Josiah Vella

(ID Card No 436694M, Boxer athlete, Malta Boxing Association) – (Appellant)

Vs

Anti-Doping Commission (Malta) – (Respondent)

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

- Dr Carmel Cascun BA FCII MJur LLD – Chairman
- Dr Marisa Cassar BPharm MBA PhD – Member
- Dr Christopher Dalli LLB LLM LLD – Member

- Dr Kristina Pavia BA LLD – Secretary

Before the commencement of the appeal hearing on the 29th January 2019, Dr Marisa Cassar and Dr Christopher Dalli declared to the Chairman that they are not aware of any circumstance or conflict which could negatively affect their impartiality with respect to any of the parties involved in this appeal. A similar declaration was made by the Chairman.

Mr Josiah Vella was assisted by Av Martin Fenech.

The Anti-Doping Commission (ADC) was assisted by Av Christina Borg Debono.

1. Preliminaries

- 1.1 The request to convene the Appeal Panel was made on the 4th December 2018 following receipt of an Appeal Petition filed by Dr Martin Fenech on behalf of the Appellant Josiah Vella on the 6th November 2018.
- 1.2 The Appeal Petition was filed subsequent to the decision handed down by the National Anti-Doping Disciplinary Panel (hereinafter referred as the 'First Panel') against the boxer Josiah Vella on the 17th October 2018.
- 1.3 The Appeal Panel when considering this appeal principally took note of the following documents which form part of the process file:
 - (a) Doping Control Laboratory Report issued by Seibersdorf Laboratories on the 16th August 2018 which indicated the presence of Clenbuterol in the athlete's urine sample;
 - (b) Doping Control Form for Josiah Vella dated 28th July 2018;
 - (c) Notification of Adverse Analytical Finding (Ref: 1TSTJOSVEL-18) on 17th August 2018 was issued to Josiah Vella by NADO Malta;

- (d) A letter from the Malta Boxing Association of the 18th August 2018 to Josiah Vella imposing on him a provisional suspension;
- (e) An undated request from Josiah Vella for a provisional hearing containing also the athlete's declaration that he was not accepting the provisional suspension;
- (f) The minutes of the First Panel's proceedings during its sitting on the 27th September 2018 whereby Josiah Vella did not appear;
- (g) The Decision (Case Ref: 3/2018) delivered by the First Panel on the 17th October 2018.

2. The Charge and the Finding

- 2.1 On the 28th July 2018, a National Anti-Doping Officer ('NADO') collected a urine Sample from Josiah Vella during the Judgment Day Competition at Corradino Sports Complex as evidenced by the Doping Control Form attached as part of the process file.
- 2.2 The Sample was submitted for analysis at the Seibersdorf Doping Control Laboratory, a World Anti-Doping Agency ('WADA') accredited laboratory ('the Laboratory'). The Laboratory analysed the 'A' sample in accordance with the procedures set out in WADA's International Standard for Laboratories.
- 2.3 Analysis of the 'A' Sample returned an Adverse Analytical Finding ('AAF') for clenbuterol.
- 2.4 Under section S1.2 of the WADA 2018 Prohibited List, clenbuterol is classed as an Anabolic Agent. It is a non-Specified Substance and is prohibited at all times.
- 2.5 Josiah Vella did not have a relevant Therapeutic Use Exemption in place for the taking of any medication or supplements.
- 2.6 On the 17th August 2018, the athlete Josiah Vella was notified by NADO Malta of the AAF indicating the presence of Clenbuterol and that it alleged an Anti-Doping Rule Violation due to the presence of a prohibited substance or its metabolites or markers in an athlete's sample. This violation is stipulated in Art3(2)(a) of the Anti-Doping Regulations, 2015.
- 2.7 As referred to in the original decision laid down by the First Panel, Josiah Vella contested the provisional suspension and this was subsequently lifted by the Malta Boxing Association.
- 2.8 By its decision of the 17th October 2018, the First Panel, having considered the facts before it and in light of the fact that the athlete did not appear, felt convinced and comfortably satisfied that the athlete Josiah Vella has breached the Anti-Doping Regulations, 2015 Art3(2)(a) and WADA Code Art2.1 and consequently the First Panel imposed on the athlete Josiah Vella a suspension of ineligibility from any sports activities for a period of four (4) years commencing from the date of the First Panel decision in terms of Art 11(2)(a) of the Anti-Doping Regulations, 2015 and Art10.2.1 of the WADA Code.

3 The Appeal

3.1 Josiah Vella's defence lawyer filed an appeal on behalf of his client against the decision of the 17th October 2018 of the First Panel on the 6th November 2018. In brief the grounds of Vella's appeal are the following:



- (a) Vella follows a strict diet regime which complements the sport that the athlete practices;
- (b) That the athlete sought professional help for both his training and his diet;
- (c) That a nutritionist had recommended that the athlete consumes a type of fat burner in order to make weight for his upcoming boxing match;
- (d) And that finally, the athlete did not know that these fat burners contained a prohibited substance and therefore had no intention to take such illicit substance.

On the basis of the foregoing, the appellant asked the Appeal Panel:

- (i) To revoke the decision of the First Panel dated 17th October 2018; and if not possible
- (ii) To alternatively reduce the decision to a period of time which reflects the reality of the situation.

3.2. The ADC did not present the Appeal Panel with any written submissions in reply.

4. Considerations by the Appeal Panel

4.1 During the verbal submissions during the appeal hearing held on the 29th January 2019, generally the able defence lawyer of the appellant repeated in substance what was submitted in writing in the appeal petition. However, the Appeal Panel took note of the following main submissions and additional information verbally made during the appeal hearing by:

The athlete's defence lawyer:

- That the penalty was excessive and that it should be reduced to two years as the evasion was not intentional even though he did not perform the required due diligence on what was being ingested;
- That the athlete is not contesting the breach but is merely asking for a reduction in penalty due to the reliance on a professional person's assistance and their respective knowledge of their specialised field;
- That there should be a measure of proportionality considering other anti-doping cases where the maximum penalty of 4 years suspension was also given.

Additionally, the appellant stated that he did not appear for the First Panel's hearing because he did not receive the hearing notification. However the ADC replied that a notification had been duly sent.

4.2 The ADC submitted that due to the circumstances of the case being brought before them and their determination of goodwill on the part of the appellant that a reduction of the sentence could be possible subject to the cooperation by the athlete to provide further information on the substance and the source from where it was obtained.



4.3 On the basis of the foregoing and the athlete's own admission of ingestion, the Appeal Panel has no doubt that the athlete has committed an anti-doping violation in terms of Regulation 2(a)(i) *It is each Athlete's duty to ensure that no Prohibited Substance enters his body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. 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 rule violation under sub-regulation (2)(a).*

4.4 For the purposes of establishing sufficient proof of this anti-doping violation, sub-regulation (2)(a)(ii)(aa) provides that it is sufficiently proven by the *presence of a prohibited substance or its metabolites or markers in the athlete's A sample where the athlete waives analysis of the B sample and the B sample is not analysed.* The First Panel had found that there was a breach of Article 3(2)(a) and this is not in doubt for the Appeal Panel due to the uncontested Adverse Analytical Finding in line with the above provisions.

So this Appeal Panel will not delve further into the breach committed by the athlete under Regulation 2(3) (a) and confirms the ruling contained in paragraph 4.1 contained in the First Panel's decision (Case Ref: 3/2018) of the 17th October 2018.

4.5 Taking into account the evidence tendered before the First Panel and the submissions made at the appeal stage, both written and verbal and given that the anti-doping violation under sub-regulation (2)(a) was sufficiently proven, the main issue before the Appeal Panel concerns principally the extent of the application of Regulation 11(2)(a) and 11(2)(a)(i) in the Anti-Doping Regulation, 2015 which read:

(a) the period of ineligibility shall be four years where:

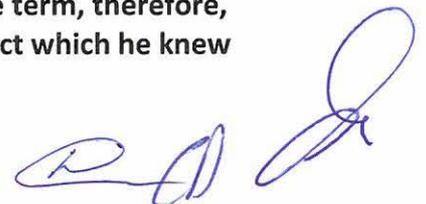
(i) the anti-doping rule violation does not involve a specified substance, unless the athlete or other person can establish that the anti-doping rule violation was not intentional;

As stated in para. 2.4 above, clenbuterol is a non-specified substance and would ordinarily result in a period of ineligibility for four years unless it can be proven that the anti-doping violation was not committed intentionally.

What this Appeal Panel is required to assess is whether the athlete's violation of regulation 3(2)(a) was, on the balance of probability, intentional or not.

However, prior to deciding whether the breach was intentional or not, it is necessary to consider how the intentional element is defined under regulation 11(2)(c). The first part of sub-regulation 2(c) states:

"as provided for in sub-regulations (2) and (3), the term "intentional" is meant to identify those *athletes who cheat (emphasis added)*. The term, therefore, requires that the athlete or other person engaged in conduct which he knew



constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded the risk.”

The second part of sub-regulation 2(c) states:

“An anti-doping rule violation resulting from an adverse analytical finding for a substance which is only prohibited in-competition shall be rebuttably presumed to be not "intentional" if the substance is a specified substance and the athlete can establish that the prohibited substance was used out-of-competition. An anti-doping rule violation resulting from an adverse analytical finding for a substance which is only prohibited in-competition shall not be considered "intentional" if the substance is not a specified substance and the athlete can establish that the prohibited substance was used out-of-competition in a context unrelated to sport performance.”

The second part of this sub-regulation 2(c) does not apply to the present case as it is only relevant to an anti-doping rule violation resulting from an adverse analytical finding for a substance which is only prohibited in-competition. As clenbuterol is a non-specified substance prohibited at all times, this is not the case in the matter under review.

- 4.6 During the final session held on the 12th February 2019, the athlete and his counsel provided an empty container of the supplements which the athlete had stated he was using in the weeks prior to the taking of his sample. While the ADC could not test the container, the packaging was indicating the presence of clenbuterol in Bulgarian and relied on the athlete that it was the correct source of ingestion of the clenbuterol.
- 4.7 During the appeal hearing, the defence lawyer for the appellant, whilst admitting the ingestion of a prohibited substance by the appellant, argued with some emphasis that when the substance was ingested, it was not consumed by the athlete with the intention to enhance his performance but rather to lose weight. The counsel argued that his reliance on a professional opinion by a nutritionist, who provided him with these particular supplements, is what led to the ingestion of the prohibited substance.
- 4.8 This Appeal Panel however must also note that on the athlete’s Doping Control Form, when asked to identify what supplements he had consumed in the seven days prior to the sample collection, Mr Josiah Vella replied “none”.
- 4.9 In light of the above, this Appeal Panel examines whether the criteria for a reduction to the period of ineligibility as prescribed under sub-regulation 4(b)(iii) could be satisfied. This provision states that:

(4) the period of ineligibility for anti-doping rule violations shall be eliminated or reduced, when the following circumstances are established:



(b) period of ineligibility to be reduced for no significant fault or negligence:

*(iii) if an athlete or other person establishes in an individual case ... that he bears no significant fault or negligence, then ... the applicable period of ineligibility may be reduced based on the athlete or other person's degree of fault, but the reduced period of ineligibility may not be less than one-half of the period of ineligibility otherwise applicable...
Provided that ... (4)(b)(iii) shall apply only to the imposition of sanctions. [It is] not applicable to the determination of whether an anti-doping rule violation has occurred and will only apply in exceptional circumstances*

4.10 This Appeal Panel and the ADC both accept that the administration of a prohibited substance by the athlete's personal nutritionist should have a bearing on the inexperienced athlete's degree of fault and that this should be reflected accordingly in line with the principle of proportionality. Additionally, this Appeal Panel also notes that the athlete had limited anti-doping education and no familiarity with the doping regime but maintain that a degree of fault lies with the athlete particularly for failing to declare the ingestion of dietary supplements in the Doping Control Form.

4.11 As a result, while this Appeal Panel is minded to accept the ADC's request to reduce the sentence that was imposed on the appellant by the First Panel, it does not believe that the minimum reduction, as requested by the appellant's counsel, would be proportionate.

5. The Decision

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

- By confirming that the appellant Josiah Vella did breach Regulation 3(2)(a) of the Anti-Doping Regulations, 2015 (LN 17 of 2015 - the Sport Act Chapter 455 of the Laws of Malta);
- By reforming paragraph 4.2 in the decision delivered by the National Anti-Doping Disciplinary Panel of the 17th October 2018 (Case Reference: 3/2018) by imposing on appellant Josiah Vella a suspension of ineligibility from any sport activities for a period of three years (in lieu of four years) starting from the 17th October 2018.

Dr Carmel Cascun (Chairman) :

Dr Marisa Cassar (Member) :

Dr Christopher Dalli, (Member) :

Msida, 1st March, 2019