Decision of the National Anti-Doping Disciplinary Panel.

Case Ref: 5/2018

Anti-Doping Commission (Malta)

-vs-

Brandon Bartolo - member of the Malta Boxing Association: 1TSTBRABAR-18

The National Anti-Doping Disciplinary Panel (hereinafter referred to as the 'Panel') consisting of Dr. Maria Azzopardi LL.D. as Chairperson, and Dr. Frank Testa LL.D., Prof Janet Mifsud (Clinical Pharmacology and Therapeutics) and Mr. Mark L. Zammit (Clinical Pharmacology and Therapeutics)) as members.

Before the commencement of this proceeding, the Chairperson and members of the Panel declared that they are not subject to any circumstance or conflict that could negatively affect their impartiality in the case under review.

The athlete was present at the hearings held on the 26th October 2018 and 19th November 2018 assisted by his lawyer Dr. Joe Mifsud.

1. Preliminaries:

Considered the Request by the National Anti-Doping Commission dated the 23rd March 2018 to the Chairperson of the Panel to schedule a sitting for the hearing of a case concerning the alleged breach by Brandon Bartolo of the Anti-doping Regulations (Legal Notice 17 of of 2015, Sports Act, Chapter 455, Laws of Malta).

Took note and reviewed the following documents that were forwarded to the Panel and the athlete at the initial stage by the Coordinator of the Anti-Doping Programme, namely:

(i) The request by NADO to the Panel to schedule a hearing dated the 23rd March 2018;
(ii) Letter of Notification by NADO to Brandon Bartolo, Malta Boxing Association, SportMalta and WADA of the alleged violation of the Anti-Doping Rules dated the 15th March 2018;
(iii) The Doping Control Form dated 25th February 2018;
(iv) The Test Report dated the 15th March 2018 reporting an Adverse Analytical Finding of S6, Stimulant / 4-methylehexan-2-amine (methylexaneamine), a specified stimulant under S6.b of the Prohibited list.
(iv) A letter dated the 19th March 2018 from the Malta Boxing Association to Brandon Bartolo imposing a provisional suspension
(v) There was no Request for a 'B' Sample.
(vi) There was no Acceptance for Provisional Suspension.

Took note of the Notice to Brandon Bartolo to appear before the Panel on the 20th September 2018 at 17.30 which the Panel had to cancel, another sitting was coordinated between all parties on the 26th October 2018 at 17.30 and a subsequent sitting was held on the 19th November 2018 at 14.30 so that Brandon Bartolo could answer to the accusation based on Article 3 (2)(a) and (b) of L.N 17 of 2015 of the Laws of Malta.

Copy of the Notice of hearing was also forwarded to the Anti-Doping Commission, SportMalta and Malta Boxing Association.

2. Merits:

2.1 Took note of the evidence showing that the athlete produced a urine sample on the 25th Feruary 2018 during a competition and the Test Report dated the 15th March 2018 confirming an Adverse Analytical Finding - S6, Stimulant / 4-methylehexan-2-amine (methylexaneamine), a specified stimulant under S6.b of the Prohibited list. Moreover, the athlete did not request a B Sample and did not accepted the Provisional Suspension.

2.2 Took note of the athlete's reply through his lawyer by email dated 26th July 2018 whereby he submitted that the result of the test showing an adverse analytical finding in his urine sample was not the result of an intentional and deliberate use of illicit substances by the athlete. The only product he took before the competition was the one which was listed in the doping control form and such was bought from a popular shop in Malta which sells sports material which product was openly declared by the athlete before testing.

2.3 Took note of the submission by the NADO that on the 19th of March 2018 the athlete was ntoified witht eh provisional suspension by the MBA and following such a provisional hearing was held during on the 3rd of April 2018 during which the provisional suspension was lifted on the same day.

2.4 Took note of the evidence given by the Robert Vella on behalf of Carm & Co importing mainly sports supplements who explained that the product N1 is produced by a company "Nutrend" in Czech Republic and are WADA Compliant and that they supply national olympic teams and the local company supplies the Malta National Swimming Team. The witness produced a declaration dated 25th September 2018 which states that "*Our company NUTREND D.S., a.s. with its place of business in Chvalkovice 604, in Olomouc, Czech Republic declares that all our products we manufacture and sell-dietary supplements and products intended for special nutrition - products for sportsmen and people with increased performance (further stated as products) are free of all substances that are stated in the list of prohibited substances and methods of doping which is issued by the World Anti-Doping Agency WADA and they do not mean a threat to sportsmen in the sense of positive doping test after usage of these products.*" The witness also declared that the company does not produce any medicinal products and therefore I cannot say that there can be contamination in this case.

2.5 During the evidence or Robert Vella, Dr. Joe Mifsud requested that the athlete is given the opportunity to test the product in the event that the company distributing the product in Malta or the supplier can cover the expenses of the testing since the athlete is not in a position to pay for the testing of the product to verify whether there is a possibility of contamination. Dr. Mifsud asked the witness whether the company is willing to pay for the expenses but the witness declared that he is not in a position to reply but needed to make a request to the company. The NADO rebutted that Testing has to be done in a WADA Accredited Laboratory and not through the supplier since the latter would have an interest in the outcome of the result. NADO explained that when an athlete wishes to test a supplement, he is to provide NADO with the product which is being used and provide another sealed product which of the same batch. Then the NADO will send the product to a WADA Accredited Laboratory. The lab conducts two tests, one test on the opened product and the other test on the sealed product. All the procedure is documented and the athlete will have to pay for the supplement, testing and courier. The total expense is approximately €1,500/€2,000.

2.6 During the hearing the NADO declared that they have no opposition that the product is tested through WADA Accredited Laboratory and according to WADA rules. Thus, the Panel asked the athlete if he is willing to test the product according to WADA rules and pay for the expenses. Dr Mifsud declared that the athlete is not in a position to pay for the expenses of the testing and has asked the witness whether the company is willing to pay for the expenses. The witness declared that he is not in a position to reply to such request but needs to consult his superiors. The Panel explained that since the contestation of the athlete is based on the possible contamination of the product, than it is up to the athlete to prove such argument. Such an important defence cannot be based on whether the expenses will be paid by the company of not. It was within the

responsibility of the athlete to verify the possibility of an agreement with the supplier or distributor to reimburse him the expenses of the testing and since March 2018, he had ample time to verify such. Thus, the Panel requested the athlete that during the sitting which could be postponed by some minutes, had to declare whether he still requested the testing and was committed to pay for the expenses of the testing.

2.7 After hearing the parties, the Panel has decided that the evidence required to proof contamination of the product lies within the responsibility of the athlete, who has to prove on a balance of probability that he had no significant fault or negligence and therefore since the athlete is not accepting to pay for the expenses of the testing of the product according to WADA rules, the Panel cannot delay the procedure any further so that the athlete can verify whether he can produce another product of the same batch and whether the supplier or distributor can pay for the expenses of the testing, since the onus of proof is on the athlete and since the athlete had ample time to verify such possibility. Thus, the Panel decided that the Panel shall proceed to hear further evidence.

Upon request of the athlete's lawyer, the case was adjourned to the 19th of November 2018 for continuation.

2.8 During the sitting of the 19th November 2018, the athlete gave evidence. Brandon Bartolo confirmed his signature on the doping control form dated 25/2/2018 during a competition against an Italian. The athlete declared that he has taken pre-workouts of different brands for the past years, way back when he practised football. He confirmed that he never checked the components of the product but since he bought it from Eurosport (a well-known sports shop in Malta) he did not question the product and its components. In the past he used to buy another brand named 50/50 and then he shifted to N1. He explained that he was tested in December 2017 and February 2018. In both cases he declared that he was taking pre-workouts (this was confirmed by the Panel who has asked a copy of the doping control forms).

He started using N1 for the past 4 months since before the test in February 2018 and mainly two to three times a day, having 3 scoops with a 400ml bottle of water. Upon being questioned by NADO, Brandon Bartolo confirmed that he did not check if the product contained any supplements or medicines. One product is used every in one and half/ two months.

2.9 It has been established that int this case traces of illicit substance suffices and thus there is no need to proof a minimum threshold.

3. Considerations:

3.1 In this case the athlete is not contesting the result emerging from the doping control test and therefore there is no contestation on the documents exhibited and in particular the results emerging from the Analysis Report.

3.2. The Panel makes reference to the point of departure in doping cases which is stipulated under Article 3(2)(a)(i) of L.N. 17 of 2015 of the Laws of Malta whereby it states that:
"*it is each athlete's personal duty to ensure that no prohibited substance enters his or her 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)*".

Therefore, when the doping test identifies a prohibited substance in the body of the athlete, the burden of proof shifts onto the athlete who has to rebut to this evidence. In this case the athlete is arguing that the only plausible reason behind the positive result in his urine test is that the product he was using was contaminated with an illicit substance.

According to athlete's argument of defence he had no significant fault or negligence in the result of the positive test in February 2018 because he had bought the product from a well-known sports shop, the product is considered by the distributor to be of no threat to sportsmen to doping test and that he had used the product since before the last test in December 2017 (though the brand name of the N1 is not listed in the December 2017 doping control form but it is mentioned that he was taking supplements).

3.3 The Panel considers that the best proof that the athlete could have come up with to substantiate his argument is the testing of the product according to WADA regulations in a a WADA accredited Laboratory and in this respect the athlete has declared that he is not financially capable of paying for the expenses of the test. This leaves the Panel no option than to decide upon the evidence brought before the panel including the testimony of the athlete.

The Panel deems it appropriate to make reference to the definitions of "intentional" arising from Article 11(2)(c) L.N. 17 of 2015 which stipulates that:

"*as provided for in sub-regulations (2) and (3), the term "intentional" is meant to identify those athletes who cheat. 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 that risk. 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.*

3.4 Taking into consideration that this case involves a stimulant and therefore a specified substance (S.6 of the Prohibited List) and the athlete is claiming that there was not an intentional element on his part and mainly alleging contamination of product.

Therefore, the legal provision relevant to the defence of the athlete is Article 11(4) of LN 17 of 2015 (WADA 10.5 - Reduction of the Period of Ineligibility based on No Significant Fault or Negligence) whereby it is stipulated that:

Art. 11(4) "*The period of ineligibility for anti-doping rule violations shall be eliminated or reduced, when the following circumstances are established:*

(a) when an athlete or other person establishes in an individual case that he bears no fault or negligence, then the otherwise applicable period of ineligibility shall be eliminated;

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

(i) where the anti-doping rule violation involves a specified substance, and the athlete or other person can establish no significant fault or negligence, then the period of ineligibility shall be, at a minimum, a reprimand and no period of ineligibility, and at a maximum, two years of ineligibility, depending on the athlete's or other person's degree of fault;

(ii) in cases where the athlete or other person can establish no significant fault or negligence and that the detected prohibited substance came from a contaminated product, then the period of ineligibility shall be, at a minimum, a reprimand and no period of ineligibility, and at a maximum, two years ineligibility, depending on the athlete's or other person's degree of fault;

(iii) if an athlete or other person establishes in an individual case where sub-regulations (4)(b)(i) or (4)(ii) are not applicable, that he bears no significant fault or negligence, then, subject to further reduction or elimination of the period of ineligibility as provided in sub-regulation (4)(d), 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. If the otherwise applicable period of ineligibility is a lifetime, the reduced period under this sub-regulation shall be no less than eight years:
Provided that sub-regulations (4)(a) and (4)(b)(iii) shall apply only to the imposition of sanctions. They are not applicable to the determination of whether an anti-doping rule violation has occurred and will only apply in exceptional circumstances;

(c) an athlete or other person may not plead no fault or negligence under sub-regulation (4)(a) in the following circumstances:
(i) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement;
(ii) the administration of a prohibited substance by the athlete's personal physician or trainer without disclosure to the athlete; and
(iii) sabotage of the athlete's food or drink by a spouse, coach or other person within the athlete's circle of associates:
Provided that, depending on the unique facts of a particular case, any of the circumstances mentioned in this sub-regulation could result in a reduced sanction under sub-regulation (4)(b);"

Not having a test on the possible contamination of the product, the Panel can only assess on the basis of the proof submitted by the athlete, whether Brandon Bartolo "*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 that risk".*

3.5 When examining the contents of the N1 Pre-workout formula product handed over by the athlete it transpires that one of the ingredients was dimethylaminoethanol [DMAE also referred to as dimethylethanolamine, an organic compound with the formula $(CH_3)_2NCH_2CH_2OH$]. 4-methyl hexeneamine [DMAA, commonly known as 1,3-dimethylamylamine, 1,3- amphetamine or dimethylamylamine] and for which Brandon Bartolo was found positive and DMAE are structurally different. Moreover, the Panel finds it to be exceedingly unlikely that DMAE (present in the N1 pre work formula) can be transformed/metabolised to DMAA in humans, thus leading to a positive test result.

The Panel concludes that without the proper testing of the product there are three possible scenarios for the positive doping result, that is:
a) Contamination of the pre-work out he was using or;
b) Contamination of any other substance which he could have possibly taken or;
c) Other exposure intentional or otherwise to 4-methyl hexeneamine

3.6 Taking into consideration all above argumentations and evidence produced, the Panel has to establish whether on a balance of probability the athlete arguments on his non-intentional conduct not to dope has been proven. The main two points that the athlete has to bring forward in cases of no significant fault or negligence are:
a) athlete has to prove how it got in the system;
b) athlete proves he applied the expected standard of behaviour.

On the basis of the first criterion, the athlete's argument is that the product was contaminated but this has not been proved and nor did he prove how the substance entered his body. Moreover, in respect of the second criterion, as explained under paragraph 3.5 it seems to be an improbable task to demarcate an illicit substance in the components mentioned on the labelling of the product but at the same time the athlete admits that he did not check the product nor the components which made up the product but simply relied on the sports shop reputation and guidance and such is surely advisable.

3.7 Based on the above considerations, the Panel was persuaded that the evidence produced by that the athlete prove that he did not act with the intent to dope but on the other hand the athlete did not convince or prove how the source of the substance entered his system. Despite believing that the athlete only made use of the N1 which does not show any components possibly leading to

an adverse analytical finding, the Panel is not satisfied, by a process of deduction alone, that the result of the positive doping test is due to contamination of the product. There is no sufficient evidence to demonstrate that the product used (N1) was contaminated and thus the Panel is not in a position to conclude on the basis of the evidence it heard and evaluated that the adverse analytical finding was a result of contamination. The athlete is not eligible to any reduction below two years as he failed to prove "no significant fault or negligence".

However, due to the length in proceedings, the Panel agrees that the date of the provisional suspension shall run from the date of the first hearing.

4. Decision:-

Therefore on the basis of the above considerations, the National Anti-Doping Disciplinary Panel rules that:

4.1 Brandon Bartolo has breached the Anti-Doping Regulations, 2015 [Art. 3(2)(a)] LN 17 of 2017 and WADA Code Art. 2.1, whereby the presence of a prohibited substance or its metabolites or markers has been found in Brandon Bartolo urine sample A that had been collected from him on the 25th February 2018.

4.2 And therefore the National Anti-Doping Disciplinary Panel as provided under Art 11 (2) (a) of the Anti Doping Regulations, 2015 and Art. 10.2.2 of the WADA Code is imposing on the athlete Brandon Bartolo a suspension of ineligibility from any sports activities for a period of two (2) years commencing from the 26th October 2018.

4.3 A copy of this decision is to be forwarded to the Malta Boxing Association, SportMalta and WADA.

Dr. Maria Azzopardi LL.D Chairperson	Dr. Frank Testa Member	Prof. Janet Mifsud Member	Mr Mark L. Zammit Member

Today, the 9th December, 2018.