SPORT RESOLUTIONS (UK)

SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/NADP/508/2016

NATIONAL ANTI-DOPING APPEAL PANEL

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF THE WELSH RUGBY UNION

Before:

Charles Flint QC

William Norris QC

Dr. Mike Irani

UK ANTI-DOPING

Anti-Doping Organisation

-v-

ADAM BUTTIFANT

Respondent

Mr. Graham Arthur and Tony Jackson, for UKAD

Mr. Daniel Saoul, instructed by Dr. Edward Carder of Mishcon de Reya, for the Respondent

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DECISION

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1. This is an appeal by UKAD against the decision of a tribunal made on 14th December 2015 which decided that Adam Buttifant had committed a doping

offence under article 2.1of the UK Anti-Doping Rules 2015 ("the ADR") adopted by the Welsh Rugby Union, and imposed a period of ineligibility of 2 years.

2. Mr. Buttifant is a 19 year old rugby player, He was subject to an out of competition test on 8th June 2015, following which an adverse analytical finding recorded the presence of dehydrochloromethyltestosterone ("DT") in his sample. DT is a steroid and is a prohibited substance, in and out of competition, but is not a substance specified under article 3.3 of the rules.

3. Mr. Buttifant admitted the violation of article 2.1 of the ADR in that a prohibited substance was present in his sample. Under article 10.2.1 the period of ineligibility to be imposed is 4 years "unless the Athlete … can establish that the Anti-Doping Rule Violation was not intentional."

4. The tribunal decided that the rule violation was not intentional and imposed a period of ineligibility of 2 years.

5. UKAD appeals against that decision on the following grounds:

> (1) (The tribunal) was wrong to find, on a balance of probabilities, that Mr Buttifant's ingestion of dehydrochloromethyltestosterone 'was probably caused by taking M-Sten'; and
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> (2) It was wrong to find, on a balance of probabilities, that Mr Buttifant had discharged his burden of proof in respect of establishing that he had not acted intentionally when he committed his anti-doping rule violation.

The nature of appeal under rule 13 of the NADP Procedural Rules

6. Under rule 13 of the NADP Procedural Rules each party has a right to appeal the decision of a tribunal. Rule 13.4 provides:

> Standard of review:
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> 13.4.1 Where required in order to do justice (for example to cure procedural errors in the Arbitral tribunal proceedings), appeals to an Appeal Tribunal pursuant to this Article 13 shall take the form of a rehearing *de novo* of the issues raised in the proceedings, ie. the Appeal Tribunal shall hear the matter over again, from the beginning, without being bound in any way by the decision being appealed.
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> 13.4.2 in all other cases, the appeal to an Appeal Tribunal shall not take the form of a *de novo* hearing but instead shall be limited to a consideration of whether the decision being appealed was erroneous.

7. Those provisions are very clear. Any party to a reference to the NADP may appeal, but not every appellant is entitled to a rehearing. It is the first instance tribunal which will hear the evidence and make determinations on the factual and scientific evidence which the parties adduce. It is necessary for each party to put its full case and evidence forward, for in general it will not be allowed to improve or add to its case on appeal. It is only "where required in order to do justice" that there will be a rehearing on appeal. The rule gives the example of a procedural error in the tribunal proceedings, but there may be other circumstances in which it appears that the appellant has not received a fair hearing before the tribunal or where it is necessary, in order to ensure a fair hearing, that a rehearing should be held. But those cases will be the exceptions, not the general rule.

8. In the absence of such circumstances the role of the tribunal hearing an appeal is limited to a review of the decision. The basis of any appeal must be that the tribunal erred in principle. An error of law, such as a misdirection on the meaning of the relevant anti-doping rules, will fall within the rule, but the appeal tribunal will not re-evaluate the factual findings. On questions of fact, the test is whether there was evidence which could support the findings made, whether there was a failure to take into account relevant evidence, and whether the findings are logically reasoned. The appeal tribunal must be careful not to apply its own views

as to the weight of the evidence, or particular parts of the evidence. That restraint on the part of the appeal tribunal will particularly apply to findings of fact which may depend on the credibility of witnesses. Provided there is sufficient evidence to justify the finding, it is the first instance tribunal which will determine the primary facts, the weight to be attached to those facts and the inferences to be drawn from them.

9. In this case the appellant applied to adduce further expert evidence as to the probable cause of the adverse analytical finding. That application was refused because evidence which had not been produced before the first instance tribunal could not be relevant or admissible on the issue whether the tribunal had misdirected itself in its assessment of the facts. That question is to be determined on the basis of the evidence which was placed before the tribunal.

The meaning of "intentional" under Article 10.2.1

10. The issues on this appeal are defined by the grounds of appeal and relate only to the findings of fact made by the tribunal as to whether the anti-doping rule violation was intentional. The essential issues are whether the tribunal erred in principle in the findings it made in the decision:

    (a) as to the probable cause of the ingestion

    (b) as to whether the anti-doping rule violation was intentional.

11. UKAD did not argue that the tribunal had misdirected itself in law as to the meaning and effect of article 10.2.3 which defines, or gives guidance as to, the meaning of the word "intentional" in article 10.2.1. However in his skeleton argument Mr. Saoul for the player argued that the substance of the argument put forward by UKAD was that the player must demonstrate how the prohibited substance entered his system in order to show that the violation was not intentional. He submitted that the argument was plainly wrong, that previous decisions of NADP panels to that effect were wrongly decided and that the point should be decided by this appeal tribunal.

12. In a decision made on 31 December 2015 of the Sport Dispute Resolution Centre of Canada in *CCES v Youssef* the arbitrator stated:

> "… the cases from the United Kingdom stand for the proposition that an athlete must prove the means of ingestion in order for him to prove a lack of intent."

The arbitrator was there referring to the cases of *UKAD v Paul Songhurst* (8 July 2015) and *UKAD v Lewis Graham* (27 August 2015).

13. In this case the tribunal dealt with this question of law as follows:

> [29] In *UKAD v Lewis Graham*, a tribunal decision dated 27 August 2015 under the 2015 WADA Code, the panel held that where the ADRV arises under Article 2.1 the athlete cannot be held to satisfy the burden of proof to show that the ADRV was not "intentional" without establishing the likely method of ingestion of the Prohibited Substance. Before us, it was submitted on behalf of the athlete that this formulation was incorrect, and that the decision construed Article 10.2 in a way which was not justified.
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> [30] The *Lewis Graham* decision referred to a number of previous decisions to the effect that if the manner in which a substance entered an athlete's system is unknown or unclear it is logically difficult to consider the question of intent. The tribunal held that whilst the Article does not expressly provide that the Athlete must establish how the Prohibited Substance entered his body he must do so in order to show negative intention.
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> [31] The case law cited by the *Lewis Graham* panel was under a previous WADA rule where there was a specific requirement that the athlete establish how the prohibited substance has entered his system. A similar wording is applicable under the 2015 WADA Code in relation to No Fault and No Significant Fault or Negligence, but not in relation to the definition of Intentional. Thus the draftsman made a conscious decision not to provide for such a requirement in relation to intentional use but to include it in relation to the separate provisions in relation to No Significant Fault or Negligence.
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> [32] We therefore accept the submission that the tribunal in *Lewis Graham* expressed themselves in terms that appear to impose a bright line rule where none is provided for in the rule, and to that extent we do not consider that their interpretation of the rule is correct.
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> [33] That said, we consider it will be a rare, possibly very rare, case where the athlete will be able to satisfy the burden of proof as to intent without establishing the likely means by which the Prohibited Substance entered his system. It will not normally be good enough for the athlete simply to assert that he did not take any prohibited substance deliberately and ask the tribunal to believe him (as did the athlete in *UKAD v Songhurst).* We refer to what the tribunal (two members of whom were part of the present panel) said in *Songhurst:*
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> > *"in the normal course it is not to be expected that prohibited steroids are found in the body of an athlete. In any normal case knowledge concerning how the substance came to be in the body is uniquely within the knowledge of the athlete and UKAD can only go on the scientific evidence*

of what was found in the body. The scientific evidence of a prohibited substance in the body is itself powerful evidence, and requires explanation. It is easy for an athlete to deny knowledge and impossible for UKAD to counter that other than with reference to the scientific evidence. Hence the structure of the rule."

14. In view of the suggested difference between NADP panels on the interpretation of article 10.2.3 this tribunal has decided to deal fully with the point, although in the event this has not been necessary in order to decide the appeal. If there is a difference in approach it is desirable that it be resolved, even if the difference in practice appears more theoretical than real.

15. UKAD's arguments on this appeal are in summary:

(1) in a presence case, that is a violation of article 2.1, an athlete who claims that the violation was not intentional must explain what the "conduct" was which caused the violation; fault can only be determined if the athlete can explain what it was that caused the violation to happen; without being satisfied as to the method of ingestion a tribunal is not able to make a proper assessment of intention;

(2) there is therefore in practice very little difference between the meaning of intentional in article 10.2.3 and the requirement imposed in the definition of No Fault or Negligence; in each case the athlete has to explain how the violation happened.

16. The Respondent's arguments are in summary:

(1) the only issue to be determined under article 10.2.3 is the question of whether the athlete acted intentionally and there is no legal or evidential burden placed on the athlete to establish how the prohibited substance entered his body;

(2) article 10.2.3 must be interpreted strictly in accordance with its language and any ambiguity resolved in favour of the athlete; to introduce a requirement that the athlete is required to prove the means of ingestion would be to offend against the principle of doubtful penalisation;

(3) the requirement is that the athlete shows that he did not engage in conduct which he knew constituted a violation; the only issue is as to conduct which

the athlete knew about; he cannot be required to prove what he did not know; thus the focus under article 10.2.3 is on the athlete's state of mind;

(4) Article 10.2.3, in contrast to the definition of No Fault or Negligence and the terms of article 10.4 of the 2009 WADA Code, does not require the athlete to establish how the prohibited substance entered his system;

(5) The previous decisions of NADP panels, in particular *UKAD v Lewis Graham*, were wrongly decided in determining that an athlete must prove the source of the prohibited substance as a pre-requisite to proving a lack of intention.

17. In an article 10.2.1.1 case there is no express requirement under article 10.2.3 that an athlete who asserts that the rule violation was not intentional must prove how the prohibited substance entered his body.

18. This is in contrast to the definition of No Fault or Negligence which states "Except in the case of a minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system". There is the same requirement in the definition of No Significant Fault or Negligence. Under article 3.1 where a burden of proof is placed on the athlete the standard of proof shall be by a balance of probability. Accordingly an athlete who asserts that he had no, or no significant, fault or negligence must prove, on the balance of probabilities, how the prohibited substance entered his system. In *UCI v Contador* (6 February 2012) a CAS panel decided, at paragraph 340, that where there are a number of possible ways in which the prohibited substance might have been ingested, but no one source was established as more likely than not, then the athlete could not prove that he had acted with no significant fault or negligence.

19. The issue for a tribunal under article 10.2.1 is whether the violation was intentional. The guidance as to the meaning of "intentional", as "meant to identify athletes who cheat", is given in the first sentence of article 10.2.3. The article then provides:

> "The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she 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."

The relevant conduct to be considered is the conduct which constituted or resulted or might have constituted or resulted in the violation.

20. It is necessary to bear in mind that article 10.2.3 covers a number of possible violations of the Code and also deals with substances that are specified or only prohibited in competition. The article therefore provides a general definition of the word "intentional" by reference to "conduct" which may be applied to different types of case. In the case of violations of article 2. 2 (use), 2.3 (evading sample collection), article 2.5 (tampering) and article 2.6 (possession) the conduct in question is integral to the violation alleged and is likely to be clear from the evidence produced in support of the charge. In the case of substances only prohibited in competition the athlete must establish that the substance was used out of competition, that is more than 12 hours before the competition, and, in the case of substances not specified, in a context unrelated to sport performance. This the athlete can only do by proving the means and circumstances of such use. So in those cases the means of ingestion will be central to the factual enquiry conducted under article 10.2.3, and where the burden lies on the athlete he will have to prove the means of ingestion. It is difficult to see why in principle the position should be markedly different in the case of an adverse analytical finding which leads to a violation under article 2.1 in respect of a substance which is not specified, and is prohibited both in and out of competition.

21. It is not helpful to point to the contrast between article 10.2.3 and the former rule at article 10.4 of the 2009 WADA Code in support of the argument that the draftsman made a deliberate decision to remove the requirement that an athlete is required to prove how a prohibited substance entered his body. Article 10.2.1 is an entirely new provision which must be interpreted on its wording in the context of the 2015 WADA Code. If the meaning of the article is clear the rule against doubtful penalisation cannot assist.

22. Where the violation does not involve a specified substance the burden of proof is placed on the athlete. Under article 3.1 where the burden of proof is on the athlete to establish specified facts or circumstances, then the standard of proof shall be by a balance of probability. The specified facts or circumstances in an article 10.2.1.1 case are the circumstances in which the prohibited substance came to be present in the athlete's body, whether by act or omission, and without the requisite knowledge.

23. This issue cannot be decided without placing article 10.2.3 in its context in the Code. Under article 2.1.1 it is the athlete's personal duty to ensure that no prohibited substance enters his body, and the athlete is responsible for any prohibited substance found to be present in a sample. As the comment to article 4.2.2 explains substances such as anabolic agents and hormones which are not specified are considered more likely to have been ingested by an athlete in order to enhance sports performance. That imposes an evidential burden on the athlete to explain the presence of a performance enhancing substance in his body.

24. That evidential burden requires the athlete to put forward an explanation of the conduct which he asserts resulted, or might have resulted, in the violation of article 2.1. If the athlete cannot prove the conduct which resulted, or might have resulted, in the violation then the facts and circumstances specified in article 10.2.1.1 are not established. In such a case the tribunal, which must act on evidence, has no evidential basis on which to make a finding that the violation was not intentional.

25. The Respondent relies on an article written by Professor Ulrich Haas and others on the 2015 WADA Code (Int Sports Law Journal 2015) for the proposition that article 10.2.1.1 covers a case in which the athlete cannot prove the means of ingestion. The authors state, at page 27:

> *Two main categories of violations fit under the umbrella of non-intentional:*
>
> *(i) Violations for which the origin of the substance is established…*
>
> *(ii) Violations for which the Athlete cannot establish the origin of the substance (thus precluding the application of a Fault-related reduction, unless the Athlete is a Minor) yet can establish a sufficient factual basis to demonstrate that the violation was not intentional*

The 2015 Code does not explicitly require an Athlete to show the origin of the substance to establish that the violation was not intentional. While the origin of the substance can be expected to represent an important, even critical, element of the factual basis of the consideration of an Athlete's level of Fault [i.e. i.e. in relation to arguments of No Fault or No Significant Fault], in the context of Article 10.2.3, panels are offered flexibility to examine all the objective and subjective circumstances of the case and decide if a finding that the violation was not intentional is warranted.

There is then a reference to the *Contador* case in which there were three or more possible sources of the substance but a lack of precision as to which was the source. The authors continue:

When it comes to a finding that a violation was not intentional, by contrast, if the panel accepts that the Athlete did not intend to cheat and finds that the most probable pathway of ingestion was inadvertent, applying a 4-year period of Ineligibility for failure to establish the origin of the substance stricto sensu would inevitably raise proportionality concerns."

26. The authorship of Professor Haas deserves considerable respect but the reasoning, particularly in the last paragraph, is not entirely clear. It is certainly correct that article 10.2.3 does not explicitly require the athlete to establish the means of ingestion, and the test for intention does permit a tribunal to have regard to any relevant evidence, both objective and subjective as to the athlete's state of mind. The evidential problem, which that passage in the article does not address, is how in practice a tribunal could assess the relevant conduct and accept that the athlete did not intend to cheat when there is a number of plausible explanations none of which is determined, on the balance of probabilities, to have been the valid explanation. If it is suggested that an athlete can point to the most probable amongst several plausible causes of the violation and invite a tribunal to find that he did not in that respect act intentionally, then that is a proposition which we could not accept.

27. Article 10.2.3 does allow a tribunal to consider all relevant evidence in assessing whether the violation was intentional, but the most important factor will be the explanation or explanations advanced by the athlete. There must be an objective evidential basis for any explanation for the violation which is put forward. We reject the argument put by the Respondent that the athlete's contention that he does not know how the prohibited substance entered his body is consistent with an intention not to cheat and that the ultimate issue is the credibility of the

athlete. The logic of the argument would be that where the only evidence is that of the athlete who, with apparent credibility, asserts that he was not responsible for the ingestion then on the balance of probability the athlete has proved that he did not act intentionally. Article 10.2.3 requires an assessment of evidence about the conduct which resulted or might have resulted in the violation. A bare denial of knowing ingestion will not be sufficient to establish a lack of intention.

28. In summary, in a case to which article 10.2.1.1 applies the burden is on the athlete to prove that the conduct which resulted in a violation was not intentional. Without evidence about the means of ingestion the tribunal has no evidence on which to judge whether the conduct of the athlete which resulted in the violation was intentional or not intentional. There is no express requirement for an athlete to prove the means of ingestion but there is an evidential burden to explain how the violation occurred. If the athlete puts forward a credible explanation then the tribunal will focus on that conduct and determine on the balance of probabilities whether the athlete has proved the cause of the violation and that he did not act intentionally.

29. There may be wholly exceptional cases in which the precise cause of the violation is not established but there is objective evidence which allows the tribunal to conclude that, however it occurred, the violation was neither committed knowingly nor in manifest disregard of the risk of violation. In such a case the conduct under examination is all the conduct which might have caused or permitted the violation to occur. These rare cases must be judged on the facts when they arise.

30. In this case the tribunal correctly stated the effect of article 10.2.3 at paragraphs 33 and 34 of the decision. However we do not consider that the tribunal in *UKAD v Lewis Graham* either misinterpreted the rule or drew a bright line or, if it did, drew it in the wrong place. At paragraph 34 of that decision the statement that the athlete must establish how a substance entered his body was made in relation to substances prohibited in competition only, which is a point expressly covered in article 10.2.3. At paragraph 38 the essence of the reasoning was

> "without establishing the likely means of ingestion of the Prohibited Substance it is difficult to see how this Tribunal could properly and fairly consider the question of intent in relation to the conduct which led to that ingestion."

We share that difficulty, but do not preclude such a finding in an exceptional case.

31. The cases[1] decided by the NADP panels under article 10.2.1.1 are unanimous and correct as to the practical effect of article 10.2.3. It is only in a rare case that the athlete will be able to satisfy the burden of proof that the violation of article 2.1 was not intentional without establishing, on the balance of probabilities, the means of ingestion.

The findings of fact

32. The evidence and the findings of fact were set out at paragraphs 17 to 27 of the decision, and will not be repeated here. The first question which the tribunal considered was whether the probable means by which the DT was ingested was the taking of tablets of a product called M-Sten manufactured by Pharma Labs. M-Sten was stated on the label to contain not DT but a different steroid, stenbolone. There was no scientific evidence available as to whether the M-Sten tablets taken by Mr. Buttifant contained or were contaminated by DT, for the remaining stock of those tablets had been disposed of in the circumstances set out in the decision.

33. The tribunal dealt with this issue as follows:

> [35] The present case was unusual for the following reason. Mr Buttifant accepted that M-Sten contained a Prohibited Substance, although his case was that he was not aware of that when he ingested it. But the Prohibited Substance which was found in his body was not the same Prohibited Substance as that which M-Sten is said to contain. So how did DT get into his body?
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> [36] The following evidential points were significant:
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> (a) a number of articles were produced showing that mislabelling of products sold on the internet containing anabolic steroids was rife: in one 2014 survey for which Professor Cowan was an author, of 24 products tested, 16 contained different steroids from those referred to on the label and one contained no steroid at all;
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> (b) that same article listed the 24 purchased steroids, two of the mislabelled products were manufactured or supplied by Pharma Labs. Pharma Labs are the manufacturers of M-Sten, although it is possible that there are more than one Pharma Labs;
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> (c) Dr Carder sought to make enquiries of the Pharma Labs who manufactured M-Sten. This appeared to be an untraceable Chinese-based website which was plainly seeking to hide its location and contact details. The distributor

[1] *Songhurst* (8 July 2015)at para 29, *Graham* (27 August 2015)at para 38, *Hastings* (18 November 2015) at para 69, and *Townsend (22 November 2015)* at para 53

was a Michigan based entity which equally appeared to have taken steps to conceal its true owner and was uncontactable;

(d) Given that M-Sten was labelled as containing a different steroid, it is striking that the expected steroid, stenbolone, did not show up on Mr Buttifant's test;

(e) Mr Buttifant's account was strongly supported by that of his mother, whose immediate reaction once she discovered from internet research that M-Sten contained a steroid, was to flush it down the toilet, an action whilst in many respects laudable had the unfortunate consequence of preventing testing of the product.

[37] The one piece of evidence which caused us concern was that of Mr Wojek, who gave his evidence very fairly and impartially, when he told us that the symptoms encountered by Mr Buttifant after he took M-Sten would not be expected to be attributable to DT. We recognise this is an important point which would suggest that mislabelled M-Sten might not have given rise to the finding of DT in Mr Buttifant's system, and this point has caused us some disquiet. However, Mr Wojek's view was not an unequivocal one: he fairly said when asked whether DT could have caused the side effects which Mr Buttifant described after he took M-Sten was that it was "not likely but not impossible."

[38] Having considered this point in the light of the other evidence before us, on the balance of probabilities, and notwithstanding what Mr Wojek said, we are satisfied that the ingestion of DT was probably caused by taking M-Sten.

34. In a very clear and fair argument for UKAD Mr. Arthur submitted that there was no sufficient evidential basis to find that M-Sten must have been mislabelled or contaminated with DT. The tribunal was wrong:

(1) to assume that because some supplements have been found to have been mislabelled it follows that this supplement was contaminated , still less that it contained DT.

(2) to make a finding that it was striking that stenbolone was not present in the sample, given that the evidence was that Mr. Buttifant had stopped using the supplement some 40 days before the sample was taken.

(3) to assume that DT could still have been present 40 days after oral consumption when the athlete had produced no evidence to that effect.

(4) To rely on the evidence from Mr. Buttifant's mother which could not be relevant to the issue of how DT entered his system, because she did not know and could not give evidence on that point.

35. In his persuasive submissions Mr. Saoul for the Respondent drew attention to the care with which the evidence had been examined by the tribunal. Mr. Buttifant

had been extensively cross-examined and questioned by members of the tribunal. The tribunal had made clear, at paragraph 45, how it had initially viewed the case being advanced with considerable scepticism, but been persuaded by the evidence. The evidence from Dr. Carder of Mishcon de Reya, who have acted *pro bono*, did produce a considerable body of evidence which supported the case that the product taken by Mr. Buttifant could have been contaminated and thus could have contained DT. In particular, on the expert literature, there is a body of evidence that bodybuilding supplements are often mislabelled and may contain anabolic steroids which are different from the contents listed, in some cases to save on the costs of production. In particular, research had discovered that two products produced by Pharma Labs actually contained steroids different from the notified contents.

36. Mr. Saoul laid considerable stress on the argument that UKAD's case that the M-Sten did not contain the DT involved an assumption that the player had chosen not to mention the true source of the DT, and instead decided to confess to taking a different prohibited substance, which did not match up with the positive test. He described that as an absurd case theory. UKAD's response to this point is that it does not advance a positive case as to how DT entered the body, and does not need to do so. But the tribunal clearly accepted the evidence of Mr. Buttifant, and his mother, as truthful and thus dismissed the possibility that the player might have advanced a false explanation.

37. This tribunal is satisfied that there was evidence from which the conclusion set out at paragraph 38 of the decision could properly be drawn. Dealing with the main points on which the tribunal relied in paragraph 36:

    (1) Factors (a) (b) and (c) could be described as speculative and not providing any solid evidential basis for concluding that the M-Sten probably contained DT. But having been taken to the literature we accept that there was evidence from which, in conjunction with its overall view of the facts, the tribunal could conclude that the literature could support such a finding.

    (2) Factor (d) is based on the implied premise that a steroid ingested in tablet form more than 40 days before the sample was taken could have been detected in that sample. That may appear a surprising conclusion in the

absence of any expert evidence to that effect. The burden of proof on the issue of intent lies on the athlete, but the evidence which he is required to produce depends on the points taken against his case. We were informed by counsel for the Respondent that at the hearing UKAD had not sought to argue that it was impossible for the sample to have detected such ingestion and in those circumstances this experienced tribunal was entitled to proceed on the assumption that if stenbolone had been ingested in the circumstances asserted by Mr. Buttifant then it is likely that it could have been detected in the sample.

(3) Factor (d) might also be considered not logically to support the conclusion that DT must have been contained in the M-Sten product. The absence of evidence of stenbolone provides no positive evidence of the ingestion of DT. But even if that factor is discounted the tribunal was entitled to form its own view on the evidence as a whole and this factor was not on its own decisive. Even if it proved little it was consistent with the conclusions drawn from factors (a) (b) and (c).

(4) Factor (e) was not logically probative of the contention that DT had been contained in the supplement taken, but the evidence from the player's mother did corroborate his case that it was this supplement that he had taken, and that it had had unfortunate side-effects.

38. The tribunal was very conscious of the principle that uncorroborated assertion by the athlete as to the means by which the prohibited substance entered his body is not sufficient to satisfy the test under article 10.2.3. However it was entitled to find, on all the evidence, that in these unusual circumstances the probable source of the ingestion of DT was the taking of M-Sten tablets.

39. The second finding which is challenged is the finding that the conduct was not intentional. In the decision those findings are:

> [39] In the light of this conclusion, did Mr Buttifant engage in conduct which he knew constituted an ADRV or knew that there was a significant risk that the conduct might constitute or result in an ADRV? We find that the answer to this is "no":
>
> (a) We note Mr Barber's evidence that no drugs training or nutritional advice was given to players at Bargoed RFC at the time.

(b) Mr Buttifant is 19. He has been described as naïve and young for his age. His dyslexia has made it difficult for him to read. Further, his embarrassment about his dyslexia and dyspraxia has made him reluctant to ask questions which might appear to show ignorance, and thus reveal his disabilities to others. It was for this reason, we were told, that he failed his first year studies at university. He presented to us as having little real understanding of drugs in sport, and we suspect he had even less before the AAF. The reference to what was in fact a steroid on the M-Sten label would, we accept, have meant nothing to him, and we also accept he would have been reluctant to discuss the supplements he was taking with others. He had had no nutritional or drugs advice. His evidence that he did not think Amazon would sell anything dodgy rang true. When taken together with the powerful evidence of his mother, we accept his explanation of events.

[40]In these circumstances we find Mr Buttifant has satisfied the burden of proof on him to show that his conduct was not intentional.

40. The findings at paragraph 39 (b) are pure findings of fact, which do depend critically on an assessment of the reliability of the evidence of Mr. Buttifant, assessed with the assistance of some medical evidence as the extent of his dyslexia and dyspraxia. Those findings cannot be challenged on appeal.

41. The only point of law which was taken was the assertion that there is an internal inconsistency in the tribunal's findings. It is submitted that the finding at paragraph 41 that Mr. Buttifant could not show no fault or negligence conflicted with the finding that his conduct was not intentional. The short answer to that point is that article 10.2.3 imposes a subjective test. The tribunal found that his conduct was not intentional. That is not a sufficient condition for the finding of no significant fault or negligence. The definition of no significant fault or negligence requires, in addition to lack of knowledge, that the athlete could not reasonably have known or suspected even with the exercise of utmost caution that he had used a prohibited substance, thus importing an objective standard.

Conclusion

42. For those reasons the appeal is dismissed. We record the benefit, to this tribunal, of the assistance provided *pro bono* by Mr. Saoul and Dr Carder of Mishcon de Reya.

Charles Flint QC
For the Tribunal

7th March 2016

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