SR/258/2021

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF THE BRITISH BOXING BOARD OF CONTROL

Before:

William Norris QC (Chair)
Dr Tim Rogers
Professor Kitrina Douglas

BETWEEN:

Philip Bowes

Appellant

and

UK Anti-Doping Limited ("UKAD")

Respondent

DECISION OF THE APPEALS PANEL

Introduction and Factual Background

1. This is an appeal against the Decision of the National Anti-Doping Panel ("NADP") Tribunal issued on 5 August 2021.

2. The First Instance Tribunal ("Tribunal") determined a charge against Mr Bowes (hereafter "the Appellant") arising from an alleged violation of Article 2.1 of the UK Anti-Doping Rules

("ADR")[1]. This followed an Adverse Analytical Finding ("AAF") which indicated the presence of a Prohibited Substance or its metabolites or markers in a Sample collected from him In-Competition on 2 September 2020. The substance in question was *Ostarine*, but in very small quantities – the concentration in the A Sample being approximately 0.5mg/ml.

3. The Appellant was, at the material time, a professional boxer, then aged 37, and was licensed by the British Boxing Board of Control[2] and he provided the Sample (completing a Doping Control Form – referred to as a DCF) immediately after he had fought Akeem Ennis-Brown for the Commonwealth and British Light Welterweight titles. The unanimous decision had been in Mr Ennis-Brown's favour.

4. In due course, the Appellant provided a detailed Response to the Notice of Charge (which had been issued on 16 October 2020) and expert evidence was filed on both sides: that from UKAD consisted of a report from Professor David Cowan (Professor Emeritus in Pharmaceutical Toxicology, King's College London) and a Witness Statement from the UK Head of Science & Medicine, Nick Wojek.

5. Apart from his own evidence, the Appellant filed an Expert Witness Statement from Professor Pascal Kintz, Professor of Legal Medicine at the University of Strasbourg, and a Witness Statement from Michael Helliet, who had been his boxing manager for five years, testifying to the Appellant's good character.

6. Both parties were legally represented and oral evidence was given by Professor Cowan, Mr Wojek, Professor Kintz and from the Athlete himself. The hearing was conducted remotely by video.

7. The Appellant, whilst admitting the Anti-Doping Rule Violation ("ADRV"), contended that he had not committed that ADRV intentionally so that the otherwise applicable period of Ineligibility of four years should be reduced to two years and, further, that the applicable period of Ineligibility should be eliminated on the basis of No Fault or Negligence under

[1] As noted by the Tribunal, the relevant rules were version 2, in effect from 1 October 2019.
[2] British Boxing Board of Control ("BBBC") had adopted the ADR.

ADR Article 10.4 or reduced from four to two years on the basis of No Significant Fault or Negligence under ADR Article 10.5.1(b) and/or under ADR Article 10.6.3.

8. In its Decision, the Tribunal concluded as follows (per paragraph 74):

> "*For the reasons set out above, we find that:*
>
> *(i) Mr Bowes has committed an ADRV pursuant to ADR Article 2.1 by virtue of the presence of a Prohibited Substance, namely ostarine, in the Sample he provided on 2 September 2020;*
>
> *(ii) Mr Bowes has not discharged the burden on him under ADR Article 10.2.1(a) to establish that the ADRV was not "intentional" within the meaning of ADR Article 10.2.3;*
>
> *(iii) A period of Ineligibility of four years is imposed under ADR Article10.2.1 such period to run from 2 September 2020, to expire on 1 September 2024;*
>
> *(iv) Mr Bowes result in the bout on 2 September 2020 is disqualified."*

9. In accordance with Article 13.4 of the 2021 ADR and Article 13 of the 2019 Rules of the NADP, Mr Bowes and the other parties named in Article 13.4 had a right of appeal to an Appeal Tribunal of the National Anti-Doping Panel. This is the right which the Appellant has exercised.

Establishing an Anti-Doping Rule Violation (ADRV)

10. As the Tribunal noted, the burden was upon UKAD to establish the commission of an ADRV to its comfortable satisfaction – see ADR Article 8.3.1.

11. Paragraph 21 of the Tribunal's Decision (which we adopt) sets out this explanation of the Anti-Doping Rules:

> "*The ADRVs are defined at Article 2 of the ADR, which provides that the following constitutes an ADRV:*
>
> ***'2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample, unless the Athlete establishes that the presence is consistent with a TUE granted in accordance with Article 4***

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his/her body. An Athlete is responsible for any Prohibited Substance or any of its Metabolites or Markers found to be present in his/her Sample. 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 Article 2.1; nor is the Athlete's lack of intent, Fault, negligence or knowledge a valid defence to a charge that an Anti-Doping Rule Violation has been committed under Article 2.1.

2.1.2 Proof of any of the following to the standard required by Article 8.3.1 is sufficient to establish an Anti-Doping Rule Violation under Article 2.1:

(a) Presence of a Prohibited Substance or any of its Metabolites or Markers in the Athlete's A Sample, where the Athlete waives his/her right to have his/her B Sample analysed and so the B Sample is not analysed;

(b) Where the Athlete's B Sample is analysed and such analysis confirms the presence of the Prohibited Substance or any of its Metabolites or Markers found in the Athlete's A Sample; […]'"

Period of Ineligibility in the Event an ADRV is Established; the main issue on appeal

12. ADR Article 10.2 provides as follows:

"***10.2 Imposition of a Period of Ineligibility for the Presence, Use or Attempted Use, or Possession of a Prohibited Substance and/or a Prohibited Method***

This period of Ineligibility for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6 that is the Athlete's or other Person's first anti-doping offence shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

(a) The Anti-Doping Rule Violation does not involve a Specified Substance,[3] unless the Athlete or other Person can establish that the Anti-Doping Rule Violation was not intentional.

(b) …

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

10.2.3 As used in Articles 10.2 and 10.3, the term 'intentional' is meant to identify those Athletes… who cheat. The term, therefore, requires that the Athlete … 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] Ostarine appears at Section S1.2 (Other Anabolic Agents) of the WADA Prohibited List 2020; it is not a Specified Substance and is prohibited at all times.

13. Subsequent to 2 September 2020, a later (2021) edition of the UK Anti-Doping Rules came into effect, based on the 2021 World Anti-Doping Code. Although it may not be strictly material to the issue the Tribunal had to decide or the basis upon which this Appeal proceeds, it is informative to consider the different language used in the latest iteration of Article 10.2.3 which is as follows:

> "*10.2.3 As used in Article 10.2, the term 'intentional' is meant to identify those* ***Athletes*** *or other* ***Persons*** *who engage in conduct which they know constitutes an Anti-Doping Rule Violation or they know that there is a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and they manifestly disregard that risk.*[4]
>
> *(a) An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a Prohibited Substance or a Prohibited Method which is only prohibited In-Competition shall be rebuttably presumed to be not 'intentional' if the Prohibited Substance is a Specified Substance or the Prohibited Method is a Specified Method and the Athlete can establish that the Prohibited Substance or Prohibited Method was Used Out-of-Competition.*
>
> *(b) An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a Prohibited Substance or a Prohibited Method which is only prohibited In-Competition shall not be considered 'intentional' if the Prohibited Substance is not a Specified Substance or the Prohibited Method is not a Specified Method and the Athlete can establish that the Prohibited Substance or Prohibited Method was Used Out-of-Competition in a context unrelated to sport performance.*"

14. As will be apparent from the analysis which follows later in this Decision, the Tribunal's approach to the issue of how an athlete may establish absence of intention is central to the arguments and issues arising in this Appeal. The Tribunal summarised the matter at paragraph 50(ff) of its Decision, and concluded (at paragraph 59) that:

> "*59. Having regard to all of the above factors, we are not persuaded that Mr Bowes' evidence is sufficient for him to avail himself of the narrowest of corridors available in the absence of him being able to demonstrate the source of the ostarine. He has failed to discharge the burden imposed on him under the ADR.*
>
> *60. The period of Ineligibility is therefore four years, in accordance with ADR Article 10.2.1(a)"*

15. The Tribunal went on to address what was then the Appellant's alternative case that any otherwise applicable period of Ineligibility should be eliminated on the basis of No Fault or

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[4] Footnote 1 to that provision reads as follows: "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."

Negligence under ADR Article 10.4 or reduced from four to two years on the basis of No Significant Fault or Negligence under ADR Article 10.5.1(b) and / or under ADR Article 10.6.3. However, we need say no more about that alternative issue since, as is explained in paragraph 5 of the Amended Grounds of Appeal, the Athlete "*does not, in these Amended Grounds of Appeal, seek to appeal findings below that he could not establish No Fault or Negligence or No Significant Fault or Negligence*".

The Test We Should Apply in the Appeal Process

16. This Appeal is not a *de novo* rehearing but, rather, is a review of the NADP Decision. Indeed, ADR Article 13.4 directs that an appeal made to a NADP Appeal Tribunal proceeds on the following basis:

> "*13.4 Standard of review*
>
> *13.4.1 The scope of a review on appeal includes all issues relevant to the matter and is not limited to the issues raised before the first instance Tribunal. Any party to the appeal may submit evidence, legal arguments and claims that were not raised in the first instance hearing so long as they arise from the same cause of action or same general facts or circumstances raised or addressed in the first instance hearing.*"

17. The Appellant's current legal representatives were invited to indicate whether they sought a *de novo* hearing or, rather, a review as per ADR Article 13.4.1. On 24 September 2021, the Appellant's representatives confirmed the following:

> "*Mr Bowes requests a review by the Appeal Tribunal pursuant to Article 13.4.1 of the NADP Rules; Mr Bowes does intend to submit evidence and legal arguments that were not raised in the first instance hearing. However, a de novo hearing is not requested.*"

18. The parties referred this Appeal Panel to previous case law as to the approach we should take to that review.[5] In context, and bearing in mind that this is, as we have already said,

[5] Four cases were referred to – namely: *Gabriel Evans v UKAD* SR/NADP/515/2016, endorsed by the Appeal Tribunal in *Adam Carr v UKAD* SR/197/2020; and *Ellis Richards v UKAD* SR/077/2020; and, most recently, *Mark Dry v UKAD* SR/1342021.

a review and not a rehearing, the approach that we take is that we should differ from the Tribunal if, but only if, their decision:

(a) was based upon a misunderstanding of or obvious error in relation to matters of fact (that is, evidence); or

(b) involves a wrong application of legal principle; or

(c) was inherently unreasonable; or if

(d) by virtue of any fresh evidence or arguments that have been admitted at the Appeal Hearing, we can be satisfied that a first instance panel, had it heard that evidence, would have reached a different decision.[6]

Additional Evidence Submitted on Appeal

19. Pursuant to a Directions Hearing on 22 September 2021, and in accordance with paragraph 3.2 of the Directions made at that hearing, the Appellant was permitted to serve Amended Grounds of Appeal, together with any further additional evidence that he wished to adduce. That additional evidence included a Second Witness Statement from the Appellant himself [97-101][7] with an important exhibit, namely, what is said to be a tabulation of "*supplements, vitamins & minerals and/or medications taken between 2 July and 2 September 2020 inclusive*" [102-109].[8]

[6] We deliberately choose the indefinite article "a" without reference to how we think this particular first instance Tribunal might have been impressed or unimpressed by that evidence. The fact that this particular Appeal Panel might have taken a different view from the first instance Tribunal is therefore not *necessarily* decisive though it may be persuasive. But, as we explain further below, this is a largely academic point in the context of this case because we would have come to the same conclusion as the Tribunal in the light of the evidence we have heard. We also consider the Tribunal was entitled to decide as it did on the evidence it had.

[7] All references in square brackets are to the Appeal Bundle, comprising some 340 pages, including authorities. There was additional documentation, including the Bundle available to the panel below and other authorities / references to rules, to which we may refer separately.

[8] Although the Appellant told us that this table had been in existence some months before the NADP hearing, it was not made available nor was it referred to during the course of it. We were not told the full reason for that apparently surprising fact but we recognise and respect that such decisions may be covered by legal professional privilege.

20. In addition, evidence was also submitted by his fiancée, Ona Vrondis-Fontinelle. She is a qualified solicitor working for the London Borough of Waltham Forest, and her evidence is material particularly to the extent that she helps to establish the chain of custody as regards the nail clippings sent to Professor Kintz.

21. Next, there was a Witness Statement submitted by the Appellant's trainer, Mr Leon McKenzie, which supported the Appellant's account of himself as a person who is careful in his approach to the purchase of supplements and in his attitude to training. He said that the Appellant "*generally gets his supplements from his sponsor and they both check the ingredients for prohibited substances*".

22. A Witness Statement was also served from Mr Javed Khan, who is a Director of Healthshop UK Limited. He says he has sponsored the Appellant "*since 2017, providing him with various supplements and vitamins*", and asserts that he and the Appellant habitually "*check the product on Informed Sport*" or otherwise by checking the "*ingredients on the WADA Prohibited List*".[9]

23. Mr Khan's Statement does not, however, refer to some supplementary evidence which was obtained by UKAD in response and which is exhibited to the Witness Statement of James Laing [167-169]. Mr Laing went through the list of supplements set out in the Appellant's table and investigated the website maintained by Healthshop UK. He noted, in particular, some brands to which our attention was directed during the Appeal Hearing.

24. The relevant passages in his Witness Statement [168] read as follows:

> "*8. Before cross-checking the supplements listed by the Athlete in exhibit **JL/01**, I browsed the Healthshop UK website to see if any products jumped out to me as being a potential source of ostarine. I noted that a particular brand, namely 'War Torn Labz', advertises a number of supplements which include various names for Selective Androgen Receptor Modulators ('SARMs') such as 'MK 2866', 'GW 501516', and 'LGD 4033'. A screenshot from the Healthshop UK website, which shows numerous 'War Torn Labz' supplements for sale, is exhibited to this statement at **JL/06**.*
>
> *9. A particular supplement, namely 'War Torn Labz MK 2866', caught my attention since MK-2866 is another name for ostarine/enobosarm. I therefore clicked on 'War Torn Labz MK 2866'. This opened the webpage exhibited to this statement at **JL/07**.*

[9] See paragraph 3 of Mr Khan's Witness Statement [124-5].

10. *I noted that the product description for 'Warn [sic] Torn Labz 2866' contained the following message:*

'SARMS ARE FOR RESEARCH PURPOSES ONLY. THIS PRODUCT IS NOT A NUTRITIONAL SUPPLEMENT, NOR A FOOD AND SHOULD NOT BE USED AS ONE. THIS PRODUCT IS SOLELY FOR RESEARCH PURPOSES ONLY.'

11. *The webpage exhibited at **JL/07** also contained an image of the ingredients list for 'War Torn Labz MK 2866'. This ingredients list named (2S)-3(4-cyanophyenoxy)-N-[4-cyano-3-(trifluoromethyl)phenyl]-2-hydroxy-2-methylpropanamide) as the only ingredient. A screenshot of the ingredients list for 'War Torn Labz MK 2866' is exhibited to this statement at **JL/08**.*

12. *In the Expert Witness Statement of Professor Pascal Kintz dated 1 June 2021 (enclosure PBAP18 to the Athlete's initial Notice and Grounds of Appeal dated 30 August 2021), I noted that ostarine is also referred to as (2S)-3(4-cyanophenoxy)-N-[4-cyano-3-(trifluoromethyl)phenyl]-2-hydroxy-2-methylpropanamide). A copy of the Expert Witness Statement of Professor Pascal Kintz dated 1 June 2021 is exhibited to this statement at **JL/09**.*

13. *I then proceeded to cross-check the supplements listed by the Athlete in **JL/01** against the products advertised for sale on the Healthshop UK website. The results of my searches are detailed in the table below.*

Supplement as listed in JL/01 (and Brand)	**Available on Healthshop UK website on 2 September 2021?**
ITest (DNA Sports)	No
Ashva-Gandha (Himalaya Herbal Health Care)	No
IVit (DNA Sports)	Yes – a screenshot from the Healthshop UK website is exhibited to this statement at JL/10.
Test-It (Fitness Culture)	No
Tongkat Ali (Natural Anabolic)	Yes – a screenshot from the Healthshop UK website is exhibited to this statement at JL/11.
Adonis (Warrior)	No
Zampro (Applied Nutrition)	No, however there is a supplement on the Healthshop UK website called 'ZMA Pro' by Applied Nutrition. A screenshot of 'ZMA Pro' as advertised on the Healthshop UK website is exhibited to this statement at JL/12.
Test Your Limits (TNT Supplements)	No

Fish Oil (VitaZam)	No
Vitamin B Complex (NutriZam)	No
Gamma-Mynd Premium Nootropic (DNA Lean)	No
Epsom Salts – Magnesium Sulfate Heptahydrate (Care Plus)	No
Tribulus Gokshura (Himalaya Herbal Health Care)	No
Confido Tablets (Himalaya Herbal Health Care)	No
Multivitamin (Animal Pak)	No
Wow Hydrate (Wow Hydrate)	No

25. The Appellant also served a number of what are called "*Character Statements*" which unquestionably make impressive reading and support the assertion, which we accept without reservation, that he is a good person who has done exceptional work in the community and is[10] a "*respected role model for children*" through his work in schools, in prisons, and in other community initiatives.

26. We say straight away that we accept as honest the evidence of those who hold a good opinion of the Appellant. We also accept that this is relevant evidence to be taken into account in any assessment of the issue of intention under ADR Article 10.2.3. However, it cannot be decisive: even good people make mistakes and, sometimes, they do wrong.

[10] In the words of Shama Akram

The Appeal Hearing; Evidence and Analysis

27. The Appeal was conducted remotely and there was no objection to the composition of the Panel. The hearing had originally been intended to be conducted remotely but the Appellant later suggested (as COVID-19 restrictions were eased) that it would be preferable for the hearing to be in person, particularly bearing in mind that he had apparently had some connection difficulties during the First Instance Hearing.

28. The Chair's decision in response to that suggested was that, since the matter had been listed remotely and Panel Members had accepted their appointments on that basis, it should continue to be heard remotely[11].

29. As had been the case at the First Instance Hearing, UKAD was represented by Tom Middleton, Head of Case Management. The Appellant had new legal representation from Nik Yeo of Counsel, instructed by L.K. Law LLP.

30. We are very grateful both to Mr Middleton and to Mr Yeo for their written and oral submissions, but we would wish to single out Mr Yeo and L.K. Law LLP for particular thanks, bearing in mind that they provided their valuable services *pro bono*. In our view, they enabled the Appellant's case to be put forward to the best possible advantage and we wish to acknowledge that.

31. The hearing itself involved a review of the old and new documentation, including consideration of the transcript of the First Instance Hearing. Mr Middleton did not challenge any of the fresh evidence submitted by the Appellant, apart from the oral evidence the Appellant gave himself. However, we should recognise, if it is not self-evident, that there is a difference between evidence that is *unchallenged* and evidence that is accepted as accurate in all respects, and is therefore to be treated as "*agreed*". We treat the evidence, other than that of the Appellant himself, as falling into the former category of unchallenged evidence.

[11] Sensibly, the Appellant joined his counsel, Mr Yeo, for the hearing and we are satisfied that he was able to follow and engage in the appeal hearing to the fullest extent necessary.

32. The effect of the Appellant's own evidence, in summary, was as follows:

(a) He affirmed the truth of his First and Second Witness Statements.

(b) He explained that the First Instance Hearing was, as far as he was concerned, unsatisfactory at least as regards to his own participation: he said he was at work, helping a client[12] and was not concentrating so as to put his case to the best effect he could. He said that he could not hear questions very well and that, whereas he accepts that he did say he had taken ten supplements in the relevant period[13], that was not actually correct because (as he now says) he had in fact only taken four. He explained this significant difference by saying he was "*annoyed*" and "*being a bit flippant*", that it was a long day and he was "*kind of rushing*" his answers.

(c) He repeated the explanation he had given to the Tribunal for the fact that he had just written "*multivitamin*" on the Doping Control Form ("DCF") on the basis that this was done immediately after the fight when the Sample was taken, he was hurt and tired and just wanted to go home.

(d) By reference to his claim to having been, as one might summarise his explanation, not fully engaged with the process during the first instance hearing (and the other circumstances he described), he sought to explain why he told the Tribunal[14] that he never took the substance called "*TNT*", whereas the new table that he produced shows [104] that he had indeed taken such a supplement.

(e) He said that he had not sought to adduce any evidence from the supplier of his supplements (Mr Khan / Healthshop UK) last time because he did not think it was necessary, and, when it was put to him that it now emerges that Healthshop UK

[12] For whom he acted as a bodyguard: he was at that person's house when the hearing was conducted
[13] See the exchange in cross-examination quoted in UKAD's written submissions on appeal [149-150] and in the transcript of that hearing [58-60]. As is noted at para 58 of the Tribunal's decision, that list included "*three natural testosterone boosters*" which the Tribunal considered did "*not sit easily with Mr Bowes's description of himself as taking a careful and responsible approach to anti-doping and his use of supplements*".
[14] See the transcript [71]

stocks (amongst other unlicensed substances) *Ostarine*[15], he said that he was unaware of it.[16]

33. There can be no doubt that this additional evidence is, and would have been, material to the issues considered by the Tribunal. We must certainly take account of it. Whether it is helpful to the Appellant's cause is a very different matter. Mr Yeo, understandably, argues that the fact that the Appellant's sponsor and provider of supplements actually stocked a substance containing *Ostarine* is supportive of his contention that he must inadvertently, and notwithstanding the exercise of all reasonable care, have taken a contaminated supplement. Mr Middleton, by contrast, suggests that it has quite the opposite implication; namely that it is supportive of the inference that the Appellant took a Prohibited Substance deliberately.

34. Those may be the two opposing thesis but, given the evidence that has emerged during the appeal process, it is not a binary choice. A further possibility, which UKAD rely on in the alternative, is that the source of the ADRV was a supplement that came from Healthshop UK, which, whilst not taken deliberately by the Appellant in an attempt to 'cheat', was nevertheless taken without any adequate investigation or check which, had it been undertaken, would have revealed that the product was (or might contain) a Prohibited Substance. On that basis, it was submitted that the Appellant would have been acting recklessly in the sense that he must therefore be taken to have known "*that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk*" (in the words of ADR Article 10.2.3).

Establishing that an ADRV was Unintentional; Principle and Guidance

35. ADR Article 10.2.1(a) says in terms that it is for the "*Athlete or other Person [t]o establish that the Anti-Doping Rule Violation was not intentional*". How an Athlete is able to discharge that burden has been the subject of some controversy in the CAS jurisprudence

[15] i.e. the very substance that returned the ADRV
[16] The substance in question is not a legitimate substance, being available only on the Black Market and in the material exhibited to Mr Laing's Witness Statement, has a disclaimer "Not for Sale".

and amongst commentators on the provision and has been the focus of several decisions of the NADP and the Appeals Panel. The issue was also the focus of much of the written and oral submissions by the parties to the present case. Nevertheless we hope we may be forgiven for trying to keep the matter as simple as possible summarising (without engaging in an extensive review of) the relevant jurisprudence and bearing in mind, as is critically important, that there is a world of difference between what may be required in theory and in practice – by which we mean that the factual context of the particular case is of the utmost importance.

36. It is therefore important at the outset to distinguish between principle and practice. The key legal principle is laid down in ADR Article 2.1, 10.2.1 and 10.2.3: it is for the Athlete to prove, on a balance of probabilities, that his violation was not intentional as that word is explained in the provision. How that may be proved will depend on the quality of evidence and argument adduced in the particular case. To that end, previous rulings at CAS and by the NADP have sought to provide persuasive (and, in some cases, authoritative) guidance on what we are characterising as matters of practice.

37. Obviously, if an athlete is able to demonstrate the source of contamination (and offer an innocent explanation for its presence in his system), it will be easier for the athlete to discharge the burden of proof upon them than if they cannot. But it is not a *sine qua non* that they must go that far: there will be other cases where, for example, the Athlete has no positive evidence of the source of the substance but still seeks to discharge the burden of proof by their own assertions of evidence which may be supported by other evidence but not anything which goes as far as to establish the probable source.

38. In such a case, whether a tribunal is persuaded that the Athlete has nevertheless managed to pass successfully through "*the narrowest of corridors*[17] or is able to show that theirs is one of the *"rarest*[18]*"* cases in which the burden of proof has been discharged

[17] That is the language of the decision in *Villanueva v FINA* CAS 2016/A/4534 at para 37
[18] See para 65 of *WADA v WSF & Nasir Iqbal* CAS 2016/A/4919 quoted at paras 26 to 28 of the NADP decision in the first instance case.

without such positive evidence will depend on the facts of the particular case. It is in respect of such cases[19] that the jurisprudence has sought to offer guidance.

39. The Appellant faces exactly that difficulty here in that he is trying to establish that he acted unintentionally, within ADR Article 10.2.1 and 10.2.3, but cannot assert positively that he knows the source of contamination – that is, he cannot identify the means whereby the Prohibited Substance must have got into his system – albeit he suggests[20] it is probable that it must have come from a contaminated supplement from his sponsor/supplements supplier.

40. The line of cases set out by the Tribunal in its decision in the present case[21] establishes that it would be "*a rare case*"[22] 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*". Alternatively, that such proof will "*normally*" be required[23], and both in the case of *UKAD v Graham*[24] and in *UKAD v Williams*[25], the possible imperatives behind imposing this burden upon the Athlete are clearly explained.

41. As regards the CAS jurisprudence, the Tribunal's starting point, understandably, was the reference to the decision in *Guerrero v FIFA*[26] and to the earlier decisions in *Villanueva v FINA*[27] and in *WADA v WSF & Nasir Iqbal*[28].

42. At paragraph 26 of the Decision under appeal, the Tribunal referred in a footnote to the *Villanueva* case having been "*followed in Lawson v IAAF – CAS 2019*". As Mr Yeo, on behalf of the Appellant, understandably submitted (we paraphrase), the CAS jurisprudence is not quite as simple as that (or at least it does not end there).

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[19] As regards the width of the corridor and/or the degree of rarity, as one might say.
[20] Particularly in the light of the evidence from Mr Laing as to the products now known to be supplied by Healthshop UK
[21] See para 23-28 of the Decision.
[22] See *UKAD v Buttifant* SR/NADP/508/2016; *UKAD v Songhurst* SR/0000120248 ; *UKAD v Graham* SR/0000120259 ; *UKAD v Williams* SR/0000120251.
[23] See *UKAD v Songhurst* SR/0000120248
[24] SR/0000120259
[25] SR/0000120251
[26] CAS 2018/A/5546
[27] CAS 2016/A/4534
[28] CAS 2016/A/4919

43. It is, of course, clear that the Rules do not impose – though they could have imposed – an absolute requirement that an Athlete who seeks to prove absence of intention must prove the source of the Prohibited Substance. The effect of the jurisprudence, though expressed in different formulations, amounts to establishing the guideline that it will be very hard, but not impossible, for that burden to be discharged without such proof. If authority for that proposition is needed, it can be traced through the cases cited above and through others, including ***Abdelrahman***[29], ***Villanueva***[30], ***Ademi***[31] and ***Iqbal***[32].

44. It is true that the ***Lawson***[33] case addressed the same issue as here, which is whether a Tribunal can accept that an Athlete has discharged the burden under Article 10.2.3 without being able to establish the origin of the Prohibited Substance. Indeed, it was a case where a CAS Panel found that absence of intention had been proved, and accepted the Athlete's explanation that he had consumed meat which, on the balance of probabilities, was most likely contaminated.

45. The ***Lawson*** decision was the subject of trenchant criticism by Jonathan Taylor QC, in his April 2020 article on "*Assessing Contamination and Thresholds Under the World Anti-Doping Code*". The thrust of the article was that ***Lawson*** was not just a difficult case but involved a mistaken approach and risked opening the floodgates to dishonest athletes, and was contrary to the longstanding body of CAS jurisprudence that preceded it.

46. Whilst ***Lawson*** may reasonably be regarded as an exceptional case, it does not stand alone. A similar approach was taken by the CAS Panel in the case of ***Jamnicky***[34]. On the other hand, other panels have continued to favour what one might characterise as the more restrictive, rather than the more liberal, approach. Indeed, the CAS Panel in ***Iannone***[35] went so far as to describe[36] both the cases of ***Lawson*** and ***Jamnicky*** as "*outliers*".

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[29] CAS 2017/A/5016 and 5036
[30] CAS 2016/A/4534
[31] CAS 2016/A/4676
[32] CAS 2016/A/4919
[33] CAS 2019/A/6313
[34] CAS 2019/A/6443
[35] CAS 2020/A/6978
[36] At paragraph [134]

47. The relevant section of that paragraph [134] in *Iannone* reads as follows:

> "*It is clear that the Athlete cannot rely on simple protestations of innocence or mere speculation as to what must have happened, but must instead adduce concrete and persuasive evidence establishing, on a balance of probabilities, a lack of intent (see for example, CAS 2017/A/5369; CAS 2016/A/4919; CAS 2016/A/4676; CAS 2017/A/5335. Lawson and Jamnicky, the most recent cases, are outliers in as much as they apparently propose an enlargement of that possibility.*"

48. That is not the latest word on the issue. In our view, the clearest and most authoritative analysis of the relevant jurisprudence and issues of principle and practice is to be found in a CAS decision which was issued after the First Instance Hearing in the present case, namely, *Sports Integrity Australia and WADA v Shayna Jack and Swimming Australia*[37].

49. In our view, the *Shayna Jack* decision establishes[38] that the quality of the evidence that will be needed to prove an absence of intention, without proof of the source of ingestion or contamination, will always be fact sensitive and there are no absolute or invariable rules as to what evidence will and what will not suffice.

50. By way of a convenient summary of what the CAS Panel resolved in the *Shayna Jack* case, after its discussion of the *Iannone* case, it concluded as follows:

> *"123. The present Panel notes this reference to the absence of binding precedents in CAS, as well as the countervailing desire for consistency and predictability. But like must be compared with like. The present Panel, as it too is dealing with a reduction of ineligibility under a substantially identical regime, will seek coherence with the succinct statement in para. 134 of* Iannone*.*
>
> *124. From the outset of the present case, SIA has accepted that there was no direct evidence that Jack intentionally ingested Ligandrol to enhance performance and agreed that the level of banned substance was low and there was no evidence of any long-term usage of the substance (see para. 99 of the Appealed Decision). These concessions are significant, but (contrary to what might be expected by someone unacquainted with the rules) not decisive – or else this appeal would have been hopeless, and dropped. SIA is well cognizant of the rules and knows that it does not have the burden of proving intentional misconduct; in order to secure confirmation of the reduction of ineligibility granted by the Appealed Decision, it is for the Athlete to prove its absence.*"
>
> "*183. Given the occasional superficiality and inaccuracy of accounts of complex legal proceedings in social and other media, the Panel feels it appropriate to summarise succinctly what has happened in this case. The Athlete accepted at an early stage*

[37] CAS 2021/A/7579 & 7580. The NADP here had (and referred to) the first instance decision.
[38] If ever that was controversial, which we doubt.

> *in the process that she failed to avoid ingestion of a Prohibited Substance, and as a result lost the chance to compete as a realistic medal contender in the Tokyo Olympics. Such a failure is a serious matter and results in a four-year period of ineligibility to compete. This does not mean that she was found guilty of cheating, and the rules moreover allow her the opportunity to reduce the period of ineligibility to two years by proving that she did not* intentionally or recklessly *consume the Prohibited substance. In this case a majority of the Panel finds that the Athlete has, on the balance of probability, done so.*"

51. On the basis of the foregoing, therefore, we would accept that, as a matter of principle, the Appellant in the present case could have succeeded in establishing absence of intention, notwithstanding his inability to show the probable source of contamination, on the basis that his assertions of innocence coupled with the other evidence (including evidence as to character) adduced on his behalf were sufficient to establish lack of intentional violation: that is, that it is more likely than not that some form of contamination occurred (through use of a contaminated supplement, for example, of which contamination he was completely unaware and had no reason to suspect) or from some other unknown cause over which he had no control.

Application to the Instant Case; Ground One

52. The issue to which we turn, therefore, is whether we consider that the Tribunal should have accepted his case in that respect and / or whether we, given the further evidence which we have heard, would accept it now (or, indeed, would have accepted it had we been sitting as a first instance Tribunal). In addressing these issues, it is helpful to consider the four Grounds of Appeal upon the basis of which the Tribunal's Decision has been challenged.

53. Ground One focuses on the additional evidence adduced which, it was contended "*clarifies key evidence on which the NADP relied*".

54. It is submitted on behalf of the Appellant that the Tribunal was wrong to hold it against him that he had written "*multivitamin*" on his Doping Control Form when, on any view, that was an incomplete / inaccurate response, and should not have taken account of the fact that his evidence was that he had taken testosterone boosters in the seven days before the

Sample was provided and should have accepted that he had established a careful and responsible approach to supplement use.

55. We do not think we can criticise the Tribunal for the view that it took of what the Appellant wrote on the Doping Control Form or for the view they formed as to his use of supplements. They heard his evidence about that and they evaluated it by reference to the account that he gave of those supplements that he had, in fact, taken. At paragraph 40 of their Decision, they rejected his suggestion that what he had meant to describe were a "*multiple of vitamins*" and that he had provided the information at a time of some distress, when he had lost the fight, he was in pain, it was late and he was tired and wanted to go home.

56. It is also noteworthy that he was asked in some detail by the Tribunal about the various products he had taken between 2 July and 2 September 2020, these being substances he had sent to Professor Kintz for testing. The Tribunal noted that only one of the products actually identified appears to have been capable of being described as a "*multivitamin*".

57. We take the same view as to the Tribunal's approach to his supplement use. As the transcript of the Appellant's evidence to the Tribunal demonstrates, he was questioned extensively by Mr Middleton on behalf of UKAD about the supplements he said he was taking "*up until the day of the fight*". In answer to those questions, he asserted positively that he had in fact been taking ten supplements up until the day of the fight. He sought (perhaps in an argumentative way) to justify that evidence as being consistent with what was written on the Doping Control Form by saying (we paraphrase) that if he had been taking up to ten vitamins, then it would indeed be accurate to say that it was a "*multiple of vitamins*".

58. In our view, it is impossible to criticise the Tribunal for its approach. Furthermore, we suspect that if the Tribunal had heard the same evidence as was given to us by the Appellant about the supplements that he now says he was actually taking, they would have regarded him at least as an inconsistent, and hence unreliable, witness. We say that because, in preparation for this hearing, the Appellant has submitted the table which is said to have been prepared six months before the First Instance Hearing and which

purports to set out all the supplements, vitamins / minerals and / or medication he took prior to giving the Sample[39]. If the material contained in the table had been made available to the Tribunal at the same time as they heard the evidence that we have already summarised, we doubt that they would have been impressed not least because it would have contradicted what he said orally. Indeed, the table and the Appellant's present position that he had taken only four supplements in the week preceding the bout, is wholly at odds with his repeated references to the ten supplements when questioned during the First Instance Hearing.

59. In another example of inconsistent accounts given to two different tribunals, we note that he told the Tribunal in evidence that he had not taken the substance *TNT*[40] whereas the table PB2 [104] shows that he had in fact taken *TNT* in 2021.

60. In deciding whether the Appellant had discharged the burden of proof upon him, the Tribunal, at paragraph 58, referred both to the CAS Panel's decision in ***Villanueva*** and the Sole Arbitrator's Decision in the ***Jack*** case[41]. The Tribunal therefore asked itself whether the evidence that the Appellant had given about his use of medicines and supplements supported his assertion that he took a "*careful and responsible approach to Anti-Doping in his use of supplements*". That they rejected that contention was plainly material to their assessment of whether he had discharged the burden of proof upon him. They found that he had not.

61. Far from considering that the Tribunal fell into error in the way in which they approached the assessment of his evidence, we think they were perfectly entitled to reach the view they did. Indeed, we consider that the additional evidence that we have heard would be likely to have strengthened rather than weakened their conclusion. Placing ourselves in the position of a First Instance Tribunal hearing the totality of the evidence, when deciding whether to regard the Appellant as a reliable witness, we would have to have regard to

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[39] As we said earlier, whilst it may seem extraordinary that this was not referred to and disclosed at the First Instance Hearing, we respect the explanation given that this was covered by legal professional privilege;
[40] See [71]
[41] We have already extensively discussed the CAS Decision on Appeal in that case. The fact that the Appeal Panel only accepted by a majority that the athlete in that case had discharged the burden of proof demonstrates how fact-sensitive these cases are as well as the truism, going back to *Buttifant*, that it will, in practice be difficult or only rarely, that this can be done without proof of the means of ingestion.

the fact that he gave one account to the Tribunal and has now given a different (and inconsistent) account by reference to his new version of what supplements he took, based upon the table.

62. Nor were we persuaded that this can be explained on the basis that the evidence he gave to the Tribunal was because (we paraphrase) he was not really concentrating at the time. With respect, that is not how the evidence at the First Instance Hearing reads.

63. The matter does not end there, however. When one decides whether he has established the careful approach to supplement use for which he argues, it is now clear that not only has he now shown that he has given a series of inconsistent explanations for his approach to such supplements but also, as it now appears from the evidence adduced by Mr Laing, that his sponsor and supplier of supplements was in fact trading in the very Prohibited Substances which were found (albeit in very small quantities) in his Sample.

64. Mr Yeo argues that it makes it more likely than not that the 'accidental contamination' thesis is therefore correct. We do not agree. It is equally consistent with the Appellant having taken a banned supplement from that source deliberately or recklessly (in the sense we explained earlier).

Second Ground of Appeal: The Application of the *Lawson / Shayna Jack* Tests

65. We have said enough already about the jurisprudence and we reiterate that the approach we take is informed and determined by the analysis in the *Shayna Jack* case. To that extent, we have no issue at all with the approach which, as it was put in *Lawson*, "*begins with the science and then considers the totality of the evidence through the prism of common sense possibly 'bolstered' by the Athlete's credibility. In other words, start with the science, continue by taking a broad view, test it against common sense, and finally consider whether the credibility factor confirms the emerging conclusions*".[42]

[42] Quoted in *Shayna Jack* at paragraph 157.

66. In our view, the First Instance Decision here, properly construed, demonstrates that is exactly how the Tribunal approached this case and it is certainly how we approach it. How, therefore, is it said that the Tribunal went wrong?

67. The Amended Grounds of Appeal [92] identify six matters which are said to reflect the totality of the evidence. We will deal briefly with each without, we hope, undue repetition of what we have discussed already.

68. First, it is said that the Athlete was not reckless but, to the contrary, he was "*extremely careful as to the supplements he was taking. This is demonstrated by the Table and the clarifications provided in [his] Second Witness Statement and the Statements of Mr McKenzie and Mr Khan*".

69. As we have said, we consider that the Tribunal was perfectly entitled to conclude that the Appellant was nothing like as careful as he claims. He was unwise to purchase his supplements from someone who supplied Prohibited Substances and the assertion that he was "*extremely careful*" does not sit well with the inconsistent accounts of what supplements he took and when, to which we have already referred. In our view, the supplementary evidence from Mr McKenzie and Mr Khan does nothing to undermine the Panel's (and our) conclusion that the Appellant had not established that he was an extremely careful user of supplements as he claims.

70. Second, it is said that there was a history of negative tests, which is entirely true. But that is not inconsistent with the Appellant having taken *Ostarine* deliberately on one occasion or having taken a supplement which, unknown to him, in fact contained *Ostarine* in circumstances where he had made no adequate attempt to check what it was that he was taking (especially since he was purchasing from a supplier who in fact supplied *Ostarine*).

71. The third point raised is that the evidence given by Professor Kintz as to the negative tests taken from the nail clippings supplied should have been afforded greater weight. We accept the evidence of the Appellant's fiancée as to the chain of custody for those nail clippings and we certainly would go so far as to accept, on a balance of probability, that those nail clippings came from the Appellant. However, whilst they contradict any

indication of long term use, they do not contradict a possible deliberate or reckless use of a supplement containing Ostarine on one occasion.

72. Fourth, it is pointed out that the concentration was extremely low and so, it is said, a "*dose smaller than a grain of salt could have been responsible for the positive reading*"[43]. Whilst that is true, it does not contradict the hypothesis that this substance got into the Appellant's system either through deliberate or reckless administration.

73. Fifth, it is said that the Athlete has gone to considerable trouble and expense to defend his position, and that is a relevant consideration to be taken into account. We can say that we do attach weight to that contention, but we do not consider that it counterbalances the other matters which have led us to conclude that the Appellant has not discharged the burden of proof upon him, and led the Tribunal to reach the same conclusion.

74. We take exactly the same approach to the sixth point which is that there is very substantial evidence of the Appellant's good character before this Appeal Panel. As we have already said, we accept that he is in many respects an admirable person, particularly as regards his service to the local community. But, as we have said before, even good people make mistakes.

Third Ground of Appeal

75. The third and related ground is that the Tribunal was unfair and inconsistent in its approach to what evidence was speculative and what was not. The argument is that it was wrong to reject as pure speculation the Appellant's contention that *Ostarine* had entered his system through a contaminated product, when it was equally speculative, as Professor Cowan was suggesting, to say that he might have taken the substance deliberately because Athletes will "*just sometimes try something*".

[43] As confirmed by Professor Kintz in evidence.

76. It may be fair to say that both assertions are speculative, but that does not mean that they are equally so. One has also to bear in mind that it was for the Appellant to prove his absence of intention and the Tribunal found, and was in our view entitled to find, that he had failed to do that. In the light of the evidence we have now heard, one might now also speculate that the source of the contamination could just as well have been a product containing *Ostarine* supplied by Healthshop UK, which the Appellant took in ignorance of the fact that it actually was, or contained, *Ostarine*, but in circumstances where he was reckless in the sense that he "*manifestly disregarded*" the risk of a violation in taking that substance.

Fourth Ground of Appeal

77. The fourth Ground of Appeal is in relation to the character evidence which is now submitted, which, as we have said, is hugely impressive. We have already referred to that evidence more than once. It tells us a lot about the Appellant's character, and that is all good and we take account of it, but it is not sufficient, in our view, to enable him to overcome the evidential burden that the Rules impose upon him. We accept it can be a relevant consideration in an assessment of credibility. However, in the context of the legal issues which arise here, what matters is not just whether his evidence is capable of belief but whether it is also reliable.

78. Assessment of credibility in that sense is very much a matter for a Tribunal which hears and sees witnesses and evaluates their written and oral testimony. In our view, and for reasons it gave, the Tribunal was entitled to conclude that the Appellant had not established an absence of intention within the constraints imposed by ADR Article 10.2.1 and 10.2.3. As we have also already said, in the light of all the evidence we have heard, we would take a similar view.

Conclusion

79. In all those circumstances, and for the reasons that we have given, this Appeal Panel:

(1) dismisses the Appeal and confirms that the Appellant has committed an ADRV under ADR Article 2.1 in that a Prohibited Substance, namely *Ostarine*, was present in the Sample he provided on 2 September 2020;

(2) holds that the First Instance Tribunal was entitled to find, and that we would find, that the Appellant has failed to discharge the burden on him under ADR Article 10.2.1(a) of establishing that the ADRV was not "*intentional*" within the meaning of ADR Article 10.2.3;

(3) confirm that a period of Ineligibility of four years must apply under ADR Article 10.2.1, such period to run from 2 September 2020 in accordance with ADR Article 10.11.3;

(4) confirms that the Appellant's result in the bout of 2 September 2020 is disqualified, in accordance with ADR Article 9.1.

William Norris QC
Chair, on behalf of the Appeal Tribunal
London, UK
14 April 2022