SPORT RESOLUTIONS (UK)

NATIONAL ANTI-DOPING PANEL

SR/NADP/53/2018

IN THE MATTER OF AN APPEAL BROUGHT UNDER THE ANTI-DOPING RULES OF BRITISH WEIGHT LIFTING

Before:

Jeremy Summers (Chair)
Carole Billington-Wood
Colin Murdock

BETWEEN:

Adam Fedorciow ("the Athlete")

Appellant

and

UK Anti-Doping ("UKAD")

National Anti-Doping Organisation

Decision of the Appeal Tribunal

Introduction

1. The Appellant is a 27-year-old weight lifter who has been licensed as a competitor of British Weight Lifting ("BWL") since 2012. On 15 July 2017 the Appellant

competed at the BWL Championships held in Coventry at which he was required to provide an In-Competition urine sample.

2. That sample returned an Adverse Analytical Finding ("AAF") for the Prohibited Substance higenamine and its metabolite coclaurine.

3. In consequence of the AAF, the Appellant was charged with an Anti-Doping Rule Violation ("ADRV") contrary to Article 2.1 of the Anti-Doping Rules ("ADR").

4. The Appellant admitted that he had committed the alleged ADRV by email dated 17 September 2017. At a hearing convened in London on 16 January 2018, a National Anti-Doping Panel ("NADP") tribunal ("the Tribunal") imposed a two year period of Ineligibility on the Appellant in consequence of the ADRV.

5. The written decision of the Tribunal was released to the parties on 6 February 2018.

6. On 15 February 2018, UKAD wrote to the NADP requesting a number of changes to the written decision.

7. An amended written decision, incorporating the changes requested by UKAD, was provided to the parties on 19 February 2018.

8. The Appeal Tribunal was of the view that the practice of parties seeking unilaterally to correct finalised decisions issued by tribunals could lead to criticism and should be discouraged.

9. The Appellant served initial grounds of appeal by email dated 26 February 2018.

10. Directions were issued on 9 March 2018 to facilitate the hearing of the appeal, all of which were fully complied with.

11. An appeal hearing was convened in London on 8 May 2018 at which the Appellant was represented on a pro bono basis by Mr Max Shephard of counsel and UKAD was represented by Mr Paul Renteurs of counsel. The Appeal Tribunal records its gratitude to both advocates for their assistance in this matter.

12. This is the reasoned decision of the Appeal Tribunal.

Grounds for Appeal

13. The grounds of appeal lodged on 26 February 2018 were as follows:

    i. The tribunal failed to accurately assess the evidence when rendering its decision that the athlete had not established that he bore 'No Significant Fault or Negligence'.

    ii. The tribunal failed to properly apply the criteria of 'No Significant Fault or Negligence' when rendering its decision.

14. The Appellant subsequently served amplified grounds of appeal on 23 March 2018.

15. The amplified grounds reversed the order of grounds initially served and asserted:

    "The tribunal failed to apply the criteria of 'no significant fault or negligence' properly when rendering its decision

    Under this ground of appeal, the athlete highlights the following:

    a) That the tribunal misdirected itself when considering the definition for no 'significant fault or negligence'

    b) That the relevant jurisprudence was not considered properly in respect of 'no significant fault or negligence'

    c) That the totality of the circumstances was not considered in the tribunal's findings.

    The tribunal misdirected itself when considering the definition for 'no significant fault or negligence"

Material Considered

16. The Appeal Tribunal was provided with, and able to consider in advance of the hearing, all the material that had been before the Tribunal.

17. In addition, it was provided with material relating to the changes made to the original written decision and further documents relevant to the determination of the Appeal.

Submissions

18. On behalf of the Appellant, Mr Shephard expanded upon the amplified grounds of appeal as referred to above.

19. In relation to the first of the three sub-headings advanced in support of the initial ground of appeal, Mr Shephard submitted that the erroneous inclusion, in the Tribunal's initial written decision, of the definition of 'No Fault or Negligence'[1] as opposed to 'No Significant Fault or Negligence'[2] could not be regarded as merely a typographical error. It was a material error, which cast doubt on the way in which the Tribunal had approached its determination. It was not now possible for the Appeal Tribunal to speculate as to what had been in its contemplation.

20. In particular, Mr Shephard drew attention to paragraph 94 of the CAS decision on appeal in the case of *Sharapova v International Tennis Federation*[3]:

'In light of the totality of such circumstances, the panel concludes that the player's claim of NSF can be accepted.'

21. Mr Shephard noted that no such finding had been made by the Tribunal, and in his submission, such a finding would have been made had the Tribunal properly applied itself to the definition provided for 'No Significant Fault or Negligence'.

22. In making that submission, Mr Shephard also drew attention to paragraph 4.17 of the Decision in *WADA v Lund*[4]*:*

> *The panel finds that Mr Lund has satisfied it that in all of the circumstances he bears No Significant Fault or Negligence and, therefore, reduces the period of ineligibility from two years to one year.*

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[1] UK-Anti Doping Rules dated 1 January 2015 adopted by British Weight Lifting
[2] Ibid
[3] CAS 2016/A/4643
[4] *WADA v Lund & FIBT* (CAS 06/001)

23. In support of his submission that the error in relation to the definition could not simply be regarded as typographical, Mr Shephard noted that, at paragraph 40 to the written decision, the words "reasonably excusable" appeared to have been lifted from the definition included at paragraph 19. In Mr Shephard's view, this made it very unlikely that the use of the word 'reasonably' was simply an error made in the drafting of the written decision.

24. Mr Shephard noted that in the response from UKAD, it had been stressed that the definition of 'No Significant Fault or Negligence' had been included in the written submissions before the Tribunal and had been developed during the course of oral representations made at the hearing. Again, in Mr Shephard's view this made it less likely that the error was simply typographical.

25. In support of this argument, Mr Shephard noted that the Tribunal had made no finding as to how the Prohibited Substance had come to be ingested by the Appellant. This was an essential component of being able to find No Significant Fault or Negligence.

26. With reference to the Tribunal's findings at paragraphs 41 and 42 of the written decision, Mr Shephard submitted that the Tribunal had placed over reliance on the risks presented by supplements and the obligations on the appellant by virtue of ADR 1.3.1. That over-reliance had been contributory to the misdirection in applying the No Significant Fault or Negligence test.

27. Turning to the second of the three sub points under the first ground, that the Tribunal had failed properly to consider relevant jurisprudence, Mr Shephard submitted that the Tribunal had failed correctly to apply the decisions in *Sharapova* and *Lund* (above).

28. With respect to Sharapova, Mr Shephard placed reliance on paragraph 84 of the CAS decision:

> *In so doing, it is in fact clear to this Panel […] that an athlete can always read the label of the product used or make internet searches to ascertain its ingredients, cross check the ingredients so identified against the Prohibited List or consult with the relevant sporting or anti-doping organisations, consult appropriate experts in anti-doping matters and, eventually, not take the product. However, an athlete*

cannot reasonably be expected to follow all such steps in each and every circumstance. To find otherwise would render the NSF provision in the WADC meaningless.

29. This, in Mr Shephard 's submission, was contrasted with paragraph 38 to the Tribunal's written decision:

> *Mr Fedorciow failed to carry out the necessary steps. While acknowledging that Athletes cannot reasonably follow all steps in every circumstance, the Sharapova case found that they can at a minimum always read a products label for the ingredients and cross check them all against the Prohibited List. Mr Fedorciow therefore did not do everything he reasonably could have done.*

30. The above formulation, it was asserted, had reconfigured the paragraph in Sharapova referred to above and, in so doing, had imposed a burden upon the Appellant that did not in fact exist. It was wrong, in Mr Shephard 's view for the Tribunal to have found that an athlete can, at a minimum, undertake the steps detailed in paragraph 84 of Sharapova.

31. Turning to the decision in Lund, Mr Shephard noted the uncertainty regarding the historic status of higenamine. In this respect he referred to the decision in *Sakho*[5] which had dismissed an ADRV allegation against a player having concluded that the status of higenamine was uncertain at that time.

32. Mr Shephard referred in particular to paragraph 4.15 in *Lund*[6]. This noted that the athlete in that case had acted responsibly and had regularly checked the Prohibited List. However, in 2005 he had made a mistake in not doing so. That led the Tribunal (on appeal) reducing the period of Ineligibility from two years to one year on the basis that the athlete had established No Significant Fault or Negligence.

33. The Tribunal in this case had not adopted a similar approach, and in so doing had erred.

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[5] Decision of the UEFA Control Ethics and Disciplinary Body (29251 - UEL - 2015/16)
[6] *Lund* (n 4)

34. Mr Shephard stressed that it had never been suggested that the Appellant had been dishonest.

35. UKAD had only issued a warning in relation to higenamine in August 2017, and therefore after the Appellant had returned his AAF. In Mr Shephard 's submission, it was not possible for an athlete like the Appellant to be accurate in knowing what is prohibited until a substance is expressly referred to as having been placed on the Prohibited List.

36. Mr Shephard directed the Appeal Tribunal's attention to the only document he asserted had been received by the Appellant that related to the Prohibited Substance. This was a BWF newsletter dated 21 December 2016[7]. This did not itself contain a direct reference to higenamine but simply contained a link to the UKAD "100% Me" document where such a reference could be found. In Mr Shephard 's submission, given that the reference had not been expressly included within the actual body of the BWF newsletter, it was unfair to the Appellant to suggest that he should have noticed that higenamine was to be included on the 2017 Prohibited List. There needed to be an equality of outcome, and this is what the panel had achieved in the decision in *Lund* (above).

37. With respect to the final sub-limb of his first ground of appeal, the failure to consider all the evidence in totality, Mr Shephard submitted that, had the Tribunal taken a holistic view, it would have found that the Appellant had not demonstrated Significant Fault or Negligence. It had not done so and had erred in not taking such a view.

38. Again Mr Shephard pointed to the fact there had been no reference to higenamine in the BWF newsletter of 21 December 2016. He noted that at paragraph 40 of the Tribunal's written decision there was a reference to the link to the 100% ME document referred to above. The Tribunal had been wrong to find that there was no reasonable excuse for the Athlete not having fully absorbed the content of that document.

[7] British Weight Lifting, 'Important Information for athletes: WADA 2017 Prohibited List', 21 December 2016

39. Although UKAD, as noted, had eventually issued a specific warning, this had post-dated the Appellant's AAF.

40. As was clear from paragraph 92(iii) in *Sharapova*[8], no specific warning had been issued in relation to the Prohibited Substance in that case. This was a factor that the CAS appeal panel had felt able to consider in determining that the 'No Significant Fault or Negligence' definition had been satisfied. In contrast the Tribunal in the present instance had not found that the lack of warning was relevant.

41. In any event, even if the Tribunal had considered all relevant factors individually, it had failed to do so collectively, and had erred in not doing so.

42. Turning to the second substantive ground of appeal, if the Appeal Tribunal was not with the Appellant in relation to the first ground, in the alternative, it was still possible to find that the Tribunal had not properly assessed all the evidence.

43. Again, emphasis was placed on the Tribunal's finding that there had been no reasonable excuse for the Appellant not to have read the BWF newsletter. There had, in Mr Shephard's submission, been a reasonable excuse in all the circumstances; the newsletter had not specifically referred to the Prohibited Substance.

44. In summary, on behalf of the Appellant it was argued that the first instance decision should be annulled, that the Appellant should be found to have acted without Significant Fault or Negligence, in particular that the Appellant had not acted intentionally and that, given that the Appellant had been suspended since 21 August 2017, the appropriate period of Ineligibility should be ordered as "time served".

45. In response, Mr Renteurs addressed each of the points advanced on behalf of the Appellant.

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[8] *Sharapova* (n 3)

46. With regard to the definition issue in relation to 'No Significant Fault or Negligence' in his submission it was clear that this was just a drafting error and the Tribunal had held the definition of 'No Significant Fault or Negligence' well in mind.

47. He noted that that the issue had been before the Tribunal in written submissions and in oral representations. There was also no reference in the written decision of the need for the Appellant to have demonstrated the upmost caution, which was the test for No Fault or Negligence. This again reflected that the Tribunal had applied the correct definition.

48. The Tribunal had properly applied the decision in *Despres*[9]. There was no magic to the term 'totality of circumstances' which was a stock phrase. The Tribunal had given global consideration to all factors (even if had not said so expressly) and had concluded that the Appellant's failure had been significant.

49. To the extent that the Appellant argued that no finding had been made as to the manner in which the Prohibited Substance had been ingested, this point was irrelevant. It had never been in issue and the mode of ingestion had never been challenged by UKAD.

50. The Appellant's suggestion that the Tribunal had placed undue reliance on ADR 1.3.1 (b) was without merit. The Tribunal had been entitled to take account of this provision and had done so.

51. On jurisprudence, UKAD submitted that the Tribunal had correctly applied both *Sharapova* and *Lund*. The Sharapova case (paragraph 84 above) had found that there were certain steps an athlete could always take, whilst noting that an athlete cannot be reasonably expected to follow all steps in each and every circumstance, and each case was to be considered accordingly. As such it was open to the Tribunal to find that, in the circumstances of this case, that the Appellant had not done all that he could have done, and this was its finding.

52. The Tribunal had clearly considered all the background circumstances and asked itself whether it was reasonable to have expected the Appellant to have done more.

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[9] *WADA v Despres* CAS 2008/A/1489

53. Paragraph 38 to the written decision had in fact simply recorded UKAD's submission and was not a finding. Mr Shephard had accordingly been misplaced in his suggestion that the Tribunal had reformulated the decision (at paragraph 84) in *Sharapova*.

54. Mr Renteurs noted that the Appellant had possessed a good understanding of the anti-doping regime in general, the documents that had been available to him and the fact that he had crossed checked his supplements against the 2016 Prohibited List.

55. In contrast, at the material time in 2017, he had not effected any internet search, he had not cross checked against the 2017 Prohibited List, he had not fully read the 100% Me document and similarly had not read two further relevant UKAD documents[10].

56. UKAD rejected the submission that the Appellant had been badly served by BWF as had been found in Lund. BWF had supplied all its members, including the Appellant, with the newsletter in December 2016. This had provided a link to the 100% Me document. The Appellant had confirmed he had received this document but had simply not read it through.

57. Turning to the second ground, and the assessment of the evidence, Mr Renteurs submitted that the matters referred to by the Appellant in support of this ground had in fact been considered by the Tribunal.

58. He stressed that the appeal was not a question of what decision the Appeal Tribunal might have made, but simply a question of the Appeal Tribunal determining whether or not the Tribunal's decision was flawed and/or whether it was one that no reasonable tribunal could have reached.

59. In a closing address, Mr Shephard indicated that the point in relation to ingestion was no longer advanced.

60. He confirmed that the Appellant had seen the 100% Me document but had not read the final section. In contrast, the documents prepared by UKAD "2017

[10] UKAD, 2017 Prohibited List – Summary of Changes

Prohibited List – Summary of Changes", whilst making reference to higenamine only included that reference in a section "How can you help your Athletes".

61. As such, he submitted that the reference was not directed at athletes themselves or requiring them therefore to read that particular section.

62. It was reiterated that the Tribunal had reached its decision on wrong principles and therefore the decision could be overturned in line with the accepted test to be satisfied on appeal as set down in *Evans v UKAD*[11].

63. There was no need for the Appeal Tribunal to interfere with any findings of fact. It could safely find that the Tribunal had misdirected itself. In particular there was an absence of the evidence having been considered in totality and no mention of the test required to be satisfied for No Significant Fault or Negligence.

64. The failure of the Tribunal to correctly record that definition was so significant that it should call for a review of the decision in any event. Further, as noted, the Tribunal had failed properly to apply either *Sharapova* or *Lund*. There was a requirement for an equality of outcome and to ensure a consistency of decisions.

65. Mr Renteurs concluded by reiterating that the Tribunal had taken into account all relevant circumstances and that the absence of the express use of the words in totality was not significant.

66. The Tribunal had considered that there were a number of things, any one of which the Appellant could reasonably have been expected to have done. The fact that he had failed to do any of them had made his fault significant.

67. In particular, he had not read the relevant documents in their entirety, he had not checked the ingredients of the supplement he proposed to take against the 2017 Prohibited List and he had not conducted even the most basic of internet searches.

Test on Appeal

[11] *Evans v UKAD* (SR/NADP/515/2016)

68. As noted above, both parties agreed that the relevant test to be applied by the Appeal Tribunal was that set out in *Evans v UKAD* (above).

> *'In short, UKAD's submission which we endorse as correct, is that we should only interfere with UKAD/WADA's decision in the event that we decide that the exercise of their discretion was one that no reasonable decision maker could have reached and/or where the process whereby it was reached was flawed and/ or unfair and/or where the decision maker misapplied the rules or failed properly to analyse and apply matters of evidence.'*

Decision

69. The Appeal Tribunal carefully considered all the evidence and submissions advanced. It reminded itself that that burden was on the Appellant to satisfy the Appeal Tribunal that the decision of the Tribunal had been erroneous as per the test in Evans.

70. The Appeal Tribunal addressed each of the Appellant's grounds of appeal in turn.

71. The Appeal Tribunal rejected the submission that the Tribunal had misdirected itself when considering the definition of No Fault or Negligence. Whilst unfortunate that an incorrect definition had been transposed into the written decision, the Appeal Tribunal was entirely satisfied that the Tribunal had considered and applied the correct definition when reaching its decision. The error in drafting had not, in the finding of the Appeal Tribunal, had any material impact on the decision reached.

72. The submission that the Tribunal had not properly considered the relevant jurisprudence was similarly not upheld. *Sharapova* had suggested that there were certain steps that an athlete can always take whilst making clear that there might be circumstances where those steps could not reasonably be taken. In the finding of the Appeal Tribunal, the Tribunal had applied that reasoning, and concluded that in the circumstances of the Appellant's case, it was reasonable to have expected him to have taken those steps. That was a finding that it was entirely reasonable for the Tribunal to have made. *Lund* was distinguishable on the facts, and in any event, any one case is only of limited value as a precedent.

73. Whilst there had been no express reference in the written decision to having considered all the evidence in totality, the Appeal Tribunal was satisfied that the Tribunal had properly looked at the position in the round when reaching its decision, and that there had been no error in the way in which the Tribunal had analysed and applied the evidence it had been required to consider.

74. Having considered all three sub-headings advanced under the first ground of appeal advanced, the Appeal Tribunal rejected the Appellant's primary submission that the Tribunal had failed to apply the criteria of 'No Significant Fault or Negligence' properly when rendering its decision.

75. As Mr Shephard accepted, the second ground of appeal in effect repeated the third sub-heading of the first ground, although it could stand on its own right as an alternative ground of appeal.

76. The Appeal Tribunal however rejected the submission that the Tribunal had failed to accurately assess the evidence when rendering its decision that the athlete had not established that he bore 'No Significant Fault or Negligence'. The Appeal Tribunal was again satisfied that the Tribunal had assessed the evidence in a way that was plainly within the discretion afforded to the Tribunal.

Conclusion

77. For the reasons given above, the appeal was dismissed.

78. In so doing the Appeal Tribunal noted that UKAD had not positively asserted that the Appellant had acted intentionally. In reaching its determination the Tribunal had accordingly not found that the Appellant had acted intentionally, and nothing in this decision should be viewed as suggesting that the Appellant had acted intentionally as defined by the ADR.

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