SR/092/2023

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE 2021 BRITISH BOXING BOARD OF CONTROL ANTI DOPING RULES

Before:
Katherine Apps KC (Chair)
Dr Mehernoosh Irani
Dr Terry Crystal

BETWEEN

UK ANTI DOPING ("UKAD")

Anti-Doping Organisation

and

Zolani Tete

Athlete / Respondent

DECISION OF THE NATIONAL ANTI-DOPING PANEL

Introduction

1. This is a case in which the Athlete, former world bantamweight champion boxer Mr Zolani Tete, was found to have stanozolol-1'N-glucuronide in his urine Sample. The Sample was provided on 2 July 2022 after winning a boxing bout against Jason Cunningham at the OVO Arena, Wembley by a knock out in the 4th round. The substance detected was

a metabolite of Stanozolol which is listed as an anabolic androgenic steroid under section S1.1 of the WADA 2022 Prohibited list (prohibited In and Out-of-Competition).

2. All parties agree that the British Boxing Board of Control Anti-Doping Rules ("ADR") are the applicable rules for this matter due to the bout being played in the UK and that the ADR should, so far as possible, be interpreted consistently with the World Anti-Doping Code ("WADC") and with case law of the Court of Arbitration for Sport ("CAS").

3. The Athlete was charged with and has admitted Anti-Doping Rule Violations ("ADRV") contrary to ADR Articles 2.1 and 2.2 on 8 February 2023. Due to these admissions, and having seen the report from the World Anti-Doping Agency ("WADA") Accredited Laboratory at the Drug Control Centre Kings College London, we are comfortably satisfied that the ADRVs have taken place.

4. All parties have additionally expressly consented to the jurisdiction of this Panel and have no objections to its members.

5. In this hearing we determine the appropriate penalty for the Athlete. The default penalty under ADR 10.2.1(b) would be a 4 year period of Ineligibility. The Athlete seeks to mitigate this period on the basis that he seeks to persuade the Tribunal that:

   a. The ADRVs were not intentional (Article 10.2.3);

   b. That he bears No Significant Fault or Negligence (Article 10.6.2: even though he accepts that he cannot prove the source);

   c. The period of Ineligibility should run from the date of the test (2 July 2022) rather than the date on which he was notified (some 3 ½ months later) because of substantial delay (Article 10.13.1).

6. We have been assisted by the submissions of Ms Katherine Hampshire and Ms Kylie Hutchison, a barrister and solicitor acting on a pro bono basis for Mr Tete, and Ms Ailie

McGowan, a solicitor in house at UKAD and her team. We thank them all for their written and oral submissions and assistance to the Panel.

7. This decision summarises our reasoning but does not record every aspect of the evidence presented to us nor every argument made. This is not intended as any disrespect to the parties or their representatives. The submissions made and evidence given have been considered carefully in full. This decision sets out the key elements of our reasoning and the relevant procedural history so that the parties can understand our decision and so that they can know whether and on what grounds to exercise their right of appeal, if they wish to exercise that right.

Summary of our decision

8. As set out below our decision is that:

   a. The Athlete has not discharged the evidential burden necessary to show that the ADRV was not "*intentional"* in the sense required by the ADR. Where the source cannot be proved, it requires him to pass through the "*narrowest of corridors*" and to show that the substance entered his body neither intentionally nor recklessly.

   b. The Athlete has not persuaded us that a reduction for No Significant Fault or Negligence is available without proving the source of the substance in his body.

   c. Even if we are wrong about (b) we find the Athlete was negligent and that he cannot demonstrate No Significant Fault on the facts of this case.

   d. We are all seriously concerned by the 3 ½ month delay in informing the Athlete of the Adverse Analytical Finding ("AAF"). This is significantly beyond the timescale provided for in the WADA International Standard for Laboratories. It is not only of academic interest. It is not attributable to the Athlete. It has substantially affected the Athlete's opportunity to commission testing which might have had the potential to have been relevant, in particular hair testing and testing of those who had been with him on 2 July 2022 and in the run up to the bout. The Athlete had already cut his hair and, the properties of stanozolol are such that any person would, by 3 October 2022 inevitably have tested negative, even had they been positive on 2 July 2022. We are

not persuaded by UKAD's submissions that there has been no substantial delay. Along with the other factors considered below, we consider it unlikely in this case that that evidence would have exonerated Mr Tete, but that does not change the point that UKAD, South African Institute for Drug-Free Sport ("SAIDS") and the laboratory should not have assumed that and should have given Mr Tete that opportunity sooner. We consider there to have been substantial delay by UKAD, by the laboratory commissioned to undertake the testing, by SAIDS and by the South African Boxing Board. Had reasonable endeavours been taken, the AAF should have been notified no later than 20 days, plus 2 days for the sample to reach the lab and 2 days for the test to be independently checked and 4 days to allow for the Commonwealth Games, so by 30 July 2022 so the 4 year period of Ineligibility should start on that date.

Structure of this decision

9. This decision has the following structure:

   a. The procedural history

   b. The legal framework

   c. Stanozolol and the expert evidence

   d. The evidence of the Athlete

   e. Submissions of the Athlete

   f. Submissions of UKAD

   g. Determination of intentionality

   h. No Significant Fault or Negligence

   i. The period for suspension

   j. Right of appeal

   k. Consequentials

Procedural history

10. The case has an unusually long procedural history.

11. The Athlete is a professional boxer. He is currently aged 35 (he was age 34 on the date of the test). He has had a long and distinguished boxing career, having started professional boxing in 2005. The Athlete has held the IBF Junior Bantamweight title and then the WBO World Bantamweight title from 2017-2019. From 2019 he took two years out from boxing because of Covid 19 and returned to fighting in December 2021.

12. On 2 July 2022 the Athlete fought and won a fight in the Super Bantamweight category against Jason Cunningham at the OVO Wembley Arena. The fight was won with a knock out blow in the fourth round. After the bout the Athlete gave a urine test which was split into two in the usual way, and was supervised by UKAD.

13. On 18 October 2022, just over 3 ½ months later, the Athlete was informed of the AAF by SAIDS. He was told of the result of the AAF from his A Sample and that he may have committed ADRVs. The two ADRVs were framed as follows:

    a. Article 2.1: a Metabolite of stanozolol, namely Stanozolol-1'N-glucuronide, a non-Specified Substance was present in a urine Sample provided by him on 2 July 2022; and

    b. Article 2.2: that he Used a Prohibited (and non-Specified) Substance, namely stanozolol, on or before 2 July 2022.

14. On the same date, but by letter dated 3 October 2022, but not served on him until 18 October 2022 the Athlete was provisionally suspended "*from participating in any capacity in a Competition or activity authorised or organised sport by any Signatory, Signatory's member organisation, or a club or other member organisation by any amateur or professional league or any national or international level event or any elite*

or national-level sporting activity funded by a government agency as from the date of this notification."

15. This was a lengthy period. The chain of custody report shows the Sample (taken in Wembley on 2 July 2022, a Saturday), reached the lab (at Kings College London) on 5 July 2022 (a Tuesday). The laboratory sent a letter to UKAD on 25 July 2022 (the day of the 20 day limit in Article 5.8.3.4 of the WADA International Standard for Laboratories) stating that it could not analyse the Sample within 20 days due to staff capacity issues caused by the Commonwealth Games. It was then analysed and a report sent on 13 September 2022. There was then a further period of 2 days while the Sample was independently reviewed. On 15 September 2022, SAIDS stated to UKAD that they would assume Results Management Authority. They notified Boxing South Africa on 3 October 2022, some 2 weeks later. Mr Tete was not notified. The SAIDS notification letter gave Mr Tete until 18 October 2022 to request an analysis of his B Sample. Having heard nothing from Mr Tete they called Mr Tete who confirmed he was unaware of the result. SAIDS served Mr Tete the same day an electronic copy of the letter. UKAD has not sought to suggest that any of these delays are attributable to Mr Tete, but they deny that there has been any substantial delay, and instead seek the period of Ineligibility to run from 3 October 2022.

16. On 1 November 2022 the Athlete requested an analysis of his B Sample. After dates were provided the Athlete confirmed to UKAD through SAIDS that he wished this to occur on 22 November 2022. Payment was processed on 18 November 2022 but not received in advance of 22 November 2022, so this was further rearranged to 6 December 2022.

17. On 6 December 2022 the Athlete was informed that this B Sample also contained the AAF for the same metabolite of stanozolol.

18. On 28 December 2022 the Athlete, through his agent, Mr Mlandeli Tengimfene requested that this matter be remitted to UKAD and requested an extension of time to respond to the Notice letter. All parties accept that UKAD is the appropriate authority. An extension was granted on 9 January 2023.

19. On 30 January 2023 UKAD wrote to the Athlete to state that it had taken over Results Management and sought a response by 6 February 2023.

20. The Athlete also responded substantively to the ADRV to UKAD in a statement signed on 6 February 2023 said by UKAD to have been served on 8 February 2023. That statement:

    a. Admitted the ADRVs;

    b. Admitted the integrity of the A and B Sample analysis and that the metabolite was found in both samples.

    c. Explained that between 6 December 2022 and 30 January 2022 the Athlete requested a recommendation for a lab to assess a particular supplement labelled as USN Creatine. The Athlete inquired of the manufacturer, who said that it did not contain stanozolol. The Athlete then sent the sealed container of USN Creatine to the Institute of Legal Medicine in Strasbourg, which reported on 30 January 2023 that there was no stanozolol in the substance submitted to it.

    d. Explained that he was continuing his own investigation to determine *"the identity of the prohibited substance, the source thereof as well as the manner in which it entered his system."*

    e. Asked to put on record that on 2 June 2022, the Athlete had an injection of Celestone Soluspan (a permissible substance), his agent having checked with SAIDS, the South African Anti-Doping agency on or around 25 May 2022 that it was prohibited only "*In-Competition"* and not Out-of-Competition. No party seeks to persuade us that this injection was the source of the stanozolol. We will return to the relevance of this injection below.

21. The Athlete contacted Professor Pascal Kintz, his expert, by email of 10 February 2023.

22. On 15 January 2023 the Athlete wrote to UKAD and asked for a further pause of proceedings, pending toenail analysis.

23. On 24 February 2023 the Athlete was formally charged with the ADRVs and given until 6 March 2023 for his response.

24. On 6 March 2023 the Athlete responded in a further witness statement. He reasserted his admission of the ADRVs and stated that he was continuing "*conducting investigations to determine how the prohibited substance entered my system*." He stated that he had "*enlisted the services of Professor Kintz… to conduct a scientific analysis of my toenails to determine how the substance entered my body."* The Athlete stated that he was aware that UKAD does not accept such results and also referred to paragraph 5.3.6.4 of the WADA International Standards for Laboratories. The Athlete sought an opportunity for a hearing where he could *"state more facts."*

25. On 17 March 2023 the Athlete sent two brown envelopes collected by a Dr Siyabulela Bungane to the Institute of Legal Medicine in Strasbourg. The Tribunal have been sent 3 videos showing the collection of these nail clippings by Dr Bungane wearing one glove (and a bare hand) chopping nails onto an incopad on which the Athlete was sitting and placing fragments from the incopad into envelopes. There is no date and time stamp on those videos, nor did the camera remain on the samples throughout. While UKAD initially did not accept the chain of custody and this was a principal concern of their expert, Professor David Cowan, UKAD has confirmed during the hearing that they accept that the toenails analysed by Professor Kintz were from the Athlete and were taken on 17 March 2023.

26. On 15 March 2023 UKAD submitted a request for arbitration and I was appointed as Chair. The parties consented to an extension of the usual 40 day period for determination from the date of referral.

27. On 21 March 2023 the nail clippings arrived at Professor Kintz's laboratory and Professor Kintz issued a certificate of analysis on 5 April 2023, stating that no stanozolol or metabolites were found.

28. At a directions hearing on 3 April 2023 held by the Chair, the Athlete was represented by (non pro bono) Counsel, Mr Adrian Montzinger. The Athlete's Counsel agreed to provide the response to the ADRVs and all evidence relied on by 4pm on 11 April 2023. The directions permitted parties to agree modest extensions (3 days), but longer extensions would require the permission of the Chair. The parties agreed for the matter to be determined through a remote hearing on Zoom and that an appropriate listing would be 1 and ½ days by private hearing.

29. The Athlete sought a yet further extension on 17 April 2023 and stated he was awaiting toenail analysis. UKAD indicated that it was neutral to this request.

30. Evidence was not provided within this timescale and the Chair determined the application on 27 April 2023, providing revised directions. The Chair highlighted to the parties that;

> *"The Rules applicable to this Tribunal provide for a speedy, but fair, determination of ADRVs. There is a default period of 40 days from referral to determination which, in this case, has been varied by consent by the parties. The reason why ADRVs ought usually be determined swiftly include (non exhaustively):*
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> a. *To provide an effective means of enforcing the relevant rules, consistently with the WADA Code.*

b. *To ensure that the length of proceedings do not make any dispute as to the length of any sanction academic, by taking longer than the shortest ban available to the Tribunal.*

c. *That many Athletes (including this one) are under provisional suspension while the process takes place, which, in effect, prevents them from participation in the relevant sport.*

d. *It is usually possible to make case management directions which enable the swift resolution of the matter and which permit both sides to adduce relevant evidence (including expert evidence).*

The chronology of this matter is already longer than many anti-doping cases due, in part, to requests earlier in the process for extra time to test the B Sample and to look into the means by which the substance entered Mr Tete. The listed hearing is almost a year after the ADRVs were detected.

The touchstone for determining this application is what timetable will give Mr Tete a fair opportunity to make submissions on penalty and address the three defences he has indicated he wishes to pursue. Mr Tete should have an opportunity to give evidence, both by himself and from others who can address matters which are relevant to those defences. If there are practical impediments to the taking of instructions from relevant individuals, I have considered the practical means by which these can be overcome and what timeframe is reasonable.

UKAD will also need an opportunity to consider the evidence submitted by Mr Tete and collate relevant (and not irrelevant) evidence in response."

31. The Chair set out some preliminary reservations as to the relevance of some of the proposed questions to the expert but granted an extension for shorter than the time applied for on the basis that the case was still capable of determination on the 12-13 June 2023.

32. On 5 May 2023 UKAD wrote to the Secretariat and stated that the parties were in discussions and sought for proceedings to be "*paused*" because UKAD would not be in a position to file its evidence by 12 May 2023.

33. On 9 May 2023 a further set of directions were made as follows;

"The Chair notes the correspondence from UKAD of 5 May 2023 at 11.19 am.

1. The Athlete has not complied with the directions to serve his position statement and evidence by the extended deadline.

2. UKAD have written to ask for a stay of the proceedings and that they are not presently able to comply with their deadline of 12 May 2023.

3. The deadline for UKAD's position statement and evidence is now extended to 25 May 2023.

4. Parties should endeavour to agree and clarify their position, especially whether the Athlete agrees to a 4 year

penalty and whether he is abandoning the defences outlined in the case management order. UKAD should update the Secretariat (copying in the Athlete) on 18 May 2023 as to whether there is likely to be an agreed penalty and what further directions (if any) are required and whether the parties agree variation to the directions already ordered or whether there is now an agreed decision.

5. The hearing currently listed is likely to be vacated but is currently maintained as this matter has not been agreed.

6. All parties have liberty to apply."

34. On 18 May 2023 the Athlete confirmed to UKAD and UKAD then confirmed to the Secretariat that the Athlete wished the matter to be determined at a hearing. The Chair made directions requiring UKAD and the parties to provide dates to avoid for a case management hearing. No dates were provided.

35. On 22 May 2023 the Athlete's former counsel withdrew from acting and the Athlete sought pro bono assistance from Sport Resolutions' pro bono legal advice panel.

36. On 23 May 2023 further directions were made:

"The Athlete has failed to respond to last week's direction by the deadline specified and has failed to particularise his case or provide any evidence in his defence.

2. If the Athlete wishes to be represented by Mr Tengimfene he should confirm directly to the Panel Secretariat (copying in UKAD) in writing that he wishes all communications his behalf to be with Mr Tengimfene. There is no requirement to use a representative. Mr Tete may represent himself if he so wishes.

3. The parties are encouraged to agree directions. If they do not agree, they should each propose the directions sought.

4. If the parties do not agree directions and issues, or have not agreed the appropriate sanction by consent, the Chair will list a brief case management hearing at which directions will be made to determine this matter.

5. If the parties have any dates or times to avoid these should be provided urgently to the Panel Secretariat. Otherwise the case management hearing will be listed by the Chair without regard to availability.

6. All communications with the Panel Secretariat should be copied to the other parties (including the Athlete until any confirmation of representation by Mr Tenigmfene is received in writing from him)."

37. On 31 May 2023 the Athlete's agent wrote and asked for "*patience*" while legal advice was sought.

38. The Chair directed that there be a case management hearing on 2 June 2023 at 10am. By email there was a further direction as follows:

"The pro bono legal advice service is separate from the NADP Panel and is fully independent from it. Although representation is not guaranteed via this service, the Chair understands that Sport Resolutions has made enquiries with members of the service to assist and will inform Mr Tete directly if successful. Mr Tete is currently under provisional suspension and has admitted the ADRV. The issues which require determination within a reasonable time by the Panel are whether he relies on any defences, whether those are made out, or whether the 4 year sanction as provided for in the relevant rules applies. Mr Tete is currently in breach

of the directions requiring him to particularise and evidence the defences his previous representatives indicated he wished to rely on by the dates set out in the directions. All parties are encouraged to cooperate to agree directions for the relevant issues to be determined by the Panel. If directions cannot be agreed the Panel may make a further order after hearing from the parties.

Mr Tete (and Mr Tengimfene if Mr Tete so wishes) are encouraged to attend at 10am on Friday. Parties should consider if the listed dates for the hearing can be met or whether they require to be vacated."

39. At the case management hearing on 2 June 2023 the Athlete attended with his agent and UKAD attended represented by Ms McGowan. Directions were made and the matter was listed on 11-12 July 2023 for a day and ½ with the ½ day on the 12th starting at 12.30pm as an afternoon sitting. That decision from that hearing records the following:

"4. Mr Tete and his agent explained in candid terms that they did not have sufficient funds for a lawyer nor to commission a second report from Professor Kintz in France. A first report had been sent to UKAD but not the Panel Secretariat and that had showed none of the prohibited substance in a toenail sample of 15 March 2023. Mr Tete would wish to have legal representation and in an ideal world would wish to have a more detailed report from Professor Kintz, but, absent some kind of unexpected additional money that was unlikely to happen.

5. Mr Tete's agent stated that he did not consider the existing hearing listing of 12-13 June could fairly be met because of the lack of legal representative and the evidential position. Ms McGowan for UKAD agreed that they also could not make the 12-13 June as they had not yet prepared their evidence (notwithstanding having had the report of Professor Kintz since 11 April 2023 because they had thought that the 4 year period might be accepted).

6. Mr Tete and his agent explained that he admits both ADRVs but he does not know how the substance got into his body because he didn't take it. A 4 year ban has professional and economic consequences that he does not feel able to accept. He indicated that he wished to rely on the defences set out at the first case management conference.

7. I explained to both parties why it is important for these cases to be determined as swiftly as they can be determined fairly. Also, from Mr Tete's perspective, he is under provisional suspension. I am very much aware of the importance of not letting cases, if possible, roll on

longer than the period of prohibition which, if the athlete can establish the defences they rely on, would have expired by the time of the hearing. I would hear from both parties as to what they think the plan should be going forwards and then I would make directions. Parties should not assume that if they submit expert evidence that the panel will necessarily let it in. It should be relevant to the issues to be determined and the law as it stands. Each party should have an opportunity to see the other's evidence and where issues are not in dispute this should clearly be indicated. I could understand Mr Tete's wish to have legal representation, and indeed he had previously had it and had legal advice, but this Panel conducts its proceedings in such a way that parties do not have to have a lawyer acting for them. The rules require that the Panel determine the case under the rules so we will consider the relevant case law. Ms McGowan's submissions have to indicate both authorities in favour of her position and to notify the Panel if there are authorities against her. If Mr Tete is not able to have legal representation, we cannot give Mr Tete legal advice, but we will try to ensure that he is able to understand proceedings by explaining legal jargon if it is used and by providing a written reasoned decision."

40. UKAD would have been aware that the purpose of the hearing was to list directions but attended without any dates to avoid and did not ask for any process by which dates to avoid could be submitted.

41. Shortly after that hearing, and despite having agreed to the directions by consent on 2 June 2023, on 5 June 2023 UKAD indicated that it wished to instruct Professor Cowan and he was not available on the listed dates and requested a postponement and for Professor Cowan to give evidence only in writing.

42. On 6 June 2023 the Chair refused the application to relist the hearing on the basis that UKAD were asked to attend on 2 June 2023 with relevant dates of availability and the Chair was not available on the 17 July 2023, which UKAD had requested as a new hearing date. The Chair observed, *"it is up to UKAD to choose an expert who is available on the dates for which this matter has been listed."*

43. On 12 June 2023 the Athlete filed his statement of defence pursuant to the directions and referred to a report from Professor Kintz. That evidence was provided to the Secretariat and to UKAD on 13 June 2023.

44. Notwithstanding the 6 June 2023 direction, UKAD notified the Panel that they had instructed Professor Cowan. On 14 June 2023 the Chair wrote to the parties:

> *"1. It is assumed UKAD's email was intended as an application to the Chair for a variation of directions.*
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> *2. Please can Mr Tete respond to the Panel Secretariat (copying in all parties) by 4pm (BST) on 15 June 2023 to set out his position as to whether he*
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> *agrees to the application or whether he does not (and if so provide reasons, for example if the suggested deadline would prejudice his preparation for the*
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> *listed hearing).*
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> *3. It is also noted that UKAD has referred to instructing Professor Cowan. Should the Panel now assume that Professor Cowan has become available for the*
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> *listed hearing, having previously indicated his unavailability?*
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> *4. If UKAD wishes to respond on 1 and 3, any response should be provided by midday (BST) on 15 June 2023."*

45. On 15 June 2023 UKAD stated that the Athlete had agreed to a variation of directions "*subject to the Chair's approval"* but again did not formally make an application under the liberty to apply, nor were availability dates provided.

46. The Secretariat sought those availability dates on 16 June 2023.

47. On 21 June 2023 UKAD file most of its evidence, but without the additional report of Professor Cowan.

48. On 22 June 2023 the Chair vacated the hearing on 11-12 July 2023 and relisted for 24-25 July 2023 having confirmed that those dates were available for the Athlete's new pro bono representative.

49. On 3 July 2023 the Athlete filed submissions, some further evidence and a bundle of authorities.

50. On 10 July 2023 UKAD filed an agreed bundle which omitted those submissions and did not include any authorities.

51. On 15 July 2023 UKAD filed its own submissions, an unagreed chronology and a further separate substantial bundle of authorities without any tab numbers (running to 1130 pages). That bundle duplicated many of the Athlete's authorities but omitted several of the key authorities on which he relies including *FINA v Schoeman* (FINA Doping Panel Decision 01/20). This authority was also not dealt with in the written submissions filed.

52. At a hearing on 24 – 25 July 2023 the Panel, who were appointed pursuant to the NADP Rules (and to whose appointment no party objected) were joined by the following persons:

    a. The Athlete

    b. Katherine Hampshire (Athlete's Pro Bono Counsel)

    c. Kylie Hutchison (Athlete's Pro Bono Solicitor)

    d. Mlandeli Tengimfene (Mr Tete's Agent)

    e. Ailie McGowan (UKAD Solicitor)

    f. Brodie Edmead (UKAD Paralegal)

    g. Stacey Cross (UKAD Deputy Director of Legal and Regulatory Affairs)

    h. Kylie Brackenridge (NADP Secretariat)

    i. Tilly Lock (NADP Secretariat observer)

53. The parties submitted an agreed timetable. The Chair made suggestions and a new timetable was agreed. Ms Hampshire for the athlete submitted a list of issues. None were submitted by UKAD.

54. During the hearing we heard oral evidence from the following, each of whom (save for the Athlete) were not present during others' evidence:

    a. Andile Mofu (Athlete's Coach and Mentor)

    b. Professor Pascal Kintz (Athlete's expert)

    c. Professor David Cowan (UKAD expert).

55. At the start of the hearing the Chair made the parties aware that Dr Irani and Professor Cowan know each other professionally. Both parties confirmed they had no objection to Dr Irani being a member of this Panel.

56. At the end of the hearing both parties' counsel made detailed closing submissions.

The legal framework

57. All parties are now agreed that the relevant rules are those in the ADR and that these provisions are intended to implement the WADA Code.

58. Both parties accept that we must be comfortably satisfied that the ADRV has taken place (Articles 8.3.1 and Article 2.1.2). They have been clearly admitted and we have seen the laboratory report both the A and B Sample. We are so satisfied.

59. Article 2.1.1 provides:

*"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; or is the Athlete's lack of intent, Fault, negligence or knowledge a valid defence toa charge that an Anti-Doping Rule Violation has been committed under Article 2.1. (emphasis added)"*

60. Both parties accept that the burden of proof of establishing either defence rests on the Athlete and that the relevant standard is on the balance of probabilities.

61. 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, 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 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.

(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."

62. The parties are agreed that there are 2 routes through which an Athlete can establish lack of intention:

    a. They can either establish proof of source; or

    b. They can seek to establish lack of intention through the "*narrowest of corridors*"[1] where an Athlete is entirely credible and can establish that, notwithstanding the lack of proof of source, the ADRVs were not intentional.

63. This second route has been the subject of a line of CAS case law, and also UK Anti-doping case law (for example as summarised in the first instance decision in *UKAD v Bowes* SR/056/2021 at [24]-[28] and then in detail on appeal SR/258/2021 at [35]-[51]. The significance of changes between the previous WADA code and the current wording was also considered in the case of *UKAD v Khan* SR/238/2022 at [10]-[19].

64. The Athlete's counsel confirmed that the most relevant authorities are the following:

    a. *Ademi v UEFA* CAS 2016/A/4676;

    b. *Cox v FINA* 07/18;

    c. *Jamnicky v Canadian Centre for Ethics in Sport* CAS2019/6443;

    d. *Schoeman v FINA* 01/20;

[1] Villanueva v FINA CAS 2016/A/4534 at [37]

e. *Shayna Jack v Swimming Australia* CAS 2020/A/7579 (UKAD does not accept this decision was correctly decided).

65. It is now well accepted that this second route is available in principle, and that whether it can be met will depend on all of the evidence considered in the round. Relevant factors can potentially include:

a. Whether the level detected was low and whether it was additionally pharmacologically irrelevant (*Schoeman* 6.3.3(a); *Jack*).

b. Whether the Prohibited Substance would have been likely to have been positively unhelpful to the Athlete in terms of their likely aimed for weight and muscle bulk *(Jack*).

c. Any tests done immediately before or after the ADRV and their anti-doping record *(Schoeman* 6.3.3(c); *Khan* at [32])

d. The Athlete's credibility generally and consistencies or inconsistencies in their evidence [*Jamnicky* at [182] *Jack* at [180], *Cox, Ianonne*).

e. The steps the Athlete has taken to identify the source and analyse all compounds and substances taken immediately before (*Schoeman* 6.3.3.(g));

f. The promptness with which the Athlete has commissioned those tests (*Schoeman* 6.3.3.(g)),

g. The presence of the Prohibited Substance in other substances, such as food or supplements *(Schoeman* 6.3.3; *Lawson* at [90]; *Jamnicky* at [175], *Iannone*);

h. The transmissibility of the substance itself through skin contact, sweat or other activities which may be carried out as part of the sport, training or conditioning (*Jack);*

i. Whether the Athlete was deprived by the delay in notifying of the AAF of the Athlete's best opportunity to identify the source of the positive test (*Schoeman* 6.3.3.(f))

66. The parties both agreed that, as suggested in *Jack,* it is best to start with what is known objectively about the substance and the testing results before turning to the Athlete's

explanation and evidence on their own behalf. The more pharmaceutically unlikely the explanation for ingestion, the less likely the Athlete will be able to establish this defence.

67. Previous NADP and CAS decisions (for example ***Ademi*** at [80]) have confirmed that the Athlete needs to prove the source of the AAF in order to access any arguable defence for No Significant Fault or Negligence. Indeed, the wording of 10.6.1(b) expressly requires the Athlete to show that "*the Prohibited Substance came from a Contaminated Product"* to access that reduction.

68. Undeterred by this, Ms Hampshire sought to persuade us that Article 10.6.2 does nevertheless permit an Athlete to a further deduction if there is No Significant Fault or Negligence and they cannot show proof of source. She refers to the definition of No Significant Fault or Negligence in the definitions section which states:

> ***"No Significant Fault or Negligence****: The Athlete or other Person's establishing that any Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relation to the Anti-Doping Rule Violation. Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1,* ***the Athlete must also establish how the Prohibited Substance entered Athlete's system****. (Emphasis added)"*

She submitted that the reference to "*how*" can somehow include taking the substance by some form of contamination, which isn't a contaminated product within the definition section of the ADR, but is still not from a known source.

69. Ms Hampshire sought to persuade us that, if we accept this argument, we should apply exactly the same factors as under the second non-intentional route, to the question of No Significant Fault or Negligence.

70. Ms Hampshire accepted that she could not show any other case in which NADP, CAS or any other anti-doping body or Tribunal had accepted such an argument, nor that the argument had ever previously been made.

71. We are not persuaded by Ms Hampshire's analysis. We do not consider that No Significant Fault or Negligence is available under 10.6.2 in this imaginative manner. To do so would be:

    a. to create a "near miss" concept of "contamination" broader than 10.6.1(b) but which could access a similar deduction; and

    b. would require us to ignore the plain meaning of the words "*establish how the Prohibited Substance entered the Athlete's system."*

72. Furthermore, the definition of "Fault" in the definitions section requires reference to "*a particular situation"* (emphasis added) and that the factors be relevant "*to explain the Athlete's or other Person's departure from the expected standard of behaviour*." These concepts are also difficult to apply if the source of the Prohibited Substances has not been identified. However, if this was the only reason, this, by itself would not have been decisive.

73. Nevertheless, we have considered below, on the facts of this case, what our conclusion would have been, had Ms Hampshire's legal analysis been correct.

The expert evidence on Stanozolol

74. Stanozolol is an anabolic steroid which, according to Mr Nick Wojek, UKAD medical officer, is not licensed for therapeutic use in the UK or in South Africa. It does have some potential therapeutic use in hereditary angioedema and some types of venous disorders (although more modern treatments are generally more effective with fewer side effects). It may be used in veterinary medicine lawfully, and unlawfully. Professor Kintz has once encountered a case in the course of his wider forensic work where farmed veal had tested positive for

Stanozolol. It can either be injected or taken orally and is available on the black market in both forms.

75. Professor Cowan's evidence was that Stanozolol is the commonest AAF reported by WADA accredited Laboratories accounting for 15 % of all anabolic agents S1.1 in the 2021 statistics. It has also been a substance referred to in a large volume of anti-doping caselaw, although a much smaller volume of the scientific literature on half like, metabolization and transmission.

76. While some substances molecularly similar to Stanozalol are naturally occurring (for example testosterone), there is no recorded case of Stanozolol occurring in the natural world. It is synthetically created. Unlike many other synthetic anabolic steroids, it is one of the least lipophilic and is capable of dissolution in water due to its molecular structure. This physical property means that, historically it has been thought to be especially helpful for athletes hoping to dope, because the substance itself clears the body more rapidly through the urine than other anabolic steroids (although its metabolites may well linger and be detectable for longer).

77. Mr Wojek's evidence to us is that some sports people in contact sports with weight limits combine Stanozolol use with a restricted calorie intake to balance the loss of power during a period of weight loss. His evidence was that some people who dope with anabolic steroids take the substance for a shorter period than would be necessary to experience any performance enhancing effects in the hope that it will improve recovery times, boost explosive strength and retain muscle during a period of rapid weight loss.

78. Both Professor Cowan and Professor Kintz were aware of studies published on the transmissibility of some anabolic steroids through skin contact. There is a paper which both were aware of by Xavier de la Torre, Cristiana Colamonici, Michele Iannone, Daniel Jardines, Francesco Molaioni, Francesco Botrè. Detection of clostebol in sports:

Accidental doping? 2020 Drug Testing and Analysis Nov;12(11-12):1561-1569 in which Clostebol on a person's hand was transmitted through a single handshake.

79. Professors Cowan and Kintz differed as to their evidence on the transmissibility of Stanozolol through bodily contact or contact with bodily fluids. Professor Kintz's view was that it could be credibly more likely to transfer and be absorbed through bodily contact, especially through sweat or other intimate fluids, because of stanozolol's likely increased dissolution in water (as compared with other steroids). In contrast, the same physical property of Stanozolol made Professor Cowan consider such transmission to be less, and not more, likely as compared with other anabolic steroids which are more lipophilic. Both agreed that there was no published literature on this question.

80. When metabolised, Stanozolol breaks down into a number of different metabolites including stanozolol-1'N-glucuronide. The laboratory test used in this case detected this particular metabolite in a low amount (compared with other CAS case law involving doping with Stanozolol: 2ng/ ml) and detected zero result for the substance itself. This means that it is likely that the substance would have been taken sufficient time before the test that the substance had fully either been excreted or converted to metabolites.

81. We heard that published evidence about the dosage to time during metabolization and the evidence is slim. Professor Kintz's report included a graph derived from published papers which tracked the elimination curve for Stanozolol and its main metabolites. Both Professors Cowan and Kintz were also agreed that the half life was likely to be longer when given as an injection rather than taken orally. Professor Cowan's evidence is that the metabolite detected in this Athlete's urine can be detectable for more than 12 days after a 5mg dose taken orally. Professor Kintz agreed.

82. Both Professors also agreed that looking at the urine test in isolation, there were several credible doses and regimes which could have led to 2ng / ml N-glucoranide metabolite (but no Stanozolol itself) being present in the Athlete's urine. Professor Cowan's evidence was

that this amount is very similar to that obtained in a study published by Goschl and colleagues at around 100 hours, or four days, after a single dose of 5 milligrams of stanozolol, which in his view is a pharmacologically effective dose (although would have no beneficial performance enhancing effect). Professor Kintz considered that it could (if only viewed in isolation) denote a more sustained period of ingestion, for example 2mg oral Stanozolol taken 3 times a day (which is a commonly recommended black market dose) for 6-8 weeks but stopping 14 days before the urine test.

83. The reason Professor Kintz considered that mechanism to be unlikely was because he would expect that to be shown in the toenail analysis. Toenail analysis was done by him, but showed no Stanozolol in the nail clippings submitted 8 ½ months after the test.

84. When taken for a sustained period, both experts accepted that Stanozolol can sometimes be detected in hair or nails. For nails, both Professors agreed that the relevant period would be between 8-12 months after it has been taken. There is no laboratory standard for toenail testing and the science is in its infancy. Some laboratories consider the relevant period to be 8-10 months, others (including Professor Kintz) 8-12 months. Some consider it is relevant 8-16 months. All agree it is most unlikely to be detectable if taken as a single dose. It is possible that a test taken sooner could also potentially show a positive test if the drug was taken for a sustained period. Unlike hair, which once it has exited the follicle is outside the body, the nail may contain substances which either entered through the nail root and proceeds up the nail as it grows or could be absorbed from the nail bed (both laterally and longitudinally).

85. Both Professor Cowan and Professor Kintz accepted that, while a positive test will be indicative of prolonged use, a negative test does not rule it out.

86. Professor Cowan accepted that, were a person to use Stanozolol in significant amounts for an extended period of time, he might expect to see traces in nails and hair. Professor Cowan also accepted that the absence of a positive test in this Athlete's toenails

approximately 8 ½ months after the positive test is "*also consistent with minute contamination being the source of the AAF, as well as ingestion of a small dose shortly before 2 July 2022."* However, his evidence was that, in his view, insufficient is known of the mechanism through which anabolic steroids enter the nail and the reliability of the test to eliminate sustained use or any other "innocent" mechanism, as against a one off contamination related event which was neither intentional nor reckless, nor contributed to by significant fault or negligence. This led Professor Cowan to conclude that such contamination was less likely than not.

87. Professor Kintz was more confident than Professor Cowan but was still sensibly and reassuringly cautious as to what could be concluded from a negative toenail analysis, in light of the scientific unknowns. Professor Kintz considered hair analysis to be more reliable and better supported by the published scientific evidence, but this was not available for Mr Tete due to the delay. He had cut his hair before being told of the AAF and his hair was shorter than that required by Professor Kintz and his team to analyse, when Professor Kintz asked his manager in early 2023.

88. Professor Kintz's evidence in his report and orally, to us was appropriately cautious. He could not give evidence of proof of source in this case, nor did he purport to do so. His evidence was limited to stating that:

    a. "*The negative nail test supports the scenario of contamination, as stanozolol has to be used repetitively to benefit from the substance and therefore would show up in nail*."

    b. *"Therefore, there is nothing (literature, biological tests, pharmacology) that prevents a scenario of contamination that can explain the adverse analytical findings for stanozolol in the case of Zolani Tete."*

89. Professor Kintz did not say that it was more likely than not to be contamination.

90. Neither statement reproduces the test that this Panel must apply to the legal issues, but we have been assisted by the truthful, helpful and clear evidence given by both Professors and Mr Wojek, which has greatly assisted the Panel.

Factual evidence

91. We heard factual evidence from the Athlete himself and from Mr Mofu, his coach and mentor.

92. Even though Mr Tengimene was present in the room with the Athlete and conducted the email correspondence with SAIDS and VADA on the Athlete's behalf, and the Athlete's evidence repeatedly referred to him, Mr Tengimfene was not called by the Athlete to give evidence.

93. As set out below in our reasoning, we were especially struck in the oral evidence by the following:

    a. Mr Tete had a well-practised (and historically extremely effective) routine for preparing before a big fight.

    b. He usually starts his preparation 10 weeks before the date of the fight. 8 weeks before, he moves out of his home into what he described as the "camp." He would be weighed every day and start losing weight to 2kg above the target weight for the class. He would be given particular meals. Mr Tete has historically been a bantamweight, where the maximum is 53.25kg. Mr Tete appeared to us to have a clear understanding of his objective not to lose muscle mass, while losing body fat to achieve the target weight for the fight.

    c. Mr Tete gave evidence that, while preparing for the 2 July 2022 fight, he had a resurgence of symptoms from an earlier rotator cuff injury to his right shoulder. He was told that he required a corticosteroid injection 1 month before the fight date. He was worried about the impact this could have on his muscle retention, strength and his fighting style as he is right-handed and most of his punches are from his right shoulder. While recovering he could only do cardio exercise but could do not do any

boxing with his right side while he was healing. He said he was told the corticosteroid injection was, essentially, the only option for him, so he could heal in time.

d. Mr Tete also said that he took creatine supplement, but stopped taking that 2 weeks before the fight which is why he hadn't declared it on the doping control form.

e. Mr Tete denied knowing anything of the substance, stanozolol, before the fight. He knew that anabolic steroids were sometimes used to "*boost*" energy and stamina and *"sometimes gives you muscles."* He also said he had never heard of Global DRO and was unaware that he could choose to be tested voluntarily before a fight. In South Africa he had not generally been tested out of competition. When fighting in the UK and some places abroad he had always been tested after a fight and had never had a positive test.

f. Mr Tete came across as dedicated to his sport. He said to us that he had sacrificed a lot to do his sport and had put his life into it and was hoping to make a come back and regain the world title.

g. However, Mr Tete's evidence about the steps taken to ensure that he did not take any Prohibited Substances in his body was less engaged. He referred to understanding the need to wipe down equipment after others' use, never use the same water bottle as another person in the gym, not to share towels and never accept a substance from another person without checking. His manager had emailed VADA and SAIDS on a number of occasions, including about the corticosteroid injection on 2 June 2022, but none of those messages came from himself (although he said he was there behind his manager when he sent those emails his recollection of the contents of those emails was surprisingly slim). He said that his "*trainer*" had bought the supplement "*from the pharmacy*" in East London South Africa and that the trainer and manager checked it, but he referred to no active step he took himself to verify the contents or check the manufacturer or source was reputable.

h. Mr Tete made no reference in his evidence of not having told Mr Mofu either of the injection or the supplement, despite Mr Mofu having been at the training camp, and that Mr Mofu was giving evidence in support of his defence.

94. Mr Mofu gave measured, credible and impressive oral evidence to us. Mr Mofu had trained Mr Tete since he was a youngster, around 2004-5. His evidence as to what he told Mr Tete to do in his anti-doping education was not the same as what Mr Tete said he did, or considered important. We prefer Mr Mofu's evidence where there was conflict. We found Mr Mofu had expressly told Mr Tete to "*clea*r" any supplement he takes with SAIDS and not just buy it at the pharmacy. There is no evidence from Mr Tete that the supplement taken was checked with SAIDS, indeed Mr Tete's evidence was that he thought his (other) trainer had bought it from the pharmacy. Mr Mofu also had not been told by Mr Tete about the shoulder injury or the supplement. There was also a difference between the evidence given by Mr Mofu about Mr Tete's weight. Mr Mofu gave clear evidence that he did not believe that Mr Tete had ever been as heavy as 59-60 kg and would remember if he had been. Had Mr Tete been that heavy he would have needed a more dramatic weight loss to become super bantamweight and Mr Mofu would have been concerned. We noted that Mr Tete had been cross examined about bantamweight, but had not corrected Ms McGowan that he had competed in July 2022 in super bantamweight (i.e. one heavier class).

95. When the points of disparity between Mr Mofu's and Mr Tete's evidence emerged, the Chair gave Ms Hampshire permission to call Mr Tete again so that he could give evidence to explain the disparity if he so wished. We have carefully taken into account his evidence to us. We accept that Mr Tete was also trained by other (unnamed) people and Mr Mofu had been less involved than he had in the past. We also note that it is not negligent nor indicative of fault to use a long standing trainer and mentor less before a particular fight. It is not negligent (in the sense used in the WADA code and ADR) not to tell a mentor about an injury or about every supplement. However, we are entitled to take account of the degree to which Mr Tete followed, or in this case did not follow, the advice previously given to him by his mentor and first coach, about anti-doping and the steps he should always take. It is clear to us that several of those steps were not taken by Mr Tete before the AAF.

Submissions of the parties

96. For the Athlete Ms Hampshire submitted that lack of intention and recklessness could be demonstrated by this Athlete because, in summary:

    a. There was strong evidence against intention;

    b. The distinct chemical structure of stanozolol made it more likely than other anabolic steroids to dissolve in water and be transmissible; and

    c. Because of the very low amount of Stanozolol in his Sample.

97. Ms Hampshire relied principally on similarities with the ***Jack*** case and with ***Schoeman*** (but also relied on all of her submissions in written submissions which referred to other cases, which we have carefully considered). She noted the low level found in the AAF and relied on the lack of positive toenail analysis. She submitted there was no logical reason for Mr Tete to have taken a single dose as that would have been ineffective. Ms Hampshire relied on Mr Tete's manager's engagement with SAIDS and that they were asked about the corticosteroid injection and had been emailed previously with Whereabouts information. Ms Hampshire notes that the Global DRO site in South Africa just refers the Athlete to SAIDS so it cannot be suspicious that Mr Tete didn't use it. Mr Hampshire also submitted that Mr Tete had explained why he had not told Mr Mofu about the supplement or the injection and that he was mainly being trained by someone else at the time (who was not called) and that Ms McGowan did not significantly challenge his credibility in cross examination. Ms Hampshire relied on Mr Tete's good testing record through his long career.

98. Ms McGowan for UKAD sought to dissuade us from following ***Jack*** at all and sought to distinguish ***Schoeman*** on the basis that it involved a Specified Substance and the burdens were different. In ***Khan*** there was a previous test shortly before the AAF and ***Lawson*** had hair analysis, not nail analysis, and nandrolone is a known contaminant and has been the subject of WADA warnings, but stanozolol has not. While Mr Tete has had a long career, he has only been tested 9 times. Ms McGowan submitted that we should prefer Professor Cowan's analysis to Professor Kintz.

Reasoning: Intention

99. We remind ourselves that the Athlete has to prove lack of intention and recklessness to the balance of probabilities. It is our unanimous view that the Athlete cannot do so, for the following reasons.

100. Firstly, all of those who gave expert evidence did not give evidence that accidental contamination was more likely than intentional or reckless use. While a contamination route was consistent with the level detected and the absence in the toenails, it was far from the only possible explanation. The evidence does not exclude, or make less likely than not, that there might have been either a single source, or a longer period in which it was taken, but then stopped approximately 2 weeks before the fight. We note that the presence of the N-glucuronide but not Stanozolol itself makes it more likely that the substance was taken longer ago, rather than shorter before the fight itself. We note that toenail analysis is in its infancy, and while we consider the negative result to be admissible and a matter for us to weigh in the balance, it does not, in this case, help the Athlete over the balance of probabilities through the *"narrowest of corridors*" that he must pass, if he cannot show the source of the Prohibited Substance. It neither shows on the balance of probabilities, on the current state of the reported scientific evidence and scientific consensus on Stanozolol's metabolization and infiltration into the nail that:

a. The dose was a single dose; nor

b. That it was more likely than not to be accidental.

101. Secondly, the "*personal duty to ensure*" that Prohibited Substances and their metabolites are not found in Article 2.1.1 is that of the Athlete, and not of his team. We unanimously consider it to have been reckless for this Athlete, to have wholly delegated responsibility for checking his supplements and corticosteroid injection to his trainer and manager (neither of whom were called and who therefore cannot help the Athlete evidence the burden on him). Furthermore, we prefer Mr Mofu's evidence as to what he advised Mr Tete as part of his education. Mr Mofu advised the Athlete to engage with SAIDS before taking any supplement. Even though the supplement has not been shown to have been the source, we have been shown no evidence that this step was taken. Mr Mofu also advised

that any medical treatment should be checked with SAIDS. While Mr Tengimfene emailed SAIDS to ask about the specific corticosteroid, their advice was not that it was "*not prohibited out of competition*" but only referred to it being prohibited in competition and providing a link to apply for a TUE. Mr Tete would not have needed a TUE for this injection because the fight was a month in the future, but, there is no evidence of any reply to SAIDS and Mr Tete did not ask the doctor for any confirmation in writing of the substance given, nor did he say that he checked the product code or batch number, nor kept any other documentation which he could then use if the corticosteroid had been detected in his Sample on the date of the fight (which would be unusual but not scientifically impossible as steroids and their metabolites can remain in the body for some time afterwards). As CAS stated in ***Jack*** at [107] it is the conduct of the athlete's anti-doping practice before the ADRV rather than after which is most persuasive.

102. Thirdly, in none of the cases where the Athlete has been able to proceed through the *"narrowest of corridors*" has the Athlete's evidence not been wholly believed or found wholly credible. While much of the evidence to us was credible, we had the concerns set out above as to whether we were being told the whole truth. In particular we were concerned with the conflict between the Athlete's evidence and Mr Mofu's, that he did not correct the target weight he was cross examined about in his first evidence.

103. Fourthly, unlike the ***Jack*** case, where CAS concluded that the substance could not have been credibly beneficial to the Athlete (and instead the reverse) there was a clear potential motive for Mr Tete to take an anabolic steroid for a short, but sustained low dose around the time of his shoulder injury, where he was:

    a. needing to lose a significant number of kgs from his weight 10 weeks before the fight to his target weight;

    b. had just suffered a resurgence of that shoulder injury to his dominant shoulder and while he could only carry out cardio and no strength training;

    c. he was at especially obvious risk of losing muscle mass while also losing weight;

d. He knew of the use of anabolic steroids generally in doping to “boost” power, recover more quickly and build muscles.

Mr Tete’s evidence about how much this fight and come back meant to him after his break from boxing, his injury and all he had sacrificed was powerful and wholly credible, but on this particular issue is not helpful for Mr Tete in establishing that he did not intentionally or recklessly take Stanozolol while preparing for the fight. That evidence is further consistent with a plausible motivation for using this substance in this particular context.

104. Fifthly, we consider Mr Tete’s history of negative tests and that he should have known that he would be tested after the Wembley fights. These are points which are potentially in his favour as they might make it inherently less likely that Mr Tete would attempt to dope. However, we consider that the notoriety of Stanozolol as a substance quickly cleared from the system, and that the scientific analysis is consistent with (and not more likely than not inconsistent with) a dose or doses taken longer than 5 days before the bout means that this is not a case, such as ***Jack*** or ***Khan***, where permitting the entry of the substance intentionally or recklessly can be discounted as inherently improbable. Therefore, in combination with the other factors, this does not tip the scales.

105. Sixthly, it is well established in the case law that an Athlete must do more than *“mere speculation*” or issue protestations of innocence. Mr Tete has taken some steps to try to establish the source, and his realistic options were limited by the delay by UKAD, SAIDS and the laboratory. However, he has not acted particularly promptly in seeking the other tests, and has chosen not to call evidence from the trainer or his manager. He has been, in part, a cause of the delay since 2 November 2022 by late cleared funds for testing, dismissing his previous lawyers and failing to meet deadlines. He has taken fewer steps less quickly than ***Jack*** and ***Schoeman***. While the panel considered ***Jack’s*** decision not to call her partner (also an Athlete with whom she lived, and who she suggested might have been an inadvertent source) was not a “*fatal flaw*” in her case (see CAS decision at [177]), in this case the failure to call the manager or trainer is a puzzling omission that, along with all of the other factors, does not assist the Athlete cross the evidential threshold. Instead

it falls on the other side of the scales. What is additionally striking in this case is that very little has been put forward by the Athlete as a credible hypothesis as to how the substance entered his body. There have been vague references to training in the same gym as others and Professor Kintz has highlighted to us what might be scientifically plausible explanations. However, this can go no further than speculation without further evidence from the Athlete to follow up that scientific evidence. We accept that, where a source is truly accidental, it can be very difficult to "prove a negative" and too rigid an adherence to requiring expensive testing and searches to be conducted may make it easier for more wealthy Athlete's to progress through the "narrowest of corridors" than those who are less wealthy, well-resourced or who live in Countries with a less well established forensic testing infrastructure of laboratories, and who would need to seek assistance from those abroad. Nevertheless, calling evidence from trainers and managers is not a costly step.

106. We do not accept all of UKAD's arguments. We do not disregard the toenail analysis. We also do not consider that we can hold the lack of hair analysis against Mr Tete. Mr Tete has short hair and had cut his hair in the 3 months following the test and before the AAF was notified to him. We note that Global DRO would likely have redirected Mr Tete to SAIDS, and UKAD produced no screenshots of websites to put to Mr Tete in cross examination as to what searches and checks he ought to have conducted. We also consider that the delay in notifying him has meant that some of the factors available in some of the case law (for example testing those who the Athlete dined, trained and lived with) were unavailable to him because, 3 months after the test, they would inevitably have tested negative, even if they had been contaminated at the same time. However, having considered carefully all of the other factors, we do not consider that that delay, by itself, renders this process inherently unfair. We consider it to be unlikely that that evidence, even if it showed others with low levels of the substance, would establish that there was no recklessness or intention (in the sense required by the ADR).

107. We have not disregarded the ***Jack*** case as UKAD invited us to. We have found the judgment in ***Cox*** to be the least helpful because the reasoning is less developed than ***Jack.*** It is not our role to retry the facts of the ***Jack*** case. We have been assisted by the detailed

way in which the evidence was approached and have adopted a similar approach to this case. We have also found the analysis in *Schoeman* to be helpful and we have also considered the case law in which this defence has not succeeded which the parties cited in their submissions. We do not consider that these are just all different cases on different facts. No case will ever have identical facts, but a structured analysis, such as that caried out in *Jack* and *Schoeman*, informed by the relevant test under the rules and the primary duty in ADR 2.1.1 can assist.

No Significant Fault or Negligence

108. This issue does not arise for the reasons set out above at paragraphs 67-72. However, on the evidence we consider that the Athlete has shown negligence and significant fault within the meaning of the Rules. Steps which he should have taken to ensure that what he took into his body did not contain Prohibited Substances were not taken.

Period

109. We therefore find that the appropriate period for Ineligibility under the ADR is 4 years.

Start date

110. The usual position under the ADR Article 10.13 is that the period of Ineligibility starts on the date of decision but there are exceptions (for example it is usual to give credit for the time spent on suspension).

111. An additional exception is Article 10.13.1 which provides:

> *"Delays not attributable to the Athlete or other Person:*
>
> *Where there have been **substantial delays** in the hearing process or other aspects of Doping Control, and the Athlete or other Person can establish that such delays are not attributable to them, the period of Ineligibility may be deemed to have started at an earlier date, commencing as far back as the date of Sample collection or the date on which another*

Anti-Doping Rule Violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified. (emphasis added)"

112. Ms Hampshire seeks to persuade us that there have been substantial delays. Ms Hampshire, however, objects to the splitting up of different periods of delay.

113. Ms McGowan seeks to persuade us that the delays have not been substantial. As the point was raised late and in the hearing, the Chair allowed both parties to submit written submissions, which we have considered. They are most helpful. Ms McGowan has also flagged us some of the relevant case law: *Chepalova v FEI*, CAS 2010/A/2041 paragraph 179 (in which the Athlete's submissions were rejected. The analysis was complex and took an appropriate time – in that case 6 months); *WADA v Bellchambers et al*, CAS 2015/A/4059, paragraph 167 (a case in which the discretion was exercised in the Athlete's favour in part); *Al Rumaithi v FEI*, CAS 2015/A/4190, paragraph 62 (where the argument was unsuccessfully deployed by the Athlete). Ms Hampshire addressed the *Chepalova* and *Bellchambers* cases in her submissions. Ms Hampshire sought to distinguish *Chepalova* on the basis that the test employed in that test was more complicated because the substance could be naturally occurring, whereas Stanozolol is always synthetically produced. Ms Hampshire also asked us to take into account the delay in processing the B Sample.

114. We agree with Ms Hampshire that there has been substantial delay but disagree with her that we should consider the time period in chunks. The *Bellchambers* case considered the chronology in stages, and we find it helpful to do so here. For each period we consider whether the time period exceeded a reasonable time, and whether it was substantial.

115. We have exercised our discretion to start the sanction period 30 days after the test. This is for the following reasons:

    a. The Sample was taken on 2 July 2022. It was not delivered to Kings College until 5 July 2022. We can understand why it could not be delivered on the Sunday (3 July 2022)

but we have had no explanation as to why it could not have been delivered on the Monday (4 July 2022).

b. There is now WADA guidance for International Laboratories in which Article 5.8.3.4 states that a sample should be reported within 20 days of receipt. The letter from the laboratory was sent on the last day of the 20 day period. It refers to the busy period around the Commonwealth Games. This was not an unexpected event but had been known about for a considerable period of time. Furthermore, while the technique used had some complexity (as a laboratory technique) and is slower than some analytical techniques, we do not accept that it is a technique which, once begun and cross checked, should have taken more than a few (single digit) number of days. Giving some credit for the Commonwealth Games, we permit an additional 4 days to the reasonable time.

c. We note the ***Chepalova*** case concerned a longer delay which, in 2010 was found not to be substantial. However, that concerned a different substance at a different time. The reasoning is brief on this issue and we wonder whether the decision would have been the same had it been made more recently.

d. There was then an additional delay once the laboratory reported. This was not attributable to UKAD, but as made clear in ***Bellchambers,*** any other reason for delay, so long as it was not attributable to the Athlete can be taken into account. SAIDS should be commended for contacting Mr Tete when they saw the deadline for requesting the B Sample had been missed. However, it is less commendable that Mr Tete was not told of the AAF immediately by email and that this took over a month from the laboratory's report to reach him.

e. We do not consider that it is appropriate or relevant to consider the time period for analysis of the B Sample. This was in part (by the non clearance of funds) contributed to by Mr Tete. Furthermore, by this stage he was already on Provisional Suspension and we give credit for time served during that period. Also, had we started the period at the end of the B Sample analysis period, Mr Tete would spend a longer period (and not a shorter) period ineligible than if the date chosen was 30 July 2022.

116. We therefore consider that a reasonable time (without substantial delay) would have been:

a. 2 days to transmit the sample to the lab

b. The report of the sample within 20 days;

c. An additional 4 days to account for the complexity and the Commonwealth Games;

d. 2 days to verify the sample independently

e. Then communication by email, which would be instantaneous.

117. On this basis we exercise our discretion that the period run from 30 July 2022 for a period of 4 years.

118. We have set out the detailed procedural chronology above. Both parties have at different points engaged in substantial delay.

119. As set out above UKAD also, after unsuccessfully applying to move the hearing on the basis of Professor Cowan's availability nonetheless instructed him regardless and put in jeopardy the listing through delay in providing evidence. While this delay by UKAD does not affect the burden of proof on Mr Tete on the issues in this case, nor is it relevant to this issue under 13.13.1 we record it, in the hope that it is not repeated in future.

Right of Appeal

120. In accordance with Article 13.5 of the NADP Procedural Rules any party who wishes to appeal must lodge a Notice of Appeal with the NADP Secretariat within 21 days of receipt of this decision

121. Pursuant to ADR Article 13.4.2(b), the Appeal should be filed to the National Anti-Doping Panel, located at Sport Resolutions, 1 Paternoster Lane, London, EC4M 7BQ (resolve@sportresolutions.com).

Consequentials

122. Both parties have 7 days from the date of this decision to request any redactions prior to publication of this decision in accordance with the NADP Procedural Rules at 11.5.

123. We pass on our thanks to the Secretariat for their excellent support and to all parties representatives, especially those acting pro bono.

Katherine Apps KC
Chair, on behalf of the Panel
London, UK
09 August 2023