

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF
THE RUGBY FOOTBALL LEAGUE**

Before:

David Casement KC
Professor Brian Lunn
Dr Terry Crystal

BETWEEN:

Rowland Kaye

Appellant

and

UK Anti-Doping

Respondent

DECISION OF THE NATIONAL ANTI-DOPING APPEAL TRIBUNAL

Introduction

1. Rowland Kaye appeals the decision of the National Anti-Doping Panel Tribunal dated 4 January 2023 ('the Decision') pursuant to which he was made subject to a period of Ineligibility of four years. The Anti-Doping Rule Violation was admitted and the only matter in dispute was the sanction. Mr Kaye contended that he had discharged the burden of proving on the balance of probabilities that the ingestion of the Prohibited

Substance was not intentional and therefore the period of Ineligibility should have been two years rather than four. This was notwithstanding that he accepted before the Tribunal below, and on appeal, that he does not know and cannot prove how the Prohibited Substance entered his body.

2. In summary, Mr Kaye is currently 23 years old and has played rugby league since the age of 15. He has represented Wales in both the under 16 and under 18 age groups. He has also represented Wales Students and captained his university team. From the age of 17 he has played in League 1 and in the 2021 season he played in the Elite 1 League in France for Carcassonne. At the time of the Sample Mr Kaye was playing for Hunslet RLFC and was registered with the Rugby Football League at all relevant times such that he was subject to the Anti-Doping Rules of the Rugby Football League ('ADR'). There is no dispute that the Athlete is subject to the ADR and that UK Anti-Doping ('UKAD') has the jurisdiction to bring the charges for breach of the ADR and the National Anti-Doping Panel has jurisdiction to hear and determine such charges.
3. On 5 January 2022 Mr Kaye provided a urine Sample in an Out-of-Competition test at a Hunslet RLFC training session. On the Doping Control Form Mr Kaye declared that in the preceding seven days he had used "Piriteze (antihistamines), ABE pre-workout, paracetamol and ibuprofen." The Sample was divided into two bottles and were ascribed their dedicated numbers for the "A Sample" and the "B Sample." The A Sample returned an Adverse Analytical Finding for a long-term Metabolite of oxymetholone and methasterone (18-nor-17 β -hydroxymethyl-17 α -methyl- 2 α -methyl-5 α -androst-13-en-3-one) with an estimated concentration of approximately 4ng/ml. Both oxymetholone and methasterone are listed under s1.1 of the WADA 2022 Prohibited List. They are non-Specified Substances that are prohibited at all times, both In-Competition and Out-of-Competition. Both Prohibited Substances are potential parent substances of the Metabolite found in the Athlete's Sample. It is not possible to identify which was the parent substance and it is not suggested that anything turns on which particular substance it was.

Procedural History

4. The relevant procedural history is as follows. On 4 March 2022 UKAD sent to the Athlete a Notice Letter notifying him that the analytical evidence indicated that he may have committed an Anti-Doping Rule Violation and that he would be the subject of a mandatory Provisional Suspension with immediate effect. On 13 March the Athlete requested that his B Sample be analysed. He stated that he had never deliberately or knowingly taken any form of anabolic steroids. On 31 March the analysis of the B Sample was carried out and on 13 April UKAD confirmed to the Athlete that the analysis of the B Sample had confirmed the results of the A Sample. The analysis confirmed the presence of the Metabolite with an estimated concentration of 3ng/ml.
5. On 20 April 2022 the Athlete wrote to UKAD and reiterated that he did not know how the Metabolite came to be in his Sample. The Athlete admitted the Anti-Doping Rule Violation and stated that the Anti-Doping Rule Violation was not intentional and he bore *“no fault or negligence.”*
6. On 12 May 2022 UKAD sent a Charge Letter charging Mr Kaye with Anti-Doping Rule Violations pursuant to ADR Article 2.1 (Presence) and 2.2 (Use). Both charges stipulated that the Metabolite present within the Sample was a Metabolite of oxymetholone and that he had Used oxymetholone. On 23 May Mr Kaye responded and confirmed his previous response. Additionally he provided a list of supplements that he said he had been using. He admitted Presence of the Prohibited Substance but denied the charge of Use. A further response to the Charge Letter was sent by the Athlete on 10 June 2022 in which he denied intentional use of a Prohibited Substance. He also contended he was not guilty of any Fault or Negligence or any Significant Fault or Negligence.
7. UKAD issued a replacement Charge Letter on 21 October 2022 and removed the charge of Use. The stated reason for this was that UKAD had received confirmation that the Metabolite could be a long-term Metabolite of both oxymetholone and methasterone. UKAD considered it was inappropriate to proceed with a charge of Use when it was unclear which was the precise parent Prohibited Substance.

8. On 8 July 2022 UKAD submitted a request for arbitration to the National Anti-Doping Panel. A remote hearing took place on 14 December 2022 by way of a Zoom call. The Decision was circulated on 4 January 2023 and a Notice of Appeal was served by the Athlete on 18 January 2023. David Casement KC was appointed as Chair of the Appeal Tribunal on 25 January 2023. A directions hearing took place before the Chair on 7 February 2023 and a final hearing before the Appeal Tribunal took place on 4 April 2023 by way of a remote hearing with the consent of the parties.

The Appeal

9. The appeal hearing was attended by Mr Kaye represented by Mr Tim Meakin of Counsel. Mr Meakin was acting pro bono in respect of the appeal as he had done in the proceedings below and the Appeal Tribunal expresses its gratitude for his assistance. UKAD was represented by Mr Scott Smith as advocate together with Tom Middleton, Head of Case Management and Joe Wightman, Legal Officer. Both advocates were of great assistance to the Appeal Tribunal in their written and oral analyses of the evidence and the relevant authorities.

10. The Appeal Tribunal was comprised of David Casement KC (Chair), Professor Brian Lunn and Dr Terry Crystal. The secretariat to the appeal was Alisha Ellis.

11. It was common ground between the parties that the appeal hearing proceeded by way of a rehearing. The documents including the transcript of evidence and the written submissions from the hearing below were provided to the Appeal Tribunal. However, the Athlete was aware that he was entitled to adduce further evidence including the opportunity to provide further oral evidence and to raise further arguments not advanced below.

12. In the event the main issues on appeal were very narrow:

12.1 has Mr Kaye discharged the burden of proof upon him so as to prove, on the balance of probabilities, that the means by which the Prohibited Substance came

to be in his body was not intentional. UKAD contends that Mr Kaye cannot prove on the balance of probabilities how the Prohibited Substance entered his body and, given the evidence available, cannot discharge the burden of proof. On behalf of Mr Kaye it is contended that notwithstanding the inability to prove how the Prohibited Substance entered his body he is still able to prove on the balance of probabilities that it was not intentional;

12.2 should the period of Ineligibility run from the date of the Sample collection, as contended by Mr Kaye, or from the date of the Provisional Suspension, as contended by UKAD.

The Applicable Law

13. Ultimately there was little dispute between the parties as to the relevant rules and applicable authorities although there was a difference of emphasis between the parties and a substantial difference as to the application of the authorities.

14. The charge facing Mr Kaye was solely one of presence contrary to ADR Article 2.1 which provides, in so far as relevant to these proceedings:

“2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample, unless the Athlete establishes that the presence is consistent with a TUE granted in accordance with Article 4.

2.1.1 It is each Athlete’s personal duty to ensure that no Prohibited Substance enters their body. An Athlete is responsible for any Prohibited Substance or any of its Metabolites or Markers found to be present in their Sample. Accordingly, it is not necessary to demonstrate intent, Fault, negligence or knowing Use on the Athlete’s part in order to establish an Article 2.1 Anti-Doping Rule Violation; nor is the Athlete’s lack of intent, Fault, negligence or knowledge a valid defence to an assertion that an Article 2.1 Anti-Doping Rule Violation has been committed.

2.1.2 Proof of any of the following to the standard required by Article 8.4.1 is sufficient to establish an Article 2.1 Anti-Doping Rule Violation:

(a) An Adverse Analytical Finding of the presence of a Prohibited Substance or any of its Metabolites or Markers in the Athlete's A Sample, where the Athlete waives analysis of the B Sample and so the B Sample is not analysed.

(b) An Adverse Analytical Finding of the presence of a Prohibited Substance or any of its Metabolites or Markers in the Athlete's A Sample, where analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample."

15. In respect of sanction, ADR Article 10.2 provides:

"The 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 Persons' first anti-doping offence shall be as follows, subject to potential elimination, reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:

10.2.1 Save where Article 10.2.4(a) applies, the period of Ineligibility shall be four (4) years where:

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

16. ADR Article 10.2.3 provides:

"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."

17. It is apparent from ADR Article 10.2.3 that the term "intentional" has two aspects, one is engaging in conduct knowing that it constitutes an Anti-Doping Rule Violation. The second aspect is recklessness.

18. On 1 January 2021 the revised WADA Code came into effect. It included a new "Comment to Article 10.2.1.1" which states:

“While it is theoretically possible for an Athlete or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one’s system, it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance.”

19. Many authorities were cited by both parties on the central issue of whether it was possible for Mr Kaye to discharge the burden of proof upon him, that his conduct was not intentional, in circumstances where he could not prove how the Prohibited Substance entered his body.
20. Mr Meakin on behalf of the Athlete relied heavily upon the case of WADA v Swimming Australia, Sport Integrity Australia and Shayna Jack CAS 2020/A/7579. At paragraph 154 of the Jack decision the Panel said, *“The determination of the two-part question is to be made in the light of all of the facts, and the Panel’s conclusion that the two factual propositions which the Athlete must establish are more likely true than false, on a simple balance of probability.”* At paragraph 155 the Panel continued *“As certitude with respect to the source of contamination decreases, so the Athlete’s chances of prevailing depend on a counterbalancing increase of the implausibility of bad motive and negligence. The doping hypothesis must no longer (on balance) make sense in all the circumstances, and the charge of recklessness must (on balance) be overcome.”*
21. The CAS Panel in Jack, by a majority, upheld the decision of the sole arbitrator below and dismissed the appeal by WADA. They accepted that the Athlete had proven on the balance of probabilities that there was an absence of intent notwithstanding that the Athlete could not prove how the Prohibited Substance came to be in their body. They took into account all of the evidence including its assessment of the credibility of the Athlete and the very low amount of the Prohibited Substance. In the present case Mr Meakin invited this Appeal Tribunal to also assess all of the available evidence including Mr Kaye’s credibility, health record, physical appearance, and the low amount found in the Sample which he contended would lead to the conclusion that there was no intention.

Mr Meakin also referred to Villanueva v Fina CAS 2016/A/4534, ITF v Lepchenko SR/254/2021 and Bowes v UKAD SR/258/2021.

22. Mr Smith on behalf of UKAD cited numerous authorities including domestic authorities before the National Anti-Doping Panel and international authorities including those before the CAS.

23. It is said on behalf of UKAD that the authorities before the National Anti-Doping Panel are clear that save in the most exceptional circumstances an Athlete cannot rebut the Article 10.2.1(a) presumption of intentional use unless they prove exactly when and how the substance entered their system. UKAD v Buttifant paragraph 31: *“It is only in a rare case that the athlete will be able to satisfy the burden of proof that the violation of article 2.1 was not intentional without establishing, on the balance of probabilities, the means of ingestion.”* Statements to similar effect are to be found in UKAD v Songhurst SR/0000120248 paragraph 29, UKAD v Graham SR/0000120259 paragraph 45 and UKAD v Williams SR/0000120251 paragraph 25 and 28.

24. Citing a range of CAS case law UKAD acknowledged that there was the “narrowest of corridors” by which an Athlete may establish absence of intention without proving how the Prohibited Substance entered their body. In Villanueva v FINA the CAS Panel found it was not a requirement that an athlete show the origin of the Prohibited Substance to establish that the violation was not intentional. At paragraph 37 the Panel said *“such a situation would inevitably be extremely rare. Even on the persuasive analysis of Rigozzi, Haas et al., proof of source would be an “important, even critical” first step in any exculpation of intent. Where an athlete cannot prove source it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him.”* Similar statements have been made in many other CAS cases including Ademi v UEFA CAS 2016/A/4676 paragraph 72 and WADA v WSF & Iqbal CAS 2016/A/4919 paragraphs 65 to 66.

25. On the morning of the appeal hearing the decision in the case of UKAD v Amir Khan SR/238/2022 was handed down and provided to the Appeal Tribunal. Both parties sought to argue that the decision in Khan supported their position in this appeal. In the

Khan case the only issue was whether the Athlete could prove the absence of intention in circumstances where he could not prove how the Prohibited Substance entered his body. The scientific evidence adduced by UKAD in that case was that the most likely cause of the positive Sample was the inadvertent administration of a micro-dose of ostarine, which the athlete was unlikely to take deliberately as a single dose. The scientific evidence adduced on behalf of the Athlete was that the dose of ostarine in the Athlete's system did not correlate with an intention to use it for performance enhancement. The Athlete had tested negative on three occasions in the six weeks prior to the test in question. The Panel concluded *"In the judgment of the Tribunal the objective scientific evidence rules out any deliberate or reckless conduct by the Athlete. It is inconceivable that he would have sought to ingest a micro-dose which would have been a fraction, at least 1,000 time less, of a dose intended to provide any performance enhancement or any other competitive advantage in the bout to be held on 19 February 2022. This is a rare case in which the Athlete was fortunate to have been required to take a doping test 7 days before the fight providing a clear marker that any subsequent sample could only have been ingested 7 days or less before the bout, thus excluding any possible argument that the residual sample could have been derived from the ingestion of a pharmacologically effective dose administered before 12 February 2022."*

The Appeal: the evidence

26. The only live evidence before the Appeal Tribunal was that of Mr Kaye. He gave evidence that this was the first anti-doping test he had ever undertaken. He gave evidence identifying the supplements he was taking in the seven days prior to the Sample collection and he was able to identify six supplements. Mr Kaye explained that on his Doping Control Form he only identified one supplement, as well as certain other medications, because it was the only one he could recall at the time. He was asked if he felt under pressure of time in completing the Doping Control Form but he did not suggest there was any pressure.
27. Mr Kaye was asked if he had evidence of purchasing the six supplements that he had identified. He stated that those supplements he bought in shops he always used cash. Those supplements that he bought online he used his bank card to purchase. No bank

or credit card statements were provided to the Appeal Tribunal. The only proof of purchase was an order confirmation in relation to ABE All Black Everything, the only supplement noted on the Doping Control Form, which was said to be acquired on Amazon by the girlfriend of Mr Kaye's brother. The confirmation showed it was acquired by a person other than Mr Kaye and delivered to that person's address and not Mr Kaye's. There was no reference to Mr Kaye or his address on the confirmation. He said his brother's girlfriend bought it for Mr Kaye as a gift but she did not provide a statement or oral evidence in respect of this. This failure to adduce evidence of acquisition, together with Mr Kaye's failure to identify any of the other five supplements he was using on the Doping Control Form or to provide a persuasive explanation for this failure, did nothing to assist his credibility before the Appeal Tribunal.

28. In order to check that the supplements he contends he was taking did not contain Prohibited Substances, Mr Kaye gave evidence that he had used two apps namely 100% me and also the Informed Sport app. He was able to confirm by using one or other of those apps that the supplements he was using did not contain Prohibited Substances. No screenshots of the apps were provided to the Appeal Tribunal to understand what information was required to be inputted into those apps e.g. batch numbers and what information, if any, was provided by the apps when that information was inputted. The evidence of the use of the apps was therefore vague and unpersuasive.

29. Mr Kaye also looked for the tick on the packaging which was the manufacturer's confirmation that the supplement did not contain contaminated substances. He was satisfied the manufacturer's tick which appeared on the Applied Nutrition Product ABE was a reasonable assurance upon which he could rely.

30. The Athlete maintained he had made "extensive efforts" to discover how the Adverse Analytical Finding occurred. It is correct the Mr Kaye took some steps to establish with the manufacturers whether any of the supplements were contaminated or there had been any reports of such. These steps consisted of one email to each manufacturer but there were no follow-up emails or calls. Applied Nutrition offered to analyse the supplement from its retained batch. That offer was not taken up. Although the Athlete

has, since the Decision, reached out again to Applied Nutrition there has been no response. Mr Kaye has not followed-up on that.

31. The Athlete also gave evidence as to his physique and also his underlying health. He presented photographs to show that his physique had not changed over the years and it was said this was not consistent with long term use of steroids. It was however made clear by UKAD that it was not part of their case that there had been long term use of steroids.

32. Mr Kaye also gave evidence that he had a possible underlying cardiac condition which had been picked up while he was playing for Carcassone. This condition was said by Mr Kaye to be inconsistent with the intentional use of steroids which would have had an adverse effect on his cardiac condition. He also gave evidence that he had been diagnosed with a renal problem when he was young. In a letter from Dr Aziz dated 19 July 2022 there was reference to a history of renal problems but there was no mention of a cardiac problem. The letter from Dr Aziz opined that the use of many steroids generally and oxymetholone, in particular, would show potential harm to kidneys. This was relied upon to show that it was unlikely that Mr Kaye would have knowingly contemplated such ingestion. However, there was no evidence Mr Kaye was aware of the harmful effects of steroids on kidneys prior to the Sample. Equally the letter does not suggest Dr Aziz was made aware of the supplements Mr Kaye says he was taking at the time, including creatine, and any effect they might have on renal function. Mr Kaye said in evidence that he discussed his cardiac problem with Dr Aziz on another occasion and had been referred to a consultant. However due to delays he has not yet had his consultation and was unable to provide a report. There was no written evidence of any follow-up investigations in respect of any cardiac problems.

33. There was evidence of physical training tests that were conducted at Hunslet RLFC in the period prior to the Sample. Mr Kaye relied upon it to show there was no improvement in his physical abilities. The picture was mixed. Some tests showed an improvement. Others showed there was a decline in performance.

34. At the time of the Sample collection Mr Kaye was nursing an injury to his tibia which he had from late December or early January but was only diagnosed between the end of January through to mid-February. He put this injury down to increased workload as he found playing at Hunslet RLFC involved an increase in physicality. The Athlete said he was using supplements to help improve his performance but he was unaware that the supplements may help with recovery from his injury. There appeared to be some conflict between this evidence and that given below where he said he did consider that supplements might assist with recovery from injury. At the hearing below Mr Kaye also said that he considered he should have been out of training for 12 weeks but was able to return after 6 weeks. Before the Appeal Tribunal he explained that after 6 weeks he was not back to full training but he was able to undertake some training.
35. The creatine that Mr Kaye consumed was one that was jointly used by him and his housemate. His housemate had free access to use it and Mr Kaye was satisfied that he could rely on his housemate completely. There was no statement or evidence adduced from Mr Kaye's housemate.
36. In addition to Mr Kaye's evidence the parties made submissions in respect of the written report of Professor David Cowan dated 16 October 2022. In his report he confirmed that he did not see any evidence of regular use of a prohibited anabolic androgenic steroid. A pharmacologically effective dose of oxymetholone two to three weeks before the collection of the Sample is a possible explanation for the Laboratory finding. A further possible explanation is the multiple dosing of either oxymetholone or methasterone from a contaminated supplement with the final administration likely to have been at least a week before the Sample was provided. If the apparently contaminated supplement was ingested within a day or two of the Sample collection, the absence of either oxymetholone or methasterone in the Sample, or a short-term Metabolite of either, makes this explanation less likely.
37. In a witness statement of Mr Nick Wojek, Head of Science and Medicine at UKAD, he opined that both oxymetholone and methasterone can be used as an aid to recovery following injury or an intense period of training. Mr Kaye gave evidence that he was unaware that steroids could have any beneficial effect in recovering from injury.

Discussion

38. There is a wealth of UK and international authorities including CAS decisions that have made clear that it will be a rare case in which an Athlete can prove that they did not have the requisite intention in circumstances where they were unable to prove how the Prohibited Substance entered their body.
39. An Athlete only has “the narrowest of corridors” to prove absence of intention in circumstances where he cannot prove how the Prohibited Substance entered their body. Absent of such proof it is more likely that an Athlete’s suggestion that a tribunal assume certain identified contaminated supplements, or some unidentified possible source, must have been the source of the Prohibited Substance amounts merely to an invitation to speculate. In support of that assumption any evidence adduced by an Athlete as to what supplements they acquired, how they acquired them, what they consumed, when they consumed them and what steps were taken before ingestion to verify they did not contain Prohibited Substances, absent objective evidence, usually amounts to no more than speculation upon speculation. It is usually not cogent evidence to discharge a burden of proof.
40. The Khan decision provides an example of a rare case where the Athlete was the subject of multiple negative tests in the weeks prior to the Sample collection. That provided a crucial marker against which to analyse the Adverse Analytical Finding in that case. The scientific evidence about the low amount of the Prohibited Substance found in the Sample was such that the Tribunal was able to conclude that the objective scientific evidence ruled out any deliberate or reckless conduct by the Athlete.
41. The evidence in Khan is very different from that in the present case. In the present case the scientific evidence is that a pharmacologically effective dose of oxymetholone two to three weeks before the collection of the Sample is a possible explanation for the Laboratory finding. A further possible explanation is the multiple dosing of either oxymetholone or methasterone from a contaminated supplement, with the final administration likely to have been at least a week before the Sample was provided.

Neither of these possibilities could be discounted and the evidence of Professor Cowan was not challenged.

42. Further, the uncontested evidence of Mr Wojek was that substances such as oxymetholone and methasterone may appeal to a rugby league player for various reasons including to hasten recovery following an injury or an intense period of training.

43. The case advanced for the Athlete was that although he cannot prove how the Prohibited Substance entered his body he accepts he used a number of supplements prior to the Sample collection, he took reasonable steps to ensure they were free of any Prohibited Substances so he cannot be said to be reckless in that respect, he is unaware of how else the Prohibited Substance could have entered his body and all of the subjective and objective evidence points to any ingestion not being intentional.

44. The Athlete's case is an invitation to assume that the source of the Prohibited Substance was one or other of the supplements identified or indeed some other unknown source and to speculate as to the circumstances surrounding that source.

45. The evidence relied upon to support the Athlete's case was vague and largely incomplete. There was no objective evidence as to the Athlete's acquisition of the supplements identified. The only written evidence was in respect of another person acquiring one of the supplements and that person did not provide a statement or give evidence. Even for those supplements that were said to have been acquired online there was no written evidence such as emails or credit card statements. The use of the apps referred to was not supported by any objective evidence as to their operation in respect of the supplements in question, what information was required to be inputted and what information would have been provided by the apps. The Athlete's description of the apps was vague and at times contradictory, confusing which app did what. There is therefore no credible evidence that the Athlete took reasonable steps prior to the Sample collection to ensure there was no risk that they did not contain Prohibited Substances. Accepting the manufacturer's own assertion, by placing a tick on the label, without checking the ingredients and undertaking appropriate searches of the actual batch number from an

independent source such as the Informed Sport app suggests a casual approach to the precautions that are reasonably expected of an Athlete.

46. The steps that the Athlete took after the Notice Letter to investigate if the supplements were the source of the Prohibited Substance were superficial. Emails were sent to the manufacturers but not chased. In the one case where the manufacturer indicated a willingness to carry out a test of their product if a receipt could be provided, that receipt was not provided. After the Decision a further approach was made to that manufacturer with the receipt but there was no response and no follow-up. The reasons for the lack of determination in making these enquiries is unclear but it is properly to be inferred that Mr Kaye himself considered they would not reveal any contamination of the products.
47. The evidence given by Mr Kaye as to his medical and physical condition around the time of the Sample collection was incomplete and vague. The cardiac and renal problems were not cogently evidenced and, in particular, there was no evidence that such conditions were of concern to the Athlete prior to the Sample collection. There is no evidence he ever discussed the supplements with his doctor or any nutritionist to ascertain if they would adversely affect underlying conditions. The assertion of concerns about medical conditions as a reason why there would not have been intentional ingestion was without evidential foundation.
48. Mr Kaye complained about the two month delay in notifying him of the Adverse Analytical Finding. The delay was due to a backlog of tests and also the absence of critical staff due to COVID-19 self-isolation in January 2022. The Appeal Tribunal does not accept that delay caused any prejudice to the Athlete. There is no basis to assume that the Athlete's enquiries of manufacturers or otherwise would have been any more determined or ultimately probative if the notification had been provided earlier. When Mr Kaye did receive the Notice Letter he had in his possession the creatine supplement he had been using. He did not have that tested and the athlete asserted that it was thrown out during a subsequent house move.
49. The Appeal Tribunal is of the unanimous view that Mr Kaye has failed to discharge the burden of proof that the Anti-Doping Rule Violation was not intentional within the

meaning of ADR Article 10.2. That does not mean that the Appeal Tribunal finds Mr Kaye intended to cheat. It means that on the evidence before the Appeal Tribunal Mr Kaye has failed to prove that he did not have the requisite intention.

50. Finally, the Appeal Tribunal can see no proper basis for ordering that the period of Ineligibility should run from the date of the Sample collection. The appropriate start date is the date of the Provisional Suspension being 4 March 2022 in accordance with ADR Article 10.13.2.

Conclusion

51. The appeal brought by Mr Kaye is dismissed for the reasons set out above. The order made by the Tribunal remains in place as follows:

- (1) There was an admitted Anti-Doping Rule Violation;
- (2) The Appeal Tribunal is not satisfied that Mr Kaye has proved how the Prohibited Substance in question entered his system and the Appeal Tribunal finds that Mr Kaye has not proven on the balance of probabilities that the means by which the Prohibited Substance entered his system was not intentional;
- (3) Mr Kaye does not contend before the Appeal Tribunal that the sanction should be eliminated or reduced by reason of No Fault or Negligence or No Significant Fault or Negligence;
- (4) The sanction must accordingly under the ADR be a period of Ineligibility of four years;
- (5) The Ineligibility will run from 4 March 2022, that is the date of Mr Kaye's Provisional Suspension, and end at 23:59 on 3 March 2026;
- (6) There was no application for costs.

52. The parties are reminded that in accordance with ADR Article 13.6 decisions of a NADP Appeal Tribunal in cases brought under ADR Article 13.4.2(b) may be challenged by appeal to CAS only by WADA. Subject thereto, decisions of the NADP Appeal Tribunal shall be the full, final and complete disposition of the case and will be binding on all Persons identified in ADR Article 13.4.1.



David Casement KC
Chair, on behalf of the Appeal Tribunal
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26 April 2023

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