SPORT RESOLUTIONS (UK)

NATIONAL ANTI-DOPING PANEL

SR/300/2019

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF BASKETBALL ENGLAND**

*Before:*

*Robert Englehart QC (Chair)*

*Dr Kitrina Douglas*

*Professor Dorian Haskard*

**B E T W E E N:**

**UK ANTI-DOPING LIMITED** ***Appellant / Respondent***

**and**

**WILLIAM OHUAREGBE** ***Respondent / Appellant***

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**DECISION OF THE APPEAL TRIBUNAL**

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## INTRODUCTION

1. We were appointed as the Appeal Tribunal to hear this appeal by the Appellant ("UKAD") against a decision of an Anti-Doping Tribunal given on 9 September 2019 and consisting of Charles Hollander QC, Carole Billington-Wood and Professor Gordon McInnes ("the Decision"). The Respondent, Mr Ohuaregbe, resists the appeal and has also cross-appealed. The appeal and cross-appeal were heard by us on 16 December 2019 in accordance with directions given by the Chairman. Pursuant to those directions the appeal proceeded by way of review, that is to say it was limited to consideration whether the Decision was erroneous, rather than by way of a rehearing *de novo*.

2. On appeal UKAD was represented by Ms Nisha Dutt and Mr Ohuaregbe was represented by Mr Philip Clemo. We are grateful to both Counsel for their thorough and succinct submissions. We are particularly grateful to Mr Clemo for his *pro bono* representation of Mr Ohuaregbe.

3. The appeal raises a short but important point. What is the proper approach for an Anti-Doping Tribunal when an Athlete credibly denies knowingly ingesting a Prohibited Substance but there is a lack of evidence apart from the Athlete's own supposition pointing to a particular source for the substance?

## THE BACKGROUND

4. The Tribunal gave a full decision. It is unnecessary for us to do more than briefly summarise sufficient of the factual background in order to make our decision understandable. If more detail is required, reference should be made to the Decision.

5. Mr Ohuaregbe is a talented basketball player. On 10 March 2019 he was playing for the London City Royals against the London Lions in the British Basketball League Trophy Final in Glasgow. It is not disputed that, both then and at all material times, he was subject to the UK Anti-Doping Rules ("ADR") which have been adopted by Basketball England as its own anti-doping rules. Mr Ohuaregbe was selected for random drug testing; he provided a urine sample which was found to contain ostarine. That is a non-

Specified Substance and is listed under the description "enobasarm [ostarine]" as an Anabolic Agent under S1.2 of the WADA 2019 Prohibited List.

6. After some rather unfortunate passage of time, about which Mr Clemo does complain, Mr Ohuaregbe was ultimately charged by letter dated 30 April 2019 with an Anti-Doping Rule Violation consisting of the presence within his sample of a Prohibited Substance. Mr Ohuaregbe's immediate response was not to dispute the Anti-Doping Rule Violation. The response served on his behalf referred to six supplements (rather than just two as had been indicated on the Doping Control Form at the time of testing) which he had taken "at about this time" and went on to say:

> Mr Ohuaregbe is of the view that he must have been the victim of a contaminated product.

7. A hearing ensued before the Tribunal on 23 August 2019. As the Tribunal noted, it was only concerned with sanction. It decided that the Anti-Doping Rule Violation had not been intentional, but it rejected the contention that there had been No Significant Fault or Negligence. Consistently with its finding of a lack of intention, the Tribunal imposed a two year period of Ineligibility backdated to 10 March 2019, the date of Sample collection.

**MATERIAL ADR PROVISIONS**

8. Under ADR Article 10.2.1 the period of ineligibility for Mr Ohuaregbe's Anti-Doping Rule Violation is four years. However, in the case of non-Specified Substances, such as ostarine, that period may be reduced to two years if an Athlete "can establish that the Anti-Doping Rule Violation was not intentional". The word "intentional" is a term of art. In this context it does not just mean "deliberate". As defined in the ADR, it connotes knowledge that the ingestion of a Prohibited Substance is, or entails a significant and manifestly disregarded risk of leading to, an Anti-Doping Rule Violation: ADR Article 10.2.3. It is not disputed but that for Prohibited Substances of the type found in this case the burden of establishing a lack of "intentional" conduct was on Mr Ohuaregbe.

**THE DECISION**

9. On the critical question whether Mr Ohuaregbe had established a lack of intention the Tribunal had very limited relevant evidence. It decided to ignore four of the possible supplements which Mr Ohuaregbe had put forward as possible candidates for contamination with ostarine on the basis that Mr Ohuaregbe had taken these four supplements too long prior to his drug test. The Tribunal concentrated upon the two supplements which had been recorded on Mr Ohuaregbe's Doping Control Form, that is *Universal Animal Flex* and *N.O Xplode BSN*. At paragraph 26 of the Decision, the Tribunal summarised its overall conclusion:

> Is there really sufficient material here on which the tribunal can conclude that one of these two supplements was likely to be the cause of the AAF [Adverse Analytical Finding] and find that Mr Ohuaregbe has satisfied his burden of proof? We regard this as a very marginal case. On balance we are just satisfied.

10. The Tribunal identified three factors which led to its conclusion. First, Professor Wolff's unchallenged written evidence had been that USADA (United States Anti-Doping Agency) had found that ostarine was prevalent in many supplements and was frequently found as a product contaminant. Nevertheless, neither Professor Wolff nor Mr Wojek (UKAD's Head of Science and Medicine) could say whether Mr Ohuaregbe's Adverse Analytical Finding was caused by a contaminated supplement or a supplement containing ostarine. Second, the concentration of ostarine found was low. This would be consistent with ingestion some time previously although it would also be consistent with low level contamination in a supplement. Thirdly, the Tribunal found Mr Ohuaregbe to be a credible witness, and his evidence was that he could think of no reason for the Adverse Analytical Finding other than inadvertent ingestion from a supplement. The above three factors were the only ones given by the Tribunal for a finding that the Adverse Analytical Finding was not "intentional" and that Mr Ohuaregbe had satisfied the burden of proof placed on him.

11. As for the subject of the cross-appeal, the Tribunal was unable to find that there had been No Significant Fault or Negligence. Mr Ohuaregbe had satisfied them how the ostarine had entered his system, i.e. from some supplement, but they did not think that

he came near to establishing compliance with the strict duty to exercise the utmost caution over what entered his system.

**THE GROUNDS OF APPEAL AND CROSS-APPEAL**

12. UKAD advance two broad grounds of appeal:

    (1) There was no evidential basis for concluding that Mr Ohuaregbe had discharged the onus of establishing that his ingestion of ostarine had not been intentional within the meaning of the ADR;

    (2) The Tribunal erred in not considering the evidence within the context of the ADR definition of "intentional".

13. The cross-appeal contends that, contrary to the Tribunal's view, there was sufficient evidence for a conclusion that Mr Ohuaregbe had established No Significant Fault or Negligence and accordingly a reduction in the two year period of Ineligibility.

**UKAD'S CONTENTIONS**

14. For UKAD Ms Dutt submitted that there was simply no evidence to justify a reduction in the applicable four year sanction under the ADR. Mr Ohuaregbe had not discharged his onus of establishing that his ingestion of ostarine had not been intentional within the meaning of the ADR. This was because he had not even demonstrated how the ostarine came to enter his system. The theory advanced, that is that the ostarine must have come from a possibly contaminated supplement, was founded on nothing other than pure speculation.

15. There was a long and consistent line of both domestic and CAS authority which established that in order to show that an Adverse Analytical Finding was not intentional an Athlete had, save perhaps in exceptional circumstances, to show by "concrete" proof how a Prohibited Substance entered his system. It is quite insufficient for an Athlete merely to protest his lack of intention and, assuming he is a credible witness, thereby to reduce the applicable sanction from four years to two years Ineligibility.

16. By way of domestic authority Ms Dutt relied on the NADP appeal decision in *UK Anti-Doping v Buttifant* (SR/NADP/508/2016) in which the Appeal Tribunal held:

> 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.

Ms Dutt also relied extensively on the NADP decision in *UK Anti-Doping Limited v Graham* (SR/0000120259), a decision which was expressly approved by the Appeal Tribunal in *Buttifant*. At paragraph 41 of its decision the Tribunal in *Graham* emphasised "the need for there to be some evidential basis for the Athlete's assertions, both in relation to the source of the ingestion and the steps taken to mitigate the risk of an ADRV". Finally, as regards domestic decisions, Ms Dutt also referred us to the relatively recent decision in *RFU v Wells* (SR/NADP/96/2018) especially at paragraphs 26-7.

17. The CAS decisions consistently demonstrate the need for some "concrete" evidence other than just an Athlete's word that an Anti-Doping Rule Violation had not been "intentional". In particular, we were referred to *Guerrero v FIFA* (CAS 2018/A/5546) especially at [65] for the Panel's summary of the applicable principles. Other authorities to which we were referred were *WADA v Chinese Taipei Olympic Committee* (CAS 2018/A/5784) especially at [60], *Abdelhak v IHF* (CAS 2018/A/5796) especially at [46], *WADA v CPA* (CAS 2017/A/4962) especially at [51-2] and *WADA v Ilescas* (CAS 2016/A/4834) especially at [73].

18. Ms Dutt summarised her criticisms of the Tribunal's conclusion in the present case as follows:

    (a) there was no evidence about the purchase of either of the supplements under hypothesis here;

    (b) there was nothing other than pure speculation that the ostarine must have come from some supplement;

    (c) there was nothing by way of scientific analysis of the supplements in question;

    (d) there was no evidence at all about the nature of the supplements in question;

(e) there was not, and could not be, any finding as to which of the two supplements on which the Tribunal alighted was responsible for the ostarine.

**SUBMISSIONS FOR MR OHUAREGBE**

19. At the outset Mr Clemo for Mr Ohuaregbe reminded us that this was not a re-hearing. We were only concerned with whether or not the Decision was erroneous. We were referred by Mr Clemo to paragraphs 7-8 of the decision in *Buttifant*, cited above, which emphasise how, at least ordinarily, the role of an Appeal Tribunal is very restricted.

20. In Mr Clemo's submission the conclusion to which the Tribunal came in the present case was one of fact with which we should not interfere. He agreed that the credibility of an athlete is not enough on its own to show a lack of intention. However, in this instance there was more than just Mr Ohuaregbe's credibility. There was additionally the low concentration of ostarine which had been ascertained as well as the context of contamination of ostarine in supplements being commonplace. This was not a case, like some others, where scientific evidence excluded the possibility of ingestion via a supplement.

21. Whilst in Mr Clemo's submission this was not a case which depended solely on Mr Ohuaregbe's credibility, this credibility was nevertheless a very relevant factor. An appeal tribunal, which does not hear the evidence, should be highly reluctant to come to any view inconsistent with a first instance tribunal's view of the credibility of an athlete.

22. Finally, it had not been necessary for the Tribunal to consider whether the present might not be an exceptional case of the kind envisaged in *Buttifant* where an athlete's mere protestation of innocence might be sufficient. Nevertheless, if necessary, Mr Clemo did ask us to consider whether the present case might not be exceptional, although he advanced no particular reason for saying so.

23. Whilst the Tribunal had been largely correct in its conclusions, the one area where the Decision was open to criticism was in relation to the Tribunal's view that a finding of No Significant Fault or Negligence was unsustainable. The Tribunal had been satisfied that the source of the ostarine was one of two supplements taken by Mr Ohuaregbe so that the threshold for a finding of No Significant Fault or Negligence was passed. However, Mr Ohuaregbe's lack of anti-doping education was a factor to which insufficient attention

had been paid. His action and inaction had to be judged against that background. In the light of that context Mr Ohuaregbe had not been careless but had done all that could be expected of him. Accordingly, we were invited to allow the cross-appeal and substitute a lesser period of Ineligibility than two years.

**DISCUSSION**

24. It would seem that the Tribunal did not have the advantage which we have had of a thorough examination of the authorities, both domestic and international. Ms Dutt conducted a skilful and thorough trawl through the jurisprudence. The Tribunal did refer to the *Buttifant* decision but did not consider the import of any other authorities. We are entirely satisfied that in assessing whether an Athlete has established a lack of intention, whether under the ADR or the WADA Code generally, an anti-doping tribunal cannot normally found its conclusion solely on the athlete's assertion, however credible, that a Prohibited Substance "must have come" from some supplement. If an Athlete is to discharge the onus of proving lack of intention some firm additional evidence other than the athlete's mere say so is requisite. As was said in *Wells*, cited above, at [26]:

> There is undoubtedly a long line of cases both in this country and before CAS in which it has been held that it is incumbent upon an athlete or player who seeks to show a lack of intention to do more than simply say that he or she is not a cheat and the Prohibited Substance must have come from some supplement or other product which he or she was taking at the material time. In all but perhaps the most unusual case, it is necessary for the athlete or player to adduce concrete evidence that the particular Prohibited Substance was in fact, albeit unknowingly at the time, in a particular supplement or product which he or she was taking.

25. The above was established for anti-doping tribunals in this country in the seminal case of *Buttifant*, cited above. There, the Appeal Tribunal said at [27]:

> There must be an objective evidential basis for any explanation for the violation which is put forward. We reject the argument put forward by the Respondent that the athlete's contention that he does

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

The *Buttifant* appeal decision continues at [28]:

> In summary, in a case to which Article 10.2.1 applies the burden is on the athlete to prove that the conduct which resulted in a violation was not intentional. Without evidence about the means of ingestion the tribunal has no evidence on which to judge whether the conduct of the athlete which resulted in the violation was intentional or not intentional …….

26. As regards domestic case law, we should also refer to the Appeal Tribunal decision in *Staples v RFU* (SR/NADP/1016/2017). There, the Appeal Tribunal said at [24]:

> The ADR do not specifically require that, in order to show that an anti-doping rule violation was not intentional, a Player has to prove how a substance entered his or her system. Nevertheless, there is a consistent line of jurisprudence to the effect that it is likely to be a rare case before a tribunal will be satisfied that the ingestion of a substance was not intentional if the tribunal cannot even know how the substance was ingested. This is affirmed in *Buttifant*, cited above, and is consistent with the CAS authorities: see, for example, the *International Weightlifting Federation* case, cited above, at 51-2 where the CAS tribunal said:
>
> 51. The Athlete bears the burden of establishing that the violation was not intentional within the above meaning, and it naturally follows that the athlete must also establish how the substance entered her body …

> 52. To establish the origin of the prohibited substance, CAS and other cases make clear that it is not sufficient for an athlete merely to protest their innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question.

The *Staples* Appeal Tribunal further observed at [27]:

> If a tribunal has nothing other than an athlete's own word and speculation as to how a prohibited substance came to be ingested, it is understandable that the evidence will be looked at with rigour. It would be all too easy for an athlete to say that he or she has never knowingly taken a Prohibited Substance, and it must have come from a contaminated product like a supplement. An Anti-Doping Organisation is rarely in a position to respond to such evidence. It is for this reason that tribunals tend to be rather sceptical in cases which depend solely on an athlete's word. There is a search for what has been called more "concrete" evidence than that.

27. Turning to the CAS jurisprudence, it consistently follows the same approach. We shall not overburden this Decision by reciting at length passages from all the decisions to which Ms Dutt referred us. It is sufficient for us to record that those decisions, and in particular the paragraphs of those decisions noted at paragraph 17 above, are all consistent with the principles set out above. The position was succinctly summarised in the *CPA* case, cited above, at [51-2]:

> 51. To establish the origin of the prohibited substance, it is nowhere near enough for an athlete to protest innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which he or she was taking at the relevant time.
>
> 52. Rather, an athlete must adduce actual evidence to demonstrate that a particular product ingested by him or her contained the

substance in question, as a preliminary to seeking to prove that it was unintentional, or without fault or negligence.

28. We gratefully adopt the Panel's observations in *Guerrero* at [65]:

> The Panel considers the relevant principles to be as follows:
>
> (i) It is for an athlete to establish the source of the prohibited substance, not for the anti-doping organisation to prove an alternative source to that contended for by the athlete; see CAS 2012/A/2759, paras. 11.31 and 11.32 ("*It was not for UEFA – the Panel emphasise – to hypothesise, still less prove, their own version of events*" as to how the prohibited substance got into the athlete's system); CAS 2014/A/3615, para. 52 ("*The Panel rejects a proposed interpretation of the rules which would seek to impose the burden on the person charging to explain the source of the substance detected in the system of the person charged"*); USADA v Meeker, AAA Panel decision dated 12 November 2013, para. 7.7 ("*Respondent alone bears the burden of showing an explanation that is more likely than not for how the Prohibited Substances entered his system. If he fails to do so he has not met the requirement for relief under WADA Code 10.5.1 and 10.5.2. Claimant is not required to put forward its own speculative theory, and its failure to do so does not compel the acceptance of Respondent's theory"*).
>
> (ii) An athlete has to do so on the balance of probabilities. Evidence establishing that a scenario is possible is not enough to establish the origin of the prohibited substance. By way of example, the Panel in CAS OG 16/25 "*found the sabotage(s) theory possible, but not probable and certainly not grounded in any real evidence*" (para. 7.27).
>
> (iii) An athlete had to do so with evidence, not speculation; CAS 2014/A/3820: *"In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide actual evidence as opposed to mere speculation*" (para. 80).
>
> (iv) It is insufficient for an athlete to deny deliberate ingestion of a prohibited substance and, accordingly, to assert that there must be

an innocent explanation for its presence in his system; in CAS 2010/A/2230, the Sole Arbitrator expressed an athlete's burden in the following terms:

"*To permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body*" (para 11.12).

(v) If there are two competing explanations for the presence of the prohibited substance in an athlete's system, the rejection of one does not oblige (though it may permit) the hearing body to opt for the other. There is always available to the hearing body the conclusion that the other is not proven. For the hearing body in such a situation there are three choices, not just two (CAS 2010/A/2230, ditto).

29. To summarise, we accept the submissions advanced by Ms Dutt that Mr Ohuaregbe would only be entitled to a finding of a lack of "intention" under the ADR if he were to establish by concrete evidence on the balance of probabilities how the ostarine in fact entered his system. Speculation is not enough. The Tribunal did not suggest that this could be some special case of the kind left open in *Buttifant*. We agree. The evidence in this case has to be assessed in the light of the principles noted above.

30. We turn to the three factors given by the Tribunal as satisfying them that Mr Ohuaregbe's Adverse Analytical Finding was not "intentional".

31. First, the Tribunal referred to the general evidence about ostarine being found in, or as a contaminant of, supplements. However, the Tribunal then noted the evidence that neither Professor Wolff nor Mr Wojek was able to say whether the Adverse Analytical Finding was caused by a contaminated supplement or a supplement containing ostarine. As the Tribunal itself remarked: "this perhaps does not take the matter much further". We agree. In truth, evidence about the prevalence of ostarine in, or as a contaminant of, supplements generally was wholly neutral. It certainly does not tend to establish that Mr

Ohuaregbe in fact ingested the ostarine found in his system via some particular supplement.

32. Second, the Tribunal noted the low concentration of ostarine in Mr Ohuaregbe's sample. Again, however, the Tribunal itself noted that this was equally consistent with an ingestion some time previously as with the presence of ostarine in, or contamination of, some supplement. In truth, this factor is again wholly neutral.

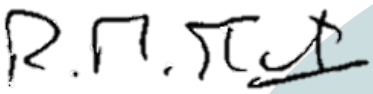
33. There remains the third factor specified by the Tribunal. The Tribunal referred to Mr Ohuaregbe being a credible witness who was unable to think of any other explanation than ingestion via a supplement. To rely on evidence such as this, however credible, seems to us to be wholly inconsistent with the jurisprudence noted above. In reality, there was nothing more than speculation.

34. The Tribunal's merciful approach deserves respect. However, in our view it cannot be justified on the authorities. Mr Ohuaregbe was unable to establish how the ostarine came to be in his system. The only possible conclusion on the evidence, such as it was, is that Mr Ohuaregbe had not discharged the burden of showing that his Adverse Analytical Finding was not "intentional". We would only add that we are certainly not saying that Mr Ohuaregbe was a cheat. We are simply saying that he has not discharged an onus of proof which rested with him.

35. We now turn briefly to consider the cross-appeal. Mr Clemo very properly agreed that, if the appeal were to succeed, he could not pursue the cross-appeal. It is a pre-condition for establishing No Significant Fault or Negligence that an athlete prove how the Prohibited Substance entered his or her system. Mr Ohuaregbe has not been able to do so. In any event, we should say that we can see no ground whatsoever for criticising the approach of the Tribunal to their dismissal of the suggestion that there was No Significant Fault or Negligence. It appears to us that on this point the Tribunal was entirely correct. There could be no ground for interfering with the Tribunal's decision on this point.

**CONCLUSION**

36. In the result, and for the reasons set out above, we allow UKAD's appeal and dismiss Mr Ohuaregbe's cross-appeal. Mr Ohuaregbe's period of Ineligibility is four years in accordance with ADR Article 10.2.1. We agree with the Tribunal that the period of Ineligibility should run from the date of Sample collection, i.e. 10 March 2019. Neither party sought an order for costs.



Robert Englehart QC

For and on behalf of the Tribunal

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London, UK

Sport Resolutions (UK)
1 Salisbury Square
London EC4Y 8AE

T: +44 (0)20 7036 1966

Email: resolve@sportresolutions.co.uk
Website: www.sportresolutions.co.uk