

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

Before:

Charles Hollander QC (Chair)

Carole Billington-Wood

Prof Gordon McInnes

B E T W E E N:

UK ANTI-DOPING LIMITED (UKAD)

Anti-Doping Organisation

and

WILLIAM OHUAREGBE

Respondent

DECISION OF THE ANTI-DOPING TRIBUNAL

Introduction

1. The Claimant, UKAD, is the national anti-doping organisation in the UK. The Respondent, Mr Ohuaregbe, is a professional basketball player. BBE is the National Governing Body for basketball in England. BBE has adopted the UK Anti-Doping Rules (“ADR”) as its own anti-doping rules
2. Pursuant to the ADR, Mr Ohuaregbe was tested In-Competition at the British Basketball League Trophy Final (‘the Game’) between London City Royals and London Lions at the Emirates Arena, Glasgow on 10 March 2019. Mr Ohuaregbe’s Samples returned an Adverse Analytical Finding for ostarine (‘the AAF’). Ostarine is a non-Specified Substance that is prohibited at all times.
3. The presence of this Prohibited Substance in Mr Ohuaregbe’s Samples constitutes a violation of ADR Article 2.1. UKAD charged Mr Ohuaregbe in these terms on 30 April 2019. This is Mr Ohuaregbe’s first ADRV. In response, Mr Ohuaregbe has stated that he did not intend to ingest ostarine.
4. Mr Ohuaregbe does not dispute that, as a licensed competitor of the BBE and a participant in competitions and other activities organised, convened, authorised or recognised by BBE, he was at all times bound by and required to comply with the ADR. ADR Article 1.2.1 states:

These Rules shall apply to:

- a. all Athletes ... who are members of the NGB and/or of member or affiliate organisations or licensees of the NGB (including any clubs, teams, associations or leagues);*
- b. all Athletes ... participating in such capacity in Events, Competitions and other activities organised, convened, authorised or recognised by the NGB or any of its member or affiliate organisations or licensees (including any clubs, teams, associations or leagues), wherever held; ...*

5. Accordingly, by virtue of Mr Ohuaregbe’s registration and his participation in a BBE organised competition, he was, at all material times, subject to the jurisdiction of BBE and therefore bound by the ADR.

6. On 10 March 2019 at approximately 18:12, a Doping Control Officer ('DCO') collected two urine Samples from Mr Ohuaregbe (In-Competition), following the Game. The first urine Sample did not meet the suitable specific gravity (i.e. concentration) for analysis at a reading of 1.004, the requirement being at least 1.005 measured with a refractometer. Assisted by the DCO, Mr Ohuaregbe split the first urine Sample into two separate bottles, which were given reference numbers A1140626 ('the First A Sample') and B1140626 ('the First B Sample'). The DCO therefore requested a second urine Sample in accordance with Annex G.4.2 of the World Anti-Doping Agency ('WADA') International Standard for Testing and Investigations (the 'ISTI'). The second urine Sample did meet the suitable specific gravity for analysis at a reading of 1.010. Assisted by the DCO, Mr Ohuaregbe split the second urine Sample into two separate bottles, which were given reference numbers A4252021 ('the Second A Sample') and B4252021 ('the Second B Sample').
7. On his Doping Control Form ('DCF'), completed at the time the Samples were collected, Mr Ohuaregbe declared that he had consumed the following supplements in the seven days prior to Sample collection: (i) Universal Animal Flex (ii) BSN N.O. Xplode.
8. All urine Samples were transported to the WADA accredited laboratory, the Drug Control Centre, King's College London (the 'Laboratory'). The Laboratory analysed the First A Sample and the Second A Sample in accordance with Annex G.4.11 of the ISTI and the procedures set out in WADA's International Standard for Laboratories (the 'ISL'). This analysis returned the AAF.
9. Ostarine is listed under section S1.2 of the WADA Prohibited List 2019 as an 'Other Anabolic Agent'. Mr Ohuaregbe had no Therapeutic Use Exemption in place.
10. UKAD charged Mr Ohuaregbe with an ADRV pursuant to ADR Article 2.1 on 30 April 2019.
11. On 13 May 2019 Mr Ohuaregbe accepted the AAF, indicating that Use of a contaminated supplement must be the source of his AAF. In this response he augmented the supplements he declared on his DCF and stated that the '*supplements taken [by Mr Ohuaregbe] at about this time*' were: (i) Universal

Animal Flex (ii) BSN N.O. Xplode (iii) My Protein – Whey Protein Isolate (iv) Optimum Nutrition's Amino Energy (v) Applied Nutrition ABE and (vi) Cellucor C4 Sport.

12. By way of a witness statement dated 5 July 2019, Mr Ohuaregbe stated that he had not received *'any in depth education regarding anti-doping and the WADA Prohibited list'* but that he was *'well aware that the responsibility for what enters an athlete's system is on the athlete'*. Mr Ohuaregbe indicated he researched supplements online through customer reviews and checking their ingredients.
13. ADR Article 8.3.1 requires that the burden rest upon UKAD to establish the commission of the ADRV charged to the comfortable satisfaction of the Panel. ADR Article 2.1 is a strict liability offence. Article 2.1.1 expressly states that it is not necessary for UKAD to prove intent, fault, negligence or knowing use of the Prohibited Substance by Mr Ohuaregbe in order to sustain a charge for Presence. Nor is it the case that an alleged lack of intent, fault, negligence or knowledge is a valid defence to such a charge.
14. The issue before the Panel is sanction.
15. The period of Ineligibility to be applied is set out at ADR Article 10.2:

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

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 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.*

16. Therefore, the period of Ineligibility is four years unless Mr Ohuaregbe can establish that his actions were not intentional. The definition of intentional can be found at ADR Article 10.2.3:

10.2.3 *As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes ... who cheat. The term, therefore, requires that the Athlete ... engaged in conduct which he ... knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk...*

Not intentional?

17. By virtue of ADR Article 8.3.2, Mr Ohuaregbe must positively prove that his explanation as to the source of ostarine is more likely than not to be correct. In other words, the balance of probabilities standard *'requires the Athlete to convince the Panel that the occurrence of the circumstances on which the Athlete relies is more probable than their non-occurrence'*.
18. In *UKAD v Buttifant* the National Anti-Doping Appeal Panel concluded that the effect of Art. 10.2 placed the burden on the Athlete to satisfy the tribunal, as to how the Prohibited Substance came to be found in his or her body. Save in exceptional cases, unless the Athlete can show this, the Athlete cannot discharge the burden of showing that the doping was not intentional.
19. This presents a serious problem for an athlete who did not intentionally take steroids but has no idea how the Prohibited Substance came to be found in his or her body, and this is often the central issue before the tribunal. On the one hand, the rule can work unfairly against an honest athlete who genuinely cannot explain

the AAF, on the other hand it is the easiest thing in the world for an Athlete who has intentionally taken steroids to protest that the AAF is due to some contaminated supplement. The AAF is itself compelling evidence against the Athlete of intentional doping, and it is the Athlete, not the regulator, who has all the relevant knowledge. The rule represents a policy decision by WADA and UKAD.

20. Mr Ohuaregbe disclosed two supplements on his Doping Control Form. Although he disclosed four more in his response and witness statement, he said in evidence that he had not taken the other four for some time but put them down for completeness in his response. The other four can thus be ignored.
21. Mr Ohuaregbe's position was that the AAF was likely due to one of these two supplements, either because they contained ostarine (albeit that ingredient was not disclosed on the list of ingredients) or because there was some contamination which led to the presence of a small quantity of ostarine.
22. We do not consider this to be one of those exceptional cases referred to in *Buttifiant* where the tribunal can reach a conclusion as to the cause of the presence of the AAF other than as suggested by the Athlete.
23. Mr Ohuaregbe did not keep samples of the supplements which he had disclosed on the Doping Control Form, so they have not been tested. We have their names, and they seem to be available on a number of bodybuilding or similar websites. There is no suggestion in their ingredients that either did or could have contained ostarine.
24. One is *BSN N.O. Xplode*. Mr Ohuaregbe said that he had taken this since he was at college in the US where the team were supplied with it.
25. The other was *Universal Animal Flex*, which he said he took for joint strengthening. He had taken it since about October 2018 for his joints and a knee injury.
26. 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 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.
27. Firstly, we were influenced by Prof Wolff's evidence:

“Ostarine is illegally sold worldwide as a performance enhancing substance and any use is considered unauthorised. The US Anti-Doping Agency has demonstrated the prevalence of ostarine in a wide range of supplements used by athletes, and that ostarine has frequently been found as a product contaminant.”

28. We note that Prof Wolff and Nick Wojek’s evidence both conclude that they are unable to say whether the AAF was caused by a contaminated supplement or supplement containing ostarine. Whilst this perhaps does not take the matter much further, we remark that we have seen a number of UKAD cases where Mr Wojek is able positively to conclude that the suggested cause or explanation could not have been responsible for the AAF and that is not a conclusion reached here.
29. Secondly, the concentration of ostarine found was low. Whilst that could have been because it had been ingested some time before, that is equally consistent with contamination or a low level of ostarine in the supplement, as opposed to a deliberate dose.
30. Thirdly, Mr Ohuaregbe’s evidence was that he could not think of any other possible reason for the AAF. We found him a credible witness. For example, we noted that he was careful in oral evidence to explain the circumstances of taking the other four supplements listed in his response in terms which excluded the possibility of them being relevant: that was in a sense a concession made against his interest because it narrowed the possibilities in a way that made his case more difficult. We regarded that and the manner of his evidence as supporting his credibility.
31. We were therefore satisfied that the AAF was not intentional. Mr Ohuaregbe satisfied the burden of proof placed upon him.

No Significant Fault or Negligence

32. Having passed the initial threshold, which reduces the period of suspension to two years, we consider whether Mr Ohuaregbe can show No Significant Fault or Negligence.

33. For ADR Article 10.5.2 to apply, Mr Ohuaregbe, having established how ostarine entered his system, must then satisfy the Panel that if he bears any Fault or negligence for the ADRV, his Fault or negligence was not significant.

34. The extent of Mr Ohuaregbe's Fault for the presence of ostarine in his system is assessed against the strict personal duty imposed on him by the ADR to *'ensure that no Prohibited Substance enters his/her body'* and that he must *'take full responsibility for what he/she ingests and uses'*. That duty is only discharged *'with the exercise of utmost caution'*, and a player must make *'every conceivable effort to avoid taking a prohibited substance and leave 'no reasonable stone unturned'*. ADR Article 1.3.1 provides:

'It is the personal responsibility of each Athlete: ...

(d) to carry out research regarding any products or substances which he/she intends to ingest or Use (prior to such ingestion or Use) to ensure compliance with these Rules; such research shall, at a minimum, include a reasonable internet search of (1) the name of the product or substance, (2) the ingredients/substances listed on the product or substance label, and (3) other related information revealed through research of points (1) and (2);

(e) to ensure that any medical treatment he/she receives does not infringe these Rules'

35. Applying this test, we do not think Mr Ohuaregbe begins to satisfy it. His research into the products he was purchasing online was minimal. He may have looked at the ingredients list, but if he did, we do not think he would have had any awareness of what he was looking for. Supplements purchased on the Internet are fraught with difficulty and often a source of contamination or undisclosed ingredients. Athletes need to do proper due diligence on what they purchase and ingest in recognition of their obligation to exercise caution in what they ingest. We take into account what he said was his very limited education in doping. As UKAD submitted he appears to have chosen to consume those supplements having:

(a) Conducted what appears to be the most cursory of Internet searches;

(b) Not conducted an Informed Sport search;

(c) Not contacted BBE or UKAD for advice; or

(d) Not sought the advice of a suitably experienced (or any) medical or specialist practitioner.

36. We therefore conclude Mr Ohuaregbe has not satisfied us that he bore No Significant Fault or Negligence.

Education

37. We note that this is another case where a professional athlete told us that they had not received any formal training or education at all in the UK or Europe in relation to drug testing and contaminants, and minimal education in the US. We did not hear from Basketball England whether they accepted these comments, but we reinforce the importance of educating athletes to make the right decisions, and the importance of establishing educational programmes to that end.

Sanction

38. ADR Article 10.11 requires that, usually, sanction starts on the day of a decision. Article 10.11.3 requires that a player receives credit for any period of (respected) provisional suspension:

10.11 Commencement of Ineligibility Period

The period of Ineligibility shall start on the date of the final decision providing for Ineligibility, or if the hearing is waived, or there is no hearing, on the date Ineligibility is accepted or otherwise imposed, save as follows:

...

10.11.3 Credit for Provisional Suspension or period of Ineligibility Served:

(a) Any period of Provisional Suspension (whether imposed or voluntarily accepted) that has been respected by the Athlete ... shall be credited against the total period of Ineligibility to be serve ...

39. Mr Ohuaregbe was suspended on 30 April 2019 and, has respected the terms of the provisional suspension.

40. ADR Article 10.11.2 applies. The Rule states:

10.11.2 Timely Admission:

Where the Athlete ... promptly (which means, in any event, before he/she competes again) admits the Anti-Doping Rule Violation after being confronted with it by UKAD, the period of Ineligibility may start as early as the date of Sample collection or the date on which another Anti-Doping Rule Violation last occurred. In each case, however, where this Article is applied, the Athlete ... shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed. This Article shall not apply where the period of Ineligibility has already been reduced under Article 10.6.3.

41. Mr Ohuaregbe was charged on 30 April 2019. He accepted the charge on 13 May 2019. This was reinforced with the provision of his witness statement dated 5 July 2019. As such, the Panel takes the view that it can commence Mr Ohuaregbe's sanction from the date of Sample collection (10 March 2019).

Disposition

42. For the reasons set out above, the panel rules as follows;

(a) The Anti-Doping Rule Violation under Art 2.1 of the ADR has been established

(b) Mr Ohuaregbe having established that the Anti-Doping Rule Violation was not intentional, but not having established No Significant Fault or Negligence, the period of Ineligibility is two years.

(c) The period of Ineligibility will run until midnight on 9 March 2021.

Right of appeal

43. In accordance with Article 13.4 of the ADR Mr Ohuaregbe and the other parties named in Art. 13.4 of the ADR have a right of appeal to an appeal tribunal of the National Anti-Doping Panel. In accordance with Art 13.7. of the ADR, any party who wishes to appeal must lodge a Notice of Appeal with the NADP secretariat within 21 days of receipt of this decision.



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For and on behalf of the Tribunal
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