

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

Before:

Robert Englehart QC
Dr Terry Crystal
Lorraine Johnson

BETWEEN:

UK Anti-Doping

Anti-Doping Organisation

and

Adam Machaj

Respondent

DECISION OF THE TRIBUNAL

INTRODUCTION

1. We were appointed as the Tribunal to determine a charge brought by the Anti-Doping Organisation (“UKAD”) against Mr Machaj. He was formerly a professional heavyweight boxer licensed by the British Boxing Board of Control (“BBBoC”) until his licence expired, without being renewed, from 14 November 2018. He has now entirely retired from professional boxing. UKAD has been appointed by the BBBoC

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to administer its anti-doping rules (“ADR”). Jurisdiction and the application of the ADR on the present facts is not in dispute between the parties.

2. We held a hearing remotely through video conferencing software on 17 August 2020 at which we received evidence and heard the submissions of the parties. UKAD was represented by Nisha Dutt, and Mr Machaj was represented by James Green (instructed by Nicholas Damski of Lipman Karas). We are extremely grateful to the representatives for their able and thorough presentation of the respective cases. We should like to record our particular gratitude to Mr Green and Mr Damski for their *pro bono* representation of Mr Machaj.

THE CHARGE

3. By an undated Notice of Charge of 2 December 2019 Mr Machaj was charged by UKAD with violating Article 2.2 of the ADR by the use of three Prohibited Substances, namely clomifene, anastrozole and testosterone without having a Therapeutic Use Exemption (“TUE”). Of these three Prohibited Substances, Clomifene and Anastrozole are Specified Substances whilst testosterone is a Non-Specified Substance. Mr Machaj admits that he used all of these substances and that he therefore committed Anti-Doping Rule Violations. The sole issue concerns the appropriate sanction, in particular the length of the applicable period of Ineligibility.
4. Although we are concerned with Multiple Violations, the ADR prescribe by Article 10.7.4(a) that in this case they are to be treated as if they were one Anti-Doping Rule Violation and that for the purposes of Article 10.7:

the sanction imposed shall be based on the Anti-Doping Rule Violation that carries the more severe sanction.

5. There is no dispute between the parties that by reason of the above provision we have to treat these Multiple Anti-Doping Rule Violations by reference to the Non-Specified Substance, that is testosterone. In such a case, it is provided by ADR Article 10.2.1 that the period of Ineligibility is to be four years unless Mr Machaj can establish that the Anti-Doping Rule Violation was not intentional. Thus, the onus of proof is upon Mr Machaj if he is to avoid a four year period of Ineligibility. The term “intentional” is a term of art under the ADR. By Article 10.2.3 it is for present purposes provided that:

the term, therefore, requires that [Mr Machaj] 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.

For UKAD Ms Dutt realistically acknowledges that the real question in this case arises under the second part of Article 10.2.3. The essential issue is: Did Mr Machaj know that his ingestion of these Prohibited Substances gave rise to a significant risk that this might constitute or result in an Anti-Doping Rule Violation and manifestly disregard that risk?

6. We should also record that, if we find that Mr Machaj's conduct was not "intentional", Mr Green invites us to say that the period of Ineligibility should be further reduced below two years to one year. The basis for this contention is that there was No Significant Fault or Negligence on the part of Mr Machaj.

THE FACTUAL BACKGROUND

7. Mr Machaj was first licensed by the BBBoC as a professional boxer from 1 August 2013 although he had previously fought as an amateur when a teenager. It is fair to say that, despite his initial high hopes for a boxing career, Mr Machaj did not in the event make a great success of the professional sport. The evidence before us showed that he only ever had 11 professional bouts at modest venues. In his own words in evidence, he made virtually no money at all out of it. This ultimately prompted him to give up boxing entirely. He allowed his BBBoC licence to lapse and ceased being a professional boxer with effect from 14 November 2018. His last professional fight was on 19 May 2017. He is currently occupied with looking after his sick father in Poland and undertaking an Open University degree.
8. In 2015 Mr Machaj attended Peel House, his local GP centre, because he felt unwell and was suffering from erectile dysfunction. Blood tests showed that he had low testosterone, but the doctor who saw him said that the NHS could not assist. Mr Machaj then consulted a Dr Savage, whom he had located by an internet search as a doctor claiming to specialise in low libido problems. Dr Malik from Peel House wrote to Dr Savage:

Please see Adam who ... has found to have low testosterone. Apart from low libido there are no other major symptoms. He would like a further assessment to see if he needs testosterone treatment.

9. Dr Savage diagnosed hypogonadism and prescribed Clomifene or Clomid, one of the Prohibited Substances in this case. The drug had to be prescribed by Dr Savage himself rather than Peel House because, as Peel House wrote to Dr Savage (with copy to Mr Machaj), it was being "used in an unlicensed manner". Clomid did not produce appreciable benefits for Mr Machaj although his

testosterone level did improve somewhat. However, a side effect of the drug, which is normally prescribed as a fertility treatment for females, was that Mr Machaj was producing high oestrogen levels. Dr Savage then prescribed Anastrozole, to be taken in conjunction with Clomifene, with the intention of compensating for the extra oestrogen.

10. Mr Machaj did not find the combination of Clomifene and Anastrozole to be entirely satisfactory. In January 2018 he consulted Dr Savage again. This was shortly after the TV show to which we refer below was broadcast. Dr Savage now suggested that Mr Machaj take Nebido (testosterone) by injection in place of what he had been taking. Since then, Mr Machaj has continued to take Nebido regularly by injection at his local GP surgery. His evidence is that his testosterone levels have now improved significantly.
11. On 7 January 2018 an episode of the Channel 4 TV programme "SAS: Who Dares Wins" was broadcast. We were shown some clips from the show during Ms Dutt's opening. That episode (which had been shot in October 2017) featured Mr Machaj terminating his participation in the show. It also featured him being questioned about tablets of Clomid which had been found among his possessions. Mr Machaj claimed to have forgotten about them. When confronted with the suggestion that this was a performance enhancing drug like a steroid, Mr Machaj said that he had been asked about steroids "millions of times" but would never take them.
12. The day after the Channel 4 broadcast, UKAD was approached by a Mr Duffin with enquiries about Mr Machaj making a TUE application for Clomifene. Mr Duffin's relationship with Mr Machaj was rather obscure. He was apparently a property developer with interests in the boxing world but came to act for Mr Machaj in a quasi-managerial role. Certainly, Mr Machaj trusted him and looked to him for advice.
13. We do not need to go into the convoluted process of Mr Machaj's retrospective TUE applications. He commenced the process three times. Eventually, however, on 1 March 2019 the TUE Committee rejected Mr Machaj's TUE application. On 5 June 2019 the TUE Appeal Committee, after full consideration of the evidence, dismissed Mr Machaj's appeal.
14. Before turning to the evidence before us, we should also note that it is common ground that Mr Machaj has undoubtedly taken steps to conceal his taking of Clomifene and Anastrozole. In September 2016 he was required to undergo a full medical examination for the renewal of his BBBoC licence. At the examination he untruthfully informed the examining doctor, as recorded on the examination form, that he did not attend his doctor regularly, took no tablets or medicines regularly and had had no investigations like blood tests. Similarly, at the pre-contest medical for each boxing bout which Mr

Machaj contested he claimed not to be taking any medication or to be suffering from any illness. This was untrue.

15. Against the above background, we turn to consider the evidence which we heard.

THE EVIDENCE

16. We only heard evidence from one witness in person, namely Mr Machaj himself. Because they were not challenged, we also accepted in evidence written statements from Sam Pool and Alison Peacock.
17. Aside from the witness evidence, there was a considerable body of documentation put before us touching upon Mr Machaj's medical history as well as his retrospective TUE applications and the reasons for their failure. We shall not overburden this Decision with the detail. It is of interest and certainly shows that Mr Machaj's treatment was medically unorthodox. However, it appears to us that it is not central to the principal issue before us, that is whether Mr Machaj has satisfied us that he did not know that there was a significant risk that his taking of the drugs would lead to an Anti-Doping Rule Violation.
18. Mr Machaj is an intelligent man who demonstrated some understanding of medical matters and the physiological effects of the drugs which he has been taking. However, he has never received any formal anti-doping education and claimed not to have read the BBBoC handbook with its anti-doping information. He acknowledged that he had lied to the BBBoC medical practitioners and never disclosed what he was taking. This was, he said, for "reasons of embarrassment" in the "macho world of boxing". Mr Machaj told us that, after seeing Dr Savage, he mentioned his problems to Mr Duffin. Nevertheless, he disclosed nothing to anyone else, not even his family or girlfriend, because this was an embarrassing topic. Mr Duffin had said to him in 2015 that he had better keep it to himself, and this was also what he was thinking. Mr Machaj also confirmed that he had voluntarily attended at an interview with UKAD on 5 April 2018.

UKAD'S SUBMISSIONS

19. Ms Dutt commenced her submission by reminding us that the burden of showing a lack of "intention" lay upon Mr Machaj. Certainly, the ingestion of these Prohibited Substances was medically prescribed. However, there was no TUE. Moreover, we were invited to note the refusal of the Peel Practice to treat Mr Machaj on the NHS, the referral letter to Dr Savage stating that Mr Machaj was looking for

testosterone treatment and the Peel Practice letter to Dr Savage, copied to Mr Machaj, saying that “from a governance point of view we would be more comfortable if the prescribing of this medicine is best continued by you”. We were also referred to the Consent Form by which Mr Machaj confirmed to Dr Savage that, although Clomid was not licensed for use by men to increase testosterone, he was happy to have it prescribed. We were also reminded by Ms Dutt of the core responsibilities under ADR article 1.3.1, especially Article 1.3.1 (a) and (e), to ensure that any treating medical practitioner knows about, and that any treatment is compatible with, the ADR.

20. Ms Dutt urged us to find that, whilst Mr Machaj may not have had detailed knowledge of precisely what was a forbidden drug, he must have realised that the addition of testosterone to the body through drugs was illicit under the ADR. It was evident from what Mr Machaj himself said about steroids that he realised there were some drug prohibitions in boxing. There was no other credible explanation for his repeated lies to BBBoC medical practitioners.
21. Ms Dutt also referred us to two authorities. In *UKAD v Grammer* (NADP 4 January 2012) at paragraph 8.2 the Tribunal noted that “the Athlete was not entitled to follow blindly the recommendation of his Doctor”. In *World Athletics v Yator* (SR/360/2019), the Sole Arbitrator expressed his belief at paragraph 27.2.5 that there would be intentionality if an athlete “ought to have known” that there existed a significant risk of breach of the ADR.
22. We were invited to find that on the totality of the evidence Mr Machaj had not discharged the onus of showing a lack of intention. If, on the other hand, we were so satisfied then we would have to deal with the suggestion of No Significant Fault or Negligence. The points made by Ms Dutt in relation to intention also applied to this plea. We were referred to the Commentary to the World Anti-Doping Code which refers to “exceptional circumstances” being required for the plea. CAS has opined that “the utmost caution” is required: see *FIFA & WADA* (CAS 2005/C/976, 986). Furthermore, under ADR Article 1.3.1 an athlete has a personal responsibility to know that he, and anyone like a medical practitioner giving advice, knows what is permitted under the ADR.
23. In the present instance Mr Machaj took no steps whatsoever to check that what he was prescribed was permitted for a professional boxer under the ADR. Simply doing what he was told by Mr Duffin and Dr Savage is entirely insufficient to show No Significant Fault or Negligence. Thus, even were we to find a lack of intention such that the period of Ineligibility was reduced to two years, there would be no ground for any further reduction.

SUBMISSIONS FOR MR MACHAJ

24. For Mr Machaj we were invited by Mr Green to find that there was no intentional Anti-Doping Rule Violation. Mr Machaj had never received any anti-doping education for boxing and had never read any literature from the BBBoC which might have referred to anti-doping. He was entirely ignorant.
25. The medical reasons for Mr Machaj taking the Prohibited Substances in question had been fully explained. It was evident that Mr Machaj had done no more than follow the advice of a medical practitioner who was a specialist in the area of Mr Machaj's concern. He only obtained the Prohibited Substances on prescription and never used them for any other purpose than the treatment of his condition.
26. With hindsight it was regrettable that Mr Machaj had concealed his taking of Clomid and Anastrozole from the BBBoC doctors. However, he in fact obtained no competitive advantage, and his reasons for the concealment were entirely understandable. For a heavyweight male boxer in the "macho world" of boxing the condition from which Mr Machaj suffered was indeed embarrassing. It was not at all surprising that Mr Machaj wanted no-one to know about it and told no-one else at all other than briefly mentioning it to Mr Duffin, his confidant.
27. Leaving aside the failure to inform the BBBoC doctors, Mr Machaj has always been totally honest with UKAD. He voluntarily attended his interview, and it was only as a result of information which he himself voluntarily proffered on his TUE application that his use of Anastrozole and Nebido were disclosed. The reality is that Mr Machaj never gave any thought at all to the ADR or boxing's anti-doping rules. He was just following medical advice and never had any intention to commit an Anti-Doping Rule Violation.
28. Mr Machaj should have investigated with the BBBoC whether the drugs which he was taking were permissible. Nevertheless, it was submitted that there were features suggestive of No Significant Fault or Negligence, that is to say:
 - (1) Mr Machaj took the drugs on medical advice to treat a medically diagnosed condition;
 - (2) There was no intention to obtain a competitive advantage, and none was in fact obtained;
 - (3) He was ignorant of the ADR and had received no anti-doping education;
 - (4) He had been honest and open with UKAD.
29. Finally, even if we were to reject the plea of No Significant Fault or Negligence, we were invited to moderate any twoyear period of Ineligibility on the ground that it would not be proportionate. Although briefly mentioned in his written opening, this suggestion was not developed by Mr Green in oral argument.

DISCUSSION

30. For the use of Prohibited Substances which, as here, include testosterone, the starting point under the ADR is undoubtedly a period of Ineligibility of four years. It is only if Mr Machaj can satisfy us on the balance of probability that his conduct was not “intentional”, as that term is defined in the ADR, that we would be entitled to impose a lesser sanction. Intention must, of course, be assessed in accordance with the Article 10.2.3 test. We agree with the parties that the real question here is whether Mr Machaj knew that his taking of the drugs in question might involve a significant risk of an Anti-Doping Rule Violation but manifestly disregarded the risk.
31. We should preface our consideration of the evidence by saying that we agree with Mr Green that the question is what Mr Machaj knew, not what he ought to have known: cf. *UKAD v Normandale* (SR/NADP/86/2019), especially at [23]. We are concerned with his actual state of mind. In our view, the observations of the Sole Arbitrator in the *Yator* decision, to which Ms Dutt referred us, go too far and do not reflect what Article 10.2.3 actually says. Having said that, it is of some assistance in assessing what a person in fact knew to do so against a background of what he should have known.
32. We agree with Mr Green that Mr Machaj did not take these drugs in order to gain a competitive advantage over opponents. We accept that Mr Machaj took these drugs for medical reasons. The amount of testosterone in his body is naturally lower than in the average person, and Mr Machaj did indeed wish to increase the amount of testosterone in his body. Nevertheless, we do have difficulty with the proposition that any ordinary person could think that the artificial ingestion of testosterone in a boxer might be compatible with any anti-doping code. Mr Machaj’s medical treatment was on any showing unorthodox and he was told about Clomid not being licensed for his use. This must have raised some suspicion in his mind.
33. Mr Machaj may not have paid any attention to, or even been aware of, the specific requirements of the ADR. Nevertheless, he is clearly a person of intelligence with connections in the world of boxing. He also told us how he had worked as a personal trainer at a gym and had undertaken a year’s course in personal training. Such a person would undoubtedly be likely to know that there are drugs which are prohibited in sport. We are satisfied that Mr Machaj did at least know that there were controls on the taking of drugs within boxing. Indeed, what he said in his UKAD interview and on the Channel 4 TV programme about steroids indicated an appreciation that some drugs are impermissible in a sporting environment.
34. We also take into account that Mr Machaj certainly concealed what he was taking from the BBBoC. His explanation was that this was because of embarrassment at his condition. We can understand that Mr

Machaj did not want general publicity for his condition. Nevertheless, we did not find this embarrassment to be a convincing explanation for not informing the BBBoC doctors in confidence. He was perfectly content to discuss the matter with Dr Malik of Peel House, whom he did not know, as well as Dr Savage. We consider that the most likely explanation for the lies to the BBBoC doctors was that Mr Machaj realised that what he was taking by way of drugs was likely to be prohibited. This was a risk which Mr Machaj manifestly disregarded. In our view that is also the likely explanation for Mr Duffin telling him not to tell anyone about what he was taking.

35. Mr Duffin has suggested that he knew nothing about what Mr Machaj had been taking until the Channel 4 TV programme was broadcast. However, that is to be contrasted both with Mr Machaj's evidence and with what he said in an email of 18 April 2020: "[I] was advised by my team to keep my mouth shut about the matter in regards to treatment from the start".
36. For the reasons set out above, we have not been persuaded by Mr Machaj that his use of the Prohibited Substances was not intentional (within the meaning of Article 10.2.3 of the ADR). He has not discharged the onus of proof, and it follows that the period of Ineligibility is one of four years pursuant to ADR Article 10.2.1. In his evidence, Mr Machaj frankly acknowledged that he had lost his interest in boxing and that his health was far more important to him than boxing. The risk of these drugs being forbidden for a boxer was of much less importance to Mr Machaj than addressing his perceived testosterone deficiency.
37. In the light of our conclusion on intention, we do not need to consider the question of a reduction in sanction on account of No Significant Fault or Negligence. It is sufficient for us to note that if we had had to address the question we would not have found that there was No Significant Fault or Negligence. The reality is that Mr Machaj took no steps at all to check the compatibility of these drugs with professional boxing in circumstances where, as explained above, he knew that there was at least a significant risk that they were prohibited and manifestly disregarded that risk.
38. Finally, we note Mr Green's point on proportionality. The extent to which, if at all, a Tribunal would be entitled to lessen the otherwise applicable sanction on the basis of the Tribunal's view of what is proportionate is highly questionable. In any event, the ADR are quite clear that the sanction for an "intentional" Anti-Doping Rule Violation consisting of the use of a Prohibited Substance is a four year period of Ineligibility. This is entirely consistent with the current WADA Code which was the product of

very considerable scrutiny and debate. Our obligation as a Tribunal is to apply the ADR. It is not a matter of discretion. We reject the appeal to proportionality as a freestanding argument.

CONCLUSION

39. In conclusion, for the reasons set out above, we find that:

- (1) the admitted Anti-Doping Rule Violations are established; and
- (2) the applicable period of Ineligibility is one of four years.

As noted, Mr Machaj has given up boxing and ceased to hold a BBBoC licence from 14 November 2018. Thus, the sanction we impose may be thought in any event to be somewhat academic in practice. However, the parties were agreed that in the particular circumstances of this case any sanction should run from the date when Mr Machaj ceased to hold a professional licence and thus be subject to the ADR in accordance with ADR Article 10.11.2 (Timely Admission). We so direct. Furthermore, all Mr Machaj's results in contests since September 2015, when he commenced taking Clomifene, are Disqualified pursuant to ADR Article 10.8. Finally, both parties are reminded that they have a right of appeal against this Decision.



Robert Englehart QC (Chair)

For and on behalf of the Tribunal

London

04 September 2020

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