SR/056/2021

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

Before:

Kate Gallafent QC (Chair)
Lorraine Johnson
Dr Terry Crystal

BETWEEN:

UK Anti-Doping Limited ("UKAD")

Anti-Doping Organisation

and

Philip Bowes

Respondent

DECISION OF THE NATIONAL ANTI-DOPING PANEL

A. Background and procedure

1. On 16 October 2020 the United Kingdom Anti-Doping ("UKAD") charged Philip Bowes with a violation of Article 2.1 of the UK Anti-Doping Rules ("ADR")[1] arising from an Adverse Analytical Finding ("AAF") indicating the presence of a Prohibited Substance or its

[1] Version 2.0, in effect as from 1 October 2019. The Panel agrees with UKAD that no issue of *lex mitior* arises in the case such that it is necessary to have regard to the Version 1.0 of the 2021 ADR, in effect as from 1 January 2021.

Metabolites or Markers (ostarine) in a Sample collected from him In-Competition on 2 September 2020. The indicative estimate for the concentration of Ostarine in the A Sample was approximately 0.5 ng/ml.

2. The Sample collection took place immediately after Mr Bowes' fight against Akeem Ennis-Brown, in which Mr Bowes was defeated by unanimous decision. At that time Mr Bowes, then aged 37, was licensed by the British Boxing Board of Control, which had adopted the ADR.

3. On 2 November 2020, Mr Bowes' previous legal representatives requested analysis of the B Sample, but declined to confirm whether he admitted the charge in circumstances where he did not know whether ostarine was in fact present in his Sample and, if so, its source.

4. The B Sample analysis took place on 24 November 2020 and Mr Bowes was notified of the result on 1 December 2020. The B Sample analysis confirmed the presence of ostarine. The indicative estimate for the concentration of ostarine in the B Sample was approximately 0.3ng/ml.

5. On 11 December 2020 Mr Bowes admitted that ostarine was present in his Sample, but asked to be afforded until at least 31 January 2021 to complete his investigations into how it came to be there and provide his explanation for it accordingly. UKAD agreed to an extension to provide a substantive response to the Notice of Charge to 18 January 2021. The deadline was subsequently extended to 1 February 2021 by agreement. Mr Bowes then asked for a further extension to 15 February 2021, in response to which UKAD agreed to an extension only until 5 February 2021.

6. In the absence of a substantive response by that date, on 15 February 2021 UKAD requested that an NADP Tribunal be convened to determine the charge against Mr Bowes.

7. The President of the NADP duly appointed the Chair on 1 March 2021, and the other members of the Tribunal were subsequently appointed on 20 April 2021.

8. On 9 March 2021, the Chair held a directions hearing by telephone at which Mr Bowes was represented by Richard Martin and Tom Seamer (Morgan Sports Law) and UKAD was represented by Tom Middleton.

9. Although the parties had agreed directions prior to the hearing, in the light of the fact that the ADR provides that the Athlete must respond to the Notice of Charge by a specified deadline of "*not more than twenty (20) days, which may be extended only in exceptional cases"* (Article 7.11.3(d)), the Chair sought the parties' assistance on what was said to be exceptional about this case.

10. Mr Seamer explained that Mr Bowes was having some supplements tested in France and that there had been severe delays, such that the supplements had not yet been tested. The supplements had been sent on 8 February 2021 but were not received by the laboratory until 3 March 2021. The reason why the supplements had not been sent sooner was that Mr Bowes is of limited means such that he has been unable to investigate or commission several avenues of investigation simultaneously rather than consecutively, as well as delays caused by the intervening Christmas period.

11. The Chair's view was that were the case to have come before her sooner, it was doubtful that she would have considered that it was 'exceptional' such as to justify an extension of the deadline for responding to the Charge Letter of the length by then effectively required (20 April 2021), even taking into account the time taken for the analysis of the B Sample. However, as at the date of the directions hearing she accepted that the circumstances were such as to justify Mr Bowes having until 20 April 2021 to provide his substantive response, taking into account the uncertainty as to when the French laboratory would provide its report, as well as the potential need for him to instruct an expert (who might be asked to act *pro bono*) thereafter. UKAD agreed.

12. In the circumstances, the Chair considered that the requirement under the Procedural Rules that the hearing should take place "*no later than forty (40) days after the NADP Secretariat receives the Request for Arbitration, save where fairness requires, or the parties otherwise agree"* (Article 7.9.1) was met.

13. In accordance with the Chair's directions, Mr Bowes provided his response to the Notice of Charge (in the form of a witness statement) on 20 April 2021, by which time Mr Bowes had instructed a new legal representative. Mr Bowes exhibited to his witness statement three Certificates of Analysis for ostarine testing on various supplements and products and a

Certificate of Analysis for nail testing for ostarine.

14. On 18 May 2021 UKAD filed an Expert Report from Professor David Cowan (Professor Emeritus in Pharmaceutical Toxicology, King's College London) and a Witness statement of Nick Wojek (Head of Science and Medicine at UKAD).

15. In response, Mr Bowes filed an Expert Witness Statement from Professor Pascal Kintz (Professor of Legal Medicine, University of Strasbourg), and a character statement from Michael Helliet (Mr Bowes' boxing manager for the past 5 years).

16. UKAD filed its submissions on 17 June 2021.

17. The hearing took place on 15 July 2021, by video conference, in the light of the current COVID-19 pandemic.

18. Mr Bowes gave evidence and was cross-examined on behalf of UKAD (represented by Mr Middleton), as did Professor Kintz. Professor Cowan gave evidence and was cross-examined on behalf of Mr Bowes (represented by Ms Alecsandra Manning-Rees). Mr Wojek was not required to be called as his evidence was accepted by Mr Bowes.

19. We would express our gratitude to all representatives for their assistance.

B. Legal Framework

20. The burden rests on UKAD to establish the commission of an Anti-Doping Rule Violation ("ADRV") to the comfortable satisfaction of the Panel (ADR Article 8.3.1).

21. ADRVs are defined at Article 2 of the ADR, which provides that the following constitutes an ADRV:

> *"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 his/her body. An Athlete is responsible for any Prohibited Substance or any of its*

Metabolites or Markers found to be present in his/her Sample. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an Anti-Doping Rule Violation under Article 2.1; nor is the Athlete's lack of intent, Fault, negligence or knowledge a valid defence to a charge that an Anti-Doping Rule Violation has been committed under Article 2.1.

2.1.2 Proof of any of the following to the standard required by Article 8.3.1 is sufficient to establish an Anti-Doping Rule Violation under Article 2.1:

(a) Presence of a Prohibited Substance or any of its Metabolites or Markers in the Athlete's A Sample, where the Athlete waives his/her right to have his/her B Sample analysed and so the B Sample is not analysed;

(b) Where the Athlete's B Sample is analysed and such analysis confirms the presence of the Prohibited Substance or any of its Metabolites or Markers found in the Athlete's A Sample; […]"

22. Where an ADRV is established, 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,[2] *unless the Athlete or other Person can establish that the Anti-Doping Rule Violation was not intentional.*

[2] Ostarine appears at Section S1.2 (Other Anabolic Agents) of the WADA Prohibited List 2020; it is not a Specified Substance and is prohibited at all times.

(b) ...

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

10.2.3 As used in 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..."

"Intentional"

23. In the case of *Thomas Curry v UKAD (Appeal)* SR/NADP/968/2017 the Sole Arbitrator considered of the word 'cheat' in ADR Article 10.2.3. He stated:

"In construing this provision, it is important to bear in mind that a 'presence' ADRV is a 'strict liability' violation. Per ADR Article 2.1.1 it is expressly provided that questions of fault, intent, negligence are not relevant considerations as to whether an ADRV in terms of ADR 2.1 has been committed. In terms of ADR Article 2.1.2(a), mere presence of a Prohibited Substance in an A Sample is sufficient to constitute the ADRV. Accordingly, when considering the intention of an Athlete, for the purposes of ADR Article 10.2.1(a), in ingesting a Prohibited Substance, which is Specified Substance, whether the Athlete intended to gain a competitive advantage by so ingesting is not a question to which the provision is addressed. Rather, the relevant question is whether the Athlete intended, within the meaning of ADR Article 10.2.3 that the Prohibited Substance or its Metabolites or Markers be present in his system so that it or they would be present in a Sample provided by him in the event that he was required to provide a Sample…" (§23)

24. The issue of what an athlete is required to demonstrate in order to satisfy the burden of proof that the ADRV was not intentional has been considered by a number of Tribunals of the UK National Anti-Doping Panel. See, for example:

24.1. *UKAD v Buttifant*[3]

"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

[3] UKAD v Buttifant SR/NADP/508/2016 (Appeal)

of ingestion." (§31)

24.2. *UKAD v Songhurst*[4]

"In any normal case knowledge concerning how the substance came to be in the body is uniquely within the knowledge of the athlete and UKAD can only go on the scientific evidence of what was found in the body. The scientific evidence of a prohibited substance in the body is itself powerful evidence, and requires explanation. It is easy for an athlete to deny knowledge and impossible for UKAD to counter that other than with reference to the scientific evidence. Hence the structure of the rule." (§29)

24.3. *UKAD v Graham*[5]

"…were [the Athlete's] *approach to be adopted by this Tribunal then our decision would effectively be an invitation to unscrupulous athletes in the future simply to deny all knowledge of the source of a prohibited substance with the aim of reducing … a four year ban to two years. In the majority of cases, particularly where ingestion could have resulted from a number of different methods, it would be difficult if not impossible for UKAD to go behind such protestations of innocence. In short, the new scheme established by the 2015 WADA Code … would be fundamentally undermined at the outset.*" (§45)

24.4. *UKAD v Williams*[6]

"Mr Williams must establish how the Prohibited Substances came to be present in his system. Although there is no explicit requirement in the wording of Article 10.2.3 in this regard, the Panel agrees with UKAD's submission that without being satisfied as to the method of ingestion, the Panel is not able to make a proper assessment of intention." (§25)

25. Where an athlete is required to establish the source of a Prohibited Substance, the applicable principles have been summarised by CAS in *Guerrero v FIFA*[7] as being that:

"(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…

[4] UKAD v Songhurst SR/0000120248
[5] UKAD v Graham SR/0000120259
[6] UKAD v Williams SR/0000120251

[7] CAS 2018/A/5546

> (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…*
>
> (iii) *An athlete had to do so with evidence, not speculation …*
>
> (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…*
>
> (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..."* (§65)

26. Nevertheless, the establishment of the source of the prohibited substance in an athlete's sample is not a *sine qua non* of proof of absence of intent: see *Villaneuva v FINA:*[8]

> "*the Panel can envisage the theoretical possibility that it might be persuaded by an athlete's simple assertion of his innocence of intent when considering not only his demeanour, but also his character and history (it is recorded if apocryphally, that the young George Washington admitted chopping down a cherry tree because he could not tell a lie. Mutatis mutandis the Panel could find the same fidelity to the truth in the case of an athlete denying a charge of cheating). That 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."* (§37)

27. The CAS Panel in that case also emphasised that it did not need to be satisfied that the athlete did cheat:

> "*The choice before it was not binary. As Lord Brandon, an English Law Lord, said in The Popi M 1985 1 WLR 984 "a judge (or arbitrator) can always say that 'the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden' [p. 955]*".

28. A differently constituted CAS Panel (but containing the President of the Panel in *Villanueva*) in the case of *WADA v WSF & Nasir Iqbal*[9] subsequently followed its reasoning on the issue

[8] CAS 2016/A/4534, followed in *Lawson v IAAF* CAS 2019
[9] CAS 2016/A/4919

of intent, subject to one point:

"65. This Panel would wish in the interests of clarification to comment on one aspect of the reasoning in CAS 2016/A/4534 at paragraph 37 where it is stated "[…] the Panel can envisage the theoretical possibility that it might be persuaded by an athlete's simple assertion of his innocence of intent when considering not only his demeanour, but also his character and history (it is recorded if apocryphally, that the young George Washington admitted chopping down a cherry tree because he could not tell a lie. Mutatis mutandis the Panel could find the same fidelity to the truth in the case of an athlete denying a charge of cheating)". This Panel does not construe this passage in CAS 2016/A/4534 to mean that a mere denial by an athlete of intent to cheat would ever be dispositive. It recalls that not only was George Washington in the apocryphal tale someone endowed with qualities not enjoyed by ordinary humans of being incapable of telling a lie but that his inbuilt inability to do so led him to admit to guilt not to proclaim his innocence. It is confident in this interpretation since it was also said in CAS 2016/A/4534: "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''.

66. So while this Panel assumes in favour of the Athlete that he does not have to necessarily establish how the prohibited 19-NA entered his system when attempting to prove on a balance of probability the absence of intent, in all but the rarest cases the issue is academic."

<u>Reduction in the period of Ineligibility</u>

29. The period of Ineligibility may be reduced, so far as potentially relevant in this case, in the following scenarios:

"10.4 ***Elimination of the Period of Ineligibility where there is No Fault or Negligence***

If an Athlete or other Person establishes in an individual case that he/she bears No Fault or Negligence for the Anti-Doping Rule Violation charged, then the otherwise applicable period of Ineligibility shall be eliminated.

10.5 ***Reduction of the period of Ineligibility based on No Significant Fault or Negligence***

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Anti-Doping Rule Violations under Article 2.1, 2.2 or 2.6

…

(b) Contaminated Products

In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault."

30. These terms are in turn defined in the Appendix: Definitions to the ADR:

> ***"Fault***
>
> *Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk.* […]"
>
> ***"No Fault or Negligence:***
>
> *The Athlete or other Person establishing that he or she did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his/her system."*
>
> ***"No Significant Fault or Negligence****:*
>
> *The Athlete or other Person establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relation to the Anti-Doping Rule Violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his/her system."*

31. In considering what is meant by "*utmost caution"* the starting point is ADR Article 1.3.1 which provides that:

"It is the personal responsibility of each Athlete:

> *(a) to acquaint him/herself, and to ensure that each Person (including medical personnel) from whom he/she takes advice is acquainted, with all of the requirements of these Rules, including (without limitation) being aware of what constitutes an Anti-Doping Rule Violation and of what substances and methods are on the Prohibited List;*
>
> *[…]*
>
> *(c) to take full responsibility for what he/she ingests and uses;*
>
> *(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; [...]"*

32. The CAS has held that "*only in the event that the anti-doping rule violation is held to be not intentional, is there any warrant for an examination of the Player's fault or negligence"* (*WADA v IIHF & F* at [73]).[10]

C. The Evidence

33. Mr Bowes admits that the presence of ostarine in his Sample constituted a violation of ADR Article 2.1.

34. His evidence was that he had never knowingly taken ostarine, nor had he at any time reason to believe that he had taken it inadvertently. Following receipt of the Notice of Charge, he decided to proceed with a source investigation, with the assistance of his then legal

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[10] CAS 2017/A/5282

representatives and his fiancée (herself a lawyer, but not in the sphere of sports law). On 29 December 2020 (following delays because of border closures as a result of COVID-19) he sent all the supplements that he had used between 2 July and 2 September 2020 inclusive to Professor Kintz to be tested for ostarine contamination. In his report dated 13 January 2021 Professor Kintz stated that none of the supplements tested positive for ostarine.

35. On 4 February 2021 Mr Bowes sent a further 16 supplements and topical creams/gels that he had used prior to 2 July 2021 for testing by Professional Kintz. In his reports dated 10 and 12 March 2021 (there having been customs delays in receiving the substances as a result of the UK leaving the EU) Professor Kintz stated that none of the supplements or creams/gels tested positive for ostarine.

36. On 11 April 2021 Mr Bowes' fiancée contacted Professor Kintz directly to ask if he could assist further in reporting on the AAF. Mr Bowes then sent samples of his finger and toe nails to Professor Kintz, who undertook an ostarine analysis and in his report dated 14 April 2021 stated that the results revealed no trace of ostarine in his toenails or finger nails.

37. Mr Bowes told the Panel that he had been a professional boxer since 2011 and prior to this case had never been charged with an ADRV. He had been involved in a few title fights that had lasted 12 rounds and at all of those fights he had been asked to provide a urine Sample, so he knew that his urine would be tested on 2 September 2020, when he was fighting for the vacant British Title. It was his 24th professional fight. The previous time that he had been tested had been in 2019, after which three fights had been cancelled and he had not fought in a year and a half.

38. He said that he has always been extremely careful about what he consumes to ensure that he does not violate the ADR, and even when he is unwell there are certain medications that he avoids. Prior to taking any new supplements he, his trainers and his sponsor (the Health Shop UK Ltd) screen the list of ingredients for any prohibited ingredients. Where supplements aren't provided by his sponsor the list of ingredients were screened by himself and his trainers, and where possible he takes supplements that are Informed Sport Registered.

39. He said that it would have made no sense for him to take ostarine for 'bulking' as he had never had a problem with meeting the limits of his weight category and he is naturally muscular.

40. In response to questioning on behalf of UKAD Mr Bowes confirmed that he had taken all 10 of the supplements that he had initially sent to be tested up until the day of the fight. When asked about his response on the Doping Control Form to the declaration of medication asking him to "*provide details of any prescription / non-prescription medication or supplements taken in the last seven days, including dosage where possible"*, to which Mr Bowes had answered "Multi Vitamins", Mr Bowes initially said that multiple vitamins just meant a multiple of vitamins. Asked if he had considered that answer at the time, he said that it was late, he had to get stitches, he was tired and dejected and he wanted to go home.

41. When asked by the Tribunal about the various products that he had taken between 2 July and 2 September 2020 (of which there were in fact seven different products – Mr Bowes had sent Professor Kintz three of the same bottles of Ashva-gandha, one of which was empty) Mr Bowes confirmed that one was an electrolyte rehydration product, one magnesium that would be added to a bath, one an all-round herbal health product, one a probiotic and three were testosterone boosters. (We note that although Mr Bowes did not describe any of the products as vitamins, having subsequently checked the products on-line, the product described by Mr Bowes as a probiotic (Ivit) was in fact a multivitamin).

42. Mr Bowes was also asked about steps that he had taken to show that the nail clippings analysed by Professor Kintz were his. He said that he had taken a photograph of his nail clippings and sent it to Professor Kintz, but could not explain why that photograph had not been provided. Following a suggestion by the Tribunal that Mr Bowes had the opportunity to look for the photograph Ms Manning-Rees helpfully indicated that she already had a copy of the email attaching photographs which were sent to Professor Kintz, and this was provided to the Tribunal. The photographs were in fact of Mr Bowes' hands and feet, rather than the actual clippings.

43. The expert opinion of Professor Cowan was that although it is possible that a small amount of ostarine had been inadvertently administered by Mr Bowes, it is also feasible that a larger pharmacologically effective dose had been administered two or three weeks before the urine

Sample was collected. He was unable to state which of the two scenarios was the more likely. Professor Cowan did not consider that the apparent absence of the finding of a substance in the fingernail and toenail analysis was necessarily the opposite of the finding of that substance in terms of evidential value; whilst an AAF is only issued where the relevant substance has been reliably identified in the Sample, which means a large enough concentration to ensure that identification, Professor Kintz's analytical statement in relation to the nails analysis simply meant that he was unable to identify the presence of ostarine above his limited of identification.

44. Professor Cowan accepted in cross-examination that there was no indication in evidence before him of any long-term ostarine use by Mr Bowes, but did not accept that there was no physiological benefit from taking this type of drug as a 'one off'. He suggested that athletes will sometimes just try something, not like it and not take it again, even if a sufficient dose would be required over a sufficient period of time for e.g. a bulking cycle. He had not seen anything to suggest that it would be beneficial to take ostarine for a period running up to a bout, although it could be used after a bout to recover by stopping the catabolic cycle. He suggested that an athlete might take it thinking it was something else, or on the recommendation of someone else, in the nature of trying things.

45. In his expert report Professor Kintz identified a number of anti-doping cases in which hair samples had been accepted by CAS and international federations in support of a reduction or elimination of sanction for an AAF, and stated that nails could replace hair as a matrix of evidence in such cases. He identified two recent papers published by his laboratory on this issue: Kintz, P., Gheddar, L., Raul, JS. (2021) Testing for anabolic steroids in human nail clippings. Journal of Forensic Sciences, doi: 10.111/1556-4029-14729, and Kintz, P., Gheddar, L., Ameline, A., Raul, JS. (2020) Identification of S22 (ostarine) in human nails and hair using LC-HRMS. Application to two authentic cases. Drug Testing and Analysis, 12, 1508-1513.

46. Professor Kintz accepted that "*some parameters about the detection of ostarine in nail have not been addressed: dose necessary to give a positive result, repeatability, robustness, contamination, carry-over, interferences, variable incorporation into nail, external factors that may have an impact, etc. The minimum dose that had to be ingested by the athlete in order to get a "positive" detection in nail is unknown.*"

47. He agreed with Professor Cowan that the concentration in Mr Bowes' urine was small and could be indicative of two different situations: incidental ingestion from a contaminated dietary supplement or tail-end elimination following an administration regimen. However, his view was that the negative nail test of Mr Bowes, with a limit of detection of 1 pg/mg does not support repetitive administration of ostarine (i.e. the second situation). He strongly maintained that a minute contamination is responsible for the AAF of Mr Bowes.

48. His evidence before the Tribunal was that there is no interest in using ostarine as a one-off, and that on a balance of probabilities it was possible to exclude repeated use of ostarine, taking into account the low level of it in Mr Bowes' urine, Mr Bowes' strong denial and the absence of ostarine in the nail clippings. He could not say that 100% the nail clippings belonged to Mr Bowes, as there was no evidence to show where they came from. He agreed with Professor Cowan that much work still needed to be done in terms of development of nail analysis, although noted that the same was true for urine. He agreed that it was equally possible that the presence of ostarine in Mr Bowes' Sample had come from a one-off dose as from contamination, but said that it would be absolutely stupid to use it one time.

49. The (agreed) evidence of Mr Wojek was that:

49.1. Ostarine is a selective androgen modulator ('SARM') designed to have similar pharmacological effects to testosterone but with fewer side effects.

49.2. Ostarine is not approved for human use anywhere in the world; it can therefore only be purchased on the black market in oral (tablet or liquid) form.

49.3. Ostarine is often marketed illegally as a dietary supplement claiming to promote muscle building. It is also purported to maintain lean body mass when administered in conjunction with training and a controlled diet.

49.4. The concentration of ostarine found in Mr Bowes' Sample is small and could be indicative of either:

49.4.1. inadvertent ingestion of ostarine (as a contaminant within a supplement product); or

49.4.2. ‘tail end’ elimination of ostarine following an administration regimen finishing in the weeks leading up to the fight on 2 September 2020.

49.5. A compound with the properties of ostarine could appeal in the sport of boxing as improving one’s power-to-weight ratio by becoming leaner is an effective way to enhance muscular power, speed and agility.

D. Issues

Can Mr Bowes establish that the ADRV was not intentional?

50. Mr Bowes accepts that he cannot demonstrate the source of the ostarine in his system. Although he asserts that it came from a Contaminated Product, none of the supplements or products used by him that he had tested were shown to be contaminated with ostarine.

51. He therefore relies upon Professor Kintz’s evidence, as well as his character as a man of integrity, his conduct as a positive role model in the wider community, in seeking to pass through the “*narrowest of corridors”* identified in *Villanueva*.

52. So far as Professor Kintz’s evidence is concerned, UKAD’s starting point is that it does not accept that the fingernail and toenail analysis that has been provided in this case has any probative value, in reliance on the WADA International Standard for Laboratories (“ISL”) Version 10.0 November 2019 Paragraph 5.3.4.5.6 which stated:

> “**Alternative Biological Matrices**
>
> *Any negative Analytical Testing results obtained from hair, nails, oral fluid or other biological material shall not be used to counter Adverse Analytical Findings or Atypical Findings from urine or blood (including whole blood, plasma or serum).”*

53. However, Mr Bowes does not seek to argue that the AAF reported in respect of his urine Sample was wrong, based on the analytical testing results obtained from his nails. Rather, he seeks to put the AAF into what he considers to be its proper context, that is, the absence of evidence of protracted use. In our view he is therefore not seeking to deploy the results from his nails to “*counter”* the AAF in this case. His use of the analysis of nail testing

therefore cannot be excluded in principle.

54. So far as the probative value of the analysis itself is concerned, UKAD point to the absence of any chain of custody documentation to provide assurance of the integrity of the nail samples as coming from Mr Bowes. We note that Mr Bowes' fiancée is a solicitor, although we did not hear evidence from her directly, and we were provided with the email that she had sent Professor Kintz prior to the clippings being sent to him. In our view, whilst we understand that at this point Mr Bowes was no longer being assisted by his original legal representatives and it may be thought understandable that this issue was not considered by Mr Bowes and/or his fiancée, it is highly unsatisfactory for this to have been done without proper records to prove that the clippings received by Professor Kintz were those of Mr Bowes.

55. UKAD also emphasises the number of caveats which Professor Kintz himself attached to analysis of nail samples, and in particular the absence of any scientific consensus or understanding of how much ostarine needs to have been taken in order to be present in a nail. We agree that such caveats are highly relevant to the probative value of the nail testing analysis.

56. We also note that Professor Kintz's view that the possibility of repeated use could be excluded was not based solely on the nail analysis, but also on the low level of ostarine in Mr Bowes' urine as well as his 'strong denial'. However, so far as the low level of ostarine is concerned, Professor Kintz accepted that one possible scenario consistent with that low level was tail-end elimination following an administration regimen, so in itself it cannot mean that it is more likely than not that ingestion was accidental.

57. We have also taken into account the evidence of both Professor Cowan and Professor Kintz as to the apparent lack of beneficial effect on improvement of a single dose of ostarine, but remind ourselves that the alleged lack of usefulness of a Prohibited Substance in a particular sport does not provide proof that an athlete did not intentionally take such substance (*Iqbal* at §74).

58. So far as Mr Bowes' denial is concerned, we have had regard both to the CAS Panel's reminder in *Villanueva* that "*the currency of such denial is devalued by the fact that it is the common coin of the guilty as well as of the innocent*" (§41), as well as the Sole Arbitrator's

view in *Jack v Swimming Australia & ASADA*[11] that "*it would be an over-cynical and wrong approach to the evidence of people such as the Applicant to start with the presumption that what they say is not to be believed or can only be believed if corroborated by other objective evidence"* (§88). It is in this context that we have considered Mr Bowes' response to the requirement that he declares his use of medicines or supplements in the preceding seven days. The answer of "multivitamins", in circumstances where he was taking a number of supplements, including three natural testosterone boosters, does not sit easily with Mr Bowes' description of himself as taking a careful and responsible approach to anti-doping and his use of supplements.

59. Having regard to all of the above factors, we are not persuaded that Mr Bowes' evidence is sufficient for him to avail himself of the narrowest of corridors available in the absence of him being able to demonstrate the source of the ostarine. He has failed to discharge the burden imposed on him under the ADR.

60. The period of Ineligibility is therefore four years, in accordance with ADR Article 10.2.1(a).

Can Mr Bowes establish that he bears No Fault or Negligence / No Significant Fault or Negligence?

61. Mr Bowes argues that any applicable period of Ineligibility should be eliminated on the basis of No Fault or Negligence under ADR Article 10.4 or reduced from 4 years to 2 years on the basis of No Significant Fault or Negligence under ADR Article 10.5.1(b) and/or under ADR 10.6.3.

62. However, as noted by the CAS in *WADA v IIHF & F*, it is only in the event that the ADRV is held not to be intentional that there is any warrant for an examination of the Player's Fault or Negligence.

63. Moreover, the definition of No Fault or Negligence expressly provides that the Athlete must establish how the Prohibited Substance entered his system, as does the definition of No Significant Fault or Negligence, as well as Article 10.5.1(b) in relation to Contaminated Products.

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64. As Mr Bowes has been unable to establish how ostarine entered his system it follows that he cannot satisfy one of the requirements necessary for the issue of Fault or Negligence to be considered under ADR Article 10.4 or ADR Article 10.5.

65. Mr Bowes also sought to rely upon ADR Article 10.6.3 in this context, which provides as follows:

> *"10.6.3 Prompt Admission of an Anti-Doping Rule Violation after being Confronted with a Violation Sanctionable under Article 10.2.1 or Article 10.3.1:*
>
> *An Athlete or other Person potentially subject to a four-year sanction under Article 10.2.1 or 10.3.1 (for evading or refusing Sample Collection or Tampering with Sample Collection), may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete's or other Person's degree of Fault by promptly admitting the asserted Anti-Doping Rule Violation after being confronted with it, upon the approval and at the discretion of WADA and UKAD."*

66. UKAD's position is that it had considered the application of ADR Article 10.6.3 to Mr Bowes' case and whilst it acknowledges Mr Bowes admitted his ADRV in a prompt manner after the results of the B Sample analysis were confirmed to him, is not in a position to properly assess the degree of Fault and seriousness of the ADRV that may entitle Mr Bowes to a reduction under ADR Article 10.6.3, in the absence of any evidence to support his claim that the AAF was the result of contamination, such that it had not exercised its discretion thereunder.

67. Mr Bowes did not seek to challenge UKAD's position on this issue in these proceedings.

E. Commencement of Period of Ineligibility

68. ADR Article 10.11 requires that, usually, sanction starts on the day of a decision.

69. However, ADR Article 10.11.3 further provides that an Athlete shall receive credit for any period of respected Provisional Suspension:

> *"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 served […]"

70. Mr Bowes was provisionally suspended on 16 October 2020. There is no suggestion that Mr Bowes has not respected the terms of the Provisional Suspension. The period of time between 16 October 2020 and the date of this decision must therefore be credited against the four year period of Ineligibility.

71. We have also considered the application of ADR Article 10.11.2, which provides as follows:

> *"10.11.2 Timely Admission:*
>
> *Where the Athlete or other Person 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… In each case, however, where this Article is applied, the Athlete or other Person 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 the hearing decision imposing a sanction, or the date the sanction is otherwise imposed…"*

72. Mr Bowes was charged with this ADRV on 16 October 2020 following the AAF arising from the Sample collected on 2 September 2020. He accepted the ADRV by letter dated 11 December 2020, ten days after receipt of the outcome of the analysis of the B Sample. In these circumstances we consider it appropriate to start the period of Ineligibility on 2 September 2020, the date of the Sample collection.

F. Disqualification of results

73. ADR Article 9.1 provides that "*An Anti-Doping Rule Violation in Individual Sports in connection with or arising out of an In-Competition test automatically leads to Disqualification of the result obtained in the Competition in question, with all resulting Consequences, including forfeiture of any medals, titles, points and prizes.*" Accordingly, Mr Bowes result in the bout on 2 September 2020 is disqualified.

G. Conclusion

74. For the reasons set out above, we find that:

    i. Mr Bowes has committed an ADRV pursuant to ADR Article 2.1 by virtue of the presence of a Prohibited Substance, namely ostarine, in the Sample he provided on 2 September 2020;

    ii. Mr Bowes has not discharged the burden on him under ADR Article 10.2.1(a) to establish that the ADRV was not *"intentional"*, within the meaning of ADR Article 10.2.3;

    iii. A period of Ineligibility of four years is imposed under ADR Article 10.2.1, such period to run from 2 September 2020, to expire on 1 September 2024.

    iv. Mr Bowes result in the bout on 2 September 2020 is disqualified.

H. Right of Appeal

75. In accordance with Article 13.4 of the 2021 ADR and Article 13 of the 2019 Rules of the NADP, Mr Bowes and the other parties named in Article 13.4 have a right of appeal to an Appeal Tribunal of the National Anti-Doping Panel. In accordance with Article 13.7 of the 2021 ADR and Article 13.5 of the Rules, any party who wishes to appeal must lodge a Notice of Appeal with the NADP Secretariat within 21 days of receipt of this decision. The Appeal should be filed to Sport Resolutions, 1 Salisbury Square, London, EC4Y, 8AE and contact can be made via resolve@sportresolutions.com.

Kate Gallafent QC
Chair, on behalf of the Panel
London, UK
05 August 2021

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