

Introduction

1. Kerry Nathan (“the athlete”) is a fifteen year-old female boxer who won the Senior 72kg Female title at the New Zealand Amateur Boxing Championships at Rotorua on 30 September 2006. The competition was run under the jurisdiction of Boxing New Zealand Inc (“Boxing NZ”).
2. As the winner of a title, the athlete was selected to provide a sample for drug testing. On 10 November 2006, Drug Free Sport NZ issued a determination under sections 16B and 18(1) of the New Zealand Sports Drug Agency Act 1994. It determined that Kerry Nathan had committed a doping infraction by testing positive to cannabinoids. Cannabis is a prohibited substance banned by the World Anti-Doping Code (the WADA Code) Prohibited List 2006, and by the anti-doping regulations of Boxing New Zealand.
3. Boxing NZ made an application to the Tribunal alleging that the athlete had committed an anti-doping violation and seeking the imposition of sanctions pursuant to the Rules of the Tribunal and the applicable regulations of Softball New Zealand.

The WADA Code

4. Under Annex F of the Regulations of Boxing NZ, the Regulations for the Control of Banned Substances state that Boxing NZ “*Condemns* the use of Prohibited Substances and Prohibited Methods in sport” and that it “*Recognises* that Doping is fundamentally contrary to the spirit of sport.” The Regulations also state that the purpose of the policy contained in them includes giving effect to the core aspects of the

World Anti-Doping Code and achieving compliance with the New Zealand Sports Drug Agency Act 1994 to achieve practical application of the WADA code in New Zealand. The policy also includes self imposed obligations on Boxing NZ to educate and inform athletes and their support personnel about issues concerning doping in sport.

5. In accordance with the Regulations, where a determination of a doping infraction has been made by Drug Free Sport New Zealand, Boxing NZ is required to forward the matter to this Tribunal for a hearing and, if appropriate, the imposition of sanctions.
6. Under the WADA Code, the mandatory period of suspension for a first breach of the Code is a period of 2 years' ineligibility. However, cannabis is a specified substance; namely, one of the substances which are particularly susceptible to unintentional Anti-Doping Rule violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents.
7. Accordingly, the provisions of Article 10.3 of the Code apply. Under that Article, if an athlete can establish that the use of a specified substance "was not intended to enhance sports performance", the normal period of ineligibility of 2 years does not apply. On a first violation, as this is, where that condition is satisfied, the range of penalties available to the Tribunal are, at a minimum, "a warning and reprimand and no period of Ineligibility from future Events and at a maximum, one (1) year's Ineligibility."

8. The athlete has the onus of satisfying the Tribunal on a balance of probability that the use of the substance was not intended to enhance sports performance: Article 3.1 of the Code.

The Tribunal's approach

9. The Tribunal's approach to cannabis violations was summarised in *Softball NZ v Karaitiana* SDT/12/06, 28 April 2006 and the principles explained in that case have been applied by the Tribunal subsequently.
10. In more recent cases, however, the Tribunal signalled the possibility that it would take a firmer line with athletes who offend in this way by imposing short periods of ineligibility. The Tribunal gave effect to this indication last week, in a Minute dated 15 December 2006 issued by the Chairperson of the Tribunal and now posted on the Tribunal's website at <http://www.sportstribunal.org.nz>. The purpose of the Minute is to warn athletes that they should now expect that a first violation of the WADA Code involving cannabis will usually be met by a period of suspension. The Tribunal has indicated that, at "entry level", it is likely to impose a suspension or period of ineligibility which will reflect the athlete's intended participation in sport over the period.
11. This case, however, involves an infraction which occurred before the Minute indicating this change in approach was issued. It would be unjust to apply the new approach in a case which pre-dates the warning issued on 15 December. Accordingly, the Tribunal applies the following key principles from the *Karaitiana* decision:

- (a) In the case of a first anti-doping violation, if the athlete can satisfy the Tribunal that there was no intention to enhance sporting performance, the Tribunal will be likely to issue a reprimand and warning, without imposing any period of ineligibility, if it is also satisfied that -
- (i) the use of cannabis was unrelated to the sport;
 - (ii) the cannabis use by the athlete did not represent any danger to other competitors, officials or members of the public; and
 - (iii) there were no other circumstances (described in the cases as “aggravating circumstances”) which would indicate that a reprimand and a warning would not be a sufficient remedy.
- (b) The Tribunal would be likely to consider aggravating circumstances to exist, and to impose a period of ineligibility, if the athlete’s attention had been drawn specifically to the need to adhere to the sport’s anti-doping policy and the WADA Code and the athlete had defied such a caution by offending nevertheless. Such a warning may have been contained in an agreement entered into in respect of a particular competition, or may have been specifically drawn to the athlete’s attention by his or her sport by other means.

The proceedings

12. A pre-hearing telephone conference was conducted by the Tribunal at 8.00am on 19 December 2006. Kerry Nathan participated fully, as did her representative and her father. Boxing NZ was represented by Deirdre Rogers, its Executive Officer.
13. The principal objectives of the respective anti-doping rules of Boxing NZ, WADA and the Tribunal are that hearings should be conducted fairly and in a timely manner. In the present case, the parties through their representatives agreed that the Tribunal did not need to conduct a formal hearing in respect of the application and could, instead, treat the pre-hearing telephone conference as the hearing proper. This was agreed on the basis that the members of the Tribunal would take into account the written material provided by the parties, supplemented by evidence from the athlete given on formal affirmation, and submissions by the representatives.
14. Consistently with the interests of determining this matter in “a just, speedy and inexpensive” manner (Rules 4.2.5 and 11.5.1), we proceed to deal with the matter on the basis of the papers filed by the parties and the evidence given during the telephone conference.

Kerry Nathan’s Position

15. The athlete admitted that she had committed an anti-doping violation in relation to cannabis. In a letter sent to the Registrar of the Tribunal on her behalf, the contents of which she affirmed, she admitted breaching the Anti-Doping Rules and explained that she had smoked cannabis while celebrating a cousin’s birthday. At the hearing, the

athlete said that the celebration had taken place on 15 September 2006, a fortnight before the National Championships. Miss Nathan said that she had not, at the time, considered the consequences of her actions and that, with hindsight, she was now deeply regretful that she had let down her family, gym, Association and Boxing NZ. She indicated a wish to continue boxing and expressed the view that she had the ability to represent Auckland and New Zealand in the future.

16. The athlete confirmed these sentiments to the members of the Tribunal and appeared genuinely remorseful.
17. We noted the observations of the athlete's father, Mr Graham Nathan, who confirmed his disapproval of his daughter's conduct. He told us that while he was aware that she smoked cigarettes (contrary to his advice), he was unaware that she had taken cannabis. There was no evidence that Miss Nathan was an habitual user.

Boxing NZ's position

18. Ms Rogers told the Tribunal that Boxing NZ made no particular submissions as to sanction, but said that registered athletes such as Miss Nathan were provided with wallet cards setting out their obligations under the Anti-Doping rules. However, Ms Rogers acknowledged that, since Kerry Nathan had initially been registered to fight at a junior level, and had entered the senior championship only because there was no competition in the other grades, Miss Nathan may not have been fully informed on anti-doping issues.

19. Ms Rogers also confirmed that, as seems fairly obvious, the presence of cannabinoids does not enhance a boxer's performance. Boxing NZ accepted that, in this case, cannabis was used in a purely social setting unrelated to the sport without any intention to enhance sporting performance.

Discussion of the present case

20. On the basis of Kerry Nathan's letter and the additional information provided during the telephone conference, the Tribunal is satisfied to the required standard that:
 - (a) This was a first offence.
 - (b) Miss Nathan did not smoke cannabis for performance-enhancing purposes.
 - (c) The use of cannabis was unrelated to the sport, and there was no danger to other competitors, officials or spectators.
 - (d) There were no "aggravating factors", as that term was described in the *Karaitiana* decision.
21. There is some credibility, in our view, in the claim of this 15 year-old athlete that she was guilty of a momentary lapse of judgment which failed to take account of the consequences of her actions.
22. Miss Nathan appears to have promise as a boxer. She was warned by the Tribunal, during the telephone conference, of the serious consequences of a second doping infraction.

Decision and sanction

23. In the circumstances, the Tribunal finds that Kerry Nathan committed an anti-doping infraction in that the presence of cannabinoids was found in a sample provided by her at the New Zealand Amateur Boxing Championships at Rotorua on 30 September 2006.
24. In accordance with Regulation 10.2 of Boxing NZ's Regulations for the Control of Banned Substances, and Article 10.1 of the WADA Code, Kerry Nathan is disqualified from the Senior 72kg Female national event for 2006, and she will forfeit all results, titles, medals and prizes won at the event.
25. Miss Nathan is warned against the use of cannabis and reprimanded for using it in September 2006.



Kit Toogood QC
Deputy Chairperson (for the Tribunal)

21 December 2006