INTERNATIONAL RUGBY BOARD

IN THE MATTER of the Regulations Relating to the Game

A N D

IN THE MATTER of a doping offence by ISAKE KATONIBAU ("the Player")

Judicial Committee

Tim Gresson	(New Zealand)	(Chairman)
Gregor Nicholson	(Scotland)	
Doctor David Gerrard	(New Zealand)	

Appearances and Attendances

For the Board

Ben Rutherford	(Counsel for the IRB)
Tim Ricketts	(IRB Anti-Doping Manager)
David Ho	(IRB Anti-Doping Officer)

Player

Isake Katonibau	(Player)
Vilianne Katonibau	(Player's Father)
Maria Katonibau	(Player's Mother)
Lieutenant Colonel P Luveni	(Counsel for the Player)
Major Navneel Sharma	(Counsel for the Player)
William Koong	(Medical Officer, FRU)
Fanny Simpson	(ORADO, Doping Control Officer)
Natanya Potoi	(ORADO, Testing Co-Ordinator)
Meli Cavu	(ORADO, Anti-Doping Chaperone & Doping Control Officer)

Hearings
18th, 23rd and 31st October 2012 (GMT) (by telephone conference) and written submissions

DECISION OF THE BOARD JUDICIAL COMMITTEE

Background

1. Isake Katonibau ("the Player") has been a member of the IRB's Out of Competition Testing Pool since April 2010. This required him to provide declarations as to his whereabouts on a quarterly basis. His signed a Whereabouts Declaration dated 19th April for the ensuing three month period which disclosed he was available for testing at his "*home address*", 117 Kapadia Place, Raiwai, Suva from Monday to Sunday and his telephone numbers were 338 2678 and mobile number 726 7957.

2. The Player also declared he is employed as a Military Officer. He is aged 29. He is an experienced Fiji 15s and 7s International and since 2009 had received IRB anti-doping education materials. Prior to the Pacific Nations Cup 2012 he received a copy of the IRB Anti-Doping Handbook which at page 9 states:

> *"Failure to comply with the request to provide a Sample may be considered an anti-doping rule violation which may result in a sanction of 2 years".*

3. The IRB alleges on 27th June 2012 the Player was in breach of IRB Regulation 21.2.3[1] in that he "*refused or failed without compelling justification to submit to Sample collection after notification as authorised in these Anti-Doping Regulations or otherwise evaded Sample collection*". The Player denied the allegation. He stated he agreed to be tested, although he was variously "*angry*", "*offended*", "*embarrassed*" "*felt he was being discriminated*" because during family time at his parents' residence he again had been selected. Thus, he stated he waited at his parents' residence for "*not less than 30 minutes*" and then for reasons relating to his wife and infant child he chose to leave the property. As a result, for reasons which will become apparent, the Drug Control Officer ("DCO") and her male chaperone were thwarted in their attempt to obtain a sample from the Player.

4. In relation to Regulation 21.2.3, the IRB alleged the Player's conduct amounted to either an intentional refusal, or failure or evasion to submit to a

[1] Regulation 21.2.3 provides: "*Refusing or failing without compelling justification to submit to Sample collection after notification as authorised in these Anti-Doping Regulations or otherwise evading Sample collection*".

sample collection. Alternatively, it is alleged there was a negligent failure to submit to sample collection. Further it is alleged there was not a compelling justification for the Player's refusal or failure to take the test. The elements of Regulation 21.2.3 will be discussed in more detail later.

5. Regulation 21.3.1 places the burden of establishing the Player's "*refusing or failing or evading sample collection*" on the IRB. The standard of proof required is whether the IRB has established an anti-doping rule violation to the comfortable satisfaction of the BJC "*... bearing in mind the seriousness of the allegation that is made*. *This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.*"

6. In relation to whether the Player demonstrated a "*compelling justification*" for his refusal or failure to take the test the burden of proof is placed on the Player. Subject to two exceptions (which are not applicable in this case) the standard of proof is by a balance of probability (refer Regulation 21.3.1).

7. The Player was provisionally suspended effective from 16th July 2012.

Process

8. A Board Judicial Committee ("BJC") was appointed to consider this matter and prior to the hearing commencing on 18th October 2012, it issued Minutes giving directions as to pre-hearing issues relating to presentation of evidence and submissions by Counsel. Following the completion of the hearing on 31st October 2012, the BJC issued further directions in relation to receiving rebuttal evidence from a witness and further submissions from Counsel. The BJC is grateful to Counsel for their comprehensive submissions.

Disclosure

9. During the hearing issues arose as to whether the IRB had disclosed to the Player's Counsel all the background documentation and evidential material which had been provided in folders in hard copy form to the BJC. We are satisfied all the material provided to the BJC was provided (albeit, initially not in a folder) to the Player's Counsel but out of an abundance of caution the BJC directed the IRB to provide a replica folder to the Player's Counsel. To avoid this problem in future cases the IRB may wish to give consideration to

adopting a similar process in relation to disclosure which of course is consistent with the procedure adopted by Courts and Tribunals sitting in various jurisdictions.

Evidence

10. Extensive evidence in the form of written statements and oral evidence (which included cross-examination) was received from:

- Mrs Fanny Simpson (Oceania Regional Anti-Doping Organisation) ("ORADO"), Doping Control Officer ("DCO)
- Natanya Potoi, ORADO Testing Co-Ordinator ("the TCO")
- Meli Cavu, ORADO Anti-Doping Chaperone and DCO
- David Ho, IRB Anti-Doping Officer
- The Player
- Vilianne Katonibau, the Player's Father
- Maria Katonibau, the Player's Mother.

11. There were significant conflicts in the evidence, some of which related to central issues in the case. In assessing the evidence, the BJC found parts of the evidence of the Player and his Father to be less than convincing and preferred the evidence of the witnesses called on behalf of the IRB. Although, there were some discrepancies (mainly in relation to collateral issues) in parts of the evidence of the latter witnesses, we are satisfied they gave their evidence truthfully. None of them had reason to manufacture or fabricate any parts of their evidence as was suggested. Overall, we found their evidence to be more reliable than the evidence of the Player and his Father and we reject the suggestion they have colluded with the result parts of their evidence is either false or unreliable. Thus, unless indicated otherwise, our findings of fact have been made on the foregoing assessment of the veracity and reliability of the witnesses' evidence.

12. Both Counsel in their submissions analysed the facts in considerable detail for the purpose of advancing their respective cases. However, in our view we do not consider it necessary to traverse all the factual issues that have been referred to by Counsel. Many of them are collateral to the central issues and we have confined our findings to what we considered constituted the critical facts.

Facts

13. On 27th June 2012, following an ORADO, DCO Training Workshop (which finished at approximately 6.30 pm), the DCO in carrying out an IRB "*Mission Order*" to select for testing any two players included in the Fiji 7s Testing Pool, selected two players (including the Player) for out of competition testing.

14. The DCO stated she selected the Player for testing because of the proximity of his declared whereabouts residence to the ORADO office.

15. Despite unreliable telephone records[2] (which as indicated during the hearing we put aside) and witnesses being uncertain about exact times, we are satisfied following the selection of the two players between approximately 6.50 pm to 7.10 pm that evening Mrs Simpson telephoned the Player at what he had listed as his "*home address*" (117 Kapadia Place, Raiwai, Suva – telephone number 338 2678) to advise him he had been selected for out-of-competition testing.

16. The DCO and Player gave conflicting accounts as to some aspects of the ensuing telephone discussion. As indicated, we prefer the DCO's account which virtually contemporaneously she recorded in brief notes prior to compiling a more detailed report later that evening at approximately midnight. Part of her report states as follows:

> *"When I called the athlete's home number 338 2678, the phone rang 3 times. The individual on the side of the line reply "Hello" and I asked "Can I please speak to Mr Aisake Katonibau the rugby 7's player. The reply in Fijian "io, o au ioqo" (in English translation "Yes its me"). I notified the athlete: "Bula Aisake, this is Fanny Simpson, from ORADO. You have been selected for drug test. If you fail to comply you could be sanctioned by your sport".*
>
> *I also advised the athlete that I was on our (myself (DCO) and male chaperone) way to his home in Raiwai. The athlete respond*

[2] The original records provided during the hearing contained inaccuracies and were clearly unreliable. Accordingly, during the hearing of the evidence, as in the case of UK Anti-Doping v Six (http://www.ukad.org.uk/anti-doping-rule-violations/current-violations) we indicated they would be put aside and not forensically analysed. Following the evidence the BJC received Counsel for the Player's written closing submissions (in response to the written closing submissions of Counsel for the IRB) and further evidential material in relation to some aspects of the telephone records which we were informed had been obtained pursuant to the execution of a search warrant. Clearly, this created an issue in relation to the hearing process but ultimately after consideration of all the evidence we concluded the call timings were inconsequential in relation to the Player electing to leave his parents' address and failing to ensure the test could be undertaken that evening.

> *"Im sorry but Im not home", I then reply to the athlete saying "O iko tiko i vale, o iko vosa mail landline" (in English translation "You are at home because you are talking to me on your home phone or landline"). "Oi" (in English "Yes" or "In agreement"). I reminded the athlete again that if he fail to comply he could be sanctioned by the sport. The athlete respond confirming that he is aware of the consequences and express his concern for "always being selected for drug test". I again request for the athlete that he is not to go anywhere and except us to be at his home in a few minutes. Athlete confirmed that he will wait for us at his residence in Raiwai."*

17. Apart from acknowledging that she had once spelt the word "*oi*" incorrectly (it should be "*io*") and despite rigorous cross-examination by the Player's Counsel, we are satisfied the accuracy of this crucial part of the DCO's evidence was not undermined when she gave oral evidence at the hearing. Indeed, in challenging the veracity of parts of the DCO's evidence[3], the Player went so far as to suggest the DCO did not and could not speak in the Fijian language. However, when called to give rebuttal evidence in relation to that part of the conversation, in response to a request from a member of the BJC (Mr Nicholson) without hesitation the DCO spoke in the Fijian language. Her response was not challenged in subsequent cross-examination. She stated also that she had lived in Fiji for approximately 50 years and had no difficulty understanding the particular dialect of the language. She was adamant she had no misunderstanding as to what was said during the discussion and included the comments in Fijian in part of her notes because she considered they were important.

18. Significantly, Ms Potoi, who was also present at the ORADO office when the DCO contacted the Player, confirmed she overheard the DCO's comments, part of which were in the Fijian language.

19. The Player stated, he was "*angry*" at again being selected for testing at his parent's home during family time. He expressed his frustration to the DCO but in spite of this we are satisfied the Player confirmed he would wait at the residence, the DCO having indicated that she would be there "*in a few minutes*". Moreover, in relation to the crucial facts which provide the evidential foundation for the alleged breach, we are satisfied the DCO notified the Player he was required to undergo a sample collection. Further,

she explained he should remain at the residence and he could be sanctioned if he failed to comply with her directions. Indeed, the Player claimed the DCO in a "*harsh*" fashion "*threatened*" him of the possible consequences if he failed to comply with her directions. The Player confirmed he was aware of the consequences if there was non-compliance.

20. The DCO and Chaperone stated they travelled to the Player's residence by taxi. There was a conflict in the evidence as to the period of time which elapsed from the time the DCO made the initial telephone call and the Player leaving his parents' residence as a result of receiving a telephone call from his wife who was five months pregnant. She insisted her husband should take their daughter (who we were informed was suffering from influenza) back to their home situated at 63 Milverton Road, which is situated nearby.

21. We are satisfied the DCO and Mr Cavu (a school teacher who was acting in the capacity of a Chaperone for the testing), arrived at the property sometime within a period of approximately 30 minutes from the initial telephone discussion. In this respect we consider it took the DCO and the Chaperone longer than the DCO initially indicated. In their evidence the Player and his Father stated the Player waited at his parents' residence for approximately 30 minutes before he left[4]. In our view, it was not necessary to determine the exact period of time that elapsed before the DCO and the Chaperone arrived at the property as the evidence clearly established that without advising the DCO and contrary to the DCO's requirement that he remain at the property until she arrived, within a period of approximately 30 minutes he decided to leave of his own volition.

22. The DCO and Chaperone stated when they arrived at the property they found the front gate was closed. The DCO stated she rang the landline number again. The Player's father answered and advised her his son had left the residence with his (the Player's) daughter. He requested the DCO return the next day. According to the Player he had requested his parents to inform the DCO he had returned to his "*home address*" situated approximately one kilometre from his parents' residence and she should

[3] In relation to the "*not at home*" comment, the Player suggested he also said "*he would not be home for long*". This was emphatically rejected by the DCO.

[4] This was variously expressed "*waiting for 30 minutes*", "*not more than 30 minutes*", "*not less than 30 minutes*", "*after half an hour*", and the Player's father " *almost half an hour*".

contact him there or at his army barracks the next day. We are satisfied the DCO was not informed by the Player's Father his son could be contacted at the Milverton Road address which the Player stated his family had occupied for approximately two months. Further, the Milverton Road address had not been disclosed in an up-dated Whereabouts Declaration. Consequently, the DCO was unaware the sample could be collected at an alternative residential address.

23. The DCO explained to the Player's father the possible consequences of his son failing to comply. Mrs Katonibau then intervened. She informed the DCO the Player had left the property with his daughter and the DCO should contact her son on his mobile number or at the army barracks the following day. Again, we conclude the Player's mother did not advise the DCO of the Milverton Road address. Mrs Katonibau terminated the call when the DCO attempted to explain the consequences if the testing was not undertaken that day.

24. Contrary to the assertion by the Player's father, who in effect suggested that from any vantage point at his residence he would have seen any person arrive and standing outside his property, we are satisfied the DCO and Chaperone following their arrival remained waiting for approximately one hour near the gate of the property.

25. In any event, even if they either did not travel to the property or went to the wrong address (neither of which we do not accept), it is indisputable that by the time the DCO made the second call to the parents' landline number, the Player had left his parents' residence without advising her of his intention to leave or informing her where he may be contacted that evening.

26. During the waiting period of approximately one hour the DCO telephoned the ORADO Testing Co-Ordinator for advice in relation to the problem which had arisen by describing the events (as outlined above) which had occurred since the initial telephone call to the Player.

27. The DCO also unsuccessfully attempted to contact the Player by telephoning his mobile number which had been provided in his Whereabouts

Declaration[5]. Further, when the DCO called the number, the Player had not provided any contact details.

28. The DCO also telephoned Mr William Koong, the FRU Medical Officer and explained the difficulties encountered. Shortly thereafter Mr Koong informed the DCO he had also been unsuccessful in his attempt to contact the Player on his mobile telephone.

29. In explaining why he left his parents' residence the Player stated he had driven the family car to his parents' residence. His daughter was restless, suffering from influenza and he had been reluctant to leave her with his parents. Further, his wife's pregnancy prevented her from walking to his parents' address to collect their daughter. He stated he and his daughter were having "*a family time with his parents*" and following the call from the DCO he was concerned his parents may think he was involved with "*drugs*". He further explained he was "*scolded*" by his wife when he arrived home with his daughter who was given cough mixture. He stated at this time his mobile telephone was not operational because it had been left at his Army Barracks.

Out of Competition Testing

30. David Ho, an IRB Anti-Doping Officer ("ADO"), provided unchallenged evidence in relation to IRB testing (including out of competition testing) in the Oceania region.

31. He explained that following the promulgation of the World Anti-Doping Code ("the Code") in 2003 prescriptive requirements as to athlete's whereabouts were introduced. The requirements included the replacement of the previous 24 hour advance notice and the preferred approach was that an athlete should not be forewarned of the testing. The ADO acknowledged however that advance notice (including telephone notice) may be appropriate in certain regions or circumstances for example "*when the player lives in a secure gated community or apartment block, when presented with a locked gate which does not allow access to a residence or when access to a residence is restricted*".

[5] The mobile telephone number (338 2678) disclosed in the Player's Whereabouts Declaration differed from the mobile number (838 2678) included in his statement produced at the hearing. During the hearing the Player indicated the latter number contained a typographical error as to the first digit.

32. The ADO also explained the distinction between the IRB Registered Testing Pool (RTP) and Testing Pool (TP). He stated:

> *"the RTP comprises what the IRB would regard as high risk players. This includes those who are currently serving a sanction, have incurred 3 Whereabouts Failures whilst in Testing Pool within an 18 month period, any player the IRB may suspect of doping, or any other player at the IRB's discretion.*
>
> *The Testing Pool is the IRB's principle Pool of players for whom the IRB conduct Out of Completion (sic) Testing and consist of a given Union's National Squads (7's and or 15's) nominated by the IRB.*
>
> *In regards to whereabouts provision RTP players are required to submit details regarding their residence, training information, any temporary accommodation, competition schedule or National Squad activity for a given quarter. In addition RTP players are required to provide a 60 minute location where they can be found for testing every day of the quarter which unless otherwise specified by the player will default to their listed residence between the hours of 6-7 am. Currently no players from Fiji are included in the IRB's Registered Testing Pool. If an RTP Player is not available for testing at his 60 minute whereabouts location he will be charged with a Missed Test. If an RTP player records three Missed Tests and/or Filing Failures during an 18 month period he is liable to be sanction for between one to two years.*
>
> *Testing Pool Players provide the same information however without the 60 minute location unless they are in an off season period or are away from scheduled team activities, perhaps through injury or illness. The National Fiji squad for 15's and 7's are both included in this Pool. These Players can be tested anywhere and at any time. They will receive a Missed Test if they are not available during their off season 60 minute location or if testers visit their whereabouts locations and are advised that the player has left the club, moved house, is overseas, or cannot be found at any of his whereabouts locations in season."*

33. The ADO also explained players are required to provide through their Unions "Whereabouts Information" on a quarterly basis as a result of which the IRB creates "*Mission Orders*". In this case the Mission Order specified the DCO to "*select any 2 players from the Fiji 7's Testing Pool*".

34. In the ADO's experience "*the geography and culture of Fiji are such that local knowledge is relied upon heavily in testing there. In many cases players have no specific residence other than a village name. The geography of the country and somewhat transient culture of people where*

they may move between different family or village residences with regularity can also complicate locating athletes in Fiji. This difficulty is increased by the fact that ORADO is one of the smaller anti-doping organisations the IRB deals with, with only one full-time staff member and very limited resources. In this combination of circumstances calling prior to making face-to face contact may be the only means by which to locate a player with certainty and efficiency".

35. The ADO stated the IRB has no record of any previous unsuccessful attempts to test the Player. The only test the IRB has on record for the Player was an out of competition sample collected at a training camp during the National Team's preparation for the Pacific Nations Cup commencing 29th May 2012. In addition, we note the Player's unchallenged evidence he was also selected for testing prior to the two UK legs of the IRB 7's series. Because he was not at his nominated address at the relevant time he did not complete the test and he was informed by the DCO (Mrs Simpson) that she had found a replacement.

36. In May 2012, the FRU distributed on behalf of the IRB, the IRB Anti-Doping Handbook prior to participating in the Pacific Nations Cup for the Fiji 15's National Team. The Handbook emphasised:

> "*Urine Sample Collection*
> *Doping Control plays an essential part in promoting and protecting doping free Rugby. Testing worldwide is conducted in accordance with the World Anti-Doping Code and the International Standard for Testing. Testing may take place at anytime, anywhere. The following is a guide to the Urine Sample Collection process and although slight variations may exist depending on the Anti-Doping Organisation, the principles are the same and will not affect the integrity of the process.*
>
> ...
>
> *A failure to comply with the request to provide a Sample may be considered an anti-doping rule violation and may result in a sanction of two years.*"

37. Further, upon being included in the Testing Pool for Out of Competition testing the Player was also sent a guide entitled "*A Guide to Player Whereabouts*" in the Fijian language.

Regulation 21

38. The IRB Anti-Doping Regulations set out the framework under which all players can be subjected to Doping Control and the procedures for any alleged infringements of those Regulations. The IRB Regulations also adopt the mandatory provisions of the Code[6].

39. The IRB Anti-Doping Regulations and the Code are based on the principles of personal responsibility and strict liability for compliance with the obligations of athletes as detailed, including the requirement to submit to Doping Control.

40. In relation to the principle of personal responsibility Reg 21.6:

> *"21.6.1 It is each Player's responsibility to ensure that:*
> *(a) ...*
> *(b) He does not commit any other anti-doping rule violation;*
> *(c) He is available for Sample collection; and*
> *(d) ...*
>
> *...*
>
> *21.6.3 It is the sole responsibility of each Player, Player Support Personnel and Person to acquaint themselves and comply with all of the provisions of the Programme including the Guidelines."*

41. IRB Reg 21.2 provides "*That Players or other persons shall be responsible for knowing what constitutes an anti-doping violation ...*". *The following constitutes anti-doping violations*:

> *21.2.3 Refusing or failing without compelling justification to submit to Sample collection after notification as authorised in these Anti-Doping Regulations or otherwise evading Sample collection."*

42. There have been previous cases where Disciplinary Tribunals have commented on the construction of the Code's Article 2.3 (Regulation 21.2.3); its wording having been replicated in other Sports' anti-doping rules.

[6] The WADA Code can be found on the WADA website at http://www.wada-ama.org/documents/world_anti-doping_program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf

43. The Court of Arbitration in Sport in the case of Azevedo v FINA[7] commented the underlying policy objective of Regulation 21.2.3 (Article 2.3 of the Code) is as follows:

> *"We agree with the following principle stated by the Court of Arbitration for Sport in Azevedo v FINA:*
>
> > *"No doubt, we are of the view that the logic of anti-doping tests and of the DC Rules demands and expects that, whenever physically, hygienically and morally possible, the sample be provided despite objection by the athlete. If that does not occur, athletes would systematically refuse to provide samples for whatever reasons, leaving no opportunity for testing.""*

44. The commentary in relation to Article 2.3 states:

> *"Comment to Article 2.3: Failure or refusal to submit to Sample collection after notification was prohibited in almost all pre-Code anti-doping rules. This Article expands the typical pre-Code rule to include "otherwise evading Sample collection" as prohibited conduct. Thus, for example, it would be an anti-doping rule violation if it were established that an Athlete was hiding from a Doping Control official to evade notification or Testing. A violation of "refusing or failing to submit to Sample collection" may be based on either intentional or negligent conduct of the Athlete, while "evading" Sample collection contemplates intentional conduct by the Athlete.*

45. During the hearing the Chairman raised with Counsel whether the abovementioned comment was entirely correct, in particular whether an athlete could commit a breach as a result of a "*negligent refusal*". As a result Counsel for the IRB has now been advised by the Chief Legal Manager of WADA that the next draft of the 2015 version will be modified to read as follows:

> *"A violation of "failing to submit to Sample collection" may be based on either intentional or negligent conduct of the Athlete, while "evading" or "refusing" Sample collection contemplates intentional conduct by the Athlete."*

46. We agree the proposed amended comment correctly summarises the "*intentional"* and *"negligent*" elements of Regulation 21.2.3 and our assessment of the evidence in determining whether the IRB has established a breach will be on this basis.

[7] CAS 2005/A/925 (24 January 2006)

47. There have been several cases in which the phrase "*compelling justification*" has been discussed. In Jones v Welsh Rugby Union[8] at paragraph 57 the UK National Anti-Doping (NADP) Appeal Tribunal emphasised the high standard of compliance required by athletes when required for out of competition testing. The majority of the Tribunal concluded that:

> *"The phrase "compelling justification" connotes that the reason for an athlete refusing must be exceptional [per International Paralympic Committee v Wium[9] at paragraph 3] indeed, unavoidable [per CCES v Boyle[10] at paragraph 53]."*

48. Further at paragraph 58 the Chairman of the Tribunal (Mr G Mew) conveniently referred to previous cases in which Tribunals have rejected as "*compelling justification"*:

- Going to work – International Paralympic Committee v Wium[11]
- Going to Church – Wium (above)
- Parental pressure – CCES v Zarboni-Berthiaume[12]
- Team orders to attend a team meeting – WADA v CONI, FIGC, Maninni and Possanzani[13]
- Sudden onset of illness – CCES v Boyle[14]
- Player who was not prepared to wait and walking off in spite of being advised of the consequences – DFSNZ v Reuben & NZRL[15]

49. And in the recent case – UK Anti-Doping (National Anti-Doping Organisation) v Marcel Six - the Tribunal rejected the proposition the Athlete's domestic

[8] (9 June 2010). Decision available at: http://www.sportresolutions.co.uk/news.asp?section=26&itemid=1404&search=nathan+jones

[9] International Paralympic Committee Legal Committee (7 October 2005)

[10] SDRCC DT 07-0058 (31 May 2007). The footnote of the Appeal Tribunal in Jones included the following quotation from the arbitrator Mr Mew in Boyle: "*... even if I accept that the Athlete was taken suddenly, violently and horribly ill while training, I cannot accept that there was reasonable, let alone compelling, justification for her failure to submit for Sample collection. To be compelling, her departure would have to have been unavoidable."* [emphasis added by the Appeal Tribunal in Jones].

[11] International Paralympic Committee Legal Committee, 7 October 2005, at para 3

[12] SDRCC DT 09-0114 (11 February 2010). In that case the athlete, who was a minor (17) was ordered by her mother to leave the DCS with her. The tribunal noted (at paragraph 19) that the athlete "*appeared to be obeying her mother, and showed no reluctance considering the consequences that her departure could have on her status as an active Athlete*".

[13] CAS 2008/A/1557 (29 January 2009). Two football players were notified of doping control at conclusion of match. On their way to the DCS, they were intercepted by their team coach and President and ordered to attend a team meeting. The chaperone was barred from the dressing room where the meeting occurred and players were, consequently, not under observation for thirty-five minutes. CAS determined that the mere fact of giving a sample later did not itself excuse the initial refusal/failure to appear for doping control. There was no evidence that the athletes insisted that they should report for doping control first. They could have ignored direction to attend the team meeting without repercussion and should have reported to doping control directly. The athletes' justification was, accordingly, not "*compelling*".

[14] Supra, at 10.

[15] Sports Tribunal of New Zealand ST20/10 (1 December 2010), decision available at: http://www.spotstribunal.org.nz/decisions-10/Reuben_Decision.pdf

responsibilities (wife ill, children at home, demand from wife to return home) amounted to compelling justification.

50. Thus, it is clear from these cases the expression "*compelling justification*", requires the Player to establish his non-compliance was due to "*exceptional*" or "*unavoidable*" reasons.

51. Finally, it is noted the "*compelling justification*" qualification is not applicable to the "*evading*" component of Regulation 21.2.3.

Doping Control Guidelines

52. Schedule 1 Regulation 21 sets out the Doping Control Procedural Guidelines. Clause 1(a) provides:

> *"**Doping Control Procedural Guidelines ("Guidelines")***
>
> *(a) These Guidelines are in compliance with the WADA International Standard for Testing and should be followed as far as is reasonably practicable. However, any departure from the procedures set out in these Guidelines shall not invalidate a finding of an anti-doping rule violation unless such departure undermines the validity of such finding."*

53. Clauses 22 to 24 address out of competition testing. The relevant provisions are as follows:

> *"**22 Out of Competition Testing***
>
> *(a) Under the Board's Out of Competition programme the Board may select any Player under membership of a Union to undergo Testing at any time or place regardless of whether that Player is part of a Registered Testing Pool or Testing Pool.*
> *(b) ...*
> *(c) Such Testing shall where possible be conducted with No Advance Notice by an authorised Doping Control Official.*
> *(d) Out of Competition Testing may take place during a rugby football season or out-of-season and may occur at a training ground, residential accommodation or any other place where the Player is likely to be found and/or has indicated in his Whereabouts Filing."*
>
> *"**23 Section of Players Out of Competition***
>
> *(a) A Player may be selected for Out of Competition testing by either random selection or targeted by the Board, Member Union, Tournament Organiser or other authorised Anti-Doping Organisation."*

*"**24. Notification of Players Out of Competition***

(a) A Player shall be notified for Out of Competition Doping Control by "No Advance Notice" notification, where the DCO or Chaperone appears unannounced and notifies the selected Player in person. The selected Player is then kept under direct observation until the Sample is sealed and appropriate documentation completed. Advance notice notification, shall only occur in the most exceptional circumstances.

(b) Where a DCO appointed by the Board to conduct No Advance Notice Out of Competition Doping Control, the DCO or Chaperone should give the Player a reasonable time to complete any activity in which he is engaged subject to the DCO's authorisation and agreed time period. Such activity should be within the DCO/Chaperones clear and continuous view.

(c) No Advance Notice Doping Control should commence as soon as reasonably practicable after a Player has been notified. In the case where the selected Player is participating in a team training session, the Player may complete the session under direct view of a DCO or Chaperone before presenting for Doping Control.

(d) The DCO shall unless advised otherwise attempt to notify the Player(s) selected for Doping Control at all their nominated whereabouts locations (prior to visiting the one hour location if the Player is in a Registered Testing Pool or during the off season or periods of injury if the Player is in the Testing Pool) in an attempt to collect a Sample.

(e) ...

(f) ...

(g) ...

(h) ...

(i) ...

(j) If the Player wishes to leave the location against the DCO's direction the DCO shall inform the Player that he is required to provide a Sample for Out of Competition Testing at the current location and outline the possible consequences of not complying with a request to provide a Sample and that it may constitute an anti-doping rule violation in accordance with the IRB Anti-Doping Regulations. If the Player still does not comply, then a failure to comply shall be recorded. The DCO shall compile a written report relating to the circumstances of the failure to comply."

54. Reference should also be made to Reg 21.34.1. It reinforces guideline Clause 1(a). It states:

> *"Any deviation or deviations from the Anti-Doping Regulations and/or the Guidelines does not invalidate any finding, decision or Adverse Analytical Finding unless such deviation or deviations are such as to cast material doubt on any finding, decision or Adverse Analytical Finding."*

Has an Alleged Anti-Doping Violation been Established?

55. Counsel raised several issues in relation to the validity of the DCO's testing process and the elements of Regulation 21.2.3.

Out of Season Validity of the Testing Process

56. It was submitted by Counsel for the Player the DCO's attempted testing occurred "*out of season*". Thus, he submitted a different testing regime applied. In particular, the DCO should have attempted to test the Player during "*the default time*" of between 6.00 am and 7.00 am.

57. Counsel submitted the term "*out of season*" is not defined in the Regulations but the definition of "*off season*"" can be relied upon as it "*inherently refers to the same thing and can be used interchangeably*". A definition of "*off season*" can be obtained from Regulation 21.10.9(f) where it is defined as a period "*starting from the specified date in which the Player is relieved from club and/or national Team Duty and ending upon the date he returns to club and/or national Team Duty*". In the context of this case Counsel submitted the Player "*played his International Test for the year on 23rd June 2012*" and "*there is no IRB record of any on-going club commitments thereafter nor has there been any tendering of such information from the Player, Fiji Rugby or Local/Club organisation*".

58. Regulation 21.10.9(f) is part of the Regulations which address the requirements of Whereabouts Filings for Testing Pool Players. It is clear on a perusal of these Regulations the whereabouts system has been adopted to ensure the testing of players is carried out in an efficient fashion. Regulation 21.10.9(f) provides:

> *"The Whereabouts Filing for Players who are part of the Testing Pool during the off season period must each day during the off season period (starting from the specified date in which the Player is relieved from club and/or national Team duty and ending upon the date he returns to club and/or national Team duty), provide a nominated*

residence and the dates in which the Player will be present at the nominated residence;"

59. In our view, the purpose of Regulation 21.10.9(f) is to require players to provide relevant Whereabouts Information; ie. written details of a nominated residence and the dates they will be present at the nominated residence during their specific off season period. Its purpose is not to define what constitutes an "*off season*" for testing purposes. In any event we are satisfied the attempted testing occurred during the Fiji Rugby season as the Player had represented Fiji in an International only four days previously and he confirmed as at 27th June 2012 domestic rugby was still being played in Fiji. Clearly the attempted testing occurred "*in season*".

60. Regulation 21.8.1 authorises the IRB to test (c.f. providing Whereabouts Information) players at any time and place. It provides:

> *"Doping Control may be carried out at any time. Doping Control may be random or targeted. All Players shall submit to Doping Control at any time and any place whenever requested by an authorised official. For the avoidance of doubt, this includes both In Competition and Out of Competition Doping Control. Out of Competition Doping Control shall be undertaken with or without prior notice (No Advance Notice). A Player may be selected to provide any number of Samples for Doping Control in any calendar year. The Board, and/or Unions shall be entitled to undertake Target Testing of Players."*

61. In addition, Clause 22(a) (Regulation 21 Guidelines Schedule 1) provides out of competition testing may occur at any time or place. Therefore in our view, the overall scheme under Regulation 21 for the efficient provision of whereabouts information by players does not prohibit testing at any time or place. We reject the submission that the charge should be dismissed on this ground.

No Advance Notice and Chaperone Not Present from Time of Notification Until Sample Obtained

62. Counsel for the Player submitted the requirements of Clause 24 of Schedule 1 Guidelines and the definition No Advance Notice in Regulation 21 had not been complied with, in that the Player should not have been given advance notice of the testing and the Player was not continuously chaperoned from the moment of notification through to sample collection. Clause 24 provides:

> *"(a) A Player shall be notified for Out of Competition Doping control by "No Advance Notice" notification, where the DCO or Chaperone appears unannounced and notifies the selected Player in person. The selected Player is then kept under direct observation until the Sample is sealed and appropriate documentation completed. Advance notice notification, shall only occur in the most exceptional circumstances."*

63. No Advance Notice is defined as:

> *"A Doping Control which takes place with no advance warning to the Player and where the Player is continuously Chaperoned from the moment of notification through until Sample provision."*

64. There was no dispute the DCO during the initial telephone conversation gave the Player notice of the testing and, at this time she was not accompanied by the Chaperone. Whether, based on the evidence of the ADO, the DCO, or the ORADO Testing Co-Ordinator, this case could be categorised as being "*most exceptional*" (emphasis added) is debatable and possibly notice should not have been given.

65. However, that is not the end of the matter. Firstly, we note Regulation 21.8.1. authorises out of competition testing can be undertaken with or without prior notice. Further, we are satisfied the Player did not suffer from any prejudice by being given notice of the sample collection and by the fact the Chaperone was not present with the DCO when she made the initial telephone call. In these circumstances Regulation 21.34.1 and Guideline Clause 1(a) apply. Regulation 21.34.1 states:

> *"Any deviation or deviations from the Anti-Doping Regulations and/or the Guidelines does not invalidate any finding, decision or Adverse Analytical Finding unless such deviation or deviations are such as to cast material doubt on any finding, decision or Adverse Analytical Finding."*

66. Similarly, Guideline Clause 1(a) provides any departure from the procedures set out therein shall not invalidate a finding of an anti-doping violation unless such a departure undermines the validity of such a finding. As mentioned, the Player suffered no prejudice as a result of the suggested deviation. Accordingly, we were not satisfied it undermined the validity of a finding that the Player committed an anti-doping violation.

Regulation 21.2.3

67. To establish an anti-doping violation against the Player the IRB must comfortably satisfy the BJC that any one of the following breaches have occurred:

    (a) The Player intentionally refused without compelling justification to submit to Sample collection after notification as authorised in the Anti-Doping Regulations; and/or

    (b) The Player intentionally failed without compelling justification to submit to Sample collection after notification as authorised in the Anti-Doping Regulations; and/;or

    (c) The Player negligently failed without compelling justification to submit to Sample collection after notification as authorised in the Anti-Doping Regulations; and/or

    (d) The Player intentionally otherwise evaded Sample collection.

68. The IRB submitted the Player's conduct amounted to intentional refusal or failure, and, if not an intentional failure then at least a negligent failure, after notification (all without compelling justification) and/or, an intentional evasion of sample collection. In other words, the Player committed a breach of any or paragraphs (a), (b), (c) or (d) above.

Elements

Notification

69. Although, arguably the Advance Notice may have been outside Guideline 24(a) (and in this respect we have not found it necessary to make a determination) for the reasons given we are satisfied the Player was notified as authorised by the Regulations (and Guideline 1(a) (refer Regulation 21.8.1 and 21.34.1 and Guideline Clause 1(a)). We find the DCO notified the Player he was required to submit to sample collection. Further he was clearly made aware of the consequences. The Player confirmed he was aware of the consequences if he failed to comply. We are satisfied the Player agreed to wait at his parents' residence for the DCO to arrive. But, following notification, without obtaining the DCO's permission and within a reasonably short period of time (approximately 30 minutes) he left his parents' residence and returned to his home at 63 Milverton Road thereby effectively preventing the DCO from obtaining a sample.

Compelling Justification

70. As discussed, the Player had the burden of proving he had a "*compelling justification*" for refusing or failing to submit to sample collection. The phrase "*compelling justification*" requires proof that the reason(s) for the Player's refusal or failure was or were "*exceptionable*" or "*unavoidable*".

71. Counsel for the Player submitted this case can be distinguished from the cases previously referred to on the basis they involved "*face to face*" (ie. instant) notification whereas in this case there was "*prior notification*". Therefore the phrase "*compelling justification*" should be "*given a more liberal/flexible meaning when there is "prior notification" as compared to situations akin to "instant notification" as the regulation and case law is more geared towards strict compliance after "instant notification*".

72. In our view, it is not appropriate to apply a different test as to the meaning of the phrase if prior notification has been given. We consider there should be a factual assessment as to whether following advance or instant notification the reason for the non compliance was exceptionable or unavoidable.

73. In this regard, we consider the Player's reasons for non-compliance could not be described as being exceptionable or unavoidable. We accept the Player was annoyed and frustrated at again having been selected for testing as he was enjoying family time with his parents and brother and as he said he did not want the embarrassment of being drug tested at his parents' home. Further, he was placed under pressure by his wife to return home with their daughter who was unwell. But, rather than avoiding the test, there were several sensible alternative options available to him. Some of these were raised by Counsel and members of the BJC during the hearing of the evidence. They included waiting at the address and explaining his predicament to the DCO when she and the Chaperone arrived. He acknowledged his parents could have looked after his daughter while he completed the test. Further, he acknowledged he did not inform his wife he was required to undergo testing which would require him to make alternative arrangements with her. Further, he could have made direct contact with the DCO and explained the Milverton Road property was nearby and requested

the DCO undertake the testing at this address[16]. In our view the Arbitrator's comments in the Canadian case (CCES & Ors v Zardo & Ors, 6 September 2005[17]) cited by Mr Rutherford are relevant:

> *"The Player did not convince (us) he did everything possible to submit to doping control. On the contrary he convinced me that he did everything possible to avoid it.*

74. During the hearing a member of the BJC (Mr Nicholson) referred the parties to the recent case of Six (supra). It has a strong parallel with this case. In Six the Tribunal, in its factual findings, referred to the athlete being "*frustrated, angry and upset*" when he was requested to take a test. He declined to take the test on the basis he had been tested recently and was not taking it again. Further, his wife, "*was extremely upset, stressed out and panicked, and children were waiting for him at home*". He had to "*get home*" as the children were unwell. The athlete suggested the test could be carried out the following day at his home. This was declined. In concluding that the athlete's refusal was not based on any compelling justification the Tribunal stated:

> *"35. Honourable though the Athlete's motives may have been, we have no hesitation in finding that his refusal was not based on any compelling justification. ...*
>
> *38. As we say, the Athlete's situation here was avoidable. He chose to race and, having chosen to race, he should have been prepared to take the test. To that extent, the problem was of his own making and whilst his decision to put his family before his obligations as an athlete may be commendable and humane, his motives do not, in our view, constitute a defence on the basis of Article 2.3."*

75. These comments are also applicable to this case. Although, for the reasons mentioned, we can understand the Player's frustration at again being selected for sample collection, we are unable to conclude that the Player has established there was a compelling justification for his refusal or failure to submit to sample collection. Essentially the Player should have made alternative arrangements for the care of his daughter and waited for the DCO so that he could provide his sample. Indeed, he could have made the necessary arrangements during the waiting period.

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[16] In this regard we note in the Jones case the DCO refused to accompany the athlete who was held to have refused or failed to comply without compelling justification, But in Jones the DCO would have been required to travel from Neath to Bristol whereas in this case there was a short distance (approximately 1 km) between the two properties.

[17] Decision available at http://www.crdsc-sdrcc.ca/resource_centre/pdf/English/495_SDRCC%20DT-05-0023.pdf

Intentional or Negligent Refusal or Failure

76. As previously indicated the IRB had the burden of establishing (to the standard of comfortable satisfaction) the Player's refusal or failure was either intentional or negligent. In this regard there are several factors, some of which we have previously referred to.

- In spite of the Player being annoyed and frustrated he had been selected for testing again, he clearly understood that he was required to remain at Kapadia Place for the purpose of sample collection. He was warned about the consequences of non-compliance and the Player confirmed he would wait at the property as instructed. However, contrary to this, prior to the DCO arriving at the property the Player (of his own volition and without advising the DCO) left the property and returned to his home situated at Milverton Road.
- The DCO was not at any stage (either by way of an up-dated Whereabouts filing or advice from the Player or either of his parents that evening) informed the Player could be contacted at the alternative home address. In this respect, we do not accept the evidence of the Player and his father (some of their evidence, in particular their answers in cross-examination, lacked credibility) that the former had requested his parents to advise the DCO of the alternative address. Neither parent referred to this important piece of evidence in their written statements and their evidence is inherently implausible. Both parents, according to the DCO provided some information where their son could be contacted the next day. It follows, if their son had requested them that evening to disclose the Milverton Road address to the DCO it is difficult to understand why at least one of them did not provide that information. This, in our view, was a further indication the Player did not wish to submit to sample collection that evening.
- Having left his parents' residence and not being contactable on his cellphone, which he had left at his Barracks, the Player made no attempt to contact the DCO. He had "*absconded*" or "*escaped*" from the DCO and because he had not updated his Whereabouts filing neither the DCO or the FRU representative could contact him that evening. If, the Player had wanted to be tested that evening then, as

previously mentioned, there were several options available whereby he could have submitted to a sample collection.

77. For these reasons we are comfortably satisfied the Player in leaving his parents' residence in the circumstances described intentionally refused or failed without compelling justification to submit to sample collection following notification. Thus, he was in breach of Regulation 21.2.3.

78. Because of this finding it is not necessary for us to consider whether the Player's conduct also amounted to intentional evasion.

Sanction

79. Under Regulation 21.22.2 of the IRB Regulations, the sanction for refusing or failing to give a sample without compelling justification is a period of two years ineligibility. The period of ineligibility can only be reduced if the conditions stipulated in Regulations 21.22.4 and 21.22.5 are satisfied. The former allows for elimination of the period of ineligibility if there was no fault or negligence. The latter allows for reduction of sanction, but not below a period of one half of the minimum period of ineligibility, if there was no significant fault or negligence on the part of the Player.

80. Counsel for the Player invited the BJC to consider the "*possible*" defence of no fault/no substantial fault or negligence. He submitted the following were "*prevalent (sic) issues*":

> *"(a) Ms Simpson was an experienced Doping Control Officer who had administered numerous tests;*
> *(b) Despite her experience, she was never faced with a similar situation. Her training and experience was of little help and she in fact called Ms Potoi for guidance;*
> *(c) She made a critical error in giving advance notice and thereby set off a chain events that should could not cope with or recover from;*
> *(d) She did not make another phone call to the Katonibau residence informing him that she was running late;*
> *(e) She in fact arrived late or did not arrive at all.*
> *(f) She did not physically present herself to the Player or the Players residence on the day and;*
> *(g) She did not by reasonable intelligence attempt to locate the Player but in fact entered into a somewhat "heated" conversation with her parents."*

81. As indicated because of the provisions of Regulation 21.34.1 and Guideline Clause 1(a) we have not found it necessary to make a finding as to whether the DCO erred in giving advance Notice. For our part we consider it would have been preferable if the DCO had not given prior Notice but whether that amounted to what Counsel characterises as a "*critical error*" is a matter of conjecture. Further, we have previously found when the DCO made the second telephone call the Player of his own volition and contrary to the DCO's instruction had departed from his parents' residence. Further, given the lack of relevant information provided by the Player and his parents as to his whereabouts, the DCO cannot be criticised for not attempting to locate the Player that evening. Indeed, we do not consider she was under any obligation to collect the sample from any other location.

82. In any event, the focus of the Regulation's definitions of No Fault or Negligence or No Significant Fault or Negligence relates to the Player's conduct. To establish no fault or negligence the Player must prove "*he did not know or suspect and could not reasonably have known or suspected even with the exercise of utmost caution ...".* To prove no significant fault or negligence the Player must establish "*... his fault or negligence, when viewed in the totality of the circumstance and taking into account the criteria for No Fault or Negligence, was not significant in relationship to an anti-doping rule violation*".

83. Mr Rutherford referred to the observations of adjudicators in two cases which considered exceptional circumstances in the context of equivalent provisions to Regulation 21.2.3. As mentioned in Zardo (supra) the arbitrator was not convinced the athlete did "*everything possible to submit to doping control*" but "*did everything possible to avoid it*". In a New Zealand case DFSNZ v Reuben and NZRU (involving a Rugby League Player who was notified and provided a partial sample only) the Player stated he was not prepared to wait around to pass a further sample and would accept the consequences. He walked off. The chaperone reported that he advised the player of the possible consequences but he declined to complete the test.

84. In dismissing a submission which urged the Tribunal to reduce the sanction because of exceptional circumstances the Chairman (Mr B J Paterson QC) referred to the rules "*are meant to have impact only in cases where the*

circumstances are truly exceptionable and not in the vast majority of cases".

The Tribunal then stated:

> *"It is unnecessary to refer to those circumstances where rules 14.5.1 and 14.5.2 have application. In the Tribunal's view, this is not one of those cases. Mr Reuben chose to walk away from the chaperone and not complete the test. The justification which he gives falls well short of the 'exceptional circumstances' test.*

85. We note also in the recent case of Six (supra) where the Tribunal having found an absence of compelling justification for the athlete's refusal, upheld a significant fault submission to reduce the sanction. The Zardo or Reuben cases were not referred to. Further, Six was decided very much upon its facts and the Tribunal doubted its approach could "*possibly translate to another case since we do regard the facts as exceptional*".

86. We are unable to find either Regulation 21.22.4 or 21.22.5 can be applied in this case. The Player simply did not "*do everything to submit to doping control*". Indeed, as we have found by choosing to leave his parents' residence "*he did everything possible to avoid it*".

87. While it may be considered the sanction for this breach is harsh, the Player was warned and had every opportunity to comply with the DCO's requirement to submit to a sample collection. It is axiomatic the BJC must apply IRB Regulations (which are based on the Code) to the circumstances of this case.

88. In top level Rugby (in particular professional or semi-professional) players are well educated on all aspects of anti-doping. Their absolute obligations, emphasised as personal responsibilities, are clearly outlined in IRB Anti-Doping publications. In this case the Player, an experienced international, had received drug education and had been tested previously. The BJC in recognising the scourge of drug misuse in sport, denounces any attempt to undermine strict adherence to the IRB Anti-Doping Regulations.

Regulation 21.22.12(a)

89. Counsel for the Player invited us to apply Regulation 21.22.12 which provides:

"(a) ***Delays Not Attributable to the Player or other Person***

Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Player or other person, then the Board or Union or Tournament Organiser imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred."

90. Counsel referred to delays caused by IRB Counsel. We note Counsel (correctly in our view) did not submit there have been "*substantial*" delays which must be established before the Regulation can be applied. We accept there have been understandable but not significant delays partly in relation to obtaining evidence (including rebuttal evidence) and in relation to the release of our decision which because of the Christmas and New Year holiday period could not be released until now. Further, this is the first case an IRB BJC has been required to consider breaches of Regulation 21.2.3 under the more advanced whereabouts and out of competition testing regime and both Counsel have properly taken the opportunity of raising factual and legal issues which have required careful consideration on our part. For these reasons we are not satisfied the delay in this case warrants the application of the above Regulation.

Decision

91. For the reasons outlined, the sanction imposed for this anti-doping rule violation is a period of ineligibility of two years commencing from 16th July 2012 (being the date upon which the Player's provisional suspension commenced) and concluding (but inclusive of) the 16th July 2014.

Costs

92. If the Board wishes us to exercise our discretion in relation to costs pursuant to Regulation 21.21.10, written submissions should be provided to the BJC via Mr Ricketts by 17:00 Dublin time on 15th February 2013 with any responding written submissions from the Player to be provided by no later than 17:00 Dublin time on 29th February 2013.

Review

93. This decision is final, subject to referral to a Post Hearing Review Body (Regulation 21.25) or an appeal, where the circumstances permit, to the

Court of Arbitration for Sport (Regulation 21.27). In this regard, attention is also directed to Regulation 21.24.2, which sets out the process for referral to a Post Hearing Review Body, including the time within which the process must be initiated.

DATED this 21st day of January 2013

T M Gresson
G Nicholson
Dr D Gerrard

INTERNATIONAL RUGBY BOARD

IN THE MATTER OF THE REGULATIONS RELATING TO THE GAME

AND IN THE MATTER OF ALLEGED DOPING OFFENCES BY **ISAKE KATONIBAU** (FIJI) CONTRARY TO REGULATION 21

AND IN THE MATTER OF A DECISION OF A BOARD JUDICIAL COMMITTEE DATED 21 JANUARY 2013

AND IN THE MATTER OF A REFERRAL TO A POST-HEARING REVIEW BODY APPOINTED PURSUANT TO REGULATION 21.24 CONSISTING OF:

Post-Hearing Review Body:

Dr. Ismail Jakoet (South Africa)
Christopher Quinlan QC (England)
Graeme Mew (Canada – Chair)

Appearances:

Lieutenant Colonel Luveni, Counsel for Isake Katonibau (the "Player")
Major Navneel Sharma, Counsel for the Player
Ben Rutherford, Counsel for the International Rugby Board (the "Board")

Attendances:

Manasa Baravilala (CEO, FRU)
William Koong (Medical Officer, FRU)
Talemo Waqa (High Performance Manager, FRU)
Tim Ricketts (IRB Anti-Doping Manager)

REASONS FOR DECISION

1. According to Regulation 21.8 of the *Regulations Relating to the Game* (the "Regulations"), Doping Control may be carried out at any time. It can be random or targeted. It can occur In Competition or Out of Competition. If it occurs Out of Competition it can be undertaken with or without prior notice (No Advance Notice). In any of these circumstances, the responsibility of Players is clear:

> *All Players shall submit to Doping Control at any time and any place whenever requested by an authorised official.*

2. In a decision dated 21 January 2013 (the "Decision"), an independent Board Judicial Committee ("BJC") determined that the Player had committed an anti-doping rule violation by reason of his refusal or failure without compelling justification to submit to Sample collection after notification as authorised by the International

Rugby Board's anti-doping regulations or otherwise evading Sample collection, contrary to. A sanction of two years' ineligibility was imposed, commencing 16 July 2012.

3. The Player has requested that the BJC's decision should be referred to a Post-Hearing Review Body ("PHRB") pursuant to IRB Regulation 21.24.

4. The right to a post-hearing review of a decision of a Board Judicial Committee is provided for by Regulation 21.24. A notice of review must be lodged within seven days of the decision under review being notified.

5. The Player via his lawyer lodged a Notice of Review on 28 January 2013.

6. This PHRB was appointed to review the Decision, in accordance with Regulation 21.25.

7. The PHRB issued a Minute dated 20 March 2013 setting out the proposed procedure for the post-hearing review. The Minute noted that a recording of the hearing by the BJC was available together with the complete documentary record that was before the BJC. It was further noted that there was no request by the Player to ask the PHRB to receive new evidence. The PHRB directed that, subject to any representations that either the Player or the Board wished to make to the contrary, the matter would proceed to a hearing by the PHRB by way of telephone conference on 8 April 2013 (Dublin time), based on the record of proceedings before the BJC, the recording of the hearing conducted by the BJC, the notice of review and the written and oral submissions of the parties to the PHRB.

8. No representations were received to vary the procedure proposed by the PHRB.

9. A brief hearing was conducted on 8 April 2013 at which time the Player and the Board requested that the PHRB conduct its review and render its decision based on the materials noted in paragraph 8 (above).

Grounds for Review

10. In his Notice of Review to a Post-Hearing Review Body the Player sets out the grounds for his request which were summarised by the PHRB in its Minute dated 20 March 2013. No objection having been taken to that summary, the PHRB refers to those grounds for the purposes of this review. Those grounds are that:

a) The BJC failed to correctly apply Section 24 of Schedule 1 to Regulation 21 ("Notification of Players Out of Competition")

b) The BJC failed to take into account and/or to apply Regulation 21.9.3 ("[t]he nature of Out of Competition Doping Control makes it desirable that no prior warning is given to the Player being tested")

c) The BJC erred in concluding that the Player was not prejudiced by being given advance notice of the Sample collection and by the fact that a chaperone was not present when the Doping Control Office gave the Player notice of the Sample collection and, hence, failed to correctly apply Regulation 21.34.1 (deviation or deviations from the Anti-Doping Regulations and/or the Guidelines)

d) The BJC failed to apply Regulation 21.10.9(f) and (h) ("Whereabouts Filing for Testing Pool Players – Off Season Period")

e) The BJC erred in finding that the Player's refusal or failure was either intentional or negligent

f) The BJC erred in concluding that the Player had failed to establish the existence of exceptional circumstances, as provided for in Regulation 21.22.4 ("No Fault or Negligence") or Regulation 21.22.5 ("No Significant Fault or Negligence") warranting elimination or reduction of the otherwise applicable sanction

Process

11. According to Regulation 21.25:

21.25.3 *The Post-Hearing Review Body shall determine the basis upon which any review will proceed. It may, however, in its discretion rehear the whole or any part of the evidence given before the Judicial Committee as it considers appropriate. Pending the decision of the Post-Hearing Review Body the decision of the Judicial Committee remains in full force and effect.*

21.25.4 *Where any question of fact arises on any review before the Post-Hearing Review Body it may be determined by reference to the record of proceedings before the Judicial Committee. However, the Post-Hearing Review Body, in its discretion, may rehear or receive written evidence in respect of the whole or any part of the evidence given before the Judicial Committee as it considers appropriate.*

21.25.5 *The Post-Hearing Review Body shall have the power to conduct and regulate the review proceedings as it sees fit having regard to the circumstances of the case. Although the Post-Hearing Review Body is entitled to regulate its own procedure it shall conform to the procedures stated in these Anti-Doping Regulations and with the procedural guidelines set out below:*

(a) The review shall be conducted in a timely fashion;

(b) The parties shall have the right to be represented by counsel at their own expense; and

(c) The decision shall be timely, written and reasoned.

21.25.6 The Post-Hearing Review Body shall be entitled to call on experts to provide specialist advice, including legal advice.

21.25.7 The Post-Hearing Review Body shall have full discretionary power to hear and receive such further evidence as it thinks fit, provided it is established by the party wishing to lead such new evidence that such evidence was not, on reasonable enquiry, available at the time of the original hearing.

Standard of Review

12. Regulation 21.25.9 provides that save where a PHRB decides to hear the entire case de novo (in which circumstances the applicable first instance standards and burdens shall apply), the party seeking review shall have the burden of proving that the decision being challenged should be overturned or varied.

13. In circumstances where a tribunal has power to review the facts and the law, the Court of Arbitration for sport (CAS) has provided guidance on how the scope of review should be regarded and applied.

14. In *Kendrick v ITF* CAS 2011/A/2518 a CAS panel stated:

10.6 Where, as is the case with Article R57 of the Code, rules or legislation confer on an appellate body full power to review the facts and the law, no deference to the tribunal below is required beyond the customary caution appropriate where the tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses. This is not, of course to say that the independence, expertise and quality of the first instance tribunal or the quality of its decision will be irrelevant to the CAS Panel. The more cogent and well-reasoned the decision itself, the less likely a CAS panel would be to overrule it; nor will a CAS panel concern itself in its appellate capacity with the periphery rather than the core of such a decision.

10.7 The Panel repeats and endorses what was said in the recent case of Bucci v FEI CAS 2010/A/2283 where a similar argument was advanced and rejected. At para 14.36 of that decision the Panel said:

> *'The Panel would be prepared to accept that it would not easily "tinker" with a well-reasoned sanction, i.e. to substitute a sanction of 17 or 19 months' suspension for one of 18. It would naturally (as did the Panel in question) pay respect to a fully reasoned and well-evidenced decision of such a Tribunal in pursuit of a legitimate and explicit policy.*

However, the fact that it might not lightly interfere with such a Tribunal's decision, would not mean that there is in principle any inhibition on its power to do so.'

15. In reviewing the grounds for review raised by the Player, we would observe that the Decision was cogent, well-reasoned and well-evidenced. Its authors were a senior lawyer, a sports medicine physician and teacher and an experienced rugby administrator. The evidence and submissions were received over the course of telephone conference hearings convened on four separate days.

16. We note too that at the hearing of the request for review, the lawyers for the parties advised that they were content for the PHRC to reach its decision based on an examination of the record of proceedings before the BJC, including the audio recordings of the hearing itself, and the written submissions of the parties. Save for a few questions directed to the lawyers by members of the PHRC, no other oral submissions were offered.

17. While the PHRC has considered all of the evidence and submissions that were placed before us, we refer only to the evidence and submissions which we consider necessary to do so in order to explain our reasoning and conclusions.

Facts

18. The Decision notes that there were significant conflicts in the evidence, some of which related to central issues in the case. However, the BJC's findings of fact are not challenged by the Player. Those facts were stated by the BJC in the following terms:

13. On 27th June 2012, following an ORADO, DCO Training Workshop (which finished at approximately 6.30 pm), the DCO in carrying out an IRB "Mission Order" to select for testing any two players included in the Fiji 7s Testing Pool, selected two players (including the Player) for out of competition testing.

14. The DCO stated she selected the Player for testing because of the proximity of his declared whereabouts residence to the ORADO office.

15. Despite unreliable telephone records (which as indicated during the hearing we put aside) and witnesses being uncertain about exact times, we are satisfied following the selection of the two players between approximately 6.50 pm to 7.10 pm that evening Mrs Simpson telephoned the Player at what he had listed as his "home address" (117 Kapadia Place, Raiwai, Suva – telephone number [provided]) to advise him he had been selected for out-of-competition testing.

16. The DCO and Player gave conflicting accounts as to some aspects of the ensuing telephone discussion. As indicated, we prefer the DCO's account which virtually contemporaneously she recorded in brief notes prior to

compiling a more detailed report later that evening at approximately midnight. Part of her report states as follows:

> *"When I called the athlete's home number [number given], the phone rang 3 times. The individual on the side of the line reply "Hello" and I asked "Can I please speak to Mr Aisake Katonibau the rugby 7's player. The reply in Fijian "io, o au ioqo" (in English translation "Yes its me"). I notified the athlete: "Bula Aisake, this is Fanny Simpson, from ORADO. You have been selected for drug test. If you fail to comply you could be sanctioned by your sport".*
>
> *I also advised the athlete that I was on our (myself (DCO) and male chaperone) way to his home in Raiwai. The athlete respond "Im sorry but Im not home", I then reply to the athlete saying "O iko tiko i vale, o iko vosa mail landline" (in English translation "You are at home because you are talking to me on your home phone or landline"). "Oi" (in English "Yes" or "In agreement"). I reminded the athlete again that if he fail to comply he could be sanctioned by the sport. The athlete respond confirming that he is aware of the consequences and express his concern for "always being selected for drug test". I again request for the athlete that he is not to go anywhere and except us to be at his home in a few minutes. Athlete confirmed that he will wait for us at his residence in Raiwai."*

17. Apart from acknowledging that she had once spelt the word "oi" incorrectly (it should be "io") and despite rigorous cross-examination by the Player's Counsel, we are satisfied the accuracy of this crucial part of the DCO's evidence was not undermined when she gave oral evidence at the hearing. Indeed, in challenging the veracity of parts of the DCO's evidence3, the Player went so far as to suggest the DCO did not and could not speak in the Fijian language. However, when called to give rebuttal evidence in relation to that part of the conversation, in response to a request from a member of the BJC (Mr Nicholson) without hesitation the DCO spoke in the Fijian language. Her response was not challenged in subsequent cross-examination. She stated also that she had lived in Fiji for approximately 50 years and had no difficulty understanding the particular dialect of the language. She was adamant she had no misunderstanding as to what was said during the discussion and included the comments in Fijian in part of her notes because she considered they were important.

18. Significantly, Ms Potoi, who was also present at the ORADO office when the DCO contacted the Player, confirmed she overheard the DCO's comments, part of which were in the Fijian language.

19. The Player stated, he was "angry" at again being selected for testing at his parent's home during family time. He expressed his frustration to the DCO but in spite of this we are satisfied the Player confirmed he would wait at the residence, the DCO having indicated that she would be there "in a few minutes". Moreover, in relation to the crucial facts which provide the evidential

foundation for the alleged breach, we are satisfied the DCO notified the Player he was required to undergo a sample collection. Further, she explained he should remain at the residence and he could be sanctioned if he failed to comply with her directions. Indeed, the Player claimed the DCO in a "harsh" fashion "threatened" him of the possible consequences if he failed to comply with her directions. The Player confirmed he was aware of the consequences if there was non-compliance.

20. The DCO and Chaperone stated they travelled to the Player's residence by taxi. There was a conflict in the evidence as to the period of time which elapsed from the time the DCO made the initial telephone call and the Player leaving his parents' residence as a result of receiving a telephone call from his wife who was five months pregnant. She insisted her husband should take their daughter (who we were informed was suffering from influenza) back to their home situated at 63 Milverton Road, which is situated nearby.

21. We are satisfied the DCO and Mr Cavu (a school teacher who was acting in the capacity of a Chaperone for the testing), arrived at the property sometime within a period of approximately 30 minutes from the initial telephone discussion. In this respect we consider it took the DCO and the Chaperone longer than the DCO initially indicated. In their evidence the Player and his Father stated the Player waited at his parents' residence for approximately 30 minutes before he left. In our view, it was not necessary to determine the exact period of time that elapsed before the DCO and the Chaperone arrived at the property as the evidence clearly established that without advising the DCO and contrary to the DCO's requirement that he remain at the property until she arrived, within a period of approximately 30 minutes he decided to leave of his own volition.

22. The DCO and Chaperone stated when they arrived at the property they found the front gate was closed. The DCO stated she rang the landline number again. The Player's father answered and advised her his son had left the residence with his (the Player's) daughter. He requested the DCO return the next day. According to the Player he had requested his parents to inform the DCO he had returned to his "home address" situated approximately one kilometre from his parents' residence and she should contact him there or at his army barracks the next day. We are satisfied the DCO was not informed by the Player's Father his son could be contacted at the Milverton Road address which the Player stated his family had occupied for approximately two months. Further, the Milverton Road address had not been disclosed in an up-dated Whereabouts Declaration. Consequently, the DCO was unaware the sample could be collected at an alternative residential address.

23. The DCO explained to the Player's father the possible consequences of his son failing to comply. Mrs Katonibau then intervened. She informed the DCO the Player had left the property with his daughter and the DCO should contact her son on his mobile number or at the army barracks the following day. Again, we conclude the Player's mother did not advise the DCO of the Milverton Road address. Mrs Katonibau terminated the call when the DCO

attempted to explain the consequences if the testing was not undertaken that day.

24. Contrary to the assertion by the Player's father, who in effect suggested that from any vantage point at his residence he would have seen any person arrive and standing outside his property, we are satisfied the DCO and Chaperone following their arrival remained waiting for approximately one hour near the gate of the property.

25. In any event, even if they either did not travel to the property or went to the wrong address (neither of which we do not accept), it is indisputable that by the time the DCO made the second call to the parents' landline number, the Player had left his parents' residence without advising her of his intention to leave or informing her where he may be contacted that evening.

26. During the waiting period of approximately one hour the DCO telephoned the ORADO Testing Co-Ordinator for advice in relation to the problem which had arisen by describing the events (as outlined above) which had occurred since the initial telephone call to the Player.

27. The DCO also unsuccessfully attempted to contact the Player by telephoning his mobile number which had been provided in his Whereabouts Declaration. Further, when the DCO called the number, the Player had not provided any contact details.

28. The DCO also telephoned Mr William Koong, the FRU Medical Officer and explained the difficulties encountered. Shortly thereafter Mr Koong informed the DCO he had also been unsuccessful in his attempt to contact the Player on his mobile telephone.

29. In explaining why he left his parents' residence the Player stated he had driven the family car to his parents' residence. His daughter was restless, suffering from influenza and he had been reluctant to leave her with his parents. Further, his wife's pregnancy prevented her from walking to his parents' address to collect their daughter. He stated he and his daughter were having "a family time with his parents" and following the call from the DCO he was concerned his parents may think he was involved with "drugs". He further explained he was "scolded" by his wife when he arrived home with his daughter who was given cough mixture. He stated at this time his mobile telephone was not operational because it had been left at his Army Barracks.

19. The BJC also received evidence concerning Out of Competition testing undertaken by the IRB, which, for the sake of completeness is also set out in full:

30. David Ho, an IRB Anti-Doping Officer ("ADO"), provided unchallenged evidence in relation to IRB testing (including out of competition testing) in the Oceania region.

31. He explained that following the promulgation of the World Anti-Doping Code ("the Code") in 2003 prescriptive requirements as to athlete's whereabouts were introduced. The requirements included the replacement of the previous 24 hour advance notice and the preferred approach was that an athlete should not be forewarned of the testing. The ADO acknowledged however that advance notice (including telephone notice) may be appropriate in certain regions or circumstances for example "when the player lives in a secure gated community or apartment block, when presented with a locked gate which does not allow access to a residence or when access to a residence is restricted".

32. The ADO also explained the distinction between the IRB Registered Testing Pool (RTP) and Testing Pool (TP). He stated:

> *"the RTP comprises what the IRB would regard as high risk players. This includes those who are currently serving a sanction, have incurred 3 Whereabouts Failures whilst in Testing Pool within an 18 month period, any player the IRB may suspect of doping, or any other player at the IRB's discretion.*
>
> *The Testing Pool is the IRB's principle Pool of players for whom the IRB conduct Out of Completion (sic) Testing and consist of a given Union's National Squads (7's and or 15's) nominated by the IRB.*
>
> *In regards to whereabouts provision RTP players are required to submit details regarding their residence, training information, any temporary accommodation, competition schedule or National Squad activity for a given quarter. In addition RTP players are required to provide a 60 minute location where they can be found for testing every day of the quarter which unless otherwise specified by the player will default to their listed residence between the hours of 6-7 am. Currently no players from Fiji are included in the IRB's Registered Testing Pool. If an RTP Player is not available for testing at his 60 minute whereabouts location he will be charged with a Missed Test. If an RTP player records three Missed Tests and/or Filing Failures during an 18 month period he is liable to be sanction for between one to two years.*
>
> *Testing Pool Players provide the same information however without the 60 minute location unless they are in an off season period or are away from scheduled team activities, perhaps through injury or illness. The National Fiji squad for 15's and 7's are both included in this Pool. These Players can be tested anywhere and at any time. They will receive a Missed Test if they are not available during their off season 60 minute location or if testers visit their whereabouts locations and are advised that the player has left the club, moved house, is overseas, or cannot be found at any of his whereabouts locations in season."*

33. The ADO also explained players are required to provide through their Unions "Whereabouts Information" on a quarterly basis as a result of which the IRB creates "Mission Orders". In this case the Mission Order specified the DCO to "select any 2 players from the Fiji 7's Testing Pool".

34. In the ADO's experience "the geography and culture of Fiji are such that local knowledge is relied upon heavily in testing there. In many cases players have no specific residence other than a village name. The geography of the country and somewhat transient culture of people where they may move between different family or village residences with regularity can also complicate locating athletes in Fiji. This difficulty is increased by the fact that ORADO is one of the smaller anti-doping organisations the IRB deals with, with only one full-time staff member and very limited resources. In this combination of circumstances calling prior to making face-to face contact may be the only means by which to locate a player with certainty and efficiency".

35. The ADO stated the IRB has no record of any previous unsuccessful attempts to test the Player. The only test the IRB has on record for the Player was an out of competition sample collected at a training camp during the National Team's preparation for the Pacific Nations Cup commencing 29th May 2012. In addition, we note the Player's unchallenged evidence he was also selected for testing prior to the two UK legs of the IRB 7's series. Because he was not at his nominated address at the relevant time he did not complete the test and he was informed by the DCO (Mrs Simpson) that she had found a replacement.

36. In May 2012, the FRU distributed on behalf of the IRB, the IRB Anti-Doping Handbook prior to participating in the Pacific Nations Cup for the Fiji 15's National Team. The Handbook emphasised:

> *"Urine Sample Collection*
>
> *Doping Control plays an essential part in promoting and protecting doping free Rugby. Testing worldwide is conducted in accordance with the World Anti-Doping Code and the International Standard for Testing. Testing may take place at anytime, anywhere. The following is a guide to the Urine Sample Collection process and although slight variations may exist depending on the Anti-Doping Organisation, the principles are the same and will not affect the integrity of the process.*
>
> *...*
>
> *A failure to comply with the request to provide a Sample may be considered an anti-doping rule violation and may result in a sanction of two years."*

37. Further, upon being included in the Testing Pool for Out of Competition testing the Player was also sent a guide entitled "A Guide to Player Whereabouts" in the Fijian language.

Analysis

20. We refer to the grounds for review set out in paragraph 10 (above). In addition, and for the sake of completeness, we refer to a further ground for review which was not separately set out in the Minute, namely that the DCO could and should have done more to locate the Player.

21. The first three grounds are that:

(a) The BJC failed to correctly apply Section 24 of Schedule 1 to Regulation 21 ("Notification of Players Out of Competition");

(b) The BJC failed to take into account and/or to apply Regulation 21.9.3 ("[t]he nature of Out of Competition Doping Control makes it desirable that no prior warning is given to the Player being tested"); and

c) The BJC erred in concluding that the Player was not prejudiced by being given advance notice of the Sample collection and by the fact that a chaperone was not present when the Doping Control Office gave the Player notice of the Sample collection and, hence, failed to correctly apply Regulation 21.34.1 (deviation or deviations from the Anti-Doping Regulations and/or the Guidelines)

22. Schedule 1 to Regulation 21 contains the *Doping Control Procedural Guidelines* (the "Guidelines").

23. Section 24 of the Schedule deals with notification of players for doping control measures Out of Competition.

24. Notification of Players Out of Competition

(a) A Player shall be notified for Out of Competition Doping Control by "No Advance Notice" notification, where the DCO or Chaperone appears unannounced and notifies the selected Player in person. The selected Player is then kept under direct observation until the Sample is sealed and appropriate documentation completed. Advance notice notification, shall only occur in the most exceptional circumstances.

(b) Where a DCO appointed by the Board to conduct No Advance Notice Out of Competition Doping Control, the DCO or Chaperone should give the Player a reasonable time to complete any activity in which he is engaged subject to the DCO's authorisation and agreed time period. Such activity should be within the DCO/ Chaperones clear and continuous view.

(c) No Advance Notice Doping Control should commence as soon as reasonably practicable after a Player has been notified. In the case where the selected Player is participating in a Team training session, the Player may complete the session under direct view of a DCO or Chaperone before presenting for Doping Control.

(d) The DCO shall unless advised otherwise attempt to notify the Player(s) selected for Doping Control at all their nominated whereabouts locations (prior to visiting the one hour location if the Player is in a Registered Testing Pool or during the off season or periods of injury if the Player is in the Testing Pool) in an attempt to collect a Sample. If the Player is not present at any of the nominated whereabouts locations the DCO shall attempt to discover in a reasonable and discrete manner the location of the Player without alerting the Player.

- *The DCO shall stay at all locations other than the one hour location for a reasonable amount of time but no less than 30 minutes (unless reliable intelligence indicates an alternative location for the Player at that time). The DCO shall stay at the one hour location from the time of arrival until the expiry of the one hour period.*

- *If the DCO is unable to locate the Player after visiting all nominated whereabouts locations and any other location that may have been obtained from reliable intelligence in the process of attempting to locate the Player then the DCO shall complete an Unsuccessful Attempt Report.*

- *If the DCO is unable to locate the Player at the nominated or default one hour location then he shall complete an Unsuccessful Attempt Report.*

(e) When a DCO makes contact with the Player who is subject to Out of Competition Doping Control he should show the Player at a minimum:

(i) A valid form of photo identification; and

(ii) A letter from the Board, Union, Tournament Organiser containing the name(s) of the DCO and authorising the DCO(s) to conduct Doping Control on its behalf.

(f) When a Chaperone makes contact with the Player who is subject to Out of Competition Doping Control he should show the Player at a minimum:

(i) A letter from the Board, Union or Tournament Organiser authorising the Chaperone to assist with conducting Doping Control on its behalf.

(g) Prior to undertaking the Sample collection the DCO shall request the Player to produce photo identification or satisfy himself of the identity of the Player to be tested as further outlined in section 6(f)(vi) of this Schedule.

(h) The DCO shall make every effort to collect the urine Samples as discreetly as possible and with maximum privacy.

(i) If the Doping Control facilities are not suitable at the location where notification took place the DCO may conduct Doping Control on the selected Player at another location. The DCO will make this decision. The Player may not leave the location where notification occurred unless the DCO permits. The Player must be accompanied by the DCO or Chaperone at all times if the testing session is to be relocated.

(j) If the Player wishes to leave the location against the DCO's direction the DCO shall inform the Player that he is required to provide a Sample for Out of

Competition Testing at the current location and outline the possible consequences of not complying with a request to provide a Sample and that it may constitute an anti-doping rule violation in accordance with the IRB Anti-Doping Regulations. If the Player still does not comply, then a failure to comply shall be recorded. The DCO shall compile a written report relating to the circumstances of the failure to comply.

(k) In all other respects the Sample collection process shall, as far as reasonably practicable, take place in accordance with the Doping Control Procedural Guidelines for In Competition testing.

24. The Player was given up to 30 minutes advance notification by the DCO before the DCO arrived at the Player's residence. The Player observes that the essence of "No Advance Notice" notification is that the DCO or Chaperone should appear unannounced and at that time notify the Player in person of his selection for doping control.

25. According to the Player, the practices described by Mr. Ho in paragraphs 31 (advance notice, including telephone notice may be appropriate in certain circumstances) and 34 of the Decision (geography and culture of Fiji justify advance notice as a means of locating players), conflict with the requirements of section 24 and, furthermore, are condescending.

26. The Player also submits that the BJC failed to consider the effect of Regulation 21.9.3 which provides, *inter alia*, that:

The nature of Out of Competition Doping Control makes it desirable that no prior warning is given to the Player being tested.

27. The Player further notes that following notification the Player should have remained under the continual observation of a Chaperone until he provided a urine Sample. This did not, and could not happen, because the Player was notified by telephone that he had been selected for doping control procedures. The Chaperone, along with the DCO, did not arrive at the Player's residence until up to 30 minutes after the DCO had notified the Player by telephone that he had been selected for doping control.

28. The status of the Guidelines and the consequences of a departure from the procedures set out in the Guidelines is addressed in Clause 1(a) of the Guidelines:

> *These Guidelines are in compliance with the WADA International Standard for Testing and should be followed as far as is reasonably practicable. However, any departure from the procedures set out in these Guidelines shall not invalidate a finding of an anti-doping rule violation unless such departure undermines the validity of such finding.*

29. To similar effect is Regulation 21.34.1:

> *Any deviation from the Anti-Doping Regulations and/or the Guidelines does not invalidate any finding, decision or Adverse Analytical Finding unless such deviation or deviations are such as to cast material doubt on any finding, decision or Adverse Analytical Finding.*

30. Notwithstanding clause 24(a) of the Schedule *("A Player shall be notified for Out of Competition Doping Control by "No Advance Notice" notification"*) and Regulation 21.9.3 (*"it [is] desirable that no prior warning is given")*, Regulation 21.8.1 does in fact contemplate Out of Competition Doping Control being undertaken "with or without prior notice".

31. Furthermore, any inconsistencies between the Schedule and the Regulation would, as a matter of ordinary principles of statutory or contractual interpretation, be resolved in favour of the Regulation.

32. Consequently, the fact that the Player in this case received some notice would not, therefore, automatically invalidate the results of any testing or justify the Player's subsequent disappearance from the address at 117 Kapadia Place (where he had taken the DCO's phone call, notifying him of Doping Control, on a landline).

33. While the Schedule does not provide express guidelines for Out of Competition testing on notice, both the Schedule and the Regulation contemplate the possibility that the procedures followed may deviate from those set out in the Regulation and/or the Schedule. Such deviations will not invalidate a finding, decision or Adverse Analytical Finding unless they would cast doubt on the validity of the finding, decision or Adverse Analytical Finding.

34. Therefore the inquiry that needs to be made is whether the fact that as much as thirty minutes may have elapsed between notice of Doping Control being given to the Player by the DCO by way of a telephone call and the subsequent attendance of the DCO and the Chaperone at 117 Kapadia Place casts doubt on the validity of the BJC's finding that the Player had refused or failed without compelling justification to submit to Sample collection.

35. If the Player had not spoken by telephone with the DCO and, hence, been notified of Doping Control, his subsequent absence when the DCO and the Chaperone turned up at 117 Kapadia Place would not have resulted in a refusal or failure finding. To that extent, the Player was prejudiced by the fact that he received notice. But to use the fact of notice having been given, when no notice was required, as an excuse for the Player's failure to wait for the DCO to arrive, or to communicate where he had relocated to, would lead to an absurd result.

36. This is particularly so whereby his own admission, the Player was warned of the consequences of not waiting for the DCO to arrive, but elected to leave anyway, despite other options being available for the care of his daughter while he underwent Doping Control.

37. In other areas of law, provisions relating to drug testing, for example in an employment setting, may engage strict application of the applicable rules. On behalf of the Player, reference was made to the decisions of New Zealand courts in *Halyar v The Goodtime Food Company*[1] and *Parker v Silver Fern Farms Ltd (No. 1).*[2] Those cases note that employee drug testing regimes impinge significantly upon individual rights and freedoms, and, hence, that policies promulgated by employers should be interpreted and applied strictly. By contrast, however, the principles underscoring doping in sport are quite different. The Introduction to the *World Anti-Doping Code* ("WADC") notes:

> *These sport-specific rules and procedures aimed at enforcing anti-doping rules in a global and harmonized way are distinct in nature from and are, therefore, not intended to be subject to or limited by any national requirements and legal standards applicable to criminal proceedings or employment matters. When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport.*

38. In *New Zealand Rugby League v Tawera*[3] the New Zealand Sports Disputes Tribunal observed that “any remedial set of rules such as the WADA Code calls for a purposive approach to interpretation and application; that is, an approach which looks at the purpose of a rule and applies that purpose in its interpretation”.

[1] [2012] NZEmpC 153
[2] [2009] ERNZ 301
[3] (2005, Sports Disputes Tribunal of New Zealand)

39. The purpose of "no notice" is to limit opportunities for an athlete to evade or manipulate Doping Control. It is something that enures to the benefit of the Anti-Doping Organisation rather than the Player.

40. The giving of notice was not prejudicial to the Player. His argument is purely technical. On a literal interpretation of the Regulation and the Schedule, he says that there was non-compliance by the Board's representatives.

41. Even if we were to agree with the Player on this point - which we do not - the giving of notice, the presence (or lack thereof) of the Chaperone and the interval between notice being given and the arrival of the DCO at the Player's home address, are not individually or collectively reasons for doubting the validity of the Doping Control which the DCO was attempting to undertake.

42. If the "no notice" provisions included important rights for the protection of the athlete, non-compliance might well result in no anti-doping rule violation being established. In *Tchachina v FIG* CAS 2002/A/385, an athlete submitted that the failure of an International Federation to invite the athlete to attend the opening of her “B” Sample deprived her of her right to be present or represented during the testing of the “B” Sample and, as such, that the testing procedure could not be regarded as complete due to the failure of the International Federation to strictly observe the rules relating to the testing of the “B” Sample. The CAS panel accepted this submission but it did not, ultimately, uphold the athlete’s appeal because the athlete had admitted that she took nutritional supplements and the evidence before the CAS panel demonstrated to the panel’s apparent satisfaction that a particular prohibited substance was present in one of the supplements taken by the athlete. But on the failure to observe the rules point, the CAS panel, noting that athletes’ rights during the course of the sample collection and testing process are relatively limited, concluded that the failure to notify the athlete of the right to attend the opening and analysis of the “B” Sample had compromised the “limited rights of an athlete to such an extent that the results of the analysis of the B-sample and thus the entire urine test must be disregarded.” To similar effect is the CAS decision in *Varis v IBU* CAS 2008/A/1607.

43. As already noted, however, the "no notice" provisions exist primarily for the benefit of the anti-doping authorities rather than as one of the "limited rights of an athlete". The Player acknowledges as much in his written submission:

> *The very purpose of not giving advance notification is to achieve an element of surprise hence giving credibility to any test sample obtained.*

44. Even were we to agree that the procedures under the Regulation had not been sufficiently complied with, no right of the Player has been infringed in this case.

45. We therefore find that there was no departure from the procedures for Out of Competition testing sufficient to cast doubt on the BJC's conclusion that the Player refused or failed without compelling justification to submit to Doping Control.

46. The next ground considered is that:

> *d) The BJC failed to apply Regulation 21.10.9(f) and (h) ("Whereabouts Filing for Testing Pool Players – Off Season Period")*

47. Regulation 21.10.21(c) deals with testing of players during a player's out of season at his or her nominated residence and establishes a "default hour" for such testing between 6 a.m. and 7 a.m. unless otherwise advised by the player.

48. The Player asserted that, despite having himself played for Fiji on 24 June and acknowledging that domestic rugby was being played in Fiji on 27 June 2012, the attempt to test him on 27 June occurred in his off-season, thereby engaging the "default hour" provision. As testing was not attempted during the default hour, he claims that he had no obligation to be at his nominated residence when the DCO attended on the evening of 27 June.

49. The first problem with this argument is that 27 June was not in the off-season. In fact whereabouts information submitted in respect of the Player placed him at Army Green Rugby Club between 4:00 p.m. and 5:00 p.m. on Mondays to Thursdays for the period covering 27 June 2012 (which we note was a Wednesday).

50. But even setting that aside, as has already been noted, pursuant to Regulation 21.8, it is clear that Doping Control may be carried out at any time. Whereabouts information is supplied to facilitate the conduct of Out of Competition testing, but the provisions relating to whereabouts in no way preclude the conduct of Doping Controls at other times or in other places.

51. On this ground of review, we therefore find that there was no error on the BJC's part.

52. The next ground for review is that:

> *e) The BJC erred in finding that the Player's refusal or failure was either intentional or negligent*

53. The genesis for this ground of review is the commentary to Article 2.3 of the WADC (which corresponds with Regulation 21.2.3) which states:

> *Failure or refusal to submit to Sample collection after notification was prohibited in almost all pre-Code anti-doping rules. This Article expands the typical pre-Code rule to include "otherwise evading Sample collection" as prohibited conduct. Thus, for example, it would be an anti-doping rule violation if it were established that an Athlete was hiding from a Doping Control official to evade notification or Testing. A violation of "refusing or failing to submit to Sample collection" may be based on either intentional or negligent conduct of the Athlete, while "evading" Sample collection contemplates intentional conduct by the Athlete.*

54. The Decision (at paragraph 76) identified a number of factors which it felt led inexorably to the conclusion that the Player's refusal or failure was either intentional or negligent:

a) The Player knew that he was required to remain at the Kapadia Place residence for the purpose of Sample collection.

b) The Player was warned of the consequences of non-compliance and confirmed he would wait for the DCO.

c) Instead, the Player did not wait. He left before the DCO arrived (and without advising her and left the property.

d) The DCO did not know the Player could be contacted at the alternative residential address at Milverton Road. The Milverton Road was not in the Player's then current whereabouts information and the DCO was not given the address by either the Player or his parents.

e) Having left the Kapadia Place address the Player made no attempt to contact the DCO

55. In our view there was ample evidence to enable the BJC to conclude that the Player's refusal or failure was either intentional or negligent and we therefore find no merit to this ground for review.

56. The next ground for review relates to the BJC's application of the regulations pertaining to the existence of "exceptional circumstances" warranting elimination or reduction of the otherwise applicable sanction.

f) The BJC erred in concluding that the Player had failed to establish the existence of exceptional circumstances, as provided for in Regulation 21.22.4 ("No Fault or Negligence") or Regulation 21.22.5 ("No Significant Fault or Negligence") warranting elimination or reduction of the otherwise applicable sanction

57. The relevant provisions are as follows:

Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances

21.22.4 ***No Fault or Negligence***

If a Player or other Person establishes in an individual case that he bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Player's Sample in violation of Regulation 21.2.1 (presence of a

Prohibited Substance or its Metabolites or Markers), the Player must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility eliminated. In the event this Regulation 21.22.4 is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Regulation 21.22.10.

21.22.5 ***No Significant Fault or Negligence***

If a Player or other Person establishes in an individual case that he bears No Significant Fault or Negligence, the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than eight years. When a Prohibited Substance or its Markers or Metabolites is detected in a Player's Sample in violation of Regulation 21.2.1 (presence of Prohibited Substance or its Metabolites or Markers), the Player must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility reduced.

58. Although these provisions seem more geared to anti-doping rule violations involving Prohibited Substances, Regulation 21.22.2(a) envisages their application to refusing or failing to submit cases (see also *NZRL Inc v Tawera*, Sports Disputes Tribunal of New Zealand (6 May 2005) and *IRB v Zaliznyy, Lytvynenko and Sukhikh* (IRB BJC, 29 May 2013).

59. As is made clear in the commentary to the corresponding provisions of the WADC (Articles 10.5.1 and 10.5.2), it is only in cases where the circumstances are truly exceptional, and not in the vast majority of cases, that the presumptive sanction will be reduced or eliminated.

60. In *UK Anti-Doping v Marcel Six* (UK NADP, 25 October 2012), an athlete refused to submit to Doping Control because he was under pressure to get home where his wife was concerned about their unwell children. While the National Anti-Doping Panel rejected the athlete's submission of "compelling justification", it did accept that, while there was fault on the athlete's part, there was not significant fault. The panel reasoned (at paragraph 46):

> … the Claimant has established that his clear motivation was to go urgently to the aid of his family whom he believed to be in significant distress with the potential for harm to the health of his wife and possibly also his children. Putting his family first in this way was not, as we have already held, compelling justification, but accepting his motivation as we do, we are able to say that he has acted without **significant** fault.

61. As both the panel in *Six* and the BJC observed, the facts of the *Six* case were truly exceptional. Significantly, the panel, accepted the athlete's evidence of his motivation.

62. The evidence of the Player, as found by the BJC (at paragraph 29) suggests that the dilemma faced by the Player was for more benign than that of Mr. Six:

> *His daughter was restless, suffering from influenza and he had been reluctant to leave her with his parents. Further, his wife's pregnancy prevented her from walking to his parents' address to collect their daughter. He stated he and his daughter were having "a family time with his parents" and following the call from the DCO he was concerned his parents may think he was involved with "drugs". He further explained he was "scolded" by his wife when he arrived home with his daughter who was given cough mixture.*

63. Part of the motivation for his departure, at least, was a concern that the Player's parents might think he was involved with "drugs". Indeed, the BJC concluded on the evidence that by choosing to leave his parents' residence, the Player did everything possible to avoid Doping Control. As the BJC noted (at paragraph 87):

> *…the Player was warned and had every opportunity to comply with the DCO's requirement to submit to a sample collection. It is axiomatic the BJC must apply IRB Regulations (which are based on the Code) to the circumstances of this case.*

64. Given the evidence and the BJC's findings we see no basis for a finding of exceptional circumstances. The Player failed to remain to undergo Doping Control, he knew that he had to wait and he knew what the probable consequences were if he did not submit to testing. This ground of review therefore also fails.

65. Finally, the Player raises as a ground for review the assertion that the DCO could and should have done more to locate the Player. He notes that Schedule 1, clause 24 (d) provides that:

> *If the DCO is unable to locate the Player after visiting all nominated whereabouts locations and any other location that may have been obtained from reliable intelligence in the process of attempting to locate the Player then the DCO shall complete an Unsuccessful Attempt Report.*

66. According to the Player, the DCO did "not by reasonable intelligence attempt to locate the Player but in fact entered into a somewhat 'heated' conversation with her *[sic]* parents." She should, the Player says, have:

a) queried the Player's parents as to where he had gone;

b) clarified with the Fiji Rugby Union as to where the Player might be;

c) obtained information from his employer as to the Player's whereabouts and;

d) made an attempt to locate the Player's wife to source his whereabouts.

67. In our view, clause 24(d) has no application to the circumstances at hand. Rather, it applies to the location of athletes during off-season periods. And, in any event, the DCO had located the Player. He was at his parents' residence. He spoke to the DCO on the telephone and was asked to remain there until the DCO arrived. He understood the importance of doing so. Nevertheless, he then left before the DCO arrived. He cannot avoid his personal responsibility for his actions by seeking to place the onus of the DCO to go and find him.

Conclusion

68. We are not persuaded on the basis of any of the grounds advanced by the Player that the BJC erred in coming to its decision.

69. The request for review is therefore dismissed and the Decision stands.

Appeal

70. Regulation 21.27 sets out the circumstance under which appeals of decisions made by a PHRB can be taken to the Court of Arbitration for Sport (CAS) and the time limits for doing so.

Costs

71. Regulation 21.25.12 provides that, subject to the discretion of the PHRB to the contrary, costs associated with any proceedings before a PHRB shall ordinarily be borne by the party seeking the review. If the Board is seeking costs, it should provide the Anti-Doping Manager with its written submission by no later than 5:00 p.m. Dublin time on 26 June 2013. The Player would then have until 5:00 p.m. Dublin time on 3 July 2013 to respond.

21 June 2013

Graeme Mew, Chairman