

INTERNATIONAL RUGBY BOARD

IN THE MATTER OF REGULATIONS RELATING TO THE GAME

AND IN THE MATTER OF THE RUGBY WORLD CUP 2007 QUALIFIERS ANTI-DOPING PROGRAMME

AND IN THE MATTER OF AN ALLEGED DOPING OFFENCE BY **SEBASTIÁN BERTI** CONTRARY TO REGULATION 21

BEFORE A BOARD JUDICIAL COMMITTEE APPOINTED PURSUANT TO REGULATION 21.20 and 21.21 CONSISTING OF:

Judicial Committee:

Dr. Ichiro Kono (Japan)

Dr. Barry O'Driscoll (Ireland)

Graeme Mew (Canada – Chair)

Appearances and Attendances:

For the Board:

Susan Ahern (Counsel)

Tim Ricketts (Anti-Doping Manager)

For the Player

Mark Gay (Counsel)

Tony Hallett (President, Richmond Football Club)

Tony Gadsby Peet (Commercial Director, Richmond Football Club)

For the Federación Rugby de Chile

Dr. José Francisco Soza (Medical Advisor)

Roberto Guerrero Lillo (Physiotherapist)

The Player

Sebastián Berti

Heard: 12 and 18 October 2006 (by way of telephone conference)

REASONS OF THE JUDICIAL COMMITTEE

1. The *Athlete Guide*, edition 4¹, published by the International Rugby Board (the “Board”) in partnership with the World Anti-Doping Agency (“WADA”) contains the following information about supplement use:

“Extreme caution is recommended regarding supplement use. It is WADA's position that a good diet is of utmost importance to athletes. The use of dietary supplements by athletes is a concern because in many countries the manufacturing and labeling of supplements may not follow strict rules, which may lead to a supplement containing an undeclared substance that is prohibited under anti-doping regulations. A significant number of positive tests have been attributed to the misuse of supplements, and taking a poorly labeled dietary supplement is not an adequate defense in a doping hearing.”

2. Sebastián Berti (the “Player”) is an international rugby player. He is a member of Richmond F.C. in England and represents his country, Chile, at the senior men’s level. He has been capped over 10 times at the senior level and has also represented his country at the Under 18, Under 19 and Under 21 levels. Although he is an amateur player, Mr. Berti is employed as a community rugby coach in England.
3. On 22 July 2006, the Player represented his country in a Rugby World Cup Qualifying match against Uruguay in Montevideo (the “Match”). He was selected for in-competition doping control and provided a urine specimen to a doping control officer. On the Doping Control Form which he completed, the Player declared that he was using Guarana, Creatine and Protein.
4. The Player’s urine specimen was divided into “A” and “B” samples and sent to the WADA accredited laboratory in Montréal, Canada. The laboratory’s certificate of analysis of the “A” sample indicated a positive test for the presence of Ephedrine measured at 13 micrograms per millilitre in the Player’s urine sample.
5. Under the World Anti Doping Code, the use of ephedrine, which is a stimulant, is prohibited when its concentration in urine is greater than 10 micrograms per millilitre.
6. The Board has no record of a Therapeutic Use Exemption (“TUE”) on file for the Player for the use of this substance.
7. Following a preliminary review undertaken pursuant to Regulation 21.20.1², the results of the positive test were subsequently communicated by the International Rugby Board to the Player via the Federación Rugby de Chile (the “Union”). As the

¹ The Athlete Guide is available on the IRB website – www.irb.com – in English, French and Spanish. The corresponding Spanish text provides:

Se recomienda extrema precaución en cuanto al uso de suplementos. La AMA opina que una buena dieta es sumamente importante para los deportistas. Asimismo, se preocupa por el consumo de suplementos nutritivos por parte de los deportistas porque es posible que en muchos países no se sigan normas estrictas en cuanto a la fabricación y el etiquetado de los suplementos, lo que podría dar lugar a que un suplemento contuviera una sustancia no declarada que esté prohibida según las normas antidopaje. Se ha atribuido un número considerable de controles positivos al mal uso de suplementos, y tomar un suplemento nutritivo mal etiquetado no se considera una defensa adecuada en una audiencia por dopaje.

² References to “Regulations” are to the Regulations Relating to the Game

Player currently lives in England, the Rugby Football Union was also advised. In accordance with Regulation 21.19, the Player was provisionally suspended from all rugby activities effective 18 September 2006.

8. The Player was given the option of having the “B” sample of his specimen analysed, but advised the Board that he accepted the findings of the “A” sample and that he did not wish to have the “B” sample analysed.
9. The Player wrote to the Board on 25 September 2006. In his letter, he said that since being notified of his positive test, he had discovered that a natural supplement, guarana, which he had used and declared at doping control, contained “Sida Cordifolia”, which, in turn, contained ephedrine.
10. In his letter, the Player requested a hearing, following which a Board Judicial Committee (“BJC”) was appointed to hear the case.
11. The Player agreed to the hearing being conducted by way of telephone conference. The hearing commenced on 12 October 2006 and continued on 18 October.
12. After the end of the hearing, the BJC convened by way of telephone conference and decided, with reasons to follow, that:
 - a. On 22 July 2006, the Player committed an anti-doping rule violation, namely, the presence in his urine sample of ephedrine at a concentration of greater than 10 ug/mL;
 - b. The Player’s use of ephedrine was not intended to enhance sport performance;
 - c. The presence of ephedrine in the Player’s urine sample was nevertheless a result of the Player’s failure to discharge his personal responsibility to ensure that no Prohibited Substance is found to be present in his body;
 - d. The sanction imposed for this anti-doping rule violation should be a period of Ineligibility of six (6) weeks, commencing 18 September 2006 (the date upon which the Player’s provisional suspension under Regulation 21.19 commenced) and concluding (but inclusive of) 30 October 2006.
13. The BJC’s reasons for its decision are as follows.

The Record

14. The Player participated in the hearing assisted by his legal representative, Mr. Mark Gay. Officials of his club and his Union also participated. The BJC had before it the following documents:
 - a. Preliminary Review Report
 - b. Laboratory Analysis Report
 - c. Doping Control Form
 - d. Letter from the Board to the Player dated 14 September 2006
 - e. Letter from the Player to the Board dated 25 September 2006
 - f. Letter from the Player to the Board dated 27 September 2006

- g. Letter from the Board to the Player dated 29 September 2006
- h. Letter from the Board to the Player dated 5 October 2006
- i. Letter from the Player to the Board dated 11 October 2006
- j. Physiotherapy Report of the Tour to Uruguay (Roberto Guerrero Lillo, July 2006) (original in Spanish, English translation)
- k. Statement of Roberto Guerrero Lillo, 17 July 2006 (English translation)
- l. Bundle of email correspondence between the Board and the Union
- m. Information on Sida Cordifolia (from www.sidacordifolia.com) and Guarana (from www.guarana.com.au).

15. The BJC received oral evidence from the Player, Dr. Soza, Mr. Guerrero Lillo and Mr. Hallett.

Anti-Doping Rule Violation Established

16. At the outset of the hearing, the Player confirmed his admission of the presence of ephedrine in his urine sample above the permitted concentration and, hence, that he had used a Prohibited Substance. Accordingly, we are satisfied that the Player has committed an Anti-Doping Rule Violation due to the presence of a Prohibited Substance, namely ephedrine, in the Player's urine sample.

17. Under Regulation 21.2.1, the "presence of a Prohibited Substance or its Metabolites or Markers in a Player's bodily Sample" constitutes an anti-doping rule violation.

18. Regulation 21.22.1 provides, in respect of sanctions:

Except for the specified substances identified in Regulation 21.22.2, the period of Ineligibility imposed for a violation of Regulation 21.2.1 (presence of Prohibited Substance or its Metabolites or Markers), Regulation 21.2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and Regulation 21.2.6 (Possession of Prohibited Substances and Methods) shall be:

First violation: Two (2) years' Ineligibility.

Second violation: Lifetime Ineligibility.

However, the Player or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Regulation 21.22.4.

19. It was confirmed that this is the Player's first anti-doping rule violation.

20. Modified sanctions may apply if the Prohibited Substance giving rise to the Anti-Doping Rule Violation is a "specified substance". In this regard, Regulation 21.22.2 provides:

The Prohibited List may identify specified substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents. Where a Player can establish that the Use of such a

specified substance was not intended to enhance sport performance, the period of Ineligibility found in Regulation 21.22.1 shall be replaced with the following:

First violation: At a minimum, a warning and reprimand and no period of Ineligibility from future Events, and at a maximum, one (1) year's Ineligibility.

Second violation: Two (2) years' Ineligibility.

Third violation: Lifetime Ineligibility.

21. Ephedrine is a specified substance.
22. The Player asserted that his use of ephedrine was not intended to enhance sport performance and, hence, that the BJC should apply a sanction as provided for by Regulation 21.22.2.

The Player's Account

23. The Player can not point conclusively to the cause of his positive test. As already noted, in his letter of 25 September 2006, he referred to his use of guarana, which he described at the hearing as a "natural plant supplement". In a further letter to the Board, on 11 October 2006, the Player stated that for a period of three days before the Match, he had taken decongestant pills to treat a heavy head cold. He claimed that these pills had been given to him by a paramedic with the Chile team.
24. The Player started using guarana two years ago. He had read that rugby players in Australia had used caffeine as part of a dietary supplement regime and decided to use guarana instead because its contents include a substance with the same characteristics as caffeine, but occurring in a natural form.
25. The Player acknowledged that he was aware of anti-doping regulations, but believed guarana, a "natural" supplement, to be safe.³ He says that he read the contents on all packaging carefully and had seen nothing that alerted him to any possible concerns. He did not discuss his supplement use (which, in addition to guarana, included creatine and protein drinks) with Chilean team support personnel because he believed that what he was taking was permitted.
26. According to Dr. Sosa, the medical adviser to the Chile team, a number of other players on the Chile team also use guarana.
27. Guarana comes from Brazil. It is apparently available as a herbal supplement and an energy drink.⁴ The Player obtained his supply of it through the Internet. He was unable to identify the precise source from which he obtained his supply of guarana or to produce any packaging for the product he used.
28. Although, generally, his use of guarana was intermittent, during the week leading up to the Match, the Player took guarana every day. He thought it would help him in

³ It is claimed that "Guarana Active" is listed on the Australian Register as "a complimentary health medicine" - Source: www.guarana.com.au. The same source continues:

"Pure guarana powder is the ideal energy drink supplement to maintain stamina and ward off fatigue and tiredness. It is used by a broad cross-section of the community, including fatigue-sufferers, athletes and party-goers."

⁴ Source: www.guarana.com.au

what he described as a “heavy professional week” in which he was away from home, undergoing a rigorous training regime and not eating a normal diet.

29. The Player’s use of guarana was declared on the Doping Control Form which he completed at the time he was tested. His use of a decongestant was not declared. He explained that he did not think to declare the decongestant because he presumed it to be benign (having obtained it from a team support personnel member) and had not taken anything that day.
30. After he was informed that he had tested positive that the Player spoke to Dr. Sosa. Dr. Sosa undertook some further research into guarana and found out that certain guarana products include *sida cordifolia*. *Sida cordifolia* contains ephedrine.⁵
31. In addition to his use of guarana, the Player also used decongestant pills for three days shortly before the Match. There was conflicting evidence about where the pills came from. The Player says he obtained them from the “paramedic”. Mr. Geurreo Lillo, the team physiotherapist, contests this.
32. The Player suggests that the combination of his use of guarana and a decongestant, possibly containing pseudoephedrine, may have caused his positive test.
33. Underscoring the Player’s evidence is his belief that his use of guarana was to supplement his diet and that his use of a decongestant was to treat a heavy cold. He denies knowingly using a Prohibited Substance to enhance sport performance.
34. The Player apologised for all of the inconvenience he felt he had caused. He said he had always supported efforts to prevent doping in sport. While his understanding of the issues was much greater as a result of what had happened, he accepted full responsibility for his actions.

The Union’s Perspective

35. Dr. Sosa indicated that, to date, the Union had concentrated its anti-doping educational efforts towards the use of medicinal products. Until this incident involving the Player, less attention had been paid to supplement use.
36. Given the use of guarana by a number of team members, Dr. Sosa had been surprised and concerned to learn about the links between guarana and *sida cordifolia* products containing ephedrine.
37. Dr. Sosa said that a medical kit was prepared about two weeks before the Match. While he believes that there would have been medicines in the box containing pseudoephedrine, he does not believe that there would have been medicines containing ephedrine, although he could not be one hundred percent sure.

⁵ According to the website <http://sidacordifolia.com>, “*Sida Cordifolia* Complex is a herbal complex designed to trigger fast fat loss. It contains precise ratios of *Sida Cordifolia*, Guarana and White Willow Bark to trigger fat loss. *Sida Cordifolia* Complex is also perfect for a Pre-Workout boost, just try it, your workouts will never be the same!” The website goes on: “The stem of this plant contains a number of active compounds, including small amounts of an essential oil, and most important, 1-2% alkaloids composed mainly of ephedrine and pseudoephedrine, with ephedrine ranging from 30-90%, depending on the source.”

38. Mr. Guerrero Lillo was adamant that he would not knowingly give a player a decongestant because he was aware of the possibility that doing so could result in a positive anti-doping test. He does not recall giving the Player anything for treatment of a cold. Another player who did ask for something for a cold was given an analgesic. Mr. Guerrero Lilla did say, however, that there was ephedrine in the medical box, but that the only ephedrine he had dispensed was to a coach. He does acknowledge that the treatment room was very busy and that there was a possibility that the Player was given something for a cold, however, he regards that possibility as low.
39. It does appear that there was not a complete inventory of the contents of the medical box, and that a complete account of who was given what was not kept.

The Player's Club's Perspective

40. Mr. Hallett stated that the Player was a new member of Richmond F.C. However, based on his acquaintance with the Player to date and having heard the Player's explanation, Mr. Hallett had no doubts about the Player's integrity and was convinced that he had not intended to enhance sport performance. He described the Player as a family man, for whom the consequences of a continuation of his suspension would have a severe impact and who deserved to have the benefit of any doubt.

The Board's Submissions

41. On behalf of the Board, it was submitted that it would be open to the BJC to find that the Player had failed to establish on a balance of probability⁶ that his Use of ephedrine was not intended to enhance sport performance. Alternatively, if the BJC accepted that the Player had not intended to enhance sport performance, the Player's lack of care and attention to his supplement and medication use fell well short of his responsibilities.
42. On the issue of intent to enhance sport performance, the Board submitted that the Player had failed to establish the source of the ephedrine that was found in his system. His evidence on the use of guarana was unsatisfactory because he could not identify the precise product used or the source from which it was purchased (other than reference to the Internet). His evidence about the use of a decongestant was in conflict with that of Mr. Guerrero Lillo and should be given little, if any, weight.
43. Even if the BJC accepted that the Player had not intended to enhance sport performance, he had been careless in his use of supplements. He did not inquire from any doctor about whether use of guarana was advisable and did not research the contents of the product that he used. He seemed to place great reliance on the claim that the product was "natural".
44. Given the Player's acknowledgment that he was aware of doping issues and had received some anti-doping education, combined with the fact that, while not a professional rugby player, he was playing at the international level, the Board

⁶ Regulation 21.3.1 provides that:

Where these Regulations place the burden of proof upon the Player or other Person or entity alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

submitted that the sanction imposed by the BJC should reflect the seriousness of the Player's lack of care and attention.

The Player's Submissions

45. On behalf of the Player, it was conceded that he had not established what had caused his positive test. It could have resulted from the use of a decongestant given to him inadvertently. It could have resulted from his use of a guarana product.
46. If medicine he obtained from team personnel was the cause, the Player was entitled to assume that he could use it without concern for any anti-doping consequences. His use of the decongestant was purely medicinal.
47. With respect to guarana as a possible cause, it had taken the expert assistance of Dr. Sosa to establish a link with *sida cordifolia* and, hence, ephedrine. It would be placing too high a burden on an amateur player to have expected him to have made this link himself. His use of the supplement was nutritional and understandable in a situation where he was away from home, training intensively and eating poorly.
48. The concentration of ephedrine in the Player's sample was only marginally over the reporting threshold and is consistent with the position that there could have been no intent to enhance sport performance. If the Player was powering up for the Match, one would have expected a much higher concentration.
49. Assuming that the Player's burden of establishing no intent to enhance sport performance was met, there were significant mitigating factors that should be considered.
50. First, as an amateur player employed in community rugby, the Player should not be held to the highest of standards.
51. Second, as a player for a Union that would be regarded as a junior member of the Board, it was perhaps understandable that the level of anti-doping education and monitoring was not as high as it might be in other countries. That said, Chile has clearly made reasonable efforts and the Player would like to be associated with further initiatives that would help prevent a similar episode to his occurring in the future.
52. Third, the substance involved is ubiquitous. The Player's infraction was most likely caused either by use of an over-the-counter non-prescription medicine in general circulation, or of a widely used nutritional supplement whose website gives no indication of any possible anti-doping concerns associated with the product's use. As such, the Player's actions were reasonable.
53. It was suggested that in many other sports, the type of infraction committed by the Player would not exceed a warning and a reprimand. By contrast, because of his interim suspension, the Player had been excluded from all rugby activity, including training and coaching, for a month already. This had inflicted a hardship not only on the Player himself, but also for those coached and taught by him.
54. Taking into account these factors, together with the Player's remorse, his ready acknowledgment of the infraction, the support of his club and his general good character, it was submitted that a warning and a reprimand would be appropriate. The

BJC was referred to the case of *Robert Dedig* (2004), in which a BJC gave a warning and a reprimand to a player who had tested positive for salbutamol, prescribed by a his personal physician (who was also a team physician), without a Therapeutic Use Exemption.

Sanctions

55. We agree with the Board's submissions that players who cannot establish the cause of their positive test will have greater difficulty establishing a lack of intent to enhance sport performance.
56. We are prepared to accept Dr. Sosa's evidence that there was a basis for concluding that the supplement used by the Player might have contained *sida cordifolia*. However, we do note that while the published information provided to us indicates that *sida cordifolia* contains guarana, we were not provided with any published material indicating that any guarana products contain *sida cordifolia*.
57. While it would have assisted the Player's cause if he had been able to identify the precise guarano (or *sida cordifolia*) product he had used and where he had obtained it from, and while there were also contradictions in the evidence before us on the claim of decongestant use, we ultimately accept that the Player did not intend to enhance sport performance.
58. We cannot accept, however, that a warning and a reprimand would be a sufficient sanction.
59. Even if, which is by no means certain, the Player was given a decongestant containing ephedrine by a team physiotherapist, the evidence of the Player's supplement use cannot be ignored. All players – be they amateurs playing club rugby or professionals playing internationally – are responsible for ensuring that no Prohibited Substances are found in their bodies.⁷ The standard is one of strict responsibility.⁸ The Player's actions fell well short of his personal responsibility.
60. While ephedrine may, indeed, be "ubiquitous", that is reflected already in the fact that there is a reporting threshold in place, such that incidental ingestion of food, drink, supplements or medications containing ephedrine does not result in an Anti-Doping Rule Violation. While the concentration of ephedrine in the Player's urine only modestly exceeded the reporting threshold and was taken into account by us in concluding that he had not intended to enhance sport performance, we are nevertheless of the view that had he exercised appropriate care and attention in his supplement use, a positive test may well not have occurred.
61. Regardless of the degree of the Player's exposure to anti-doping education, he, and all players, should know that the use of supplements is risky, hence warnings of the sort set out in the first paragraph of these reasons. Such warnings go unheeded by players

⁷ Regulation 21.6.1

⁸ See the comment to Article 2.1.1 of the World Anti-Doping Code which states:

"Under the strict liability principle, an anti-doping rule violation occurs whenever a Prohibited Substance is found in an Athlete's bodily Specimen. The violation occurs whether or not the Athlete intentionally or unintentionally used a Prohibited Substance or was negligent or otherwise at fault."

at the risk of sanctions being imposed if the result is a positive test. With testing programmes now in place in rugby at all levels, this is a message that all should pay attention to.

62. In our view, a sanction based on “time served” by the Player to date would be insufficient given the Player’s conduct.
63. Were it not for the very capable submissions made on the Player’s behalf by way of mitigation and, in particular, the impact that a lengthier period of suspension would have, not only on the Player’s livelihood but, also, on his family and the community that he serves, we might well have imposed a more severe sanction. In the result, we have concluded that a period of suspension from all rugby activities for a period of six weeks ineligibility⁹, including the period of interim suspension, is appropriate.
64. If the Board wishes us to exercise our discretion in relation to costs pursuant to Regulation 21.21.9, written submissions should be provided to the Judicial Committee and to the Player by 17:00 Dublin time on 3 November 2006, with any written submissions by the Player in response to be provided to the Board (which shall be responsible for forwarding such submissions on to the Judicial Committee) by no later than 17:00 Dublin time on 10 November 2006.

27 October 2006



Graeme Mew (for and on behalf of the Board Judicial Committee)
Ichiro Kono
Barry O’Driscoll

⁹ For avoidance of doubt, Regulation 21.22.7 provides:

No Player or Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Match, Series of Matches and/or Tournament (international or otherwise) or activity (other than authorised anti-doping education or rehabilitation programs) authorised or organised by the Board or any Member Union. Such participation includes but is not limited to coaching, officiating, selection, team management, administration or promotion of the Game, playing, training as part of a team or squad, or involvement in the Game in any other capacity in any Union in membership of the IRB. In addition, for any anti-doping rule violation not involving specified substances described in Regulation 21.22.2, some or all sport-related financial support or other sport-related benefits received by such Player or Person will be withheld by the Board and its Member Unions.