

## INTERNATIONAL RUGBY BOARD

IN THE MATTER OF THE IRB NATIONS CUP

AND IN THE MATTER OF REGULATIONS RELATING TO THE GAME

AND IN THE MATTER OF AN ALLEGED DOPING OFFENCE BY **ANDREY SOROKIN (RUSSIA)** CONTRARY TO REGULATION 21

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

Judicial Committee:

**Dr. Ismail Jakoet** (South Africa)

**Graeme Mew** (Canada – Chair)

**Gregor Nicholson** (Scotland)

*Appearances and Attendances:*

For the Board:

Susan Ahern (Counsel)

Tim Ricketts (Anti-Doping Manager)

The Player

Andrey Sorokin

For the Player:

Dr. Vladimir Minayev (Physician)

Dr. Sergei Romanteyev (Club Doctor, VVA-Podmoscovie Rugby Club)

For Rugby Union of Russia:

Leonid Penchuk (Secretary General)

Vadim Petrenchuk (Executive Director)

Nikolai Nerush (Head Coach, National Team)

Zorik Masandilov (Manager, National Team)

Also Present:

Lilly Orlovska (Translator)

Heard: 16<sup>th</sup> September 2008 by telephone conference; Interim Decision released 19 November 2008; Directions hearing on 22 December 2008 by telephone conference.

## **DECISION OF THE BOARD JUDICIAL COMMITTEE**

1. The International Rugby Board (the “Board”) alleges that, on 19 June 2008, Andrey Sorokin (the “Player”) committed an Anti-Doping Rule Violation by reason of an Adverse Analytical Finding for Indapamide, which is Prohibited Substance, classed under S5 Diuretics and Other Masking Agents. The Player does not dispute the finding. He asserts that the finding arose from his medically-prescribed use of a medicine called Noliprel to treat a serious cardiac condition.

2. This has been a unique and challenging case. It has required consideration not only of the principle of strict liability but, also, recent changes in the *World Anti-Doping Code* and the corresponding regulation in the Board’s *Regulations Relating to the Game*.

### **Strict Liability**

3. The principle of strict liability forms one of the cornerstones of modern anti-doping regulations. It is the responsibility of each athlete to ensure that no Prohibited Substance is to be found to be present in his or her body.

4. According to the principle of strict liability it does not matter whether the player knew that a product that he or she was using contained a Prohibited Substance. Thus when the Scottish skier, Alain Baxter bought an American Vicks nasal decongestant which, as it turned out, included the banned stimulant methamphetamine, even though its British equivalent product (which he routinely used without incident) did not, he was held to have committed an anti-doping rule violation when he was drug tested after winning a bronze medal at the Salt Lake City Olympics<sup>1</sup>.

5. Because of the principle of strict liability, anti-doping regulations emphasise not only the personal responsibility of athletes in terms of what they eat, drink and use, but also that it is the sole responsibility of each player to notify Player Support Personnel, including, but not limited to, their doctors, of the athlete’s obligation not to use Prohibited Substances and to ensure that any medical treatment received by them does not violate any of the provisions of the rules<sup>2</sup>.

6. Inevitably, individual situations arise in which the principle of strict liability can produce what would seem to be an unduly harsh result. The Player’s case is such a case.

### **Background to Anti-Doping Rule Violation**

7. The Player, who is now 37, has been a stalwart of Russian rugby for over a quarter of a century. He started playing rugby in 1983 and, by 1988, had made it to the national junior team and, in 1991, to the senior mens national team.

8. In 2005, the Player retired from international rugby. His family had recently welcomed a new child and he decided to spend more time with them. The Player continued, however, to play rugby, as a professional, for the Podmoskovy Rugby Club.

9. In the spring of 2008, however, the Player was asked if he could return to the national team, which was experiencing a shortage of players, to participate in the Nations Cup tournament.

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<sup>1</sup> *Baxter v. IOC*, CAS 2002/A/376

<sup>2</sup> See, for example, IRB Regulation 21.6.2 (2008 Regulations)

10. The Player's long rugby career is made all the more remarkable when consideration is given to the fact that, in 1998, he was diagnosed with a serious cardiac condition. Fortunately, it was discovered that this condition could be treated with medication. He was prescribed two drugs, Preductal and Enalapril.

11. In November 2007, the Player's doctors changed his prescription. The Enalapril was no longer having the effect that it once had. It was therefore replaced with another medicine called Noliprel.

12. Regrettably, Noliprel contains indapamide. Under Regulation 21 of the *Regulations Relating to the Game* then in force (the "2008 Regulations") and the *World Anti-Doping Code* at that time (the "2003 Code") indapamide is a banned substance under the category S. 5 Diuretics and Other Masking Agents. Indeed it remains a banned substance under the current Regulation 21 (the "2009 Regulations") and the new version of the *World Anti-Doping Code* (the "2009 Code"), both of which came into effect on 1 January 2009, but its status has been changed to the category of banned substances which are classified as "Specified Substances". The significance of this change is discussed below.

13. On 19 June 2008 the Player provided a urine sample as part of an Out of Competition Test administered by the World Anti-Doping Agency ("WADA") on behalf of the Board. This test was undertaken as part of the anti-doping programme for the IRB Nations Cup tournament, in which the Player was by then participating.

14. Following a preliminary review undertaken in accordance with Regulation 21.20, and in the absence of a record of a Therapeutic Use Exemption ("TUE") on file for the Player, it was determined that an anti-doping rule violation may have been committed. The Player was notified of his Adverse Analytical Finding on 22 July 2008 via the Rugby Union of Russia ("RUR"). Pursuant to Regulation 21.19.1 the Player was provisionally suspended upon receipt of notification of his Adverse Analytical Finding. There was some confusion as to the effective date of his suspension. For the purposes of this decision, however, we have proceeded on the basis that the Player was provisionally suspended on 25 July 2008 and has remained suspended from all forms of rugby activity since that date.

15. In accordance with the usual practice, when the Player provided a sample of his urine, it was divided into "A" and "B" samples. The Adverse Analytical Finding resulted from analysis of the "A" sample undertaken by the WADA accredited laboratory in Cologne, Germany. Following notification of the Adverse Analytical Finding resulting from the testing of the "A" sample, it would have been open to the Player to require the "B" sample to be analysed. However, by a letter sent to the IRB on 15 August 2008 the Player wrote [translation]:

I, Russian rugby player, Andrey Sorokin, hereby confirm that I accept the results of Sample A of my Adverse Analytical Finding and I do not wish to proceed Sample B analysis".

16. This Board Judicial Committee (“BJC”) was then appointed pursuant to Regulation 21.21 to hear the Player’s case. On 4 September 2008 various directions were given with respect to the procedures to be followed and it was determined that the initial hearing would take place by way of telephone conference on Tuesday 16 September. Following that hearing, the BJC released an interim decision on 19 November 2008 (discussed below). Following a directions hearing, also done by way of telephone conference, on 22 December 2008, further submissions were requested and received from the Board and the Player.

### **Anti-Doping Rule Violation Established**

17. At the beginning of the hearing, the Player formally confirmed his admission of the presence of indapamide in his urine sample 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 indapamide (S. 5 Diuretics and Other Masking Agents), in the Player’s urine sample.

### **Process**

18. Following the hearing on 16 September 2008, the BJC considered not only the application of the 2003 Code and the 2008 Regulations but, also, the possibility that the sanction applicable to the Player’s Anti-Doping Rule Violation would change as a result of the implementation of the 2009 Regulations and the 2009 Code. However, as the BJC could not consider the provisions of the 2009 Regulations and the 2009 Code until on or after 1 January 2009, the BJC, we decided to release an interim decision on 19 November 2008 but to reserve final judgment until we had jurisdiction to consider the effect, if any, of the 2009 Regulations and the 2009 Code on the applicable sanction.

19. In our interim decision, the BJC noted that under the 2008 Regulations we would have been obliged to have imposed a period of Ineligibility of not less than one year but, having regard to the pending changes in the Regulations, we elected instead to continue the Player’s interim suspension pending the coming into force of the 2009 Regulations prior to making a final determination of the applicable sanction.

### **Evidence**

20. The BJC had before it a record which included the Doping Control Form, a Player Consent Form, the Analytical Report of the Cologne laboratory, a Preliminary Review report prepared by Dr. B. J. O’Driscoll pursuant to Regulation 21.20.1 on 18 July 2008 and certain correspondence between the Player, the RUR and the Board. The BJC was also provided with extracts from the Player’s medical file (with English translation provided).

21. At the hearing, oral testimony was given by the Player, Leonid Penchuk, Dr. Vladimir Minayev, Dr. Sergei Romanteyev, Dr. Yaroslav Smakotnin, Nikolai Nerush and Vadim Petrenchuk.

### **The Player**

22. The Player’s background has already been noted. Both his club team and the national team have been aware of the Player’s medical condition since its outset.

23. The Player has never been asked to sign (or been told that he should sign) any declaration or TUE form at either club or national level. He has been drug tested on approximately 4 previous occasions during international matches or tournaments. He has not previously had an Adverse Analytical Finding.

24. The Player has always declared all medications which he has been taking when he has undergone drug testing. He declared his use of Noliprel and Preductal on the doping control form which he completed at the time of testing on 19 June 2008. He also asserts that he immediately notified his team doctors when his medication was switched to Noliprel.

25. The Player acknowledges a general awareness that doping is not permitted in sport and was sufficiently aware of doping issues to know that he should notify medical support personnel of his change in medication. However, according to the Player, his club had not received or disseminated any anti-doping information from the RUR.

26. The Player now understands that indapamide is contained in Noliprel. The Player said that he would not knowingly have taken any Prohibited Substance and that at his age it would be foolish for him to do something to jeopardise his career.

### **The Doctors**

27. Dr. Vladimir Minayev is a cardiovascular surgeon. When he first saw the Player in 1998, the Player was quite ill. There were two options for treatment: (a) surgery to insert an aortic valve; or (b) medication. It proved possible to treat the Player's condition with medication. For the first year of treatment the Player was not able to undertake any physical activities but after that he was able to resume his rugby activities. The Player has been on medication constantly for the past ten years. Dosages have changed as time has gone by and during any period of viral infection or injuries and also after intensive physical activity.

28. Dr. Minayev has warned the Player that continuing to play rugby does pose risks to his health.

29. Dr. Romanteyer, the Player's Club physician, has always deferred to the cardiologist when it comes to appropriate medical treatment for the Player's cardiac condition. He said that he would not, himself, change the Player's medication because it could lead to unpredictable consequences. Upon questioning, it became clear that Dr. Romanteyer had a limited knowledge of and familiarity with anti-doping procedures and, in particular, the TUE process. He said that while he knew about the WADA list and treats athletes other than rugby players, he did not have extensive anti-doping rule knowledge.

30. As a result of the Player's experience, a process has now been implemented whereby all players are required to provide information to the RUR about medication that they are using. Dr. Romanteyer has also made inquiries about making a TUE application for the Player but, at the time of the hearing, the appropriate forms had not yet been provided.

31. Dr. Smakotnin, the national team doctor, is now in the process of preparing an anti-doping course for Russian players and coaches. Dr. Smakotnin only took up his post as national team doctor in April 2008. He is familiar with the WADA list. He knew about the TUE system but did not have TUE application forms. Dr. Smakotnin claims that the first time that he knew that the Player was using Noliprel was when the Player filled out the doping control form at the Nations Cup tournament on 19 June 2008.

## **The Union**

32. Mr. Penchuk, the Secretary General of the RUR noted that the medication that had been prescribed to the Player was for the purpose of improving the Player's medical condition. It had nothing to do with doping. Because the Player had only been selected to join the squad very shortly before the tournament started, it had been impossible to obtain and review necessary information about medications used by the Player in the previous 21 days.

33. Mr. Penchuk advised that the Player is a professional and that he will lose his livelihood if he is punished for an anti-doping rule violation.

34. Mr. Penchuk acknowledged that he understood that a TUE was necessary and said that the RUR supports the *World Anti-Doping Code*. He said that during the tournament in Romania the TUE application papers were obtained too late.

35. Mr. Penchuk claimed that the RUR had not received any information regarding the Player's use of Noliprel from the Player's doctor. In Mr. Penchuk's view, the doctor would have a list of Prohibited Substances and medications which would contain Prohibited Substances.

36. The RUR does not have an anti-doping programme as such. The RUR is working on an anti-doping strategy for 2011.

37. Generally, the team doctor controls the medications that players use. At the moment, however, Mr. Penchuk acknowledged that the RUR does not efficiently educate players and team support personnel on anti-doping matters.

38. Mr. Penchuk was asked about the fact that there have been five previous anti-doping rule violations involving Russian players. In response, he acknowledged the need to take up a full anti-doping programme as part of the RUR's strategic plan. He understands that it is usually the players who suffer the consequences of the union's shortcomings in terms of anti-doping education.

39. According to Mr. Penchuk the RUR does try to circulate relevant information concerning anti-doping matters to clubs and club doctors.

40. Mr. Penchuk pledged that the RUR would make changes. In November 2008 the RUR will be holding a training session for doctors on the anti-doping programme.

41. All of the RUR witnesses spoke highly of the Player. They said that he was not only a sportsman but that he is a representative of Russian rugby. He is part of the RUR's future plans and they hope that when he stops playing that he will take up coaching responsibilities.

## **Sanctions**

### **A. The 2008 Regulations**

42. Under Regulation 21.2.1 (2008 Regulations), the "presence of a Prohibited Substance or its Metabolites or Markers in a Player's bodily Sample" constitutes an anti-doping rule violation.

*Basic Sanction for First Violation is Two Years Ineligibility*

43. 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.

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

*Reduction or Elimination of Sanction in Exceptional Circumstances*

45. It is open to a Player to demonstrate that an otherwise applicable sanction should be reduced or even eliminated on the basis of "Exceptional Circumstances" as provided for in Regulation 21.22.4.

46. Two categories of exceptional circumstances are identified. In the first, if a Player can establish that he "bears No Fault or Negligence for the violation" and can establish how the Prohibited Substance entered his system, the period of Ineligibility can be eliminated. "No Fault or Negligence" means:

The Player's establishing that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered the Prohibited Substance.

47. The second category is where the Player "bears No Significant Fault or Negligence" in which case the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. The definition of the term provides:

The Player's establishing that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to an anti-doping rule violation.

**B. The 2009 Regulations**

48. Under the 2009 WADA Prohibited List, Indapamide becomes a Specified Substance.

49. Regulation 21.22.3 of the 2009 Regulations provides:

Where a Player or other Person can establish how a Specified Substance entered his body or came into his Possession and that such Specified Substance was not intended to enhance the Player's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Regulation 21.22.1 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from the Game, and at a maximum, two (2) years of Ineligibility.

To justify any elimination or reduction, the Player or other Person must produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the hearing panel the absence of intent to enhance sport performance or mask the Use of a performance enhancing substance. The Player's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

50. The 2009 Regulations and the 2009 Code formally recognise the principle of *lex mitior*. The 2009 Code provides:

### **25.2 Non-Retroactive Unless Principle of Lex Mitior Applies.**

With respect to any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred unless the tribunal hearing the case determines the principle of *lex mitior* appropriately applies under the circumstances of the case.

### **25.3 Application to Decisions Rendered Prior to Code Amendments.**

With respect to cases where a final decision finding an anti-doping rule violation has been rendered prior to the Effective Date, but the *Athlete* or other *Person* is still serving the period of *Ineligibility* as of the Effective Date, the *Athlete* or other *Person* may apply to the *Anti-Doping Organization* which had results management responsibility for the anti-doping rule violation to consider a reduction in the period of *Ineligibility* in light of the 2009 Code. Such application must be made before the period of *Ineligibility* has expired. The decision rendered by the Anti-Doping Organization may be appealed pursuant to Article 13.2 The 2009 Code shall have no application to any anti-doping rule violation case where a final decision finding an anti-doping rule violation has been rendered and the period of *Ineligibility* has expired.

51. The 2009 Regulations provide:

21.35.1 These Anti-Doping Rules shall come into full force and effect on 1 January 2009 (the "Effective Date"). They shall not apply retrospectively to matters pending before the Effective Date; provided, however, that:

(a) Any case pending prior to the Effective Date, or brought after the Effective Date based on an anti-doping rule violation that occurred prior to the Effective Date, shall be governed by the predecessor to this Regulation 21 in force at the time of the anti-doping rule violation, subject to any application of the principle of *lex mitior* by the hearing panel determining the case.

(b) Where a period of *Ineligibility* imposed by the IRB, Member Union and/or Tournament Organiser under and/or in accordance with Regulation 21 in force prior to the Effective Date has not yet expired as of the Effective Date, the Person who is *Ineligible* may apply to the IRB, Member Union or Tournament Organiser (who had results management responsibility at the time of the imposition of the original period of



Ineligibility) for a reduction in the period of Ineligibility in light of the amendments made to Regulation 21 as from the Effective Date. To be valid, such application must be made before the period of Ineligibility has expired.

52. In a sporting context, the principle of *lex mitior* has been applied previously. In an advisory Opinion to CONI<sup>3</sup>, the Court of Arbitration for Sport (“CAS”) stated:

The principle of non-retroactivity is however mitigated by the application of the “*lex mitior*” principle. In this respect, the Panel fully agrees with the statements contained in the advisory opinion CAS 94/128 rendered on 5 January 1995, *UCI and CONI (Digest of CAS Awards (1986-1998))*, p. 477 at 491), which read (in the English translation of the pertinent portions) as follows:

*“The principle whereby a criminal law applies as soon as it comes into force if it is more favourable to the accused (lex mitior) is a fundamental principle of any democratic regime. It is established, for example, by Swiss law ... and by Italian law.... This principle applies to anti-doping regulations in view of the penal or at the very least disciplinary nature of the penalties that they allow to be imposed. By virtue of this principle, the body responsible for setting the punishment must enable the athlete convicted of doping to benefit from the new provisions, assumed to be less severe, even when the events in question occurred before they came into force. This must be true, in the Panel’s opinion, not only when the penalty has not yet been pronounced or appealed, but also when a penalty has become res judicata, provided that it has not yet been fully executed. The Panel considers that [...] the new provisions must also apply to events which have occurred before they came into force if they lead to a more favourable result for the athlete. Except in cases where the penalty pronounced is entirely executed, the penalty imposed is, depending on the case, either expunged or replaced by the penalty provided by the new provisions”.*

53. Similar principles have been applied in *AC v FINA*<sup>4</sup>, *ATP Tour Anti-Doping Appeal Tribunal Appeal of D Luis Feo Bernabe*<sup>5</sup> and *ATP Tour Anti-Doping Appeal Tribunal Appeal of Gaydon Oliver*<sup>6</sup>

### **The Board’s Position**

54. Players with a recognised medical condition must get a TUE using the process provided for in Regulation 21.5.1 (2008 Regulations). The opportunity existed for the Player to submit a TUE application, even though he was a late entry to the Russian squad that participated in the Nations Cup. One would also have expected that a domestic TUE was already in place for the Player, given his well documented medical condition.

55. Because indapamide is a Prohibited Substance (and not, under the 2008 Regulations and the 2003 Code) a “Specified Substance”), the relevant minimum

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<sup>3</sup> CAS 2005/C/841 CONI

<sup>4</sup> CAS 96/149

<sup>5</sup> 7 April 2005

<sup>6</sup> February 2004

sanction would apply unless the Player can demonstrate that there has been “no fault” or “no significant fault” on his part.

56. The relevant minimum sanction under the 2008 Regulations is two years.

57. This is not a “no fault” case. Reference was made to the cases of *IRB v. Andrew Hanks*<sup>7</sup> and *International Tennis Federation v. Roy Mariano Hood*<sup>8</sup>. In both of those cases, the athletes were using medically prescribed medication to address male pattern hair loss. Unfortunately, the medication concerned contained Finasteride which, at the time, was a Prohibited Substance under S.5. Diuretics and Other Masking Agents. In both cases, submissions that there was no fault on the part of the athletes were rejected.

58. However, the Board accepts the application of the *lex mitior* principle in the 2009 Regulations but notes the onus on the Player to demonstrate that the use of Indapamide was not intended to enhance his sports performance or mask the use of a performance-enhancing substance. The Board submits that if the BJC is inclined to apply *lex mitior*, the BJC should apply a period of Ineligibility that at a minimum mirrors the period of Provisional Suspension which the Player will have incurred up to the issuance of the BJC’s Final Decision.

### **The Player’s Position**

59. The Player said that he was very upset. He is 36 years old. He would like to finish his career as a sportsman. He asked the BJC to take into account that he took medication only for his health.

60. The Player asks that the BJC replace any sanction applicable under the previous regime with a reprimand, pursuant to the 2009 Regulations.

61. The Player was fully supported by the RUR.

### **Discussion**

62. Under the 2008 Regulations, because of the anti-doping rule violation which the Player has acknowledged, we would have no option other than imposing (subject to any reduction for exceptional circumstances) the mandatory minimum sanction of two years.

63. As we have noted in a number of previous “exceptional circumstances” cases, the commentary to Article 10.5 of the *World Anti-Doping Code*, which corresponds with Regulation 21.22.4 makes it clear that even in cases of inadvertent use of a Prohibited Substance, the principle of an athlete’s personal responsibility will usually result in the conclusion that there has been some fault or negligence<sup>9</sup>.

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<sup>7</sup> Judicial Committee of International Rugby Board, 13 April 2006

<sup>8</sup> Independent Anti-Doping Tribunal of International Tennis Federation, 8 February 2006

<sup>9</sup> The commentary provides:

To illustrate the operation of Article 10.5, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a prohibited substance by the Athlete’s personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited

64. In *IRB v. Slimani*<sup>10</sup>, a Board Judicial Committee recently had to consider the case of a player who had been prescribed medication by a team doctor which contained a Prohibited Substance. The Board Judicial Committee in that case noted two decisions in the jurisprudence of the Court of Arbitration for Sport where there had been findings of no fault or negligence<sup>11</sup>. Both of those cases have indicated that it will only be in truly exceptional circumstances that there can be a finding of “no fault or negligence”.

65. Having due regard to the Commentary to the 2003 Code and to the CAS jurisprudence, we are in agreement with counsel for the Board that this is not a case of “no fault”, albeit that we come to that conclusion with some reluctance.

66. However, we have no hesitation in finding that there has been “no significant fault or negligence” on the part of the Player. He has been extremely unlucky. There is no doubt at all that his use of medication containing a Prohibited Substance has been for purely medical and therapeutic purposes. It is unfortunate that he has been poorly guided by the RUR and team support personnel who, at a minimum, should ensure that all players are informed on anti-doping matters and that all medication is listed and checked on a regular basis and, in any event, before players compete. Subject to the application of the *lex mitior* principle, the Player’s Anti-Doping Rule Violation would, in our view, merit a period of Ineligibility of one year.

67. As this case was pending prior to 1 January 2009, we are bound by the terms of Regulation 21.35.1 (2009 Regulations) to apply the 2008 Regulations subject to the application of *lex mitior*. We are proscribed from applying the 2009 Regulations retroactively. Furthermore, as a practical matter, the Player has already been provisionally suspended since 25 July 2008.

68. Were we approaching this matter with regard only to the 2009 Regulations, we would need first to be comfortably satisfied that the Player did not intend by his use of Indapamide to enhance sport performance or mask the use of a performance-enhancing substance.<sup>12</sup> Given our conclusion that his use of medication containing a

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substance); and (c) sabotage of the Athlete’s food or drink by a spouse, coach or other person within the Athlete’s circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.)”

<sup>10</sup> International Rugby Board Judicial Committee, 14 October 2008

<sup>11</sup> *Pobyedonostev v. IIHF* CAS 2005/A/990 and *Adams v. CCES* CAS 2007/A/1312

<sup>12</sup> The Comments to Article 10.4 include the following:

“This Article applies only in those cases where the hearing panel is comfortably satisfied by the objective circumstances of the case that the Athlete in taking or Possessing a Prohibited Substance did not intend to enhance his or her sport performance. Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include: the fact that the nature of the Specified Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete’s open Use or disclosure of his or her Use of the Specified Substance; and a contemporaneous medical records file substantiating the non sport-related prescription for the Specified Substance. Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance”

Prohibited Substance has been for purely medical and therapeutic purposes, that onus has been met. We would then have to assess the Player's degree of fault in assessing any reduction in the otherwise applicable period of Ineligibility.

69. In *IRB v. Slimani*, which was a Specified Substance case under the 2008 Regulations, it was concluded as follows on the issue of sanction (at paragraph 61):

“... we do not find the Player entirely blameless. While, as indicated already, we think it was reasonable for him to have trusted the team doctor, it did not absolve him of his personal responsibilities. The Player took no steps to verify what was being given to him. The container he was given had no label and no instructions. As a result, it is with some reservations that we have decided to give the player the benefit of the doubt and to restrict the sanction to a warning and reprimand. In doing so, however, the Player should be aware that we came very close to imposing a period of ineligibility. The FFR's ready and unqualified admission of culpability and their stated determination to improve their procedures and education to ensure that this sort of situation does not happen again were factors in our decision not to impose a period of Ineligibility.”

70. The 2009 Regulation 21.22.3 expressly provides that a “Player's ... degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility”. In this case the Player's degree of fault should be regarded as minimal. However, the Comment to the corresponding Article of the 2009 Code – Article 10.4 – provides the following guidance to hearing panels exercising the discretion given to them in Specified Substances cases:

In assessing the Athlete's or other Person's degree of fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article. It is anticipated that the period of Ineligibility will be eliminated entirely in only the most exceptional cases.” (emphasis added)

71. It seems to us that the present case is, indeed, an exceptional one. While the Player is strictly liable for what he ingested and had the opportunity to obtain a TUE and/or to verify with his medical advisers that he was not at risk of an anti-doping rule violation by using the medication that had been prescribed for him, it is understandable that after many years of using similar medication without incident that he would not have considered the potential anti-doping implications when his medication was changed. In our view there was less fault in this Player's case than there was in *Slimani*.

72. Were we dealing with this case solely in accordance with the 2009 Regulations, we would have imposed a sanction of a warning and reprimand only. Having regard to the *lex mitior* doctrine, and in particular the guidance provided by the CAS panel in the *Advisory Opinion to CONI*, (“[e]xcept in cases where the penalty pronounced is entirely executed, the penalty imposed is, depending on the case, either expunged or replaced by the penalty provided by the new provisions”), we have concluded that the sanction to

be imposed is indeed “the penalty provided by the new provisions” which, in our judgment, should be a warning to the Player as to his future conduct and a reprimand.

73. It should go without saying that if the Player is continuing to use Noliprel or any other medicine containing a Prohibited Substance it is essential that he is in compliance with the applicable TUE requirements.

### **Decision**

74. On 19 June 2008, the Player committed an Anti-Doping Rule Violation by reason of the presence of Indapamide in his bodily Sample. Indapamide is a Prohibited Substance under both Regulation 21 and the *World Anti-Doping Code*, classed under S5 Diuretics and Other Masking Agents.

75. The sanction imposed for this Anti-Doping Rule Violation is a warning and a reprimand.

76. The Player’s provisional suspension is lifted with immediate effect and he is, subject to compliance with all other applicable laws and regulations, eligible to participate in the Game.

### **Costs**

77. The BJC provisionally considers that there should be no order as to costs, but if either of the parties wishes us to exercise our discretion in relation to costs pursuant to Regulation 21.21.9 (2008 Regulations), written submissions should be submitted to the BJC via Mr. Ricketts by 17:00 Dublin time on Monday 19 January 2009, with any responding written submissions to be provided by 17:00 Dublin time on Monday 26 January 2009.

### **Review**

78. This decision is final, subject to referral to a Post Hearing Review Body (2008 Regulation 21.24.1) and an appeal to the Court of Arbitration for Sport (2008 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.

7 January 2009

A handwritten signature in black ink, appearing to read 'Graeme Mew' with a stylized flourish at the end.

Graeme Mew, Chairman