INTERNATIONAL RUGBY BOARD

IN THE MATTER of an alleged anti doping rule violations by **EVILE TELEA** contrary to IRB Regulation 21

BEFORE A BOARD JUDICIAL COMMITTEE APPOINTED PURSUANT TO REGULATION 21.20 AND 21.21:

Judicial Committee

Tim Gresson	(New Zealand)	(Chairman)
Gregor Nicholson	(Scotland)	
Doctor Ismail Jakoet	(South Africa)	

Appearances and Attendances

For the Board

Susan Ahern / Ben Rutherford	(Counsel for the International Rugby Board)
Tim Ricketts	(Anti-Doping Manager)

The Player

Evile Telea

For the Player

Donald Kerslake	(Counsel)

For the Samoan Rugby Union

Peter Schuster	(Chief Executive Officer)
Matthew Vaea	(High Performance Manager)

Written Submissions

Submissions for IRB	27 January 2010
Mr Kerslake's Request for Directions	12 March 2010
Mr Kerslake's Submissions on Preliminary Issues	22 March 2010
Mr Kerslake's Submissions	1 April 2010
Submissions for IRB	9 April 2010
Mr Kerslake's further Submissions in Reply	23 April 2010
Submissions for IRB in Reply	30 April 2010
Mr Kerslake's further Submissions in Reply	17 May 2010

Hearings

13 January 2010
23 March 2010
15 April 2010

DECISION OF THE BOARD JUDICIAL COMMITTEE

Background

1. Following his evidence given in the previous cases of Salanoa[1] and Moala[2] the IRB alleges **Evile Telea** ("the Player") has committed five anti-doping rule violations, namely:
   - Use of a Prohibited Substance (Salbutamol – administered by oral means) on or about May 2008 without a valid TUE as required by 2008 IRB Regulation 21.5, contrary to IRB Regulation 21.2.2;
   - Possession of a Prohibited Substance (oral Salbuamatol) on or about 10 May 2008 in contravention of IRB 2008 Regulation 21.2.6(a);
   - Trafficking[3] of a Prohibited Substance (oral Salbutamol) to a Player (Salanoa) on or about 10 May 2008 in contravention of IRB 2008 Regulation 21.2.7;
   - Possession of a Prohibited Substance (oral Salbuamatol) on or about 22 May 2008 in contravention of IRB 2008 Regulation 21.2.6(a); and/or
   - Trafficking of a Prohibited Substance (oral Salbutamol) to a Player (Moala) on or about 22 May 2008 in contravention of IRB 2008 Regulation 21.2.7.

2. In the Salanoa and Moala cases the Board Judicial Committee ("BJC") found the Player, a Pharmacist, had on separate occasions supplied oral Salbutamol to both Players. All these Persons played for a Samoan district team which participated in the IRB 2008 Pacific Rugby Cup. As a result of their anti-doping rule violations both Salanoa and Moala were suspended for a period of two years.

3. Salbutamol is a Prohibited Substance classed under "S3. Beta-2 Agonists" as listed in the WADA 2008 Prohibited List. It is reproduced in Schedule 2 of IRB Regulation 21. Salbutamol in oral form is a Prohibited Substance.

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[1] Decision of BJC delivered 21 October 2008.
[2] Decision of BJC delivered 17 November 2008
[3] The relevant parts of the definitions in relation to trafficking are as follows:
2008 IRB Regulation 21.2.7: "Trafficking – to sell, give, administer, transport, send, deliver or distribute a Prohibited Substance … to a Player or Person either directly …"
2009 IRB Regulation 21.2.7: "Trafficking … any Prohibited Substance … 2009 Definitions: "Trafficking – selling, giving, transporting, sending, delivering or distributing a Prohibited Substance (either physically or by electronic or other means) by a Player, Player Support Personnel or any other Person …"

Under the 2008 Prohibited List Rules Salbutamol if permitted by a Therapeutic Use Exemption ("TUE"), can be administered by inhalation[4]. Under the 2010 Prohibited List Salbutamol no longer requires a TUE when inhaled for therapeutic purposes. However, in each case the threshold level must not be exceeded and the means of administration must be by inhalation[5]. In the Salanoa and Moala cases the threshold (of 1000 ng/mL) was exceeded and the consumption of Salbutamol was oral and not by inhalation. The substantive change effected by the 2010 amendments to the WADA list of Prohibited Substances is to abolish the need for Therapeutic Use Exemptions and to impose a duty to prove by way of a controlled pharmacokinetic study that an adverse finding is the result of inhaled Salbutamol used therapeutically[6].

4. Following confirmation of receipt of a letter from the IRB advising the anti-doping rule violations, the Player was provisionally suspended; effective 8 January 2009.

5. Although, on the face of it, this case appears to be straight-forward, it has given rise to several issues relating to various aspects of the Regulations. Some of these issues have been responsibly raised by Counsel for the Player and others have been raised by members of the BJC. This has necessitated several hearings and involved comprehensive written and oral submissions by Counsel for the IRB and for the Player. The BJC has been greatly assisted by these submissions but to avoid unnecessary prolixity, Members of the BJC will confine their comments to the most central issues of the case. In doing so, the BJC records its appreciation for the obvious

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[4] 2008 Prohibited List: "All beta-2 agonists including their D- and L-isomers are prohibited. As an exception, … salbutamol … when administered by inhalation, require an abbreviated Therapeutic Use Exemption. Despite the granting of any form of Therapeutic Use Exemption, a concentration of salbutamol (free plus glucuronide) greater than 1000ng/mL will be considered an Adverse Analytical Finding unless the Athlete proves that the abnormal result was the consequence of the therapeutic use of inhaled salbutamol."

[5] 2010 Prohibited List: "All beta-2 agonists (including both optical isomers where relevant) are prohibited except salbutamol (maximum 1600 micrograms over 24 hours) … by inhalation which require a declaration Use in accordance with the International Standard for Therapeutic Use Exemptions. The presence of salbutamol in urine in excess of 1000 ng/mL is presumed not to be an intended therapeutic use of the substance and will be considered as an Adverse Analytical Finding unless the Athlete proves, through a controlled pharmacokinetic study, that the abnormal result was the consequence of the use of a therapeutic dose (maximum 1600 micrograms over 24 hours) of inhaled salbutamol.

[6] The threshold for inhaled Salbutamol has been increased by the WADA Code 2010 to 1600ng/mL. The doses recorded in the Moala and Salanoa cases were high, both being several times over both the 2008 or 2010 thresholds; Moala returned a result of 4129ng/mL, Salanoa 2777ng/mL. As mentioned (paragraph 2) the Player had supplied oral Salbutamol to both Players.

care that Counsel have taken in the preparation of their respective submissions.

6. The Player, to his credit has fully co-operated with the process and at an early stage formally acknowledged that he committed all five anti-doping rule violations as alleged.

7. Initially the Player was not legally represented but following a suggestion by the BJC, through the auspices of the SRU, arrangements were made for the Player to be represented by Counsel (Mr Kerslake). It is understood Counsel represented his client on a pro bono basis and again the BJC records its appreciation to Counsel.

8. Subject to the application of the *lex mitior* principle, it was agreed by both Parties that the IRB Anti-Doping Regulations 2008 (which applied to the Tournament and were reproduced in the Anti-Doping section of the Tournament manual) were applicable. Following the amendment of the 2009 WADA Code, revised IRB Regulations were promulgated; valid as from 1 January 2009. These Regulations introduced some new provisions, some of which are discussed below.

9. Prior to the substantive issues being determined the BJC received applications by Mr Kerslake for the BJC to be recused and challenges to the admissibility of the evidence given by the Player during the Salanoa and Moala hearings. A hearing was conducted by the Chairman on 23 March 2010 when these matters were discussed. Given it was anticipated the BJC would not be required to resolve credibility issues at the substantive hearing and it would not assist the Player to exclude his previous evidence, Mr Kerslake indicated he wished to withdraw the recusal application and accepted the Player's previous evidence was admissible. Subsequently, Mr Kerslake relied on the Player's previous evidence in submitting that the Player's period of ineligibility should be reduced for reasons discussed in paragraphs 14 to 35.

Sanctioning

10. In imposing the appropriate sanction the BJC is required to apply the provisions of Regulation 21. They are based on the WADA Code. Several of these provisions are applicable to this case.

Multiple Violations

11. As noted, the five anti-doping violations occurred on three different dates in May 2008. This brings 2008 Regulation 21.22.5(a) into play. Essentially, the Regulation provides that unless it can be established the Player committed additional anti-doping violations after receipt of notice in respect of the first violation then:

> *"…. the violations shall be considered as one single first violation and the sanction imposed shall be based on the violation that carries the more severe sanction*; *however, the occurrence of multiple violations may be considered as a factor in determining Aggravating Circumstances.*"

12. The minimum period of ineligibility for a first violation in respect of each violation is:

Violation 1: Two (2) years' ineligibility (IRB Regulation 21.22.1)[7];
Violations 2 and 4: Two (2) years' ineligibility (IRB Regulation 21.22.1);
Violations 3 and 5: Four (4) years' ineligibility (IRB Regulation 21.22.3(b))[8].

13. During the hearing, both Parties and the BJC agreed that either of the trafficking violations for the purposes of sanctioning would be the lead violation that carried the most severe sanction. As to the starting point, Counsel for the Player submitted it should be a maximum period of four years ineligibility less any reductions which, in accordance with the Regulations (including the *lex mitior* principle) could be made. On the other hand, Counsel for the IRB submitted even if legitimate reductions could be

[7] "Except for the specific 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 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"

[8] "The period of ineligibility for other violations of these Anti-Doping Regulations shall be: (a) … (b) For violations of Regulation 21.2.7 (Trafficking) … the period of ineligibility imposed shall be a minimum of four (4) years up to lifetime ineligibility …"

made (which they did not accept) given the gravity of the offending, it should not be less than a minimum period of four years ineligibility.

Possible Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances under the 2008 and 2009 Regulations

14. In this regard the following issues were raised. Pursuant to the 2008 Regulations the BJC is empowered not to impose the mandatory minimum sanction provided the Player:

- can establish he "*bears no fault or negligence for the violation*", in which case the period of ineligibility can be eliminated (Regulation 21.22.4(a));
- can establish there was "*no significant fault or negligence*" on his part; in which case the period of ineligibility may be reduced to a period of not less than one half of the minimum period of ineligibility (Regulation 21.22.4(b));
- can establish he provided "*substantial assistance to the Board which resulted in the Board discovering or establishing an anti-doping rule violation by another Person involving Possession under Regulation 21.2.6 (Possession by Player Support Personnel), Regulation 21.27 (Trafficking), or Regulation 21.2.8 (administration to a Player)*" in which case the period of ineligibility again may be reduced to a period of not less than one half of the maximum period of ineligibility (Regulation 21.22.4(c)).

15. Although the 2009 Regulations have been amended, a Player is still required to establish that he bears "*no fault or negligence*" or "*no significant fault or negligence*" (Regulations 21.22.4 and 22.22.5). Further, a Player is still required to establish he provided substantial assistance[9] which resulted in the Board discovering or establishing an anti-doping rule violation by another person – Regulation 21.22.6. However in contrast to the 2008 Regulation, 2009 Regulation 21.22.6 provides up to 75% of the applicable period of

[9] The 2009 Regulations include a new definition as to "Substantial Assistance": "***Substantial Assistance*** *– For purposes of Regulation 21.22.6, a Person providing Substantial Assistance must: (1) fully disclose in a signed written statement all information he possesses in relation to anti-doping rule violations, and (2) fully cooperate with the investigation and adjudication of any case related to that information, including, for example, presenting testimony at a hearing if requested to do so by the Board, his Member Union or other Anti-Doping organisation or hearing panel. Further, the information provided must be credible and must comprise an important part of any case which is initiated or, if no case is initiated, must have provided a sufficient basis on which a case could have been brought.*"

ineligibility may be suspended. Therefore, in the context of this case if the Player could successfully invoke Regulation 21.22.6 the *lex mitior* principle could be applied.

16. The term "*no significant fault or negligence*" is defined in the Preamble (Part A) to Regulation 21 as meaning:

> *"The Player's establishing that 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." (refer A)*

17. A footnote to the corresponding provision of the WADA Code makes it clear that only in truly exceptional cases will these provisions operate to eliminate or reduce a sanction. This was emphasised in the case of International Tennis Federation and Roy Mariano Hood (8 February 2006). The independent Anti-Doping Tribunal stated at paragraph 18:

> *"No fault or negligence requires the Player to show the utmost caution, that is that he had taken all the necessary precautions within his power to ensure that a doping offence could not be committed. It is not a standard of negligence, in the sense of requiring only reasonable care to have been taken. On the other hand the standard of the paradigm must not be set at such a level that it is practically unattainable or unrealistic. If the Player fails to meet that very high standard he may be regarded as having borne some fault, but it may not be "significant". That word in its context connotes a lack of serious or substantial moral fault or blameworthiness, so that the rigorous application of these very strict anti-doping rules is tempered in the case of an excusable and understandable failure to have foreseen or prevented the doping offence where the conduct of the player was not particularly culpable, but failed to meet the standard of utmost caution. In either case, no fault or no significant fault, the circumstances have to be truly exceptional. Again these exceptions have to be restrictively applied to prevent the principle of strict liability being eroded, so that the exception becomes the norm."* (Emphasis added)

18. Further, reference can be made to previous cases for example, IRB v Keyter[10], IRB v Shimenga[11] and IRB v Hanks[12], where the BJC has held that it is only in truly exceptional cases that these provisions can operate to eliminate or reduce a sanction.

19. In his written submissions dated 1 April 2010, Counsel for the Player submitted there were several mitigating factors present in this case which included; the Player had not previously committed anti-doping violations, at the first reasonable opportunity he had accepted he had committed anti-doping violations, his genuine remorse and apology and his lack of understanding that the taking of Salbutamol in the circumstances described was prohibited. The BJC acknowledges that these matters are relevant mitigating factors but, as Counsel correctly accepted during the course of oral argument they did not satisfy the strict requirements of Regulations 21.22.4(a) and (b) (2008) or Regulations 21.22.4 and 21.22.5 (2009) whereby the Player is required to prove on a balance of probabilities (Regulation 21.3.1) that there was "*either no fault or negligence*" or "*no significant fault or negligence*" on his part.

Substantial Assistance

20. Counsel also submitted that the Player had satisfied the "*substantial assistance*" requirements of 2009 Regulation 21.22.6 by proving on a balance of probabilities that the Player had provided substantial assistance in discovering or establishing Anti-Doping Rule Violations by Salanoa and Moala[13]. Thus the starting point sanction should be reduced. Putting aside

[10] See IRB v Keyter at para.6 – see http://www.irb.com/NR/rdonlyres/E577D70D-E8C1-4E74-9D5A-32333CB4D529/0/CASKEYTERFinalAward.pdf.
[11] See Shimenga (July 2005 at para.32) on the IRB website http://www.irb.com/NR/rdonlyres/88032BAFC522-4711-BD37-F1CDE1838DDF/0/050724Shimenga.PDF
[12] 4 See Hanks (April 2006 at para.37) on the IRB website http://www.irb.com/NR/rdonlyres/AD6ED0D5-2DEA-44D8-A92E-CA2E78772AA5/0/060413GMUSAFinasterideFinalDecision.pdf
[13] Regulation 21.22.6 provides that the Board Judicial Committee may, prior to a final appellate decision under Regulation 21.27 or the expiration of the time to appeal, suspend a part of the period of Ineligibility imposed on in an individual case where the Player has provided Substantial Assistance to the Board Judicial Committee, criminal authority or professional disciplinary body which results in the Board discovering or establishing an Anti-Doping Rule Violation by another Person or which results in a criminal or disciplinary body discovering or establishing a criminal offence or breach of professional rules by another Person.

the question whether the Player did provide "*substantial assistance*" in accordance with the 2009 extended definition, in the view of the BJC, Counsel's submission cannot succeed, because whatever the assistance, it did not result in the IRB discovering or establishing anti-doping violation by another Person. Essentially the anti-doping violations by Salanoa and Moala were discovered and established forensically (by the positive test results of the two samples taken from each of them) and by admissions from both Players. Thus, the Player's evidence at the earlier hearings did not result in the discovering or establishing of the anti-doping rule violations by Salanoa and Moala; rather, the evidence simply explained how on each occasion they were able to access Salbutamol.

Admission of Anti-Doping Rule Violations in the Absence of other Evidence

21. Regulation 21.22.7[14] of the 2009 Regulations introduced a new provision whereby a Player who makes a voluntary admission of an anti-doping violation before receiving first notice of the admitted violation can have the period of ineligibility reduced up to 50%. This Regulation is the same as Article 10.5.4 which was introduced in the 2009 WADA Code. The Code's comment in relation to article 10.5.4 explains the intention behind the new provision as follows:

> *"This Article is intended to apply when an Athlete or other Person comes forward and admits to an anti-doping rule violation in circumstances where no Anti-Doping Organization is aware that an anti-doping rule violation might have been committed. It is not intended to apply to circumstances where the admission occurs after the Athlete or other Person believes he or she is about to be caught."*

22. The possible application of this Regulation to the circumstances of this case was raised by a member of the BJC. Both Parties accepted that if the Player satisfied the requirements of the Regulation, then again, the Player may be entitled to benefit by the application of the *lex mitior* principle.

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[14] Regulation 21.22.7 provides "*Where a Player or other Person voluntarily admits the commission of an anti-doping rule violation before having received notice of a Sample collection which could establish an anti-doping rule violation (or, in the case of an anti-doping rule violation other than Regulation 21.2.1, before receiving first notice of the admitted violation pursuant to "Regulation 21.20) and that admission is the only reliable evidence of the violation at the time of admission, then the period of Ineligibility may be reduced, but not below one-half of the period of Ineligibility otherwise applicable*."

23. In presenting its case against the Player the IRB elected to adduce evidence of his admissions made in a brief sworn affidavit dated 11 September 2008 (in respect of the Salanoa matter) and during his evidence given orally during the Salanoa and Moala hearings on 29 September 2008 and 30 October 2008. These admissions occurred before the Player acknowledged receipt (on 8 January 2009) of the IRB's letter (dated 23 December 2008) which outlined his alleged anti-doping violations. The Players' evidence at the earlier two hearings was given in response to questions by Counsel and members of the BJC and adduced after Senior Counsel for the IRB at the commencement of both hearings appropriately indicated that the IRB reserved the right to consider in the future any information given at the hearings. Given, the Player at that stage was not legally represented and may not have been present on both occasions when Counsel's comments were made, the BJC accepts there is some uncertainty as to whether he fully appreciated all the consequences in deciding whether he should waive his fundamental right to decline to give potentially self-incriminating evidence. However the BJC accepts that whatever the position in relation to the Player's understanding of his right to decline to give potentially self-incriminating evidence, he responded freely to questioning.

24. Essentially, during the Salanoa and Moala hearings the Player admitted that without having a TUE, on occasions he had ingested Salbutamol in tablet form because of a "*coughing and breathing*" condition which on occasions occurred following early morning training. He also admitted to carrying the Salbutamol tablets in his medication bag, supplying Salanoa with two tablets and allowing Moala to have unsupervised and unrestricted access to his medication bag which resulted in Moala taking two Salbutamol tablets.

25. In relation to the burden and standard of proof required to establish the

elements of Regulation 21.22.7, Regulation 21.3.1[15] (which reflects article 3.1 of the WADA Code) provides that the IRB shall have the burden of establishing the anti-doping rule violation. The standard of proof shall be whether the violation has been established to the comfortable satisfaction of the BJC bearing in mind the seriousness of the allegation which is made. However, where the Regulations place the burden of proof upon the Player alleged to have committed an anti-doping rule violation to either rebut a presumption or establish specified facts or circumstances the standard of proof shall be by the balance of probabilities except in specific instances (which are not relevant in this case).

26. Thus, given the IRB had established the anti-doping rule violations (which as mentioned at paragraph 6 the Player admitted) he then carried the burden of establishing the specified facts or circumstances detailed in Regulation 21.22.7 which has three requirements before a Player can receive a reduction in the period of Ineligibility. In the context of this case they are:

- The Player must voluntarily admit the commission of an anti-doping rule violation;
- The admission must be made before receiving first notice of the admitted violation pursuant to Regulation 21.20; and
- The admission must be the only reliable evidence of the violation at the time of the admission.

27. In relation to the first element, as mentioned, the Player in his evidence, in effect, freely admitted having committed on occasions the separate acts of being in possession, use of and giving (trafficking) a prohibited substance, namely Salbutamol all of which constitute anti-doping violations. Whether the Player actually intended or knew at the time of the admissions that he was, in effect, admitting the five anti-doping rule violations is a moot point

[15] Regulation 21.3.1 provides: "*The Board and its Member Unions shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Board or its Member Union has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which 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. 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 except as provided in Regulation 21.22.3 and 21.22.9 where the Player must satisfy a higher burden of proof*."

and in relation to this, the IRB submitted that the admissions were not "*voluntary*" in that the Player was not fully aware he was admitting anti-doping rule violations. In support of this proposition reference was made to the Sentencing Guidelines Council of England and Wales and the recent New Zealand Court of Appeal case R v Hessell[16] both of which confirmed the principle that an essential part of reductions in a criminal sentencing context is an intention to confess or own up.

28. With regard to this submission and approaching the matter as one of statutory or (as in this case) regulatory interpretation, we do not consider the Regulation should be construed as suggested. That would place a gloss on this part of the Regulation which is not apparent from its wording. In our view, the Regulation is concerned with a voluntary admission by a Player of conduct which amounts to an anti-doping rule violation. The additional mental element of requiring the Player to be aware he was admitting to having committed anti-doping rule violations is not specifically stated to be a pre-requisite. In our view, this approach is consistent with the regulatory regime of strict liability in relation to the proof of anti-doping rule violations. That is, proof of guilty knowledge on the part of the Player is not a requirement to establish an anti-doping rule violation; only the *actus reus* needs to be proved. Further, for anti-doping rule violations the well known over-arching principle "*ignorentia legis neminem excusat*" (ignorance of the law is no excuse) applies and again, for consistency it must also be applicable to a voluntary admission made under Regulation 21.22.7.

29. Further, in our view the situation posited by the authorities referred to can be distinguished. In a criminal context a plea of guilty is entered after a charge has been laid: ie. after the Person charged has been made aware of the alleged crime. Conversely, the reduction permitted by the Regulation only applies in circumstances when the Player admits to having committed an anti-doping violation before receiving notice of the violation. The BJC, also had difficulty reconciling the submission with the reliance placed on the voluntary admissions to prove the Player's infractions. As mentioned, it was submitted that because of lack of knowledge the Player's statements did not amount to voluntary admissions of anti-doping rule violations but, on the other

[16] *[2009] NZCA 450*

hand, the IRB appropriately relied on the voluntary admissions to establish the Player's anti-doping violations.

30. Turning to the second element, Regulation 21.22.7 requires the Player to have voluntarily admitted the commission of an anti-doping rule violation in the case of a sample collection before receiving notice or in a non-sample collection case, before receiving first notice of the admitted violation pursuant to Regulation 21.20. The term "*first notice*" is not defined in either the Regulations or WADA Code. But, WADA's comment on Article 10.5.4 (refer paragraph 21 supra) suggests that in both sample and non-sample cases the Regulation is intended to apply when the person comes forward and admits to an anti-doping rule violation in circumstances when the Anti-Doping Organisation was not aware the violation might have been committed by him. It is not intended to apply when the admission occurs after the Athlete believes he is about to be caught.

31. In this case, a chronological analysis of the evidence indicates the IRB would have become aware of the Player's trafficking and possession violations following receipt of sworn affidavits from Salanoa and Moala in mid September 2008, both of which implicated the Player as being the person who supplied them with Salbutamol. This occurred before the Player made full admissions of all his anti-doping rule violations during the course of his oral evidence at the subsequent Salanoa and Moala hearings. Essentially, the admissions were only made during the hearing process following the receipt of the affidavits of Moala and Salanoa by which stage as mentioned the IRB would have become aware of the Player's infractions.

32. Therefore, it can be seen if the BJC adopted the approach suggested by WADA, the Player would not have established this element as the IRB had received notice of his anti-doping rule violations before he made his voluntary admissions.

33. However, in the context of this non-sample case, the BJC is unable to determine that the current wording of the Regulation can be construed as the WADA comment suggests. Regulation 22.22.7 specifically refers to the Player receiving first notice of the admitted violation pursuant to Regulation 21.20. That Regulation contains various provisions which deal with Due

Process including provisions in relation to the Preliminary Review when the Board receives an Adverse Analytical Finding in respect of the Player's "A" sample, the "A" sample analysis, the "B" sample analysis, an Atypical Finding and finally Hearing Procedures. The only provisions in Regulation 21.20 which apply in this case are those which relate to Hearing Procedures including the requirement that a Player or Person is notified of his entitlement to a hearing before a BJC. Thus, for non-sample cases the wording is clear. This element is established if the Player makes his voluntary admission before he receives notice of his entitlement to a hearing. As mentioned, in paragraph 23 that occurred in this case.

34. In relation to the third element it is noted the heading to Regulation 22.22.7 states "*Admission of an Anti-Doping Rule in the Absence of other Evidence*". Further the Regulation stipulates that the admission must be the "*only reliable*" evidence of the violation at the time of the admission. In this regard the majority of the BJC (the Chairman and Dr Jakoet) have concluded the Player's admissions were <u>not</u> the "*only reliable*" evidence of the trafficking and possession violations available at the time of the admissions. At that time the IRB had also received the evidence (including sworn affidavit evidence) of Moala and Salanoa. Subsequently, the IRB in proving the Player's anti-doping rule violations understandably elected only to adduce evidence of his previous admissions rather than calling Salanoa or Moala to repeat the evidence they had given at their earlier hearings. But, it would be erroneous to conclude because the IRB in subsequently electing at the Player's hearing to only present evidence of his previous admissions, that there was no other available evidence at the earlier time of the admissions. The evidence of Salanoa and Moala (which as mentioned was available at the time of the Player's admissions) could have been used to establish the Player's trafficking and possession anti-doping rule violations.

35. Thus, whilst the BJC acknowledge the Player's commendable candour and co-operation during the <u>Salanoa</u> and <u>Moala</u> hearings, the majority have concluded that as the third element of Regulation 21.22.7 has not been established, unfortunately from his point of view, the Regulation cannot be invoked to reduce the period of ineligibility otherwise applicable.

Decision

36. Both Counsel for the IRB and the Player were in an agreement that the minimum period of ineligibility of four years should apply in the event the period of ineligibility could not be reduced because of any of the foregoing reasons. The BJC agrees. Although the offending does contain some aggravating features, the Player is entitled to credit for his honesty, full co-operation during the earlier two hearings and in this case his early acknowledgement of having committed anti-doping violations. Accordingly, pursuant to Regulation 21.22.1 and 3 the minimum sanction will be imposed in respect of all the Player's anti-doping rule violations. The sanction which is imposed for the Player's anti-doping rule violations is a total period of four (4) years ineligibility commencing from 8th January 2009 (the date upon which the Player's provisional suspension commenced) and concluding (but not inclusive of) 8th January 2013.

Costs

37. If the Board wishes us to exercise our discretion in relation to costs pursuant to Regulation 21.21.10, written submissions should be submitted to the BJC via Mr Ricketts by 17:00 Dublin time on Friday, 3 September 2010 with any responding written submissions from the Player to be provided by 17:00 Dublin time on Friday, 17 September 2010.

Appeal Rights

38. This decision is final, subject to referral to a Post Hearing Review Body (Regulation 21.24) and if applicable, an appeal to the Court of Arbitration for Sport (Regulation 21.27). In this regard, attention is 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.

Tim Gresson
(for and on behalf of the Board Judicial Committee)

Dr Ismail Jakoet
Gregor Nicholson

18 August 2010

DISSENTING DECISION BY GREGOR NICHOLSON ON WHETHER TELEA SHOULD BENEFIT FROM REGULATION 21.22.7

1. In order for Regulation 21.22.7 to apply there are three elements of the Regulation which must be satisfied, namely:
    a. Did Telea voluntarily admit to the commission of an ADRV?
    b. Did he do so before receiving first notice of the admitted violation pursuant to Regulation 21,20?
    c. Is his admission the only reliable evidence?

Voluntary Admission

2. As outlined in paragraphs 28 to 30 of the decision, the BJC has agreed that the player during the Salanoa and Moala cases voluntarily admitted to the ADRV.

First Notice

3. The IRB relies heavily on the commentary to Article 10.5.4 regarding the intended application of the Article. However, the commentary is a guide and it does not state that the Article can ONLY apply in the circumstances described. The commentary is secondary to the Article itself (on which Regulation 21.22.7 is based).

4. The wording of Article 10.5.4 and Regulation 21.22.7, namely *"Where a Player....voluntarily admits the commission of an anti-doping rule violation.....before receiving first notice of the admitted violation....."* clearly relates to the PLAYER receiving such notice. As outlined in paragraphs 31to 34 of the decision, the BJC has agreed that the player made his voluntary admissions before he received notice "pursuant to Regulation 20".

5. Discussion regarding the meaning of "first notice" has suggested that it could equate to "aware". However as the BJC has accepted that at the time of giving his evidence in the Salanoa and Moala cases, Telea may not have seen that he was admitting to an ADRV, it cannot be concluded to any degree of satisfaction that he believed he was about to be caught or charged. It is conjecture to suggest so and certainly not fair and reasonable to expect the player to have to prove on a balance of probability that this was not the case.

Only Reliable Evidence

6. In considering whether the Telea's admission was the only reliable evidence we require to examine whether there is any other evidence which is "reliable". The fundamental question is could the IRB have relied upon Salanoa and Moala's evidence alone (ie without Telea's own admission) to proceed with a charge against Telea ?

7. The IRB has suggested that Salanoa's and Moala's explanations of how they obtained the salbutamol is "more than reliable, it is undeniable", a statement which is without foundation. Telea could have refused to give evidence and it is conceivable that he might have considered such a course of action had he been fully aware of the consequences of

providing his self-incriminating evidence. He might even have denied it. Would one player's accusation against another then have been sufficient evidence to bring a charge bearing in mind the IRB's need to meet the required burden of proof of comfortable satisfaction?

8. I am not convinced that a charge would have proceeded successfully, or even been brought, if Telea had not given his self-incriminating evidence. A contributory factor in formulating my opinion is the fact that IRB Counsel, in stating during the Salanoa and Moala hearings that the IRB reserved the right to consider further action based on any information given at the hearings, kept this warning very general and did not direct it specifically to Mr Telea (who indeed may have been out of the room on one occasion when the statement was made). It is reasonable to infer from this that the IRB must have been concerned about Mr Telea declining to give self-incriminating evidence if he was aware of the consequences. I am very uncomfortable with the manner in which the self-incriminating evidence was obtained from an unrepresented player who was clearly ignorant of significant aspects of the anti-doping regulations and of the consequences of his evidence.

9. For these reasons I believe that Telea's self-incriminating evidence was the only evidence upon which the IRB could have RELIED in order to succeed with a charge. It was the only reliable evidence.

Summary and View on Reduction in Sanction

10. In giving evidence in the Salanoa and Moala cases to explain from where these players obtained the salbutamol they ingested, Telea willingly admitted to actions which constituted ADRVs without knowing that he was providing self-incriminating evidence that would later be used to charge him with anti-doping violations. Subsequently he has not retracted that evidence. I remain of the view that his admission is deserving of some recognition in accordance with Regulation 21.22.7 and advocate a 1-year reduction in the 4-year sanction.

Observations

11. Taking all the IRB's arguments together, namely that for Article 10.5.4 to apply (or IRB Regulation 21.22.7) then a person must have knowledge that he is admitting to an ADRV, that he must come forward himself with no encouragement or suggestion from others and no pressure from other evidence, and that the Anti-Doping Organisation itself must not be aware of the admitted ADRV, then there is little value in the admissions regulation. It is highly unlikely that anyone will ever come forward along these lines unless it is an Agassi-type confession of guilt after the person has retired or gone beyond the 8-year statute of limitations (which makes any sanction meaningless). Admissions are only likely from persons who were ignorant that their actions constituted an ADRV or who own up knowing a charge against them is likely to succeed based on other evidence.

12. Similarly, not accepting that 21.22.7 can apply in cases like this could be a considerable disincentive to others who might be called upon to provide evidence similar to Telea's in future cases. The recently introduced requirement in WAD Code Article 10.4 for corroborating evidence (as reflected in IRB Regulation 21.22.3) before the mandatory 2-year period of ineligibility can be reduced or eliminated means that players are now more likely

to need witness evidence than under the previous Code and IRB Regulations, even for relatively minor infractions.

13. I would suggest that it should be made clear to any witness who provides evidence which might be self-incriminating that they themselves are liable to being charged, but that their admission that they committed an ADRV (or an act which constitutes an ADRV, whether knowingly or not) before being charged would be taken into account and could result in a possible reduced sanction in accordance with Regulation 21.22.7 (conditional on them not challenging or retracting any previously given evidence).

14. Consideration should be given by the IRB to incorporating a standard warning in their letter charging a player, but with a positive slant to try to encourage witnesses to "own up" in giving evidence, such as…….
    Evidence of Witnesses
    Witnesses should be made aware that in the event that they admit to any action which in itself may constitute an anti-doping rule violation and which therefore may be subject to a separate charge being brought against them, then such admission can result in the applicable period of ineligibility being reduced by up to one half in accordance with Regulation 21.22.7. In the event that there is no such witness admission and/or there is other reliable evidence that an anti-doping rule violation has been committed which leads to charges being brought against that person, the available reduction specified in Regulation 21.22.7 does not apply.
    This standard warning could be repeated to witnesses before they give oral evidence during the course of a hearing.

Gregor Nicholson
BJC Member
3 August 2010