

INTERNATIONAL RUGBY BOARD

IN THE MATTER OF THE REGULATIONS RELATING TO THE GAME

AND IN THE MATTER OF AN ALLEGED DOPING OFFENCES BY **MARCIN WILCZUK** (POLAND) CONTRARY TO REGULATION 21

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

Judicial Committee

Graeme Mew, Chair (Canada)

Dr Stephen Targett (New Zealand)

Me Jean-Noël Courard (France)

Appearances

Ben Rutherford, Counsel for the International Rugby Board

Attendances

Tim Ricketts (IRB Anti-Doping Manager)

Micheal Sambozuk, Assisting the Player

Ola Jasinska (English-Polish Interpreter)

Hearing: 25 March 2013 by way of telephone conference

REASONS FOR DECISION OF THE BOARD JUDICIAL COMMITTEE

1. By all accounts Marcin Wilczuk (the "Player") is a well-liked and highly respected member of the Polish rugby community. Now 33 years old, he has been playing rugby since he was 15. He helped his club teams win the Polish championship on three occasions. He also has played club rugby in Portugal (for Benfica) and Ireland (Athy RFC and Old Belvedere RFC). A prop, he has played 31 times for his country.
2. On 6 October 2012, after playing for Poland in a Rugby World Cup 2015 qualifying match that formed part of the FIRA-AER European Nations Cup Division 1B against the Czech Republic, the Player underwent In-Competition doping control procedures. Following analysis by the Institute of Doping Analysis and Sports Biochemistry (IDAS) in Kreischa, Germany, the "A" sample (2694216) of the urine specimen which the Player provided showed the presence of benzoylecgonine, a metabolite of cocaine. Subsequent analysis of the "B" sample confirmed this Adverse Analytical Finding.
3. Cocaine is included as a non-specified stimulant in category "S6. Stimulants" on the *2012 Prohibited List* under the *World Anti-Doping Code*. As such its presence following In-Competition Sample collection is an anti-doping

rule violation under Regulation 21 of the *Regulations Relating to the Game* (“IRB Regulations”) and pursuant to the *World Anti-Doping Code* (the “WADA Code”). The presumptive sanction for a first anti-doping rule violation of this nature is a period of Ineligibility of two (2) years.

4. A preliminary review of the case was undertaken in accordance with IRB Regulation 21.20.1, following which the Player was notified in writing, via Polski Związek Rugby (the “Union”), that he may have committed an anti-doping rule violation. The Player was provisionally suspended, pending the outcome of these proceedings, with effect from 31 October 2012.

5. The Player denies using or knowingly ingesting cocaine. He points to a late night visit with a teammate to a Prague nightclub, where drinks were exchanged with strangers, as the likely source of the cocaine which ended up in his system.

6. A Board Judicial Committee (“BJC”) was appointed to hear the Player’s case. A directions hearing was convened by telephone on 5 February 2013, at which time the Player, while accepting the Adverse Analytical Finding, denied that he had committed an anti-doping rule violation. A hearing date was set for 25 March 2013.

Anti-Doping Rule Violation Rule Established

7. Shortly after the hearing commenced on 25 March, the Player formally acknowledged that he had committed an anti-doping rule violation.

8. Accordingly, we are satisfied that the Player has committed an anti-doping rule violation contrary to Regulation 21.2.1¹

9. The balance of the hearing therefore addressed the issue of the appropriate sanction to be applied.

Documentary Record

10. The BJC had before it a record which included the Doping Control Form, Team Member Consent Form, Analysis Result Records for the Player’s “A” and “B” Samples from IDAS, the Preliminary Review Report and certain correspondence between the Board and the Union. Copies of statements (translated where necessary) were provided from:

- a) The Player
- b) Grzegorz Borkowski, Secretary General of the Union
- c) Jacek Bakus, physical therapist, Polish team
- d) Jerzy Zajęc, President, Rugby Club Arka Gdynia
- e) Colm Brennan, Honorary Secretary, Old Belvedere RFC

¹ The presence of a Prohibited Substance or its Metabolites or Markers in a Player’s Sample.

f) Slawomir Kaszuba, player, Polish rugby team

11. The Player and Mr. Kaszuba gave oral testimony at the hearing.

12. Written submissions were also received from the Board before the hearing and oral submissions were made by the representative of the Player and counsel for the Board at the hearing.

13. In the reasons that follow, while we have considered all of the evidence and submissions that were placed before us, we refer only to the evidence and submissions which we consider necessary to do so in order to explain our reasoning and conclusions.

The Facts

14. Some of the oral testimony given at the hearing differed from the witness statements. Indeed, in some respects, the truth did not emerge until cross-examination by counsel for the Board. Unless otherwise stated, we refer to the facts as we find them.

15. The Polish team arrived in Prague late on a Wednesday night ahead of a Saturday game against Czech Republic. After arriving at the team hotel and attending a team supper, the Player and his friend and team mate, Slawomir Kaszuba, had a drink or two at the hotel bar and then went out to sample some Prague night life. The Player explained that he and Mr. Kaszuba had not seen each other for a long time and they had endured a long journey to Prague on a coach.

16. They found a night club. It was expensive, crowded and "did not seem very reputable".

17. The Player claims that he did not have a "wild" night. The Player believes he had three or four beers (he could not remember precisely) over a period of one to two hours.

18. While at the club, the Player and his friend met some Czech men, who upon hearing that the Player and his friend were with the Polish rugby team, engaged them in conversation. They said that they were interested in sport. They bought the Player and his friend a drink. The Player speaks some English and that was the language used to communicate with these local men.

19. The Player saw nothing unusual in the fact that the Czech men wanted to buy him and his friend a round of drinks. These drinks were bought at the bar. The Player acknowledged that he did not keep the individual who bought the round under surveillance while the drinks were being purchased.

20. The Player had not told the Polish team manager or coach that he and his friend were going out. He acknowledged that team management would not have been happy with such behaviour.

21. After leaving the club the Player and Mr. Kaszuba went back to the team hotel in a taxi. Neither of them felt well. According to the Player "we were both

excited and had tingling sensations in our hands." Mr. Kaszuba said that "we were both strangely excited".

22. It did not occur to the Player at the time that his drink may have been spiked or that he may have, by some means or other, consumed drugs.

23. The next morning, the Player still did not feel well. He and Mr. Kaszuba went to see the team's physical therapist, Mr. Bakus. Although Mr. Bakus could not find anything wrong, he recommended that they drink large quantities of water and gave the Player and Mr. Kaszuba vitamin C. Nevertheless, the Player continued to feel weak at the ensuing training session. It was not until later in the afternoon that he felt better. Even then, he felt what he described as "a big psychological discomfort" and Mr. Kaszuba said that both he and the Player continued to be visibly weak until the end of the training camp.

24. Mr. Bakus, the physical therapist corroborates this. He recounts that the Player and Mr. Kaszuba complained that they had had difficulty falling asleep the previous night. He recommended that they take a short rest period as well as consume large quantities of isotonic sports drinks and vitamins.

25. The Player and Mr. Kaszuba say they have no previous experience with taking drugs. Neither of them were able to immediately identify the symptoms they were feeling on the way home in the taxi, and afterwards, as being consistent with the ingestion of cocaine or some other Prohibited Substance.

26. The Player is able to offer no explanation as to how cocaine ended up in his system other than speculating that his drink had been spiked while he was at the Prague night club.

27. The Player acknowledges having received anti-doping education. He agreed that he had been provided with a copy of the IRB Anti-Doping Handbook. He confirmed his signature on a team member consent form which, among other things, addressed the application of the IRB Anti-Doping Regulations as part of the FIRA-AER European Nations Cup.

28. Although there was no official curfew, the Player acknowledged that he should not have gone out drinking in the run up to an international match.

29. The Secretary General of the Union notes that the Player's behaviour both on and off the playing field has made him a role model. His club President notes that in addition to playing for his country, he has served as a youth assistant coach. During his playing years he has developed a reputation for excellent play. Not only that, he is very popular within the rugby community and beyond. He has been passionate about his rugby which has had a beneficial impact on the younger players that he has come into contact with. To similar effect, his former colleagues at Old Belvedere RFC in Dublin note that the Player was held in high esteem and that he has always maintained the highest standards of behaviour on and off the playing field.

30. Although the Player is involved in a small family business, he does rely on rugby to supplement his family's income. His playing allowance has been suspended since his provisional suspension.

31. The Player asserts that he has always adhered to the principles of honour, honesty, conscientiousness and fair play. The allegations levelled against him have placed a large question mark over his future plans. The imposition of a two year sanction would essentially mean the end of his career.

The Regulation

32. Under IRB Regulation 21.2.1, the “presence of a Prohibited Substance or its Metabolites or Markers in a Player’s Sample” constitutes an anti-doping rule violation. A violation does not require “intent, fault, negligence or knowing “Use” [as defined in the IRB Regulations]” on the part of the Player.

33. Sanctions are provided for in IRB Regulation 21.22. The period of Ineligibility for a Prohibited Substance for a first time offence is two years pursuant to IRB Regulation 21.22.1.

34. It is, however, open to a Player to establish the existence of exceptional circumstances which would warrant a departure from the presumptive sanction of two years Ineligibility.

35. IRB Regulations 21.22.4 and 21.22.5 provide for the elimination or reduction of the period of Ineligibility based on exceptional circumstances. Regulation 21.22.4 provides:

No Fault or Negligence

If a Player or other Person establishes in an individual case that he bears No Fault or Negligence, the otherwise-applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Player’s Sample in violation of Regulation 21.2.1 (presence of a Prohibited Substance or its Metabolites or Markers), the Player must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility eliminated. In the event this Regulation 21.22.4 is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Regulation 21.22.10.

“No Fault or Negligence” is defined by Regulation 21 in the following terms:

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 or Prohibited Method.

36. In the event that a Player can establish that there was no significant fault or negligence on his part, a reduced sanction can be considered. Regulation 21.22.5 provides:

No Significant Fault or Negligence

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

“No Significant Fault or Negligence” is defined as follows:

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.

IRB's Submissions

37. The Player has not established the route of ingestion of the Prohibited Substance, a metabolite of cocaine, which was found in his Sample. This is a prerequisite to consideration of a reduced sanction based on exceptional circumstances.

38. In this regard, the decision of the Court of Arbitration for Sport in *IRB v. Keyter* (CAS 2006/A/1067, 13 October 2006) is on all fours. In that case also a player's speculation that his drinks may have been spiked with cocaine was held, without any other corroborating evidence, to be insufficient to meet the player's burden of establishing how the cocaine entered his system.

39. Even if the Player was able to meet this burden, he cannot demonstrate No Significant Fault or Negligence on his part. To the contrary, he went to what he acknowledged was not a reputable venue. Indeed, on cross-examination he ultimately admitted that it may have been negligent to drink in that establishment at all, let alone accept a drink from a stranger. The Player has not acted with the utmost caution required in order to demonstrate No Significant Fault or Negligence.

Player's Submissions

40. The Player acknowledges that his assertion that his drink was spiked is a hypothesis. However, until the result of the testing of the B Sample was received, the Player had difficulty accepting the Adverse Analytical Finding. He had racked his brains to see if he could find an explanation.

41. The Player acknowledged that there had been inconsistencies in the evidence which he had provided to the BJC. However he asserted that none of these inconsistencies had any significance in terms of the facts and issues that matter in this case.

42. The Player has already suffered a severe penalty as a result of being suspended. He regrets very much that he went out that night. He acknowledges that he should not have. But he could not have known that two or three days after going to the night club he would end up providing a positive Sample and, thereby, committing an Anti-Doping Rule Violation.

Discussion

43. The sanctioning regime for an anti-doping rule violation involving a prohibited Substance that is not a "specified substance" requires the imposition of a period of two years Ineligibility unless there are either exceptional circumstances warranting a reduction, or aggravating circumstances justifying a more severe penalty.

44. Athletes who argue for a reduced sanction on the basis that their food, medication or drinks have been spiked with illegal substances face an uphill task.

45. A fundamental principle of anti-doping regulations is that of strict liability. Regulation 21.2.1 (a) provides:

It is each Player's personal duty to ensure that no Prohibited Substance enters his body. Players are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Sample. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Player's part be demonstrated in order to establish an Anti-Doping Rule Violation under Regulation 21.2.1.

46. Even as the hearing progressed, it was entirely clear that the Player fully grasped this fundamental principle. He repeatedly asserted that he had not knowingly used any drug. While he did concede that some of his conduct may have been negligent, the essence of his defence was that he was in the wrong place at the wrong time but that he should not have to pay the severe penalty of a two year suspension for making a seemingly minor error of judgment that had resulted in such completely unforeseeable consequences.

Cause of Anti-Doping Rule Violation

47. If it is any consolation to the Player, the available evidence does not point to him having knowingly or intentionally used cocaine.

48. But mere speculation as to what may have happened, in the absence of other corroborating evidence will rarely along be enough to meet a player's burden of establishing how the Prohibited Substance, in this case a metabolite of cocaine, got into his system.

49. In *CCES v. Lelièvre* (SDRCC DT 4-0014, 7 February 2005) the Athlete asserted, *inter alia*, that his marijuana supply had been contaminated by cocaine, resulting in an Adverse Analytical Finding for that substance. The arbitrator ruled (at paragraph 51):

Bearing in mind that the Athlete has the burden of establishing on a balance of probabilities that he bears no fault or negligence, or no significant fault or negligence for the anti-doping violation, there must be evidence of contamination of the marijuana used by the Athlete if I am to be persuaded that exceptional circumstances that would result in elimination or reduction of the normal penalty exist. While recognising that obtaining such evidence might be difficult if not impossible, mere speculation as to what may have happened will not satisfy the standard of proof required. [emphasis added]

50. To similar effect is a decision of the Court of Arbitration for Sport in *International Rugby Board v. Keyter*. In that case, a professional rugby player tested positive for cocaine. He asserted that the Prohibited Substance had entered his body without his knowledge as a result of a spiked drink. He said that three days before he was tested, he had taken a client to a nightclub and accepted a few drinks from strangers sitting at the next table. He believed that these strangers must have put cocaine into one of his drinks. The Player produced a number of statements as to his good character in order to support these allegations (and rebut any suggestion that he had knowingly used cocaine). A disciplinary panel of the Rugby Football Union found that given the good character evidence submitted, the Player was entitled to the benefit of any doubt and, on a balance of probabilities, accepted that the Prohibited Substance had entered the Player's body through a "spiked" drink. A post-hearing review of that decision upheld the RFU disciplinary panel. On an eventual appeal, the CAS Panel rejected the rationale for the RFU's decision. The CAS panel said (at paragraphs 6.10 *et seq*):

6.10 The Panel is not willing to accept the RFU Review Panel's conclusion that the explanation offered by the Respondent was acceptable. No evidence of the alleged night out or of the actual existence of the drink supposedly

offered by strangers was submitted. There is no corroborating evidence in the record that he was even in the bar on the night in question other than his own statement. Moreover, even if the Panel were to accept that the Respondent did go to a night club and did drink something offered by strangers (quod non), the Panel must in any event underscore that cocaine contamination through a "spiked drink" is only a speculative guess or explanation uncorroborated in any manner. One hypothetical source of a positive test does not prove to the level of satisfaction required that factor (a) [how the prohibited substance came to be present in his body] is factually or scientifically probable. Mere speculation is not proof that it did actually occur.

6.11 The Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred. Unfortunately, apart from his own words, the Respondent did not supply any actual evidence of the specific circumstances in which the unintentional ingestion of cocaine occurred. The Panel, therefore, finds that the Respondent's explanation was lacking in corroborating evidence and unsatisfactory, thereby failing the balance of probability test. In other terms, the Panel is not persuaded that the occurrence of the alleged ingestion of cocaine through a "spiked drink" is more probable than its non-occurrence. This failure to establish how the prohibited substance entered his bodily specimen means that exceptional circumstances have not been established and there can be no reduction in the sanction from the otherwise established two year suspension.

51. Furthermore, as discussed in *Keyter*, the fact that an athlete is of good character will not be enough for an otherwise speculative theory of causation to enable the athlete to meet his or her burden of proof.

52. That said, the present case can be distinguished from that in *Keyter* in some respects. In the present case, there is corroborating evidence, both from Mr. Kaszuba and credit card receipts, that the Player was at the night club. We see no reason to doubt the evidence of the Player and Mr. Kaszuba that at least one round of drinks was bought by some strangers. But that is as far as it goes.

53. There was no other observable behaviour reported by the Player or his team mate to indicate that cocaine was present at the night club and/or being used by the Czech patrons who the Player and Mr. Kaszuba socialised with.

54. Nor was evidence presented that the symptoms described by the Player, Mr. Kuszuba or Mr. Bakus, are any more or less consistent with the ingestion of cocaine than with the consumption of alcohol, lack of sleep, high level of physical exertion at training, illness or various other innocent or sinister factors, alone or in combination.

55. In short, it is the BJC's view that there is insufficient evidence to support the Player's hypothesis as to the cause of his Adverse Analytical Finding and, hence, for the Player to meet his burden.

Player's Fault or Negligence

56. Because we have concluded that the Player is unable to establish on a balance of probabilities how cocaine came to be in his system, he is not entitled to further consideration of whether his anti-doping rule violation occurred without fault or negligence, or without significant fault or negligence, on his part.

57. Even if we are incorrect about that, however, the Player has, in our view, failed to demonstrate the existence of exceptional circumstances which would warrant eliminating or reducing the two year sanction.

58. It is well established that in order to take the benefit of the "exceptional circumstances" provisions of Regulation 21 or its equivalent provisions in other anti-doping rules, athletes must be able to demonstrate that they exercised "utmost caution" to protect against Adverse Analytical Findings, whether by contamination, sabotage or otherwise (see, for example, *USADA v. Gatlin*, CAS 2008/A/1461, 6 June 2008; and *Puerta v. International Tennis Federation*, CAS 2006/A/1025, 12 July 2006).

59. It was an inherently risky venture for the Player and his team mate to go out to a club of dubious repute in a foreign city and accept a drink or drinks from strangers. This is even more so because it occurred just over two days prior to an important World Cup qualifying match that both men were likely to be playing in.

60. Accordingly, even if we felt that it was open to us to consider a reduced sanction, we would have concluded that there was no basis for such reduction.

61. We are more than conscious that the consequences of this decision will have a serious impact on the Player's rugby career. It may even end it. That is clearly a matter of regret as it appears that he has been a great servant of the Game in Poland. But sentiment does not play a part in these decisions. Time and time again, anti-doping panels have reiterated the need for robust anti-doping regulation. The Player's conduct, ultimately, fell below the standard of care that he should have exercised, with very unfortunate consequences.

62. We would add that cases involving cocaine, whether consumed inadvertently or intentionally, are no less a concern than other Prohibited Substances. Although the Player did not, in this case, try to minimise the significance of metabolites of cocaine (as opposed to some other Prohibited Substance) being found in his Sample, it is worth bearing in mind the comments made by an ERC Judicial Committee in the case of *ERC v. Stevens* (16 March 2009) in which the Judicial Committee noted (at pages 2 – 3):

Cocaine is a powerful central nervous systems stimulant responsible for the death of a number of professional and non-professional sportspersons. It has a long history of use as both a narcotic and a doping agent in sport. The dangerous effects of cocaine are part of the reason for its prohibition. Whether snorted or smoked as crack, cocaine damages the nervous, respiratory and circulatory systems and its use can lead to addiction, dependency, anxiety and psychotic disorders. It is abused in sport both for its properties as a stimulant and for the psychological effects which can “permit” enhanced short term extreme physical activity.

On use cocaine breaks down spontaneously into its metabolites. Those metabolites can remain detectable in urine for periods in excess of seven days. It is not possible to determine from testing undertaken for doping control purposes whether cocaine has been taken immediately prior to a sporting event in an effort to enhance performance or whether the detected metabolites are as a consequence of “recreational” use unconnected with the playing of sport. As a consequence of its capacity to act as a powerful central nervous system stimulant and the risk of serious injury resulting from its use it remains on the Prohibited List, including the 2009 Prohibited List, and it is not a Specified Substance.

Conclusion

63. The Player has not established a basis for the elimination or reduction of his sanction on the basis that he bore No Fault or Negligence, or No Significant Fault or Negligence, for his admitted Anti-Doping Rule Violation.

Decision

64. On 6 October 2012 the Player committed an anti-doping rule violation, namely the presence in his bodily sample of benzoylecgonine, a metabolite of cocaine. Cocaine is a non-specified stimulant in category “S6. Stimulants” on the *2012 Prohibited List*.

65. The sanction imposed for these anti-doping rule violations is a period of Ineligibility of two years, commencing 31 October 2012 (the date upon which the

Player was notified of the Adverse Analytical Finding and provisionally suspended) and concluding on (but inclusive of 30 October 2014).

66. The Players' attention is drawn to IRB Regulation 21.22.13 which provides, *inter alia* that:

No Player...who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a match and/or tournament (international or otherwise) or activity (other than authorised anti-doping education or rehabilitation programmes) authorised or organised by the Board or any Union or Tournament Organiser. Such participation includes but is 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.

The full text of Regulation 21.22.13 concerning status during Ineligibility should be consulted.

Costs

67. If the Board wishes us to exercise our discretion in relation to costs pursuant to Regulation 21.21.10, written submissions should be provided to the BJC via Mr. Ricketts by 17:00 Dublin time on 8 May 2013 with any responding written submissions from the Player to be provided by no later than 17:00 Dublin time on 15 May.

Review

68. This decision is final, subject to referral to a Post Hearing Review Body (Regulation 21.25) or an appeal, where the circumstances permit, to the Court of Arbitration for Sport (Regulation 21.27). In this regard, attention is also directed to Regulation 21.24.2, which sets out the process for referral to a Post-Hearing Review Body, including the time within which the process must be initiated.

1 May 2013

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

Graeme Mew, Chairman