CAS 2006/A/1067 IRB v/Keyter

ARBITRAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Massimo **Coccia**, Professor and Attorney-at-Law, Rome, Italy

Arbitrators: Mr Richard H. **McLaren**, Professor and Barrister, London, Canada

Mr Peter **Leaver** QC, Barrister, London, England

in the arbitration between

INTERNATIONAL RUGBY BOARD (IRB), Dublin, Ireland
represented by Ms Susan Ahern, IRB Assistant Legal Counsel, Dublin, Ireland

- Appellant -

and

JASON KEYTER, London, England
represented by Mr John Partridge, Solicitor, Rugby, England

- Respondent -

1. PARTIES

1.1 The appellant International Rugby Board (hereinafter "IRB" or "Appellant"), an association formed under the laws of Ireland, having its headquarters in Dublin, is the international governing body for the sport of rugby union worldwide.

1.2 Mr. Jason Keyter (hereinafter "Mr. Keyter" or "Respondent") is a citizen of the United States of America who was a professional rugby player with the English team Esher Rugby Football Club (hereinafter "Esher RFC") before he was suspended for a doping violation. Esher RFC is affiliated with the Rugby Football Union (hereinafter "RFU"), which is the national governing body for rugby in England.

2. BACKGROUND FACTS

2.1 On 22 October 2005, the Respondent was selected for an in-competition urine doping control on the occasion of the RFU Division 2 match between Esher RFC and Moseley Rugby Football Club. The urine sample was collected in conformity with the applicable IRB Regulations by UK Sport, the National Anti-Doping Organisation for the United Kingdom, and was sent to the Drug Control Centre of Kings' College (London), a laboratory accredited by the World Anti Doping Agency ("WADA").

2.2 With a letter of 8 November 2005, UK Sport notified the RFU that the Drug Control Centre had found the "A" urine sample collected from the Respondent (sample No. A1053942) positive for Benzoylecgonine, which is classified as a stimulant in the WADA Prohibited List.

2.3 With a letter of 10 November 2005, the RFU notified Mr. Keyter that his urine sample was found positive for Benzoylecgonine. The RFU also informed the Respondent that he had the right to have the "B" sample analysed.

2.4 Further to the request of the Respondent, on 24 November 2005 the Drug Control Centre analysed the "B" sample (sample No. B1053942), which confirmed the "A" sample finding.

2.5 With a letter of 7 December 2005, the RFU notified the Respondent of the above-mentioned result. Mr. Keyter was also summoned to appear before the RFU Disciplinary Panel for a Disciplinary Hearing.

2.6 At the Disciplinary Hearing of 12 January 2006, the Respondent pleaded guilty to the doping offence but alleged that the prohibited substance had entered his body without his knowledge and will through a "spiked drink". In particular, he declared that on 19 October 2005 he took a client to a nightclub and accepted a few drinks from strangers sitting next to his table. The Respondent asserted that these strangers must have put

cocaine into one of his drinks. The Respondent also produced a number of statements as to his good character in order to corroborate his allegations.

2.7 The Disciplinary Panel found that: (a) the presence of a prohibited substance in Mr. Keyter's body was clear and unchallenged; (b) given the good character evidence submitted, Mr. Keyter was given the benefit of any doubt and, on the balance of probabilities, the Disciplinary Panel conceded that the prohibited substance entered his body through a "spiked" drink; (c) Mr. Keyter, although bearing responsibility for his behaviour, bore no Significant Fault or Negligence.

2.8 In consideration of the above findings, the Disciplinary Panel decided to suspend the Respondent from all participation in RFU competitions for 12 months, from 15 November 2005 to 14 November 2006.

2.9 The decision of the Disciplinary Panel was reviewed by members of the IRB Anti Doping Advisory Committee ("ADAC") in accordance with IRB Regulation 21 and remitted to a post-hearing review body of the RFU.

2.10 The Review Panel appointed by the RFU heard the case on 9 March 2006 and, with a ruling dated 16 March 2006, upheld the decision of the Disciplinary Panel on the following grounds: (a) the Disciplinary Panel applied an appropriate standard of proof; (b) the character evidence submitted by Mr. Keyter supported the fact that the prohibited substance entered his body unintentionally; (c) as a question of fact the degree of fault or negligence was not significant, giving the word significant *"its ordinary and natural meaning"*; (d) the one year ban was appropriate because *"where there is fault or negligence, but it is not significant, discount must be given particularly whereas here the player pleads guilty and produces evidence of good character"*.

2.11 On 6 April 2006, the ADAC analyzed the above Review Panel decision and prompted the IRB to appeal to the Court of Arbitration for Sport ("CAS").

3. CAS PROCEEDINGS

3.1 On 7 April 2006, the IRB filed a Statement of Appeal with the CAS against the decision of the RFU Review Panel (hereinafter the "Appealed Decision"). The appeal was made according to IRB Regulation 21.27.2(a)b, pursuant to which: "*In respect of decisions made pursuant to Regulation 21.26 by the applicable Member Union or Tournament Organiser post hearing review body, WADA, the Board and the Player, Person or entity concerned shall be entitled to appeal the case to CAS in accordance with the provisions applicable before such court and which will resolve definitively the dispute in accordance with the code of sports related arbitration*".

3.2 On 13 April 2006, copies of the Statement of Appeal were notified by the CAS to Mr. Keyter and to the RFU. The CAS also advised the RFU that the appeal was not directed against the RFU but that the RFU could file a motivated application for intervention pursuant to Articles R54 and R41.3 of the Code of Sports-related Arbitration (hereinafter the "Code").

3.3 On 20 April 2006, the Appellant filed its Appeal Brief with 20 exhibits.

3.4 On 21 April 2006, the RFU filed an application for intervention with no reasons attached. On 3 May 2006, the CAS invited the RFU to submit reasons for its application. Accordingly, on 9 May 2006, the RFU submitted its reasoned application for intervention. On the same day the CAS invited the IRB and Mr. Keyter to express their respective positions regarding the participation of the RFU in the arbitral proceedings.

3.5 The IRB and Mr. Keyter submitted their briefs on RFU's intervention on 15 May and 24 May 2006 respectively. On 24 May 2006, the matter was submitted to the Deputy President of the CAS Appeals Arbitration Division.

3.6 On 18 July 2006, the CAS informed the parties that, pursuant to Article R41.4 of the Code, the Deputy President of the Appeals Arbitration Division had refused the application filed by the RFU to participate as a party to the arbitration procedure. With the same letter the CAS invited the Respondent to appoint an arbitrator in accordance with Article R53 of the Code. Moreover the CAS acknowledged that the Respondent had filed no answer to the Appellant's brief within the time limit fixed by the Code and advised the Respondent that, upon application on justified grounds, he could have obtained an extension for the filing.

3.7 On 28 July 2006, the Respondent appointed Mr. Peter Lever as his arbitrator but failed to request an extension of the term to file his answer to the Appellant's brief. Notwithstanding CAS reminders, the Respondent has never filed an answer with the CAS.

3.8 On 10 August 2006, the CAS issued a notice that the CAS Arbitration Panel for the present dispute (hereinafter the "Panel") was constituted as follows: Prof. Massimo Coccia as President, Prof. Richard McLaren as arbitrator designated by the Appellant and Mr. Peter Leaver as arbitrator designated by the Respondent.

3.9 On 1 September 2006, after consultation with the parties, the CAS advised the parties that pursuant to article R57 of the Code, the Panel was not going to hold a hearing.

4. SUMMARY OF THE PARTIES' POSITIONS

Appellant

4.1 The Appellant underscores that IRB Regulation 21.22.1 prescribes a mandatory sanctioning of two years ineligibility to be imposed upon any player who tests positive for a Stimulant (such as Benzoylecgonine).

4.2 The Appellant points out that IRB Regulation 21.22.4 provides for two categories of "exceptional circumstances" under which the ineligibility sanction may be eliminated or reduced. The sanction shall be eliminated if the player can establish that he bears "No fault or Negligence for the violation". This may occur only if the player "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". On the other hand, the period of ineligibility may be reduced if the player can establish that "he bears No Significant Fault or Negligence". This may occur when the player establishes 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".

4.3 The Appellant points out that a two-prong test has to be made in order for the above exceptional circumstances to apply. First of all, the player shall demonstrate the route of ingestion of the prohibited substance and prove the specific factual circumstances of the ingestion. Only if the first prong of the test is satisfied, can the player then prove that he bears No Significant Fault or Negligence.

4.4 The Appellant points out that in this case the Respondent did not satisfy the first prong of the test since he did not show how – on the balance of probabilities – the prohibited substance entered his system. In particular the IRB asserts that the Respondent submitted no medical evidence, witnesses, or other circumstantial or corroborative evidence to prove that his drink was "spiked" by third parties.

4.5 The Appellant asserts that the Review Panel did not specifically revisit the nature of the evidence submitted by the Respondent at the Disciplinary Hearing and passively accepted the conclusions reached by the Disciplinary Panel on the grounds of entirely inadequate proofs.

4.6 As to the No Significant Fault or Negligence, the IRB asserts that a professional rugby player ought to have a heightened awareness of situations which may lead to a doping violation. In this case the Appellant points out that the Respondent knew or should have known that accepting drinks from strangers in a night club where drugs were likely to be present was dangerous. Therefore, the Respondent placed himself in a risky situation knowing about the dangers of "spiking".

4.7 The Appellant points out that the Respondent's conduct was not consistent with the exercise of the utmost caution. Therefore, the reduction by 50% of the 2 years ineligibility sanction granted by the Disciplinary Panel and upheld by the Review Panel is unwarranted or, alternatively, excessive.

4.8 For those reasons, the Appellant submitted to the Panel the following pleas for relief:

> *" (a) The IRB requests that the Decision be quashed; and*
>
> *(b) That a sanction of two (2) years from 15 November 2005 to 14 November 2007 be imposed in accordance with IRB Regulation 21.22.1 which incorporates the mandatory sanctioning provisions of the WADA code; and*
>
> *(c) Costs".*

Respondent

4.9 The Respondent failed to submit his response neither by the given time limit nor later on.

4.10 It has to be noted that the Panel took notice of the letters sent by the Respondent's Counsel to the CAS. In particular the Panel acknowledged the letter dated 24 May 2006 and considered the Respondent's claims contained therein.

5. JURISDICTION AND APPLICABLE LAW

5.1 The jurisdiction of the CAS in the present matter is not disputed and derives from IRB Regulation 21.27.2 and Article R47 of the Code. Pursuant to IRB Regulation 21.27.2, a decision by a Member Union post hearing review body, may be appealed to the CAS by the IRB itself (see above at 3.1). Moreover, pursuant to Article R47 of the Code: "*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body*".

5.2 According to Article R57 "*the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance."*

5.3 As to the applicable law, in accordance with Article R58 of the Code, as the appealed decision was issued by the RFU, the Panel must decide the dispute applying primarily the RFU regulations. In this respect, the Panel notes that pursuant to Article 1.2 of the RFU "Drugs – Anti Doping Regulations 2005-06" the RFU fully adopts the IRB's Anti-Doping Regulations (hereinafter "IRB Regulations") with some

additional provisions which do not apply to this case. The Panel also notes that, in turn, the IRB Regulations are modelled on the World Anti-Doping Code ("WADC").

6. DISCUSSION

Burden and Standard of Proof

6.1 As a preliminary issue, this Panel has to find which burden and standard of proof has to be applied on doping related issues. It has to be noted that, pursuant to Article 21.3.1 of the IRB Regulations, the burden of proof is initially on the party asserting that an anti-doping rule violation has occurred (i.e. the IRB or one of its Member Unions). As to the standard of proof, the same party shall establish that the violation has occurred "to the comfortable satisfaction of the hearing body". This standard of proof is greater than "a mere balance of probability" but less than "proof beyond reasonable doubt".

6.2 Once the IRB or its Member Union has discharged the above burdens, the athlete accused of the anti-doping rule violation is subject to "strict liability". This means that the presence in the athlete's body or bodily specimen of a prohibited substance, regardless of the athlete's intent, knowledge, fault or negligence, is sufficient to establish an anti-doping rule violation and thus the athlete's presumptive guilt (see Article 21.2.1(a) of the IRB Regulations)

6.3 The IRB Regulations allow the athlete to rebut the presumption of guilt by proving absence of fault or negligence or, alternatively, absence of significant fault or negligence. In particular, in order to rebut the presumption and obtain the elimination or reduction of the sanction, the IRB requires the athlete to prove "*Exceptional Circumstances*" (see Article 21.22.4 of the IRB Regulations).

6.4 Pursuant to Article 21.3.1 of the IRB Regulations, when the burden of proof is upon the athlete to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a "balance of probability". The balance of probability standard – set forth also by the WADC and by the CAS jurisprudence – means that the athlete alleged to have committed a doping violation bears the burden of persuading the judging body that the occurrence of a specified circumstance is more probable than its non-occurrence.

Evidence of Doping

6.5 The analysis of both samples showed evidence of Benzoylecgonine, i.e. a cocaine metabolite. Cocaine is a stimulant included in the list of prohibited substances. Mr Keyter pleaded guilty to the alleged anti-doping rule violation in the previous RFU

proceedings and the Appealed Decision held that the doping offence had indeed occurred.

6.6 Mr Keyter's failure to participate in this appeal means the evidence is no different before the Panel than it was before the prior tribunals. The Panel, therefore, adopts the conclusions of the prior tribunals that the Respondent's doping offence has occurred. In accordance with the standard of proof set forth by the IRB Anti-Doping Regulation, the Panel concludes that the Respondent's anti-doping rule violation is proven to its comfortable satisfaction, bearing in mind the seriousness of the allegation.

Sanction

6.7 The sanction for a first offense is a two year suspension. For the sanction to be eliminated or reduced, a finding of exceptional circumstances must be made within the IRB Anti-Doping Regulation and the related Definitions. Under Article 21.22 of the IRB Anti-Doping Regulation, it was up to the Respondent to discharge his burden of proving that he bore no fault or negligence or, at least, that he bore no s*ignificant* fault or negligence.

6.8 It is in this regard that the prior tribunals failed. The Definitions of No Fault or Negligence and No Significant Fault or Negligence must be applied (see *infra* at 6.13). Accordingly, to establish exceptional circumstances the Respondent must prove: *(a)* how the prohibited substance came to be present in his body, and *(b)* 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. The proof of (a) and (b) would establish No Fault or Negligence. No Significant Fault or Negligence requires a Panel, in addition to taking into account the factors relevant to a finding of No Fault or Negligence, to take into account the totality of the circumstances and, having done so, to conclude that the athlete's fault or negligence was not significant in relationship to the anti-doping rule violation. The Respondent is required to establish that the fault or negligence was not significant on the "balance of probability" (see *supra* at 6.4).

6.9 In the proceedings in front of the RFU, the Respondent stated that he had no idea how the cocaine entered into his body, and relied as a possible explanation on the ingestion of cocaine through a "spiked drink" that was offered him by strangers in a night club.

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) (see *supra* at 6.8) 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

6.12 The Panel observes that the good character evidence submitted by the Respondent cannot overcome the strict liability principle or satisfy the burden of proof. Such evidence cannot help the Respondent in establishing any feature of the ingestion of the prohibited substance. Perhaps, the good character evidence might have helped the Respondent in reducing the sanction, but only after having proven, first, how the prohibited substance came into his body and, second, the absence of any significant fault or negligence. The Panel finds that the exceptional circumstances as a method of reduction of the sanction is not available to the athlete in this case and the good character evidence is of no avail.

6.13 Finally, even if the Respondent's explanation of how cocaine had come into his body were supported by plausible evidence (*quod non*), it seems to the Panel that the Respondent's behaviour was significantly negligent under the alleged circumstances. Under the Definitions included in the IRB Anti-Doping Regulation, an athlete bears "No Fault or Negligence" when he establishes 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 […]*", and he bears "No Significant Fault or Negligence" when he establishes that "*[…]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".

6.14 Even assuming that the Respondent told the truth about the night of 19 October 2005, it is evident from the records that Mr. Keyter failed to exercise *any* caution (let alone the *utmost* caution), thereby failing both the "No Fault or Negligence" test and the "No Significant Fault or Negligence" test. As stated by the RFU Disciplinary Panel, "*the player consumed nearly half a bottle of vodka and at least one glass of champagne and one cocktail containing champagne, vodka and red bull. This was probably an underestimate and the panel formed the view that the player must have been drunk on 19 October. Any elite rugby player knows that he must monitor carefully anything he eats or drinks and it was extremely careless of this player to take drinks from strangers in a club where drugs were likely to be present*".

6.15 A CAS Panel cannot accept the submission that getting drunk, and possibly not realizing and/or remembering what was going on, is an exceptional circumstance excusing an athlete from his/her fault or negligence. If it were to do so, this Panel would create a loophole enabling athletes who have been found guilty of a doping offence to get an unwarranted reduction of the sanction provided for by the applicable anti-doping regulations.

6.16 With regard to the measure of the sanction, under Article 21.22.1 of the IRB Regulation a first doping offence for cocaine (a stimulant) requires a sanction of two (2) years' ineligibility: "*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*".

6.17 As the sanction cannot be reduced (see above at 6.10-6.15) the Panel finds and so holds that the Appealed Decision must be varied and that, pursuant to IRB Regulations, the Respondent's anti-doping rule violation must be sanctioned with a full two-year suspension.

7. COSTS

7.1 The Panel notes that under Article R65 of the CAS Code, concerning international disciplinary cases ruled in appeal, the present proceedings are free. Accordingly, the fees and costs of the arbitrators together with the costs of the CAS are borne by the CAS, with the exception of the minimum Court Office fee of Swiss Francs 500 paid by the Appellant, which in any event is kept by the CAS.

7.2 Then, pursuant to Article R65.3 of the CAS Code, the Panel must decide which party shall bear the costs of the parties or in which portion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

7.3 The Panel notes that the outcome of the present proceedings is clearly favourable to the Appellant. However, it is the Appellant's member organization conduct that brought into existence the necessity to launch this Appeal. The Panel wishes to take into account the fact that the Respondent's behavior during the previous and the present proceedings was responsible, although he choose not to appear in this Appeal proceeding. The Respondent is at a clear disadvantage vis-à-vis the Appellant in terms of financial resources. Accordingly, the Panel deems it to be fair that the Appellant bears its own costs.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by the International Rugby Board on 7 April 2006 is upheld and the Decision issued by the Review Panel of the RFU on 16 March 2006 is varied to impose a two year sanction.
2. Mr Jason Keyter is declared ineligible for a period of two years, from 15 November 2005 to 14 November 2007.
3. The award is pronounced without costs, except for the Court Office fee of CHF 500 (five hundred Swiss Francs) already paid by the International Rugby Board and to be retained by the CAS.
4. Each party shall bear its own costs.

Done in Lausanne, 13 October 2006

THE COURT OF ARBITRATION FOR SPORT

Massimo **Coccia**
President of the Panel

Richard H. **McLaren**
Arbitrator

Peter **Leaver** QC
Arbitrator