

WORLD RUGBY

IN THE MATTER OF AN ANTI-DOPING RULE VIOLATION BY ANTONIO PERINCHIEF CONTRARY TO WORLD RUGBY REGULATION 21 BEFORE A BOARD JUDICIAL COMMITTEE

Board Judicial Committee:

Christopher Quinlan QC, Chairman (England)

Dr Margo Mountjoy (Canada)

Professor David Gerrard (New Zealand)

Appearances and Attendances:

World Rugby

Ben Rutherford Legal Counsel, World Rugby

David Ho, Anti-Doping Manager, World Rugby

The Player

Antonio Perinchief

Adam Richards, Player's Counsel

Jonathan Cassidy, Manager. National 7s Squad, Bermuda Rugby Union

Heard: 16 June 2015 (by way of video conference call)

DECISION OF THE BOARD JUDICIAL COMMITTEE

I. INTRODUCTION

1. Antonio Perinchief ('the Player') is a member and player of the Bermuda Rugby Union ('the Union'). He was a member of the Union's 7s Representative

Team participating in the NACRA 7s Tournament ('the Tournament') in Mexico City, Mexico in December 2014.

2. Clenbuterol is an anabolic steroid and listed in category S1.2 Other Anabolic Agent's in World Anti-Doping Agency's ('WADA') 2014 List of Prohibited Substances and World Rugby Regulation 21 ('Regulation 21').
3. World Rugby alleges that the Player committed an anti-doping rule violation ('ADRV') following an adverse analytical finding ('AAF') for clenbuterol detected in an in-competition sample collected from the Player at the Tournament on 3 December 2014.
4. Subject to determination of a preliminary issue, before the substantive hearing, the Player was prepared to admit the ADRV.
5. The substantive hearing was conducted by video conference call on 16 June 2015. We rejected the Player's preliminary argument and thereafter heard evidence and submissions. At the conclusion thereof we reserved our decision on the substantive issues. This document constitutes the Board Judicial Committee's ('BJC') final reasoned Decision, reached after due consideration of the evidence, submissions and Arbitral Awards and authorities placed before it. Each member of the BJC contributed to it and it represents our unanimous conclusions.

II. FACTS

6. The Player is a player and member of the Union. He was a member of the Union's 7s Representative Team participating in the Tournament. Regulation 21 governed the Tournament's Anti-Doping Programme. He is bound by and subject to the provisions of Regulation 21.

7. A urine sample was taken from the Player on 3 December 2014. It was an in-competition test conducted during the Tournament. The Player's sample, in the usual way, was split into two separate bottles, referenced A2933935 ('the A Sample') and B2933935 ('the B Sample').
8. Both samples were transported to the World Anti-Doping Agency ('WADA') accredited laboratory at Laval, Canada ('the laboratory'). There was no issue as to the same transmission and continuity of the said samples. The laboratory analysed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories.
9. The laboratory Analysis Result Record ('ARR') for the A Sample dated 22 December 2014 states:

"Clenbuterol; level roughly estimated at 0.04 ng/mL, which is consistent with the consumption of contaminated meat (Mexico and China). Results reported on certificate of analysis no 14-6789AA".
10. Clenbuterol is an Other Anabolic Agent (Section 1.2 Other Anabolic Agents) under the WADA Prohibited List for 2014 (and also for 2015). The WADA Prohibited List is incorporated as Schedule 2 to Regulation 21.
11. The Player does not have a therapeutic use exemption for clenbuterol.
12. Following a preliminary review of the case in accordance with Regulation 21.20.1 (by G Nicholson, Scotland), the Player was notified in writing via the Union on 13 January 2015 that he might have committed an ADRV contrary to Regulation 21.2.1. The Player was provisionally suspended, pending the outcome of these proceedings, with immediate effect.
13. By a document dated 14 January 2015, sent on 15 January 2015, the Player, *inter alia*, denied the alleged ADRV and requested that his B sample be tested.

14. The laboratory analysed the B Sample in accordance with the procedures set out in WADA's International Standard for Laboratories. The laboratory AAR for the B Sample dated 22 January 2015 records:

"Clenbuterol; level roughly estimated at 0.04 ng/mL, which is consistent with the consumption of contaminated meat (Mexico and China). Results reported on certificate of analysis no 14-6789CA".

III. REGULATORY SCHEME

A. 2014 Regulation 21

15. These proceedings commenced before the coming into force of WADC 2015 (1 January 2015). The relevant provision is the November 2014 edition of Regulation 21, which derives from and incorporates into World Rugby 'law' the WADC 2009. That is subject to any issue of *lex mitior*. All references to Regulation 21 herein are to that edition of IRB Regulation 21, unless provided otherwise.

16. The World Rugby Anti-Doping Regulations, more particularly Reg. 21 sets out both the framework under which all players can be subjected to doping control and the procedures for any alleged infringement. Reg. 21 adopts the mandatory provisions of the World Anti-Doping Agency Code ('WADC'). WRR 21 is based upon the twin principles of personal responsibility and strict liability for the presence or use of Prohibited Substances or Prohibited methods.

17. Regulation 21.2.1 provides:

"The presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample

(a) 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 Samples. 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.

(b) Sufficient proof of an anti-doping rule violation under Regulation 21.2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Player's "A" Sample where the Player waives analysis of the 'B' Sample and the 'B' Sample is not analysed; or, where the Player's 'B' Sample is analysed and the analysis of the Player's 'B' Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Players' 'A' Sample..."

18. As for sanction, Regulation 21.22.1 provides:

"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 a Prohibited Substance or Prohibited Method) and Regulation 21.2.6 (Possession of Prohibited Substances and Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided for in Regulations 21.22.3, 21.22.4, 21.22.5, 21.22.6, 21.22.7 and/or 21.22.8 or the conditions for increasing the period of Ineligibility, as provided in Regulation 21.22.9, are met:

First violation: Two years."

19. Regulation 21.22.4 provides for the elimination or reduction of a period of Ineligibility where the Player can establish how the Prohibited Substance entered his system and that he bears no fault or negligence.

20. Regulation 21.22.5 provides for the elimination or reduction of a period of ineligibility (in this case to not less than 12 months) where the Player can

establish how the Prohibited Substance entered his system and that he bears no significant fault or negligence.

B. 2015 Regulation 21

21. However, the November 2014 edition of Regulation 21 has been superseded by 2015 Regulation. 2015 Regulation 21.20.7 states:

“These Anti-Doping Rules have come into full force and effect on 1 January 2015 (the “Effective Date”). They shall not apply retroactively to matters pending before the Effective Date; provided, however, that”:

32. 2015 Regulation 21.20.7.2 provides:

“The retrospective period in which prior violations can be considered for purposes of multiple violations under Regulation 21.10.7.5 and the statute of limitations set forth in Regulation 21.17 are procedural rules and should be applied retroactively; provided, however, that Regulation 21.17 shall only be applied retroactively if the statute of limitations period has not already expired by the Effective Date. Otherwise, with respect to any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred unless the panel hearing the case determines the principle of “lex mitior” appropriately applies under the circumstances of the case.”

22. The principle of *lex mitior* means that if since the commission of the ADRV the relevant law has been amended the less severe law should be applied. In this respect it has.

23. Article 25.2 2015 WADC (as incorporated by 2015 Regulation 21.20.7.2) provides that the principle of *lex mitior* operates to require a tribunal deciding

a case after the effective date of 1 January 2015 to apply the provisions of the 2015 WADC if they are less severe than those under the 2009 WADC (2014 Regulation 21).

24. This has potential relevance because of 2015 Regulation 21.10.5.1.2 provides:

“21.10.5.1.2 Contaminated Products

In cases where the Player or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Player’s or other Person’s degree of Fault.

[See Comment 30]”

25. “Contaminated Products” are defined for these purposes in 2015 WADA Code Appendix 1, page 133 thus:

“Contaminated Product: A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search.”

26. The effect of 2015 Regulation 21.20.7.2 is that *lex mitior* operates to require a tribunal deciding a case after the effective date of 1 January 2015 to apply the more flexible 2015 Regulation 21 range of sanctions for no significant fault or negligence in a contaminated product case in place of the more restricted 2014 Regulation 21 range of sanctions in the same circumstances.

IV. PROCEEDINGS BEFORE THE BJC

A. Background

27. Following a preliminary review of the case in accordance with Regulation 21.20.1, the Player was notified in writing via the Union on 13 January 2015 that he might have committed an ADRV contrary to Regulation 21.2.1. The Player was provisionally suspended, pending the outcome of these proceedings, with immediate effect.

28. By a document dated 14 January 2015, sent on 15 January 2015, the Player denied the alleged Anti-Doping Rule Violation ('ADRV') and requested that his B sample be tested. In the same document he asked for an expedited hearing and said that he had been selected to play in an '*Invitational 7s*' tournament in Las Vegas in February and "*provisionally selected*" for a NACRA 7s Tournament in June 2015. He also pointed out that the provisional suspension had "*resulted in the probable suspension of [his] employment as a youth football coach*".

29. Subsequent analysis of the B sample produced an identical result (para 14 above).

30. We conducted a telephone directions hearing on 2 February 2015. The Player was present and represented by Sean Field-Lament, the Union's President; Jonathan Cassidy, manager of the Union's National 7s Squad was also present. The Player denied the alleged ADRV. His case was and remains that the Prohibited Substance entered his body as a result of eating contaminated meat without his knowing that the meat was contaminated.

31. During the course of the said hearing we issued directions. We also heard an application to lift the provisional suspension. That application was first made in writing by letter dated 21 January 2015. Therein, the Player stated:

“In accordance with World Rugby Regulation 21.7.9.3, I hereby request that my Provisional Suspension be lifted with immediate affect, as I believe that sufficient evidence has been presented to demonstrate that my situation is likely to have involved a contaminated meat product consumed while I was in Mexico for the CAC Games and NACRA 7s”.

32. In a helpfully detailed email submission dated 22 January 2015, Sean Field-Lament set out the basis for and arguments in a support of the Player’s application. He submitted:

“Our rational to support this application are as articulated before:

- 1. The player has a clean blood/urine testing history*
- 2. The player (and indeed the whole traveling squad) was unaware of the World Rugby warning about the risk of contaminated meats in Mexico (it would also appear that NACRA and Mexican officials were not as well.)*
- 3. The player and travelling squad readily complied with the mandatory requirement to read and sign as read the 2014 IRB Anti-Doping Handbook as stipulated by World Rugby. “Clenbuterol” [sic] is mentioned only once in the handbook. Absolutely no reference to the dangers of its inadvertent consumption by contaminated products is mentioned- Despite there being a history of exactly that in Mexico.*
- 4. The player took part in two back to back Union sanctioned rugby tournaments (CAC games and NACRA) over a ten day span in Mexico.*
- 5. The player ate exclusively food prepared in Mexico and on a daily basis consumed meat. (see attached list)*
- 6. The two night previous to the tournament the player consumed meat-once at an Argentinian Steakhouse and then at an Italian restaurant.*
- 7. Mexico is listed by WADA as high risk for “clenbuterol” contaminated meat*
- 8. Mexico is listed World Rugby as high risk for “clenbuterol” contaminated meat*

9. *World Rugby has issued the following warning on its website; http://keeprugbyclean.worldrugby.org/downloads/Contaminated_meat_policy_EN.pdf*
10. *The player was unaware of this warning.*
11. *The organizers of both events appear to be unaware of this warning as no notification or attempt to raise awareness on this matter was issued. (as outlined in the World Rugby Contaminated meat policy)*
12. *The player fully complied without hesitation to the demanded World Rugby urine test. (further evidence of a lack of “mens rea”)*
13. *The World Rugby test report clearly states that: “the findings are consistent with “consumption of contaminated meat (Mexico and China)”*
14. *There is a long and proven track record of previous “No Fault” consumption of “clenbuterol” associated directly with consumption of meat products in Mexico. (109 FIFA athletes alone in 2011).*
15. *Recent (10/8/2014) media reports indicate problem still exists.- (<http://www.toledoblade.com/Food/2014/10/08/Banned-growth-chemical-remains-a-problem-in-beef-in-central-Mexico.html>)*
16. *The commercial use of “Clenbuterol” in domestic meat products is illegal in Mexico and as such there is little to no chance of the restaurants and/or their meat suppliers co-operating with any evidence gathering. (We have had no acknowledgement of our initial enquiries with Mexican officials on this front).*
17. *There is a test (Sterk test) to discern between pharmaceutical consumption and contaminated meat consumption of “Clenbuterol”- World Rugby have decided not use this test.*
18. *The assertion of a positive test as an irrebuttable presumption is flawed. This test can determine beyond a reasonable doubt the source or type of consumption of the drug. As such the assertion becomes rebuttable- therefore World Rugby are not providing best evidence to support their case.*
19. *The principles of natural justice apply – ie is it a fair hearing when the best evidence is not being presented. The right to a fair hearing requires that individuals should not be penalized by decisions affecting their rights or legitimate expectations. The player in this case has legitimate expectation*

that the best evidence be presented by the prosecution – i.e. the sample be subjected to the Sterk test.

20. Article 6 of the European Convention on Human Rights is a provision that protects the right to a fair trial and most importantly the presumption of innocence. The mandatory provisional suspension tramples this right and the lack of best evidence questions the fairness of the trial.”

33. On the substance of the application, Mr Rutherford did not oppose nor support the application but made (in summary) the following points:

- a. There is no known scientific test that can establish the route of ingestion of clenbuterol.
- b. Twenty players in the Tournament were tested. Only this Player returned an AAF.
- c. The BJC should be careful not to prejudge the substantive hearing, particularly where evidence is still being gathered.

34. In a written decision dated 3 February 2015 we rejected the application to lift the provisional suspension. In summary we did so as on the evidence before us at that stage the Player had not established to the requisite standard that the specific meat he consumed was contaminated or that such meat (if eaten) caused the AAF.

35. When doing so we emphasised two points:

- a. We were not indicating that ultimately we would or even might find against the Player. Only that at that stage we were not satisfied (on the material before us) that the Player had demonstrated that the ADRV is likely to have involved contaminated meat.
- b. If, in light of this decision, he wished to have the directions varied so as to bring forward the substantive hearing he was at liberty to make that application, which we would consider in light of any observations World Rugby might have. No such application was made.

36. On 18 May 2015 the Player requested an adjournment of the substantive

hearing for further time to prepare is case. That application was granted.

B. Player's Case

(1) Anti-Doping Rule Violation

37. The Player made a preliminary submission asking us to invite World Rugby to “reverse the AAF” or in the alternative to find that “World Rugby’s application be dismissed”. The basis of the submission was that there was said to be “anecdotal evidence...to suggest that adverse analytical findings for clenbuterol where the testing takes place in Mexico have traditionally not be pursued”. In his written submissions (dated 25 May 2015) he stated in support of this proposition (para 12):

- a) 109 out of 208 players tested at the Under 17 World Cup in Mexico tested positive for clenbuterol. FIFA and WADA declined to prosecute.
- b) 5 players tested positive for clenbuterol at the CONCACAF Gold Cup in 2011 and it is reported that they were absolved after their positive test were deemed to have been caused by contaminated meat. Reports confirm that WADA chose not to appeal the decisions.
- c) Danish cyclist Phillip Nielsen tested positive during the Vuelta a Mexico. The Danish Cycling Federation chose to acquit and WADA again chose not to pursue an appeal.
- d) 2 players tested positive on the opening weekend of games in the Mexican football league in 2013. The governing body decided that no doping rule was broken.

38. Subject to that, he was prepared to admit the ADRV. We ruled against that submission and he did admit that ADRV.

(2) Sanction

39. His case was and remains that the Prohibited Substance entered his body as a result of eating contaminated meat without his knowing that the meat was contaminated.

Evidence

40. The Player gave evidence to us. He said he had never knowingly taken performance-enhancing drugs. He denied deliberately taking clenbuterol. He had been tested before, with negative results. He ate meat in three different restaurants on 1 and 2 December. In the first (in the Fontana Reforma hotel) he ate beef lasagne. In the second (on 2 December) he ate beef and rice. In the third (also on 2 December), the Gotán restaurant, he had two different types of steak.
41. He told us that he neither used nor had used supplements. He did not take protein shakes.
42. Questioned by Mr Rutherford, He described himself as a “*beach boy*”: he works on a beach. He also used to coach soccer. He had no reason to take performance-enhancing drugs.
43. In answer to questions from the BJC he said he had never received any anti-doping education. He did not attend a gym. He had played rugby once before in Mexico. That was an international 7s tournament in 2012 and he was tested with negative result. He did not know of the risk of eating meat in Mexico until he received notice of the AAF. He ate meat with other members of the squad and management.
44. In his email of 22 January Mr Field-Lament said the Player ate meat on “*the two nights previous to the tournament the player consumed meat.-once at an Argentinian Steakhouse and then at an Italian restaurant...*”.
45. Mr Cassidy was the Union’s Team Manager for the Tournament and had been so for a number of years. He coached the Player at U19s. He said the Player had not received any anti-doping education from the Union. He said he and the Union were not aware of the risk of eating (contaminated) meat in Mexico and had not received any guidance on that topic before or during the Tournament.

He said he was aware of the 'Keep Rugby Clean website.

46. He also pointed to an email from Antonio Ruiz Luca de Tena, Director-General-CEO, Federación Mexicana de Rugby Union ('FMRU') sent on 26 January 2015 (20.00) in which he stated, *inter alia*:

"Regarding NACRA 7s, the FMRU did not seek, and therefore does not have, "written confirmation from the hotel/s and/or its suppliers that the meat served by the hotel was not contaminated with Clenbuterol or other anabolic agents". Additionally, the FMRU did not seek, and does not have, such letters for the lunch boxes for teams arranged for both competition games as well as for the two food trucks that were at the venue. As you know for the information previously provided to you, the lunch boxes contained sandwiches with chicken breast and turkey breast cold meat. These lunch boxes were made by a local restaurant "Los Pinos" in Naucalpan de Juarez, Estado de Mexico, Mexico. There two food trucks at the tournament served meat paninis. The FMRU is currently seeking to have letters from all these. We are hopeful to get them, although it is difficult after time has passed.

With all respects, we believe it is very important for you to know that:

- *The FMRU did not know and were not conscious that this issue was an existing real threat in Mexico. We did know of the existence of messages related to this issue at the cafeteria of Mexican Olympic Committee and only a few people in our organization happen to know of the mass - clenbuterol positive testing at the 2011 FIFA Under 17 World Cup in Mexico.*
- *The FMRU did not know of the existence of these guidelines from World Rugby till Jonathan send them to us last friday.*
- *Additionally, the FMRU was not informed / instructed by WADA, World Rugby or NACRA on this issue, if it had / should have / could have / would have been informed.*
- *The FMRU followed the tournament manual of NACRA, which does not mention this issue.*
- *The FMRU helped, through the project initiated by Ross Blake (Anti Doping*

Coordinator), on the layout and accommodation required for the doping testing at the tournament. During the whole process, the tournament manager” (emphasis added)

Submissions

47. The Player sought to rely on Regulation 21.22.4. He accepted that he had the burden of establishing the source of the clenbuterol in his sample.

48. In paragraph of his written submission he argued

25. The player accepts that the rules do not allow for a player to escape sanction by raising any number of possible hypotheses which might be possible and may explain the AAF. However, the player submits that each case must be considered on its own facts and that the judicial committee must have regard to the prevailing factors. In this case, the very significant prevailing factor is the considerable problem with meat being contaminated with Clenbuterol in Mexico causing positive test results. Given that the burden of proof is the balance of probabilities (again, see below), it is submitted that the judicial committee should have regard to the weight of circumstantial evidence in assessing whether it is more likely than not that the AAF is due to contaminated meat or the alternative hypothesis put forward by Professor Ayotte that it is the end of excretion of the administration of Clenbuterol to enhance performance two weeks earlier.

49. Further, he relied upon data from WADA supplied by way of an email from Paula Pena Toimil, Manager, Results Management, WADA sent on 26 May 2015 (19.24):

“Please find below the information that we have related to clenbuterol and meat contamination cases. I am also sharing this information with World Rugby, who is copied in this email.

According to the information in our possession, we have been notified of the closure of 79 cases related to the ingestion of contaminated meat in Mexico. There is a higher number of AAFs reported in ADAMS related to clenbuterol in the country of Mexico. However, we have not yet been notified of the outcome of all of these cases by the relevant organizations.

We have reviewed 79 cases related to clenbuterol findings in the country of Mexico:

- *These samples were related to athletes from Mexico and other nationalities who were competing or had recently been in Mexico shortly before the time of sample collection (for example, one or two days prior to sample collection).*
- *All these 79 AAFs were not pursued as Anti-Doping Rule Violations after the relevant investigations that were conducted by the related ADOs. The ADOs were satisfied that meat contamination occurred through the following individual verifications:*
 - o Concentration of clenbuterol found in the urine sample: the concentration range for meat contamination cases that we have received in the past is between 7 pg/ml to 2500 pg/ml. (1 ng = 1000pg).*
 - o The athlete involved had a link with the affected country. Other verifications were also made related to the athletes' whereabouts in the days prior to the doping control and regarding whether he/she had consumed meat in the country.*
- *Some of these samples were collected during the same event. The maximum number of cases related to clenbuterol findings from athletes participating in the same competition is 2 cases per event, according to our files.*
- *For all of these cases, we have received a decision from the relevant organization exonerating the athlete involved, and including the above-mentioned reasoning."*

50. He pointed to and relied upon the opinion of Professor Ayotte, director of the laboratory as expressed in the laboratory's AAR in respect of both A and B samples, namely that the *level of clenbuterol was "roughly estimated at 0.04 ng/mL, which is consistent with the consumption of contaminated meat (Mexico and China)"*.

51. In an email dated 15 January 2015, timed at 22.02 Professor Ayotte explained, *"the urine level is not diagnostic"*. She said that the low level readings could be the result of one of two scenarios: (1) the end of the administration of clenbuterol to enhance sport performance two weeks earlier to the testing or

(2) the ingestion of very low amounts of clenbuterol in the two previous days. The latter would not, in her opinion, “*enhance performance*” and be of “*no benefit*” to him.

52. She finished that email with this observation: “*In Mexico the contamination of meat is a real and recognised problem as you know. So there is a high probability that the presence of clenbuterol is a consequence [sic]” (emphasis added).*

53. In an email sent on 15 January 2015 (timed at 18.25) she observed, “*You are referring to urine sample 2933935 in which clenbuterol was confirmed at 0.04 ng/mL. Sorry if I am insisting but as mentioned on the certificate of analysis, such a finding is consistent with the consumption of contaminated meat. The samples were collected in Mexico and very often athletes [sic] samples collected there contain clenbuterol in traces*”.

54. He relied heavily upon that, coupled with his account of eating meat in Mexico in submitting that he had discharged the burden of proof and proved the source of the clenbuterol in his sample. He also submitted that World Rugby had not put forward any alternative scenario except of Professor Ayotte’s ‘option 2’ (para 51 above). He characterised World Rugby’s stance as “*fairly neutral*”. He argued that the tests conducted at World Rugby’s behest had little probative value since they related to one, not both of the restaurants in which he eat, and were upon one sample, taken some time after the Player consumed his meat.

55. He noted that *UCI & ors v Contador & RFEC CAS 2011/A/2384 & 2386* concerned meat consumed in Spain, not Mexico where the problem of contaminated meat is widespread and well known. Indeed, in paragraph 178 of its decision the CAS panel stated:

“More specifically, the Panel finds that there are no established facts that would elevate the possibility of meat contamination to an event that could have occurred on a balance of probabilities. Unlike certain other countries, notably

outside Europe, Spain is not known to have a contamination problem with clenbuterol in meat. Furthermore, no other cases of athletes having tested positive to clenbuterol allegedly in connection with the consumption of Spanish meat are known. On the contrary, the evidence before this Panel demonstrates that the scenario alleged by Respondents is no more than a remote possibility.”

56. He submitted that if he discharged the burden, then the period of Ineligibility should be wholly eliminated on the basis that the Player was not at fault or negligent. He pointed *inter alia*, to World Rugby’s failure (as he described it) to bring to his Union’s or his attention the problem of clenbuterol-contaminated meat in Mexico, which he said was not well known. In the alternative he invited the BJC to conclude that the seven months he had been suspended should be “*considered adequate punishment*”. We understand that submission to be founded upon 2015 Regulation 21.10.5.1.2.

57. Mr Richards reminded us that we were dealing with an amateur Union. He pointed to an email from the Mexican Rugby Union that asserted no knowledge of the danger of contaminated meat in Mexico. He observed that the Tournament Regulations and accompanying documentation was silent about the risk and the Union did not receive any guidance about it before the Tournament.

B. World Rugby's Case

(1) Anti-Doping Rule Violation

58. On the preliminary point, Mr Rutherford said that World Rugby did not wish to withdraw the case. In any event, he submitted the case having passed through the preliminary review, World Rugby had no power simply to withdraw the case. There was prima face evidence that the Player had committed an ADRV and it was for the BJC to determine the issues.

(2) Sanction

59. In its written submissions, World Rugby stated:

"In the context of the above evidence, it will be for the Player to demonstrate that the meat he consumed was in fact contaminated, that he could not so have known and that this led to his Adverse Analytical Finding if he is to bring his case within the parameters of No Fault or Negligence. Clearly, his entire case will turn on this point. If he is not able to prove the route of ingestion to the requisite standard then he would not be entitled to a reduction in sanction under Regulations 21.22.4, 21.22.5 or any other Regulation (including without limitation Regulation 21.10.5.1.2 of the 2015 Regulations pursuant to any lex mitior argument). Instead he would be subject to the default sanction under the applicable Regulations, namely, two years' Ineligibility."

60. In those submissions, World Rugby pointed to the following evidence

- a. The other nineteen tests conducted at the Tournament returned negative results.
- b. World Rugby's investigation suggests that no other team ate at Gotán restaurant in Mexico City
- c. Meat tested by World Rugby from Gotán restaurant on 23 January 2015 was found not to contain clenbuterol in the report dated 29 January 2015.

61. However, World Rugby's stance was one of declared neutrality. Mr Rutherford did not question the Player to try to undermine any of his assertions on no fault or negligence. He did not, by questioning of him or otherwise, seek to undermine any evidence called in support thereof.

62. In his conspicuously fair (and helpful) oral submissions Mr Rutherford declared that World Rugby was not "*here to say the Player is lying*". He observed that it was for the BJC to determine whether the Player had passed the "*threshold*", namely proved the route of ingestion. He described it as a difficult case, and World Rugby had "*sympathy for the Player*"; it was difficult for him to "*go back and obtain the meat he ate*". He did not submit that the Player should, fail in his primary submission as to the source of the clenbuterol. He did not submit that the evidence would or did not justify a finding that the clenbuterol in the Player's sample was from his consumption of contaminated meat. He submitted that if we were so satisfied then, as he put it the inevitable would follow, namely it was a "*no fault or negligence*" case. He said it was different from a "*supplement case*".

63. The World Rugby Keep Rugby Clean website currently contains a page warning of the risks of eating meat in China and Mexico: <http://keeprugbyclean.worldrugby.org/?page=resource&id=44>. It also contains a PDF document in ten different languages entitled "Contaminated Meat Guideline". The Guideline (and the commentary on the website) states, *inter alia*:

"Following recent advice from the World Anti-Doping Agency (WADA) regarding the potential risk of meat being contaminated with anabolic steroids in China and Mexico, World Rugby wishes to make all Member Unions aware of this situation, especially those who may be planning to participate in international Rugby matches/tournaments in China or Mexico or who may otherwise consume meat imported from either of these two countries...

If players/teams wish to reduce the risks, then they should avoid eating meat and instead eat seafood or vegetarian food only in these countries. In the event that

players eat outside of the list of establishments which have provided guarantees to the Host Union, players are strongly advised to avoid all meat products... In light of the warning in this policy, players should exercise extreme caution when consuming meat products (and may be advised to seek further assurances in relation to meat) in or sourced from either Mexico, China or countries/regions where the livestock industry is not subject to strict regulation.”

64. Mr Ho informed us that the said material went live online on 28 March 2013 and has remained so ever since. He also informed us that World Rugby did not bring that material or any other about the said risk specifically to the attention of Unions participating in the Tournament. We were also told that WADA published specific guidance on contaminated meat on 23 November 2011. The Player and Mr Cassidy said they had read neither and knew of neither.

V. MERITS

65. We have considered all the material put before, and submissions advanced to us, both orally and in writing.

A. Anti-Doping Rule Violation

66. The Player denied the ADRV. The burden of establishing the ADRV is upon World Rugby. Pursuant to Regulation 21.3.1 the standard of proof is as follows:

“The standard of proof shall be whether World Rugby or its 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.”

67. As Regulation 21.2.1(a) makes clear establishing an ADRV does not require

proof of intent, fault, negligence or the knowing use of the Prohibited Substance on the athlete's part.

68. Pursuant to Regulation 21.2.1(b) sufficient proof of an ADRV under Reg. 21.2.1 is established by, *inter alia*, the presence of a Prohibited Substance in the player's A and (since it was tested) B samples.

69. Clenbuterol is a Prohibited Substance classified under Section 1.2 Other Anabolic Agents of the WADA Prohibited List.

70. The commentary to Article 2.1.1 of the WADC provides as follows:

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

71. In our Decision dated 3 February 2015 we observed:

"Notwithstanding that the Player denies the ADRV, it seems to us that there is no issue with the test results or the AAF. Indeed his case is predicated on the test results and the AAF. With respect to the `player and those advising him, we are not confident he and they fully appreciate the strict liability nature of the ADRV. On the basis of the material before us, we anticipate that the real issues do and will concern sanction and the nature and length thereof, if any".

72. In the event and subject to his preliminary submission (para 37 above) the Player's position had changed. He was prepared to admit the ADRV.

73. We ruled again the Player's Preliminary Point. We now set out reasons for doing so.

74. No issue was taken with the formalities concerned and surrounding the taking of the Player's sample and the transmission and subsequent testing thereof. The laboratory findings in respect of the A and B samples were not contested. It was accepted that clenbuterol was found in both the A and B samples. The preliminary review procedure was correctly followed. In those circumstances, World Rugby charged the Player.

75. Once the Player was charged, the case was referred to us. The BJC's powers are derived from World Rugby's regulations. Regulation 21 (or any other) does not give us any power to dismiss the charge on the basis of what was asserted to be (in our words) unfairness. The unfairness was based on what was submitted to be this Player's unequal (and therefore unfair) treatment as compared to other athletes who it is said in similar circumstances (to him) have not been charged. If the content of Ms Paula Pena Toimil's email is accurate (and it was not suggested it was not) there have been (at least) 79 other cases that have not been pursued including (at least) one where the concentration of clenbuterol was 2.5ng/mL, notably greater than in the Player's sample.

76. We are enjoined to consider any alleged ADRV on the basis of the evidence presented to us and consider the individual charge *on its merits*. By that we mean the BJC is required to consider whether or not an ADRV has been proved. In so doing it may consider, for example, whether certain procedural irregularities are such that the ADRV cannot be proved. We concluded that it does not have some general and inherent 'supervisory power' or jurisdiction over the bringing of the proceedings. Even if we had such a power, we would not have used it in this case. There are examples of athletes being pursued for alleged ADRV where the Prohibited Substance is clenbuterol. *Contador* is but one.

77. Clenbuterol is a non-threshold Prohibited Substance. Therefore, the fact that the concentration is extremely low does not have any effect on the result. In light of (1) the strict liability principle, (2) the unchallenged laboratory

findings, (3) the absence of a therapeutic use exemption and (4) his admission, we are comfortably satisfied that World Rugby discharged its burden. We are comfortably satisfied that the Player committed an ADRV contrary to Regulation 21.2.1 following an AAF for clenbuterol detected in an in-competition sample collected from the Player at the Tournament on 3 December 2014.

78. We emphasise that this conclusion has nothing to do with the route of ingestion or finding of fault or negligence. In *Contador* the CAS Panel (para 47) observed that the

“...contention that the Prohibited Substance did not have a performance enhancing effect on the Athlete and that he must have ingested the Substance inadvertently does not preclude the application of the strict liability principle.”

79. Pursuant to Regulation 21, once an AAF has been established the burden of proof shifts to the Player who has to establish on the balance of probabilities in order to escape a sanction or to obtain a reduction of the sanction, how the Prohibited Substance entered his/her system and that he/she in an individual case bears no fault or negligence, or no significant fault or negligence.

B. Sanction

(1) Clenbuterol

80. An information sheet from the Australian Government’s National Drug Strategy notes that Clenbuterol is used *“to promote the growth of skeletal muscle ('anabolic effects') and to reduce body fat ('catabolic effects')... Body builders and athletes most often utilise clenbuterol as a 'fat burner' to 'define' muscles (i.e. for its 'catabolic effect').”*

81. World Rugby accepted in its written submissions *“that there are reports of a problem in Mexico with respect to clenbuterol contamination of beef”*. Indeed, as

noted above (para 62) World Rugby has issued guidelines in respect thereof¹. Further, as noted on the A and B Sample analysis reports and further in the (15 January 2015) email from Professor Christiane Ayotte to David Ho, clenbuterol can be found in contaminated meat, notably in Mexico and China.

82. Food products such as meat are universally governed by strict legal implications forbidding the “*in vivo*” use of chemical Substances administered to animals with the express purpose of stimulating or modifying natural growth. Such an illegal practice is unlikely to be declared by a producer nor recognised by any unsuspecting consumer who could passively absorb sufficient amounts of a banned Substance to return an AAF through urinary analysis.

(2) Starting Point

83. It is the Player’s first ADRV.

84. Pursuant to Regulation 21.22.1 the starting point is a period of Ineligibility of two years. That is subject to the Player establishing the conditions for eliminating or reducing the period of Ineligibility, as provided for in the Regulations.

85. The Player relied principally upon Regulation 21.22.4. Reliance in the alternative upon Regulation 21.22.5 has, on the facts of this case (namely involving an alleged contaminated product) been overtaken by the coming into force of 2015 Regulation 21.10.5.1.2. The burden is upon the Player to establish the conditions for eliminating or reducing the period of Ineligibility on the balance of probability (Regulation 21.3.1).

¹ <http://keeprugbyclean.worldrugby.org/?page=resource&id=44>

86. Both Regulations 21.22.4 and 21.10.5.1.2 involve a two-stage approach. Regulation 21.22.4 requires first that the Player must establish to the requisite standard how the Prohibited Substance entered his system. Regulation 21.10.5.1.2 requires the Player to establish that the Prohibited Substance came from a contaminated product. On the facts of this case it amounts to the same issue. World Rugby refers to this 'route of ingestion' criterion as the "preliminary threshold". If the Player succeeds on this ground, then second, he must establish that he bears no fault or negligence (Regulation 21.22.4) or no significant fault or negligence (Regulation 21.22.5).
87. This approach is consistent with the concept of personal responsibility. The purpose is to restrict the circumstances in which the minimum mandatory sanctions may be reduced to instances in which the Player can show (the burden of proof being upon him) the specific circumstances of how the Prohibited Substance entered his body.
88. The result is that mere assertions of innocence on the part of the Player and/or the raising of various hypotheses will not be sufficient. As the International Tennis Federation Anti-Doping Tribunal reasoned in the case of *ITF v Hood* (delivered 8 February 2006), the requirement of the player under the equivalent tennis regulations to show the route of ingestion "*...is necessary to ensure that the fundamental principle that the player is personally responsible for ensuring that no Prohibited Substance enters his body is not undermined by an application of the mitigation provisions in the normal run of cases*".
89. Further, the rationale for the requirement in the Regulations and the Code that the route, timing and circumstances of ingestion of the Prohibited Substance is established by a player is necessary as otherwise it would not be possible to evaluate the degree of caution exercised by the player in the absence of a specific explanation and supporting evidence. As the panel in *Hood* identified, and as approved in *IRB v Vikilani* (16 January 2013) at paragraph 47, the Regulation operates to prevent unsubstantiated tales of apparently inadvertent consumption from potentially triggering reductions.

90. Accordingly, the first issue is whether the Player has established the source of the clenbuterol.

(3) The Player's Burden

91. It is the balance of probability. That is a lesser standard than 'beyond reasonable doubt' or 'comfortable satisfaction'. What does it mean? In a word, 'probably'.

92. The CAS Panel in *Contador* explained it thus (para 8, Headnote):

"The athlete can only succeed in discharging his burden of proof by proving that (1) in his particular case meat contamination was possible and that (2) other sources from which the Prohibited Substance may have entered his body either do not exist or are less likely. The latter involve a form of negative fact that is difficult to prove for the athlete and which requires the cooperation of the Appellants. Thus, it is only if the theory put forward by the Athlete is deemed the most likely to have occurred among several scenarios, or if it is the only possible scenario, that the Athlete shall be considered to have established on a balance of probability how the Substance entered his system, since in such situations the scenario he is invoking will have met the necessary 51% chance of it having occurred..."

93. That is the approach we have adopted in answering the central question: has he established that the clenbuterol probably came from his consumption of contaminated meat?

(4) Route of ingestion

94. As we noted in our Decision of 3 February 2015 (para 27) this requires more than establishing *“that the clenbuterol concentration is consistent with the Player having eaten contaminated meat. [The Player must] establish to the requisite standard that the specific meat he consumed was contaminated or that such meat (if eaten) caused the AAF.”*

95. Similarly, the CAS Panel in *Contador* stated, (para 177) *“[a]s the parties agreed that it is possible that a contaminated piece of meat could cause an adverse analytical finding of 50pg/mL of clenbuterol, the only remaining element (the “missing link”) is whether that specific piece of meat was contaminated with clenbuterol. The Panel is not prepared to conclude from a mere possibility that the meat could have been contaminated that an actual contamination occurred.”* *Contador’s* sample contained a finding of 50pg/mL (that is 0.05 ng/mL). The Player in the present case’s finding is estimated as 0.04ng/mL.

96. The *Contador* Panel summarised its position thus (para 332, 333-334):

“332. The Panel has to assess the likelihood of different scenarios that – when looked at individually – are all somewhat remote for different reasons.

334. ... In weighing the evidence on the balance of probabilities and coming to a decision on such basis, the Panel has to take into consideration and weigh all of the evidence admitted on record, irrespective of which party advanced which scenario(s) and what party adduced which parts of the evidence..”

97. In this case the Player must establish that it is more likely than not that the ADRV was caused by his consumption of contaminated meat. His case is based on the following sequence of events:

- a. Before the sample was taken, he ate meat;
- b. The meat he ate was contaminated with clenbuterol; and
- c. Eating that clenbuterol-contaminated meat caused the AAF.

98. *The eating of meat:*

- a. We accept the Player's evidence on this.
- b. We accept that he ate meat when and where he described. World Rugby did not suggest he was lying about that.

99. *The meat he eat was contaminated with clenbuterol.*

- a. The starting point is that he ate meat more than once shortly before the test in Mexico where there is an established problem with meat contaminated with clenbuterol. That fact is recognised by both WADA and World Rugby. That distinguishes him from *Contador* where the CAS Panel observed on this issue (para 8, Headnote):

"...Unlike certain other countries, notably outside Europe, Spain is not known to have a contamination problem with clenbuterol in meat. Furthermore, no other cases of athletes having tested positive to clenbuterol allegedly in connection with the consumption of Spanish meat are known. As a result, no established facts that would elevate the possibility of meat contamination to an event that could have occurred on a balance of probabilities has been established."

- b. Understandably the Player cannot recover the meat he ate. He was not notified of the AAF until some weeks after he consumed the meat. He consumed meat at more than one restaurant. We note that meat recovered from the Gotán restaurant on 23 January 2015 was found not to contain clenbuterol. However, that meat was taken over seven weeks after he was tested and at only one of the three restaurants he visited. The fact there was no other positive test for clenbuterol does not mean that the meat he ate alone was not contaminated.
- c. The findings for clenbuterol in the A and B sample were identical, namely 0.04 ng/mL. According to the unchallenged scientific evidence (*per* Professor Ayotte) is consistent with the consumption of contaminated meat.
- d. We recognise Professor Ayotte opinion that *"the urine level is not diagnostic"*. As we understand it, attempts to provide a reliable,

validated scientific method for distinguishing between the pharmaceutical administration of clenbuterol and its consumption through contaminated meat are at a promising but early stage. Current tests are highly time dependent and cannot provide unequivocal evidence in such cases (*Thevis, Thomas et al 2013*). In that context we accept the opinion of Thomas Delaye-Fortin of WADA that at present there is no way to determine whether an AAF for clenbuterol results from contaminated meat or pharmaceutical preparations.

- e. She said that the low level readings could be the result of one of two scenarios: (1) the end of exertion of the administration of clenbuterol to enhance sport performance two weeks earlier to the testing or (2) the ingestion of very low amounts of clenbuterol in the two previous days. The latter would not, in her opinion, “*enhance performance*” and be of “*no benefit*” to her. As to her option (1) we accept the Player’s evidence before us, unchallenged by World Rugby, that he was not using supplements and did not knowingly take clenbuterol.
- f. The Professor’s Option (2) is the contaminated meat route. She finished that email with this observation: “*In Mexico the contamination of meat is a real and recognised problem as you know. So there is a high probability that the presence of clenbuterol is a consequence [sic]” (emphasis added).*
- g. In the absence of any other possible source or explanation, and in light of the clenbuterol level and Professor Ayotte’s opinion we are satisfied that the Player has established that there is a least a 51 per cent chance that the meat he eat was contaminated with clenbuterol.

100. *Eating that clenbuterol-contaminated meat caused the AAF.*

- a. He has never tested positive before.
- b. We accept his unchallenged evidence that he has not taken clenbuterol knowingly.
- c. We accept the Player’s evidence before us, unchallenged by World Rugby, that he was not using supplements and did not knowingly take clenbuterol.

- d. There is no other known or possible source or explanation for the clenbuterol. World Rugby did not suggest one.
- e. Therefore we are satisfied that the Player has established that there is a least a 51 per cent chance that eating that clenbuterol-contaminated meat caused the AAF.

101. This case can properly be distinguished from *Contador*. It is to be noted that in *Contador* there was three possible and competing sources of, or possible explanations for, the clenbuterol: contaminated meat (imported into Spain where it was said to have been consumed), blood transfusion or supplements (see para 65, 333). That is factually different from this case: the meat was eaten in Mexico, where the problem of clenbuterol contamination is accepted. Further, this Player was not (we accept) using supplements at the material time nor had he had a blood transfusion.

102. It is to be noted that in *Contador* the CAS panel concluded thus:

"...the Panel considers it very unlikely that the piece of meat ingested by him was contaminated with clenbuterol, it finds that, in light of all the evidence on record, the Athlete's positive test for clenbuterol is more likely to have been caused by the ingestion of a contaminated food supplement than by a blood transfusion or the ingestion of contaminated meat."

103. In *Contador* the CAS panel observed that if an athlete raises a prima facie case as to how the Prohibited Substance came into his body, the anti-doping authority cannot simply sit back and say that the athlete has not proven it on the balance of probabilities. Rather it has a duty to raise a counter explanation if it sees one, and the role of the Tribunal is then to assess which of the explanations is most likely on the evidence. The same point was made in *Mariano Puerta*. World Rugby having considered all the evidence, did not

advance a contrary explanation as to how the Prohibited Substance came into the Player's system. As we have made clear, we could find none.

104. Accordingly, we are satisfied that his consumption of clenbuterol-contaminated meat was the source of the Prohibited Substance detected in his sample.

(4) Regulation 21.22.4 – no fault or negligence

Principles

105. The 2009 WADC defines no fault or negligence thus:

“The Athlete’s establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had used or been administered the Prohibited Substance or Prohibited Method”.

106. That is repeated in the Definition section of Regulation 21.

107. Anti-Doping Tribunals have approached the definition of No Fault or Negligence as involving a high standard. Such approach reflects the commentary to Article 10.5.1 2009 WADC which observes:

“...Articles 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.

To illustrate the operation of Article 10.5.1 an example where No Fault or Negligence would result in the total elimination of a sanction is where the Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are

responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination);...

108. We appreciate that the commentary is just that. In *Fédération Internationale de Natation ('FINA') v Cielo* (29 July 2011) the CAS Panel observed (para 8.8):

"It is very easy to imagine situations where a party would be held neither to be at fault nor negligent in circumstances of contamination or mislabelling of a supplement by third parties if civil law or common law principle were strictly be applied. However the comments to the Rule [Article 10.5.1] makes it clear that wherever there is such contamination or mislabelling of a supplement then a sanction of some sort must be applied, and it follows, that notwithstanding the definition of 'no fault or negligence' in the FINA Rules/WADC, some fault or negligence has to be found to exist whenever an Athlete uses a contaminated or mislabelled supplement."

109. It seems to us that the basis for the conclusion in the second sentence of the cited paragraph is the Panel's elevation of the commentary, treating it as though it were part of the Code. By its use of the words "*has to be found*" it seems to us the CAS Panel meant that there must be some fault or negligent *imputed* (whatever the other facts of the case) where athlete takes a contaminated supplement. That is not what the words of the 2009 WADC and the definition of 'no fault or negligence' therein provide. They were also used deliberately by WADA, being words derived from, and well understood by lawyers familiar with civil and common law.

110. The 2015 WADC provides this definition:

"No Fault or Negligence: The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-

doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.”

111. Whether *Cielo* survives the new definition of fault propounded in the 2015 WADC we need not decide. Like the National Anti-Doping Panel in *UKAD v Warburton and Williams* (12 January 2015) rather than the absolute rule of the *Cielo* kind we prefer (not least because it is consistent with the words of the 2009 WADC) the approach promulgated by a differently constituted CAS panel in *Fédération Internationale de Football Association ('FIFA') v WADA*, CAS Advisory Opinion (dated 21 April 2006, para 73):

“The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition. However, the Panel reminds the sanctioning bodies that the endeavours to defeat doping should not lead to unrealistic and impracticable expectations the athletes have to come up with. Thus, the Panel cannot exclude that under particular circumstances, certain examples listed in the commentary to Art 10.5.2 of the WADC as cases of ‘no significant fault or negligence’ may reasonably be judged as cases of ‘no fault or negligence’.”

112. Further, in *CJS GAI FOREST v FEI*, FEI Tribunal decision (dated 14 September 2010, para 33)

“With regards to the question of fault or negligence, the Tribunal is of the opinion, in line with the CAS Advisory Opinion of 2006 issued by CAS upon request of FIFA and WADA, that the prerequisite of ‘no negligence no fault’ has to be achievable and that a ‘reasonableness test’ has therefore to be applied”.

113. Support for that approach is to be found in *Clifton Pinot v FEI*, (FEI Tribunal decision dated 6 August 2014) and *Clifton Promise v FEI*, (FEI Tribunal decision dated 6 August 2014). Both are contaminated supplements cases, in which there were findings of no fault or negligence.

114. In *UKAD v Wallader* (29 October 2010) the NADP Appeal Tribunal observed (at para 46):

“It is important to reiterate that the dangers of taking supplements have been made clear by the anti-doping authorities, and Athletes who do so are running a risk. ... Any Athlete who takes a supplement without first taking advice from a qualified medical practitioner with expertise in doping control places herself at real risk of committing a rule violation. Only in the most exceptional circumstances could such an Athlete expect to escape a substantial sanction if a Prohibited Substance is then detected.”

115. Having set out what we understand to be the general principles, we turn to apply them to the Player’s case.

Conclusion on no fault or negligence

116. We note Mr Rutherford’s submission that if the Player succeeded on the ‘route of ingestion’ then it was “inevitable” that this was a no fault or negligence case. He distinguished it from the taking of contaminated supplements. An obvious difference with taking of supplement is the risk of such being contaminated is well known.

117. The Player has been to Mexico once before this occasion. He tested negative on that occasion. He told us that he did not know then or in December 2014 of the risk of contaminated meat in Mexico. He had not read the information on that topic available on the ‘Keep Rugby Clean’ website. His Union did not tell him of it or of the risk of clenbuterol-contaminated meat in Mexico. Mr Cassidy said he and the Union knew nothing of the risk nor of the information on the said website. We accept the Player did not know or suspect that the meat he consumed was contaminated with clenbuterol.

118. As to the question of whether he could not reasonably have known or

suspected even with the exercise of utmost caution, one has to look at the realities. That risk arose by virtue of the mere fact that he was eating meat in Mexico. We accept his evidence that he did not know of the risk. Could he have ascertained the risk exercising the utmost caution? It is factually different from using supplements. The risk (from meat in a very few countries) is not widely known; the risk from supplements or vitamin is. On the basis of the evidence before us, had he asked his team management they would not have informed him for they were ignorant of it also. It seems, on the unchallenged evidence we have, that FMRU apparently knew nothing of it. The reality is that the AAF might have been the result of his consuming lasagne. To find that he departed from the standards of utmost caution when all around him were doing the same, is to impose upon him unrealistic and impracticable expectations.

119. In those circumstances and on these particular facts we conclude that the Player has discharged his burden under Regulation 21.22.4 and established that he was not at fault or negligent. Therefore the otherwise appropriate period of Ineligibly of two years is eliminated in its entirety. He is free to play with immediate effect.

120. We add this. Every player is personally responsible what he/she ingests. On the basis of the material before us the risk from clenbuterol-contaminated meat in Mexico remains. We are confident thought will be given to the further dissemination of information about that risk specifically to the Unions and tournament organisers most affected thereby. In that way, they can bring it to the particular attention of players who may be in jeopardy.

VI. POST-HEARING REVIEW/APPEAL

121. This decision is final, subject to a Post Hearing Review Body (Regulation 21.24 and 21.25) and, if applicable, an appeal to the Court of Arbitration for Sport (Regulation 21.27).

122. 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 started.

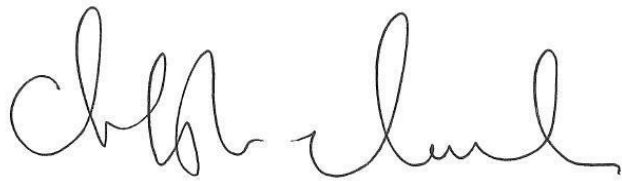
VII. COSTS

123. We make no order for costs.

VIII. SUMMARY

124. For the reasons set out above, the BJC determines:

- a. The anti-doping rule violation has been established.
- b. The Player discharged his burden under Regulation 21.22.4. Therefore no period of Ineligibility or any other sanction was imposed.
- c. He is free to play with immediate effect.

A handwritten signature in black ink, appearing to read 'Chris Quinlan', written in a cursive style.

Christopher Quinlan QC, Chairman,

Bristol, England

29 June 2015