

WORLD RUGBY POST-HEARING REVIEW BODY

IN THE MATTER OF THE REGULATIONS RELATING TO THE GAME

AND IN THE MATTER OF AN ALLEGED DOPING RULE VIOLATION BY RUBÉN RICCO (ARGENTINA) CONTRARY TO REGULATION 21 OF THOSE RULES

AND IN THE MATTER OF A DECISION OF A WORLD RUGBY INDEPENDENT JUDICIAL COMMITTEE DATED 30 MARCH 2017

AND IN THE MATTER OF A REFERRAL TO A POST-HEARING REVIEW BODY APPOINTED PURSUANT TO REGULATION 21.13 CONSISTING OF:

Post-Hearing Review Body

Tim Gresson (New Zealand), Chairman

Margo Mountjoy (Canada)

Nicholas Stewart QC (England)

Appearances

Aaron Lloyd (Counsel for the Player Rubén Ricco)

Louise Reilly and Ben Rutherford (Counsel for World Rugby)

Hearing

Conducted on the papers. Written submissions dated 6 July and 14 August 2017 (Player) and 31 July 2017 (World Rugby)

DECISION AND REASONS

Overview and procedural history

1. The Player, Rubén Ricco is an Argentine rugby player who was a member of the Argentina squad participating in the World Rugby Under 20 Championship in England.
2. On 30 May 2016 a sample was collected from the Player in Cheshire, England, as part of that tournament's Out of Competition testing programme. Analysis of that sample produced a positive finding for the presence of Clomiphene. The Player did not dispute that adverse analytical finding ("AAF") and admitted that the presence of Clomiphene in his body constituted an anti-doping rule violation ("ADRV") under Regulation 21.2.1 of the World Rugby Anti-Doping Regulations 2016.

3. Clomiphene is an anti-estrogenic medical substance, used for fertility treatment for men and women. In men, a medical dose of Clomiphene accelerates testosterone secretion.
4. Clomiphene is in the World Anti-Doping Agency ("WADA") 2016 List of Prohibited Substances, set out as Schedule 2 to the World Rugby Anti-Doping Regulation 21 ("Regulation 21"). It is in category S4, Hormone and Metabolic Modulators. It can be used by athletes to inhibit oestrogen problems caused by anabolic steroid use, one manifestation of which can be over-growth of breasts (gynecomastia).
5. Clomiphene is a Specified Substance, as defined by Regulation 21.4.2.2 for the purposes of the application of Regulation 21.10, which deals with sanctions on individuals for an ADRV under Regulation 21.2.
6. By Regulation 21.10.2, the presumptive sanction for the Player's admitted ADRV involving a Specified Substance is:
 - four years ineligibility if World Rugby can establish that the ADRV was intentional (Regulation 21.10.2.1.2)
 - two years ineligibility if Regulation 21.10.2.1.2 does *not* apply; i.e. if World Rugby does *not* establish that the ADRV was intentional (Regulation 21.10.2.2)
7. The presumptive sanction can be reduced or even eliminated in some circumstances, as follows:
 - The period of ineligibility is eliminated if the Player establishes that he bears No Fault or Negligence (Regulation 21.10.4).
 - If the Player can establish No Significant Fault or Negligence, then at a minimum there must be a reprimand and no period of ineligibility, and at a maximum a period of two years ineligibility (Regulation 21.10.5.1.1).

Because of the definition of the word "*intentional*" as provided by Regulation 21.10.2.3¹ factually there is no room for the application of either of those grounds for reduction or elimination if it is established that the ADRV was intentional. Moreover, in the present case it has never been argued for the Player that he bore No Fault or Negligence, as opposed to No Significant Fault or Negligence.

8. Having been formally notified through the Unión Argentina de Rugby, that World Rugby alleged an ADRV against him, the Player was provisionally suspended under Regulation 21.7.9 and 21.7.10 with effect from 11 July 2016 pending the outcome of his case.
9. On 11 August 2016 the Player's legal representative wrote to World Rugby giving notice of the Player's intention to admit the ADRV and requesting a hearing by a Judicial Committee appointed under Regulation 21.8.2 as to sanction only.

¹ Regulation 21.10.2.3 provides:

" the term "*intentional*" is meant to identify those players who cheat The term therefore requires that the player or other person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk"

10. The appointed Judicial Committee was: Graeme Mew (Canada), Chair, Dr George Van Dugteren (South Africa) and Joseph de Pencier (Canada).
11. The Judicial Committee conducted a hearing on 15 November 2016 by a combination of video and telephone conferencing facilities. The Judicial Committee received written submissions before the hearing, heard witnesses and oral submissions at the hearing and received further written submissions on 26 January 2017.
12. At the hearing Mr Lloyd presented the Player's case and Ms Reilly the case for World Rugby. All witnesses had provided written witness statements. For the Player, he and his friend and training partner Mr Franco Ruiz gave oral evidence by video link (each with interpretation from Spanish to English) and were cross-examined. For World Rugby, its two expert witnesses Dr Audrey Kinahan and Professor David Cowan gave oral evidence by telephone and were cross-examined.
13. The evidence before the Judicial Committee will be considered, so far as necessary in these reasons when we discuss the grounds of challenge by the Player to the Judicial Committee's findings and decision.
14. World Rugby submitted to the Judicial Committee that the Player's use of Clomiphene had been intentional and the sanction should be four years ineligibility.
15. The Player denied intentional use. He asserted that his degree of fault was less than significant and warranted reduction of the period of ineligibility to six months so as properly to reflect the degree of his fault or negligence. He did not argue No Fault or Negligence, so Regulation 21.10.4 did not come into play (see paragraph 7 above).

The Judicial Committee decision under review

16. The Judicial Committee's Decision now under review ("the Decision"), including its written reasons, was given on 30 March 2017. The Judicial Committee stated that it rejected much of the evidence tendered by the Player [para 73]. It accepted World Rugby's submission that the Player's use of Clomiphene had been intentional. In particular, the Judicial Committee held that regardless of when he had used Clomiphene, the Player "*...knew enough about anti-doping regulations to have realised that using any pharmaceutical product – particularly one recommended by a friend he worked out with at the gym – without checking its contents would run the risk of resulting in an ADRV.*" [para 72]
17. The Judicial Committee, having decided that the Player's ADRV had been intentional, stated that it was not necessary for it to consider whether there should be any reduction because of lack of fault or negligence or lack of significant fault or negligence on the Player's part (para 76 and see para 7 of this decision). That was clearly correct.
18. The applicable sanction imposed on the Player was therefore four years ineligibility.
19. On 7 April 2017 the Player gave timely written notice exercising his right under Regulation 21.13.8 to refer the sanction imposed by the Judicial Committee to a Post-Hearing Review Body and we have been duly appointed as the Post-Hearing Review Body ("the PHRB").

20. Under regulation 21.13.8.5 and 21.13.8 the PHRB is to determine the basis on which the review will proceed and has a discretion to rehear the whole or part of the evidence given before Judicial Committee. It also has wide powers in its discretion, under regulation 21.13.8.6, 21.13.8.8 and 21.13.8.9 to receive further evidence and to call on experts for specialist advice.
21. In the present case we did not consider it necessary or appropriate to rehear any evidence or receive any new evidence or expert advice. Neither party had asked us to do so.
22. Save where the PHRB decides to hear the entire case *de novo*, by regulation 21.13.8.11 the party seeking review has the burden of proving that the decision being challenged should be overturned or varied. That burden, therefore, fell upon the Player on this review.
23. We held a directions hearing by telephone on Thursday 27 April 2017, with the participation of Counsel for the Player, World Rugby and the Unión Argentina de Rugby. We (via the Chairman) then issued written directions dated 2 May 2017 for the filing of submissions and the preparation of transcripts of the oral evidence given at the 15 November 2016 Judicial Committee hearing.
24. We received written submissions dated 6 July 2017 from Mr Lloyd, written submissions in response from World Rugby dated 31 July 2017 and reply submissions from Mr Lloyd dated 14 August 2017. We also received transcripts in English of the oral evidence given on 15 November 2016.
25. On this review the Player requests:
 - (a) a reversal of the finding of the Judicial Committee that the Player intentionally committed an Anti-Doping Rule Violation; and
 - (b) a reduction in the sanction imposed by the Judicial Committee from four years' ineligibility to no more than 2 years' ineligibility - specifically 16 months.
26. The grounds advanced by the Player on this review are that the Judicial Committee erred:
 - (a) in finding that the Player engaged in conduct which he knew constituted an ADRV or knew that there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk;
 - (b) in rejecting the evidence of the Player that:
 - (i) he had been experiencing pain and discomfort and his use of Clomiphene was for the purpose of managing that pain and discomfort; and
 - (ii) he did not turn his mind to consider whether Clomiphene was a prohibited substance because he did not think of his condition, and the treatment to combat it, as in any way being for the purpose of performance enhancement.
 - (c) in finding that it was likely that Clomiphene was only available on prescription in Argentina; and

(d) in finding that World Rugby had established, to the comfortable satisfaction of the Judicial Committee, that the Player's ADRV had been intentional.

27. Mr Lloyd indicated that the Player's application for review alleged that the Judicial Committee had erred in both fact and law but was principally focused on legal error.

28. We turn to consider each of the specific Judicial Committee errors of law and/or fact alleged on behalf of the Player, set out as points (a) to (f) in Mr Lloyd's submissions [para 5] in support of his grounds of challenge recorded in paragraph 26 above.

Point (a): The Judicial Committee applied the "comfortable satisfaction test incorrectly, leading to legal error.

29. This complaint is based on the following passage in paragraph 60 of the Decision:

" judicial committees will look at all of the circumstances and decide whether, to the comfortable satisfaction of the panel (where World Rugby has the burden of proof), they believe that the anti-doping rule violation was not intentional."

30. The key word is the penultimate word "not". It is alleged by Counsel that the Judicial Committee got the test 180 degrees wrong. It was submitted that *"the Judicial Committee should not have been asking itself whether it was established to its comfortable satisfaction that the ADRV was not intentional (as recorded in [JCD para 60]) but rather whether they were satisfied to the comfortable satisfaction standard that it was."*

31. There is nothing in this point. On any sensible reading of the Decision (and in particular paragraphs 7, 19 and 20), or even paragraph 60 on its own, it is blindingly obvious that the inclusion of "not" as the penultimate word of that paragraph was just a slip. The reference in paragraph 60 to *"where World Rugby has the burden of proof"* is itself enough to show that. It would have made no sense to be talking explicitly about that situation and then later in the same sentence to describe the test as being whether the Judicial Committee believed that the ADRV was *not* intentional; i.e. the exact opposite of the burden of proof being on World Rugby.

32. On this point, there is not only no fundamental error, as Counsel submits. There is no error of substance at all. The only error was that slip, which had no effect on the Judicial Committee's reasoning or decision.

Points (b) and (c): The Judicial Committee failed to provide any reasoning or justification for the rejection of the evidence by the Player and his supporting witness Mr Ruiz. It took into account irrelevant matters and failed to take into account relevant matters in rejecting the Player's evidence that he had acquired the substance taken "over the counter"

33. Mr Lloyd treated these two points together [paragraphs 15 to 22]. That is helpful as in practical terms they are inextricably connected.

34. We note the express acknowledgment by Mr Lloyd [para 17] that, subject to specific comments on behalf of the Player which we consider below in relation to points (e) and (f), the Judicial Committee had fairly set out the key parts of the evidence and argument before it.

35. Mr Lloyd criticised the Judicial Committee's "Discussion and Analysis" at paragraphs 57 to 76 of the Decision. He submitted that the Judicial Committee provided no proper analysis of the evidence before it, nor of its reasons for rejecting crucial evidence. Specifically he submitted:

- The Judicial Committee did not state why it found it highly unlikely that the Player obtained Clomiphene over the counter.
- It did not state why that conclusion was relevant to its further findings.

36. Dealing with the specific complaints:

- It is incorrect to state that the Judicial Committee did not state why it made the finding. The Judicial Committee stated at paragraph 68: "*We find it highly unlikely that the Player obtained Clomiphene over the counter at a pharmacy. The Player's failure to take the obvious step of obtaining other evidence to corroborate his purchase from the pharmacy is telling.*" The second sentence gave a reason for the finding. It was clearly linked with, and supported by, the Judicial Committee's findings at paragraph 69 where it explained why it did not accept Mr Ruiz's evidence that he had recommended Clomiphene to the Player as treatment for pain and itchiness on the chest – noting particularly, that Mr Ruiz had taken Clomiphene on the recommendation of a trainer, rather than a physician.
- The relevance of this conclusion was obvious, without any need to spell it out explicitly. An over-the-counter purchase was more likely to be consistent with the Player's case that he was using Clomiphene innocently for treatment of chest pain and itchiness. If he had obtained the Clomiphene from a doctor, he would have faced the argument that he could and should have taken the opportunity of checking with the doctor so as to ensure that it was not and did not contain any prohibited substance. If he had obtained it from another source, such as a trainer or another athlete, the conclusion that it was for performance enhancing purposes, rather than for innocent medical reasons, would have been hard to resist.

37. We note that although the conclusions in paragraph 69 of the Decision are supportive of the finding stated in paragraph 68, those conclusions in paragraph 69 are expressed to apply even if the Player had been given the benefit of the doubt on the question of over-the-counter purchase.

38. Mr Lloyd is correct in submitting that World Rugby produced no direct evidence of the availability of Clomiphene in Argentina. However, the Judicial Committee also noted [para 30] that the Player had neither gone back to the Pharmacist to obtain evidence of his purchase nor (this would have been a simple step to take) to obtain a statement confirming the availability of Clomiphene over the counter.

39. Mr Lloyd described it as important that Mr Ruiz was not cross-examined on this point. We do not see that as important. In the light of the overall evidence and the cross-examination of the Player, it is insignificant. We do see that even though the Player was cross-examined on the point, it might have been preferable for Counsel to have put the point squarely in cross-examination of Mr Ruiz as well. However, even if that had been done, the most favourable result for the Player would have been that Mr Ruiz was unshaken and simply stuck to his evidence on that point.
40. That leads directly into the closely related submission by Mr Lloyd, that the Player was apparently unshaken by cross-examination. We see no significant force in that submission. An untruthful witness may well be able to maintain his position firmly without any apparent doubt or weakness but that does not prevent a tribunal from finding, as here, that when judged with common sense in the light of all the other evidence, he was not being truthful. This is a familiar situation in cases of contested evidence. If Mr Ruiz had also been cross-examined on this point, then on the most favourable outcome of that cross-examination the Judicial Committee would have been faced with two unshaken witnesses telling the same story. That is another familiar situation faced by fact-finding tribunals. It is clear that having two unshaken witnesses would and should have made no difference to the Judicial Committee's conclusion that the story was false when judged in the entirely proper way described above.
41. Mr Lloyd submitted paragraph 70 of the Decision was tainted by this alleged error. Paragraph 70 states: "*While there is every reason to believe that the Player used Clomiphene on Mr Ruiz's recommendation, we do not accept that it was used to treat a skin condition.*" There is no question of taint. Paragraph 70 of the Decision is simply to be read together with paragraphs 68 and 69 which set out coherent conclusions well supported by the evidence.
42. We see no force in the complaint in paragraph 22 of Mr Lloyd's Submission that the Judicial Committee accepted parts of the evidence of Mr Ruiz and the Player, but rejected other parts and in this regard we do not consider there was a rational reason why the Judicial Committee should also have rejected their evidence that the suggestion to use Clomiphene had come from Mr Ruiz. But, in any event there is no objection in principle to a fact-finding tribunal accepting parts of a witness's evidence while rejecting other parts, as long as it results in no inconsistency in the factual findings. There is no such inconsistency here.
43. At paragraph 22 Mr Lloyd submitted "*it appears that the Judicial Committee is ascribing some nefarious purpose for the use of Clomiphene without explaining why, or on what basis, that assumption is made.*" We do not consider that the label "assumption" fits at all. It was a conclusion reached by the Judicial Committee, not a mere assumption, and it was explained in the Decision.

Point (d): The Judicial Committee failed to give any apparent weight to concessions by the expert witness for World Rugby regarding the possibility of administration of the substance outside the expected timeframe (and related to this, appeared to put improper weight and unexplained weight on conclusions reached regarding the possible time of administration of the substance).

44. This was a flimsy point, which we have fully considered but firmly rejected.

45. The Player's case was that it was around Christmas 2015 Mr Ruiz recommended Clomiphene and the Player then bought it over the counter and the very latest possible date for ingestion of Clomiphene would have been at the beginning of January 2016.
46. The concession in question was by one of World Rugby's two expert witnesses, Prof David Cowan, Director of the Drug Control Centre at King's College, London. Although he clearly stated his opinion it was likely that the Player had consumed Clomiphene within the three month period before the 30 May 2016 test, he told the Judicial Committee that he did not rule out completely the possibility of administration outside that period.
47. World Rugby's other expert witness, Dr Audrey Kinahan, a practising dispensing pharmacist and the Chair of the WADA List Expert Group, stated that it would be extraordinary for Clomiphene to have been still in the Player's system on 30 May 2016 if it had last been taken when the Player claimed.
48. That was all the expert evidence before the Judicial Committee. In the light of the evidence, it is not surprising that the Judicial Committee concluded it was improbable that more than five months had elapsed between the Player's administration of Clomiphene and the test on 30 May 2016 [refer paragraph 71]. It plainly was improbable, to put it at its lowest.
49. The Judicial Committee did not ignore what Mr Lloyd described as a concession by Prof Cowan. It was expressly noted in the Decision but the Judicial Committee accepted the clear opinions of Dr Kinahan and Prof Cowan, who unequivocally concurred on the improbability of the ingestion by the Player having occurred during the period he indicated. There was no need at all for the Judicial Committee to give any further explanation.
50. Contrary to Counsel's submission there was not remotely any error of law by the Judicial Committee on this point.
51. Although we see no sensible reason for questioning the Judicial Committee's conclusion on the timing of the Clomiphene use, we note that at paragraph 72 of the Decision the Judicial Committee concluded: "Regardless of when the Player used Clomiphene, he knew enough about anti-doping regulations to have realised that using any pharmaceutical product – particularly one recommended by a friend he worked out with at the gym - without checking its contents would run the risk of resulting in an anti-doping rule violation. We simply do not believe his evidence to the contrary." [our underlining]. That was also an entirely reasonable conclusion on the evidence.

Points (e) and (f): The Judicial Committee wrongly assumed an admission by the Player of knowledge of risk although that admission had not been made by the Player in evidence. It had also failed to consider and apply the correct legal test for knowledge of risk of an ADRV in reaching its conclusion that the Player had acted intentionally.

52. Mr Lloyd treated these two points together, which was helpful as they are closely connected.
53. On these points Mr Lloyd referred specifically to paragraph 72 of the Decision which we have set out in paragraph 57 above and submitted there were two errors:

- the Judicial Committee *assumed* that the Player had actual knowledge of the risk of an ADRV, rather than turned its mind to whether that was his state of mind.
- paragraph 72 reflected an earlier mistake in paragraph 31 of the Decision, where it is stated: *“The Player admits having received anti-doping education through the Union’s Academy programme and, therefore, knew that he should check any medication taken by him.”* The alleged mistake is that although the Player clearly admitted the first point, he did not admit that he had known that he should check any medication.

54. As to the first of the two alleged errors, we see no merit in the point. There is no basis at all for describing the Judicial Committee as having *assumed* that position rather than turning its mind to examination of the evidence and drawing its conclusion from the evidence.

55. Paragraph 74 of the Decision stated:

“Accordingly, the Player’s acts and omissions, as we have found them, leave us comfortably satisfied that the Player engaged in conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.”

56. The Judicial Committee’s findings on the evidence and its reasons for its crucial conclusions in paragraphs 72 and 74 are based upon its findings of fact succinctly but clearly set out in paragraphs 68 to 71. All those findings and conclusions are fully justified by the evidence on a correct legal analysis and application of the relevant regulations.

57. As to the second suggested error, Mr Lloyd’s submission cited the following passage as *“the best record”* of the Player’s evidence:

Q. And can you also confirm that you received anti-doping education from your Rugby Academy Programme?

A. Yes.

Q. So you knew before taking medication that you should make sure the medication was safe to use?

A. Yes, but I didn’t know that that medication was going to leave a positive result because it wasn’t performance enhancing medication.

58. Mr Lloyd argued that this was not a blanket acceptance by the Player that he knew he needed to check all medication.

59. We accept the qualification in the second answer does dilute the admission by the first word “Yes”. In effect, the Player indicated although he admitted he knew in general that he should make sure medication was safe to use (i.e. safe in anti-doping terms), he did not think that applied to this particular substance, Clomiphene, because he did not think it was performance-enhancing. To that extent, the second part of paragraph 31 (after the word “therefore”), insofar as it was citing an admission by the Player, marginally overstated the admission.

60. We regard that, as a nuance so fine that it hardly justifies the label “error”. Nevertheless, accepting it for the sake of argument as an error, where does it lead?
61. Our conclusion is that paragraph 31 would be correct and fully justified on the evidence if the second part did not purport to refer to an admission at all (which is a possible reading of paragraph 31, although we shall assume in the Player’s favour that it is not the correct reading). We consider that in the light of the unequivocal admission that the Player had received anti-doping education through the UAR, it followed, whether he admitted it or not, that he knew that he should check any (that is to say, all) medication taken by him. It is not realistic to suppose that what he had learned and knew from the Rugby Academy Programme, had been qualified by any suggestion of an exception whereby he thought that a substance was not performance-enhancing. It would be stretching credulity to suppose that the Player had failed to appreciate the whole point of his personal responsibility (to check that medication was safe to use), was that it was clearly risky to make any assumption without checking.
62. Moreover, there was ample evidence to support the conclusions reached in paragraph 72, without the need to treat the second of the Player’s answers in the cited passage as an admission that he knew that he must check all medication.
63. It is not necessary to determine on this review whether the Player’s acts and omissions (as in our view correctly found by the Judicial Committee), mean that he had engaged in conduct which he knew constituted an anti-doping rule violation. This is because we conclude the Judicial Committee was right, at the very least, to be comfortably satisfied that the Player had known there was a significant risk that his conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. Thus, for the purposes of Regulation 21.10.2.1.2 the Player’s ADRV was intentional.
64. Mr Lloyd also submitted that World Rugby’s analysis of knowledge and intention recorded in the Decision (paragraph 51) was wrong, as being a too literal interpretation of the knowledge requirement inherent in the concept of intention. However, Mr Lloyd appeared to accept, it is not clear how far the Judicial Committee adopted that analysis. Thus, we do not need to go into those questions. It could only affect the question whether the Player knew that his conduct constituted an ADRV and not the alternative definition of “intentional” – that is the Player knew there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk.
65. The Judicial Committee correctly noted [at para 76] that as a result of its finding of an intentional ADRV it was not necessary to consider whether the sanction should be reduced because of a lack of fault or negligence, or significant fault or negligence on the Player’s part.

Decision on this review

66. The applicable sanction was therefore the four years’ ineligibility imposed by the Judicial Committee. We find no ground for interference with the Judicial Committee’s decision of a period of ineligibility of four years from 11 July 2016, ending at midnight on 10 July 2020.
67. The decision of this Post-Hearing Review Body is to uphold the decision of the Judicial Committee delivered on 30 March 2017. The Judicial Committee Decision drew attention to

regulation 21.10.12.1 and 21.10.12.2. The result is that the Player will be allowed to return to training on 11 May 2020 although he will not be eligible to take part in competition until 11 July 2020.

Appeal to the Court of Arbitration for Sport

68. Regulation 21.13 sets out the circumstances in which an appeal against this decision can be made to the Court of Arbitration for Sport (CAS).

Costs

69. By regulation 21.13.8.14 costs associated with any proceedings before the Post-Hearing Review Body shall ordinarily be borne by the party seeking review, in this case the Player Rubén Ricco. However, under that regulation the PHRB does have full discretion in relation to the costs. If the Player or World Rugby wish us to exercise our discretion so as to depart from that ordinary rule, written submissions must be submitted to the PHRB through Mr David Ho at World Rugby by 17:00 GMT on 20 October 2017.



Tim Gresson

Margo Mountjoy

Nicholas Stewart QC

5 October 2017