

## **WORLD RUGBY**

**IN THE MATTER OF THE REGULATIONS RELATING TO THE GAME**

**AND IN THE MATTER OF AN ALLEGED ANTI-DOPING RULE VIOLATION BY EMRE BENDER (TURKEY) CONTRARY TO REGULATION 21**

**BEFORE AN INDEPENDENT JUDICIAL COMMITTEE APPOINTED PURSUANT TO REGULATION 21.8.2**

### **Judicial Committee:**

Nicholas Stewart QC (England - Chairman)

Dr Stephen Targett (New Zealand)

Gregor Nicholson (Scotland)

### **Representatives and Participants:**

Yvonne Nolan (Counsel for World Rugby)

Emre Bender (the Player)

David Ho (Anti-Doping Science and Results Manager, World Rugby)

### **In attendance:**

Çisem Uçar (International Relations Specialist, Turkish Rugby Federation)

Kayhan Alsace (Interpreter)

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Hearing conducted by video/telephone conference on Monday 25 March 2019.

## **REASONS FOR DECISION**

### **Overview**

[1] Mr Emre Bender (the “Player”) is a member and player of the Turkish Rugby Federation (‘TRF’). He was a member of the TRF National U18s squad which took part in the Rugby Europe U18s Sevens Trophy in Esztergom, Hungary, in September 2018. He was bound to comply at all times with Regulation 21 of the World Rugby Regulations (“the Regulations”).

[2] World Rugby alleges that the Player committed an anti-doping rule violation ('ADRV') as a result of an adverse analytical finding ('AAF') for the presence of Prohibited Substances testosterone and its metabolites, detected in the sample collected from the Player. Both were detected in a sample collected from the Player by an In Competition Doping Control in Esztergom on 1 September 2018. In the rest of this decision the term "testosterone" refers to testosterone and its metabolites.

[3] Testosterone is classified in category S1.1B Endogenous AAS on WADA's 2018 List of Prohibited Substances (which appears at Schedule 2 of Regulation 21) and is prohibited when administered exogenously. It is not a Specified Substance. It is a non-threshold substance, meaning that detection of any amount will constitute an AAF, and is prohibited at all times.

[4] A preliminary review of the case was performed by Professor David Gerrard MB ChB FACSEP FFSEM in accordance with Regulation 21.7.2. The Player was notified in writing through the TRF on 1 November 2018 that his A sample had returned an AAF and that he may have committed an ADRV. The Player was provisionally suspended, pending the outcome of these proceedings, with effect from 1 November 2018.

[5] World Rugby arranged for the B sample to be tested at no cost to the Player. That test was done at the Laboratoire Suisse d'Analyse du Dopage in Lausanne, Switzerland. World Rugby notified the Player by letter dated 17 December 2018 that the result of that test confirmed the presence of testosterone and its metabolites, which had also been present in his A sample.

[6] The Player has no previous finding of an AAF or ADRV.

[7] Pursuant to World Rugby Regulation 21.8.2.1 on 29 January 2019 the Judicial Panel Chairman, Christopher Quinlan QC, appointed this Judicial Committee ('JC') to determine the Player's case.

[8] The Player has not been represented by lawyers or any other representative. By a letter in Turkish dated 7 December 2018 and signed by him, addressed to the TRF, the Player stated his position (in the English translation before the JC) as:

"I received the mail and the documents that claimed doping suspicions about me. I read the claims. My fitness coach made me use a pill before seven or eight months from matches but didn't think that whether it could be detrimental or doping. If I knew I wouldn't use. I am young, so I am uninformed about these type of issues. I think that my ex coach had directed me badly. Our coaches were warn us in the camp. Moreover, we signed. I have been playing football for several years and i have been playing rugby for two years. I want to continue my sports career and rugby as well."

[9] The Player's position stated in that letter remained his position throughout these proceedings and in his oral evidence to the JC on 25 March 2019.

[10] World Rugby's position was that as the ADRV did not involve a Specified Substance, by Regulation 21.10.2.1 the Player must be sanctioned by a period of ineligibility of four years unless he could establish (on the balance of probability) that the ADRV was not intentional. WR submitted that there was no basis for elimination or

reduction of the four years ineligibility on the ground of No Fault or Negligence (Regulation 21.10.4) or No Significant Fault or Negligence (Regulation 21.10.5).

[11] At the hearing WR submitted that the Player had failed to establish that the ADRV was not intentional or to show any other ground for elimination or reduction of the four year period of ineligibility.

[12] For the reasons which follow, the Judicial Committee finds that the Player has failed to prove that his ADRV was not intentional or that there is any basis for elimination or reduction of the four year sanction applied by Regulation 21.10.2.1.

### **Procedural directions and hearing**

[13] On 12 February 2019 the JC provided the parties with written directions concerning disclosure, written submissions, evidence at the hearing and scheduling. The hearing took place on Monday 25 March 2019 by video conference.

[14] The hearing started slightly late because of technical difficulties and then took just over two hours. The case for World Rugby was presented by its counsel Ms Yvonne Nolan. Ms Nolan had made a written submission dated 18 March 2019. In the light of the Player's admission in his letter dated 7 December 2018 that his coach had given him a pill, WR's position was that the ADRV was made out, so that submission dealt only with sanction. Ms Nolan made only very brief further submissions and called no oral evidence.

[15] The Player was not represented at the hearing. He gave oral evidence himself but produced no written or oral evidence from any other witness.

[16] While the JC has considered the entire record and paid careful attention to the evidence of the witnesses and the comprehensive written and oral submissions of the parties, we refer in these reasons only to those matters which we regard as necessary to describe and explain our decision.

### **Issues**

[17] The Player has accepted the AAF, so World Rugby has met its burden of establishing that the Player has committed an Anti-Doping Rule Violation, namely the presence in the player's sample of the Prohibited Substance testosterone and/or its metabolites.

[18] Because the Player's ADRV does not involve a Specified Substance, he bears the burden of establishing on a balance of probability that his ADRV was not intentional. That would then lower the presumptive sanction from four years' Ineligibility to two years.

If the Player had established that his ADRV had not been intentional, he might then have obtained a further reduction of the otherwise applicable sanction if he had proved that there had been No Significant Fault or Negligence on his part (or even elimination of the period of ineligibility if he had proved No Fault or Negligence at all on his part.

### **The Evidence**

[19] WR's evidence consisted of the relevant correspondence, the laboratory test reports establishing the ADRV and the Player's Doping Control Form signed by him and dated 1 September 2018.

The Player's relied entirely on his oral evidence and his letter dated 7 December 2018 mentioned in paragraph [8] above.

### **The Player's evidence**

[20] The Player needed to give his evidence in Turkish, with interpretation in both directions. He first gave a short account, which expanded on his letter dated 7 December 2018 and was consistent with that letter. He was then cross-examined by Ms Nolan and asked a few questions by the JC. He made the following points:

- (1) The Player had been going to a gym in Esenyurt for about three months before the September 2018 tournament in Hungary.
- (2) A friend had introduced him to a fitness trainer at the gym.
- (3) That trainer had told the Player some tablets, which the Player took for growth and strength. They were in a box of about 60 tablets and he took one a day until they ran out; and then he did not buy any more because he did not have the money.
- (4) The box looked like original packaging. It contained information in small print which he did not read.
- (5) His coaches and the Turkish Rugby Federation had previously given him some warning about doping.
- (6) It had never crossed the Player's mind that the tablets contained testosterone (which he had known was prohibited) or anything suspicious.
- (7) He said before cross-examination that he had felt there was something wrong with these tablets. In cross-examination he explained that he meant that he thought too many vitamins or supplements could be harmful, such as to his kidneys. But that concern was because of the daily amount, not the ingredients.
- (8) He did not remember the name of the tablets.

[21] The only other items of evidence were English translations of:

- the TRF National Athlete’s Contract in the form apparently signed by the Player, by which the Player expressly undertook not to use drugs
- a note addressed to Mr Ho and signed by two TRF National Team Coaches, stating that they always warned all players about doping. They told them how it as harmful and tried to improve their knowledge about doping. They also asked them to sign a paper with a statement which appears to have been that undertaking in the National Athlete’s Contract or something in the same terms.

[22] In practical terms the Player’s evidence also constituted his submissions.

[23] After the Player’s evidence Ms Nolan and then the Player were invited to add anything they wished in support of their cases.

[24] Ms Nolan made a brief submission, consistently with WR’s case throughout, that it was clear there had been a high degree of risk taken by the Player who was aware some substances were prohibited but took an unknown substance which he had got from a fitness coach who was not his team coach. She submitted that even on the Player’s own evidence he had not shown that there had been no significant fault.

[25] The Player made no further submissions except to repeat that he had honestly thought the tablets would help him to grow but did not contain any prohibited substances.

[26] The JC accepts that the Player gave a truthful and straightforward account. There was one point on which Ms Nolan challenged the truthfulness of his evidence, which was his not being able to remember the name of the tablets, but the JC does not believe he was trying to mislead on that or any other point.

### **Applicable Provisions of World Rugby Regulation 21**

[27] The following provisions of World Rugby Regulation 21 are engaged (omitting parts which have no relevance to the present case):

#### **Strict Liability**

##### **21.2.1 Presence of a Prohibited Substance or its Metabolites or Markers in a Player’s Sample**

**21.2.1.1** It is each Player’s personal duty to ensure that no Prohibited Substance enters his or 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 (Presence).

#### **Burden of proof**

##### **21.3.1 Burdens and Standards of Proof**

World Rugby shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether World Rugby has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Player or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

## Supplements

### **21.4.8 Nutritional Supplements and Medications**

21.4.8.1 The use of nutritional supplements by Players is a risk. In many countries regulations either do not exist or are limited in nature in relation to the manufacturing and labelling of supplements. This may lead to a supplement containing an undeclared substance that is prohibited under these Anti-Doping Rules. Nutritional supplements may not be regulated or could be contaminated or suffer from cross contamination or may not have all the ingredients listed on the product label. Players are advised to exercise extreme caution regarding the use of nutritional supplements.

21.4.8.2 Many of the substances in the Prohibited List may appear either alone or as part of a mixture within medications or supplements which may be available with or without a doctor's prescription. Any Player who is concerned about the appropriateness of treatment being administered to him, or medications or supplements being ingested by him, should seek clarification from his doctor or other relevant authority as to whether such treatment is or such medications or supplements are prohibited prior to taking possession of or using such item. For the avoidance of doubt nothing herein shall displace the Player's responsibility to ensure he does not commit an anti-doping rule violation.

## Sanctions

### **21.10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method**

The period of Ineligibility for a violation of Regulations 21.2.1 (Presence) . . . shall be as follows, subject to potential reduction or suspension pursuant to Regulations 21.10.4, 21.10.5 or 21.10.6:

**21.10.2.1** The period of Ineligibility shall be four years where:

21.10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Player or other Person can establish that the anti-doping rule violation was not intentional.

**21.10.2.2** If Regulation 21.10.2.1 does not apply, the period of Ineligibility shall be two years.

**21.10.2.3** As used in Regulations 21.10.2 . . . 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.

**21.10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence**

If a Player . . . establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of ineligibility shall be eliminated.

**21.10.5.2 Application of No Significant Fault or Negligence. .**

If a Player . . . establishes in an individual case . . . that he or she bears No Significant Fault or Negligence, then . . . the otherwise applicable period of ineligibility may be reduced based on the Player’s . . degree of Fault.

**The Player’s position**

[28] The Player made no submissions by reference to the World Rugby Regulations or any other technical points. He had given the JC his account of the facts and it is the JC’s responsibility to determine where the facts lead in terms of sanction for the clearly established ADRV. The Player appeared to understand that if WR’s submissions were right, he faced a four year suspension, i.e. a Period of Ineligibility under the WR Regulations.

[29] In the end the Player was simply asking the JC to be as lenient as possible as he was naturally anxious to avoid any lengthy suspension.

[30] It follows from Regulation 21.10.2.1 and 21.10.2.3 (both set out under paragraph [27] above) that the Period of Ineligibility can only be reduced from four to two years if the Player has shown, on a balance of probability, that:

- (a) he did not know that his conduct constituted an ADRV; and
- (b) he did not manifestly disregard what he knew was a significant risk of engaging in conduct which might constitute an ADRV.

That is a summary of what is required by the definition of “intentional” in regulation 21.10.2.3. Both those points must be established by the Player.

**World Rugby’s position**

[31] World Rugby’s position remained the same at the conclusion of the hearing as before: The Player could not show and had not shown that the ADRV was not intentional and there was no other basis on which the JC could do anything other than impose a four year period of ineligibility.

## **Discussion and Analysis**

[32] The Player's burden is to prove on a balance of probability that he "did not manifestly disregard the significant risk of engaging in conduct which might constitute an anti-doping rule violation": *World Rugby v Campomar* (10 October 2016) at para. 18.

[33] The classic formulation of the application of the balance of probability was stated by Denning J. in *Miller v. Minister of Pensions*, [1947] 2 All E.R. 372 in these terms:

If the evidence is such that the tribunal can say 'we think it more probable than not' then the burden is discharged, but if the probabilities are equal it is not.

[34] The JC has carefully considered all the evidence, the detailed submissions made by Ms Nolan on behalf of World Rugby and particularly the Player's own evidence and his plea to be allowed to continue his rugby career.

[35] Although the JC accepts that the Player has given us an honest and straightforward account, what he has told us does not permit any reduction from a four year suspension. While his knowledge of doping was fairly basic, the significant risk of taking unknown tablets sold to him by an unofficial trainer was obvious. He plainly disregarded that risk. For example, he did not even bother to read what was on the box containing the tablets, and it was the original box

[36] Accordingly, we find that the Player has not established that the anti-doping rule violation was not intentional. It was very careless of him to take those tablets, so there is no basis for a reduction of the sanction based on No Significant Fault or Negligence.

[37] The applicable sanction for the Player's anti-doping rule violation is four years Ineligibility.

## **Findings and Conclusions**

[38] The Player committed an anti-doping rule violation as a result of the presence in his tested sample of testosterone and/or its metabolites, which are Prohibited Substance.

[39] The JC finds, further, that the Player has failed to establish either that:

- his anti-doping rule violation was not intentional; or
- he bears no or no significant fault or negligence

[40] The Player has been provisionally suspended since 1 November 2018 and there is not suggestion that he has not fully observed the terms of that suspension.

[41] As a result, the applicable sanction is a period of Ineligibility of four years, starting on 1 November 2018 and ending at midnight on 31 October 2022.

[42] The Player's attention is drawn to Regulation 21.10.12 which provides, inter alia, that:

#### 21.10.12.1 Prohibition Against Participation During Ineligibility

No Player or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programmes) authorised or organised by World Rugby or any Member Union, Association or a Club, Rugby Body or other member organisation of World Rugby or any Association or Member Union, or in Competitions authorised or organised by any professional league or any international- or national-level Event organisation or any elite or national-level sporting activity funded by a governmental agency".

...

A Player or other Person subject to a period of Ineligibility shall remain subject to Testing.

#### 21.10.12.2 Return to Training

As an exception to Regulation 21.10.12.1, a Player may return to train with a team or to use the facilities of a Union, Club, Rugby Body or other member organisation of World Rugby, an Association or a Union during the shorter of: (1) the last two months of the Player's period of Ineligibility, or (2) the last one-quarter of the period of Ineligibility imposed".

[43] The full text of Regulation 21.10.12 and the related commentaries should be consulted. In the case of the Player, he would be able to return to training at the start of month 47 of the four-year period of Ineligibility, so on 1 September 2022.

### **Right of Appeal**

[44] This decision is final, subject to referral to a Post Hearing Review Body (Regulation 21.13.8) or an appeal, where the circumstances permit, to the Court of Arbitration for Sport (Regulation 21.13.2). The regulations set out the timelines within which any referral or appeal must be commenced.

**Costs**

[45] Should World Rugby wish us to exercise our discretion in relation to costs under Regulation 21.8.2.10 or 21.8.2.11, its written submissions should be provided to the JC via Mr. Ho within 10 business days of the receipt by World Rugby of this decision. The Player will then have 10 business days to respond.

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

Nicholas Stewart QC  
Chairman

18 April 2019