

WORLD RUGBY

IN THE MATTER OF AN ALLEGED ANTI-DOPING RULE VIOLATION BY ALISSON KALKMANN RIBEIRO CONTRARY TO WORLD RUGBY REGULATION 21

JUDICIAL COMMITTEE

Mr Joseph de Pencier, Chairman

Dr Margo Mountjoy

Mr Adam Casselden

DECISION

Background

1. Mr. Alisson Kalkmann Ribeiro (Player) is a Brazilian rugby player.
2. World Rugby is the International Federation governing the sport of Rugby Union.
3. The Player was a squad member of the Brazilian U20 team participating in the 2019 World Rugby U20 Trophy in Brazil.
4. On 11 July 2019, the Player provided an out-of-competition urine sample within the context of the 2019 World Rugby U20 Trophy (sample number 4314054; the Sample). The Doping Control Form (DCF) is World Rugby Exhibit 1.
5. The Sample was transported to the WADA-accredited laboratory in Salt Lake City, Utah, United States for analysis. The analysis of the A-Sample returned an Adverse Analytical Finding (AAF) for clomiphene (which may also be spelt as clomifene) and its metabolites clomiphene M1 and clomiphene M2. The A-Sample Laboratory Test Result is World Rugby Exhibit 2.
6. Clomiphene is a Specified Substance classified in S4.3 Hormone and Metabolic Modulators in the World Anti-Doping Agency's 2019 Prohibited List.
7. A preliminary review of the AAF was undertaken by Mr. Gregor Nicholson, a member of the World Rugby Anti-Doping Advisory Committee, pursuant to the World Rugby Anti-Doping Rules (WR ADR), whereby no apparent departure was found from the International Standard for Testing and Investigations and/or International Standard for Laboratories that could undermine the validity of the AAF. The preliminary report from Mr. Nicholson is

World Rugby Exhibit 3.

8. On 26 August 2019, World Rugby notified the Player of the AAF and also imposed a provisional suspension pending the outcome of the matter. The notification also invited the Player to indicate within 14 days whether he wished to have the B-Sample analyzed. The AAF notification to the Player is World Rugby Exhibit 4.
9. On 13 September 2019, World Rugby informed the Player that the 14 days for him to request the B-Sample analysis had lapsed, and was deemed to have waived his right to the B-Sample analysis. World Rugby further stated that an anti-doping rule violation (ADRV) was being asserted against him. World Rugby's letter of 13 September 2019 to the Player is World Rugby Exhibit 5.
10. On 23 September 2019, World Rugby made a request to the Laboratory for the B-Sample analysis and production of the Laboratory Documentation Package.
11. On 24 October 2019, the Judicial Panel Chairman appointed the Judicial Committee to determine the Player's case.
12. On 15 November 2019, the Judicial Committee issued its Directions to the parties.
13. On 2 December 2019, the Player submitted his written statement and accompanying evidence. World Rugby submitted its reply and accompanying evidence dated 12 December 2019.
14. To summarize the pre-hearing evidence, World Rugby presented documents concerning the collection and analysis of the Player's sample. This evidence was not disputed.
15. The Player presented evidence including witness statements concerning use of the prohibited substance in question.
16. Among the significant points were that this was the Player's first doping control, that he had received little if any anti-doping information or education prior to the sample collection, and that he had taken no steps to review or verify if the medication he was given by his team doctor was a Prohibited Substance or contained one.
17. At the heart of the Player's position is his reliance on his club team doctor. This is summarized in his written submission, paragraphs 3.17 to 3.21:

3.17. As stated above, the Athlete's family has a delicate financial situation and, therefore, his only opportunity to consult with an expert was through the Club. Moreover, since he has always trusted the Club and knows that Dr. Glaycon has his own specialized clinic, the Athlete always felt very safe consulting with him. Also, the Athlete is aware of the

importance of following the orders of the professionals indicated by the Club, since these are directed to improve his development as a professional athlete.

3.18. In this regard, Dr. Glaycon was responsible for analyzing the Athlete's performance and indicating supplements and vitamins that would help him balance his organism and replace the losses resulting from his extensive physical exercises. During the time that the Athlete had consulted with the Doctor, he had made use of many supplements, vitamins and medications without ever having any problems.

3.19. Needless to say that, as a specialized doctor and partner of the Club, Dr. Glaycon was well aware that the Athlete was a professional rugby player.

3.20. In this sense, although the Athlete himself was not acquainted with the Anti-Doping rules, as a specialized sports doctor that had a partnership with the Club, Dr. Glaycon should have alerted the Athlete about his obligations.

3.21. However, when looking at his medical record, the Club and the Athlete verified that after a consult occurred in 28 March 2019, Dr. Glaycon had prescribed the Athlete with a supplement containing 100mg of Clomifene [...]. Thus, not only did Dr. Glaycon never mention the Anti-Doping Rules but also he acted strictly against his professional obligations by prescribing a professional Athlete with a prohibited substance.

18. The Player presented a statement from Mr. Gabriel Gattino Réus, President of the Player's Joaca Rugby Club, concerning the Player's membership in the club, the Player's reliance on Dr. Glaycon, and Dr. Glaycon's role as a sponsor of the club.

19. The Player also presented a statement by Prof. L.C. Cameron concerning the source of the prohibited substance in the Player's sample, Player's Exhibit 5. It's conclusion is:

"Analyzing the reports, documents, and scientific literature, I conclude that, within a balance of probability, there is a possibility that the drug could enter the athlete's body due to the use of the above formula and that it remained detectable due to its previous use."

20. World Rugby reserved its right to cross-examine on and challenge this evidence at the oral hearing.

The Hearing

21. The oral hearing took place on 16 December 2019. Appearing for World Rugby were:

- a. Mr. Mike Earl, Mr. David Ho and Mr. Clive Kennington, World Rugby
- b. Mr. David Casserly and Mr. Magnus Wallsten, Counsel for World Rugby

22. Appearing for the Player were:

- a. Mr. Alisson Kalkmann Ribeiro
- b. Mr. Gabriel Gattino Réus, President of the Joaca Rugby Club
- c. Ms. Juliana Avezum, Counsel for the Player
- d. Ms. Bruna Palmeira, translator (whom the Judicial Committee would like to thank for her excellent work)

23. During the oral hearing, additional evidence emerged from and concerning the Player, the most relevant points being:

- a. The Player was not able to identify any particular illness or injury for which he sought treatment or medication from Dr. Glaycon. He merely consulted the doctor as directed by club officials for his general wellbeing, as did the majority of his team mates.
- b. He did not ask Dr. Glaycon about the medication clomiphene, particularly whether it was a prohibited substance in rugby.
- c. He did not consult with any other person about the clomiphene prescribed to him by Dr. Glaycon.
- d. While the Player's prescription was his Exhibit 3, he could not provide a receipt or any documentary evidence that explicitly demonstrated the purchase of clomiphene from a pharmacy which he claimed. The receipt the Player presents, his Exhibit 4, is not specific.
- e. When he received the medication from the pharmacy, he did not receive any information about it; nor did he seek any information beyond whatever Dr. Glaycon told him.
- f. His club did not provide the Player with the necessary anti-doping information or education.
- g. The Player did have some general awareness of doping and of prohibited substances prior to his doping control. For example, he was "somewhat aware" (to use his words) of media reports about the use of banned hormones and testosterone in sport. He did not connect such reports with his own situation and with the medication Dr. Glaycon prescribed him. Even the text on the prescription which explicitly linked or described clomiphene as a "testosterone inducer" (informal translation from Portuguese) did not set off any warning bells.
- h. By the time of the hearing, Dr. Glaycon was no longer the team doctor or sponsor of the Joaca Rugby Club.

24. World Rugby had invited the Judicial Committee to request that the Player make available Dr. Glaycon at the hearing to provide testimony concerning the prescription of clomiphene to the Player in March 2019. The Player was not able to do so, perhaps for obvious reasons

given the Player's assertions of the doctor's failures.

25. At the close of the oral hearing both Parties agreed that they had been provided a fair hearing.

The Anti-Doping Rule Violation Asserted by World Rugby

26. World Rugby asserted the Player committed the ADRV of the Presence of a Prohibited Substance in his Sample, contrary to Regulation 21.2.1 of the WR ADR.

27. Regulation 21.2.1.1 of the WR ADR states:

"It is each Player's personal duty to ensure that no Prohibited Substance enters his or her 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)."

28. Regulation 21.2.1.2 of the WR ADR states:

"Sufficient proof of an anti-doping rule violation under Regulation 21.2.1 is established by any 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 analyzed; or, where the Player's B Sample is analyzed and the analysis of the Player's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Player's A Sample; or, where the Player's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle."

29. Regulation 21.2.1.3 of the WR ADR states:

"Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Player's Sample shall constitute an anti-doping rule violation."

30. Regulation 21.3.1 of the WR ADR states:

"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."

31. According to World Rugby, an anti-doping rule violation under Regulation 21.2.1 of the WR ADR is established if, to the Judicial Committee's comfortable satisfaction, a Prohibited Substance was present in the Player's Sample.
32. World Rugby also submits that this is a strict liability offence, and as such an "anti-doping rule violation is committed under [Regulation 21.2.1] without regard to a Player's Fault."¹
33. According to World Rugby, the described medicinal use for clomiphene is to treat infertility in women, more particularly by stimulating an increase in hormones that support ovulation.²
34. Since the inception of the World Anti-Doping Code, clomiphene has been included on every Prohibited List issued by the World Anti-Doping Agency (WADA). According to World Rugby, medical literature states that men who use anabolic steroids, commonly use clomiphene or other anti-estrogens as an accompanying drug. The purpose of clomiphene in such a case is to inhibit the estrogen problems caused by the overdosed anabolic steroids, that appear when anabolic steroids convert in the body to estrogens or other metabolic products that have estrogenic effects.³ These problems, in men, include the over-growth of breasts (gynecomastia) and blood coagulation disturbances.⁴
35. It is not disputed that clomiphene was present in the Player's sample.
36. The AAF for clomiphene in the Player's A-Sample was confirmed by the B-Sample analysis. The Laboratory Documentation Package for the A- and B-Sample show no departures from the relevant international standards. The B-Sample Laboratory Test Result is World Rugby

¹ World Rugby cites Appendix 2 to the WR ADR Regulation 21, Comment 1.

² World Rugby cites WebMD, Clomiphene Citrate, available at: <https://www.webmd.com/drugs/2/drug-13979/clomiphene-citrate-oral/details>; Medicines.org.uk, Clomid, available at: <https://www.medicines.org.uk/emc/product/961/pil>.

³ World Rugby cites three authorities. First, Hoffman J.R. & Ratamess N.A., Medical Issues Associated with Anabolic Steroid Use: Are They Exaggerated?, *Journal of Sports Science Medicine*, June 2006, 5(2), 182-193 ("Many anabolic steroid users will use anti-estrogens (selective estrogen receptor modulators) such as tamoxifen and clomiphene or anastrozole which is a nonsteroidal aromatase inhibitor to minimize side effects of estrogen and stimulate testosterone production."), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3827559/>. Second, Handelsman D.J., Indirect androgen doping by oestrogen blockade in sports, *British Journal of Pharmacology*, June 2008, 154(3), 598-605 ("Among androgen abusers, antioestrogens are used for empirical treatment of gynaecomastia resulting from using and stopping massive doses of aromatizable androgens.") available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2439522/>. Third, Martin S.J, Sherley M. & McLeod M., Adverse effects of sports supplements in men, *Australian Prescriber*, February 2018; 41:10-13 ("At the end of a supplement cycle, the body's own testosterone concentrations may be very low. Symptomatic individuals may then use post-cycle drugs such as aromatase inhibitors, to slow the conversion of endogenous androgens to oestrogen, or selective oestrogen receptor modulators such as clomiphene and tamoxifen, to reduce the effects of circulating oestrogen."), available at: <https://www.nps.org.au/australian-prescriber/articles/adverse-effects-of-sports-supplements-in-men>.

⁴ World Rugby cites Timo Seppälä, Medical Director, The Finnish Antidoping Agency FINADA, "Clomiphene", available at <http://www.dopinglinkki.fi/en/info-bank/doping-substances/clomiphene>.

Exhibit 6. The Laboratory Documentation Package for the Player's A- and B-Sample is World Rugby Exhibit 7.

37. The Player admits to having used clomiphene in his submission of 2 December 2019, para. 3.2. For the purposes of his review, the Statement of Prof. Cameron assumes that the Player ingested 100 mg of clomiphene citrate, once a day from 20 April – 19 May 2019. That statement is the Player's Exhibit 5.
38. Consequently, submits World Rugby, the Player has committed an ADRV pursuant to Regulation 21.2.1 of the WR ADR.
39. The Judicial Committee agrees. Therefore, it remains to determine the consequences to the Player, if any.

The Consequences of the ADRV

40. According to paragraph 3.2 of his written submission, the Player admits to having used the prohibited substance, however, with no intent to cheat or to obtain an unjust advantage. He argues that he is able to (i) explain the facts surrounding the inadvertent ingestion of the prohibited substance; (ii) demonstrate how the Substance entered his body; (iii) demonstrate that he acted with no fault or negligence; and (iv) that the amount of the Substance found in his organism is consistent with the facts.
41. The Player makes alternative submissions on the consequences. Primarily he says that he acted without "fault or negligence" as understood by the WR ADR and, therefore, no sanction including period of ineligibility should apply to him. In the alternative, he says that if he acted with any degree of fault or negligence, it was light and should result in the minimum sanction available, especially in light of his provisional suspension.
42. The threshold question in this case is was the ADRV intentional. In cases involving a Specified Substance such as clomiphene, if not then the presumed period of ineligibility is two years. However, if the ADRV was intentional, then the presumed period of ineligibility is four years. From that determination, the Judicial Committee must consider the factors that would mitigate or even eliminate the consequences of the ADRV. These factors include especially a player's degree of fault or negligence, if any.

Intentional or Not?

43. Regulation 21.10.2.1 of the WR ADR provides that the period of ineligibility for a violation of Regulation 21.2.1 (Presence) of the WR ADR shall be four years where either:

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.

or

The anti-doping rule violation involves a Specified Substance and World Rugby can establish that the anti-doping rule violation was intentional.”

44. If Regulation 21.10.2.1 of the WR ADR does not apply, the period of ineligibility shall be 2 years.
45. Clomiphene is a Specified Substance pursuant to the WADA Prohibited List. Consequently, the period of ineligibility shall be 4 years if World Rugby can establish that the anti-doping rule violation was intentional.
46. Regulation 21.10.2.3 of the WR ADR provides that, “as used in Regulations 21.10.2 and 21.10.3, 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”.
47. In its written submission, World Rugby argued that based on the then current case file and information available to it, it did not pursue a case of the Player having committed an ADRV intentionally under the WR ADR. World Rugby kept this position at the oral hearing.
48. During the oral hearing, information came to light that troubles this Judicial Committee. The lack of a reason to see Dr. Glaycon and receive treatment from him does not help the Player. The lack of detail on the receipt said to be for the purchase of clomiphene based on Dr. Glaycon’s prescription does not support a plea of no intent to dope. But since World Rugby does not seek to prove that the ADRV was intentional, this Judicial Committee will accept that this is a case of unintentional doping.

Determining the Level of Fault or Negligence

49. This means that the starting point for a possible sanction includes a 2-year period of ineligibility unless there are factors for a reduction.

Establishing the origin of the clomiphene in the Player’s Sample

50. In order to apply Regulation 21.10.4 or 21.10.5.1.1 of the WR ADR (the mitigating factors of “No Fault or Negligence,” or “No Significant Fault or Negligence”) the Player must establish the origin of the prohibited substance on a balance of probability. This burden lies solely on the Player. World Rugby does not have the burden “to hypothesize, still less prove” an

alternative source.⁵

51. As set out by the CAS Panel in the case of *CAS 2014/A/3820 WADA v Damar Robinson & JADCO*: “In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide actual evidence as opposed to mere speculation.”⁶
52. The Player asserted that the origin of the clomiphene found in his Sample was medication he was prescribed by Dr Glaycon on 28 March 2019, and which he has asserted using following his purchase from the pharmacy FFC Farmacia de Manipulacao e Homeopatia LTDA on 8 April 2019.
53. The Player states that he underwent a course of 100mg of clomiphene a day from 20 April to 19 May 2019. If so, the last ingestion of clomiphene took place 53 days prior to the Player’s positive Sample collected on 11 July 2019.
54. World Rugby stated in its written submission that, based on the currently available evidence on file and data concerning clomiphene, it does not deny that the Player has shown, on a balance of probabilities, that the origin of the prohibited substance found in his Sample was the prescribed clomiphene. This Judicial Committee finds the Player’s evidence less than conclusive. Moreover, Prof. Cameron’s report is not conclusive: on a “balance of probabilities” the AAF “could be explained” by a product matching Dr. Glaycon’s prescription. But another possibility, the Player’s deliberate use of clomiphene, and from another source than Dr. Glaycon’s prescription, cannot be ruled out entirely.
55. However, this Judicial Committee is willing to grant that the Player has proven the source of the prohibited substance in his Sample on a balance of probabilities.

No Fault or Negligence?

56. Regulation 21.10.4 of the WR ADR stipulates that:

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

⁵ World Rugby cites a number of authorities: *CAS 2012/A/2759 Rybka v UEFA*, paras. 11.31 and 11.32 (“It was not for UEFA – the Panel emphasise – to hypothesise, still less prove, their own version of events” as to how the prohibited substance got into the athlete’s system); *CAS 2014/A/3615 WADA v Daiders & FIM*, para. 52 (“The Panel rejects a proposed interpretation of the rules which would seek to impose the burden on the person charging to explain the source of the substance detected in the system of the person charged”); *USADA v Meeker, AAA Panel decision dated 12 November 2013*, para. 7.7 (“Respondent alone bears the burden of showing an explanation that is more likely than not for how the Prohibited Substances entered his system. If he fails to do so he has not met the requirement for relief under WADA Code 10.5.1 and 10.5.2. Claimant is not required to put forward its own speculative theory, and its failure to do so does not compel the acceptance of Respondent’s theory”).

⁶ *CAS 2014/A/3820 WADA v Damar Robinson & JADCO*, para. 80.

57. The Player argues that he never intended to cheat nor to obtain any undue advantage, since he was only following the rules of a trusted professional. He argues that he is an unexperienced rugby player who had never received any anti-doping education at the time when he made use of the supplement prescribed by Dr. Glaycon. The Player had no reasonable motives to think that a qualified professional would be prescribing a supplement with a prohibited substance. He was a victim of a doctor who acted in total violation of his obligations and the Anti-Doping regulations, prescribing a supplement that contained a prohibited substance. The Player says he was consulting with a specialized doctor identified by his Club and who he thought he could trust. He says he did not consume a product knowing that this would constitute a violation of the anti-doping rules but rather considered to be acting diligently by following the strict instructions of a trusted professional. Dr. Glaycon sponsored the Club and was responsible for providing the athletes with medical assistance. He is described as a specialist in sports medicine and the Athlete believed that he knew what were the applicable rules. Moreover, the Player says that he participates in a collective sport and, therefore, must comply with the rules of the Club in order to be able to practice and compete with the entire team. As a consequence, the Athlete must abide by the Club's orders, including when it comes to his medical treatment.
58. The Player also notes WR ADR Article 21.10.2.3 and suggests that it gives context to the "No Fault or Negligence" provision:
- "As used in Regulations 21.10.2 and 21.10.3, 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. [...]"
59. World Rugby does not agree with the Player's position. Its submissions review in great detail many previous decisions on this provision and on athlete reliance on medical professionals.
60. It argues that in order to sustain a plea of No Fault or Negligence, a player must show that he or she "has fully complied"⁷ with his or her duty of utmost caution to remain clean of prohibited substances.⁸ The test, it argues, is that the player has "made every conceivable effort to avoid taking a prohibited substance"⁹, and that the substance got into his system

⁷ CAS 2005/C/976 & 986 *FIFA & WADA*, para. 74 ("No Fault' means that the athlete has fully complied with the duty of care").

⁸ CAS 2006/A/1025 *Mariano Puerta v. ITF*, para. 11.4.7, and CAS 2008/A/1591, 1592 & 1616 *ASADA v Nathan O'Neill*, para. 58.

⁹ CAS 2005/A/847 *Hans Knauss v. FIS*, para. 7.3.1. See also CAS 2011/A/2518 *Robert Kendrick v. ITF*, para. 10.14 ("In each case, the Athlete's fault is measured against the fundamental duty which he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance."); CAS 2007/A/1395 *WADA v. NSAM & Cheah & Ng & Masitah*, para. 80 ("The burden is therefore shifted to the athlete to establish that he/she has done all that is possible to avoid a positive testing result."); CAS 2011/A/2414 *Zivile*

despite all due care on his part. Indeed, says World Rugby, the CAS has made clear that the athlete's degree of fault (i.e., how far he has departed from his duty to use utmost caution to keep prohibited substances out of his system¹⁰) is the only relevant criterion,¹¹ and any other factors that do not go to the issue of fault are irrelevant.¹²

61. World Rugby further argues that it is abundantly clear from the CAS jurisprudence that Art. 10.4 of the World Anti-Doping Code (and here Regulation 21.10.4 WR ADR) applies only in the most exceptional cases. It cites four examples.¹³

Balciunaite v. LAF & IAAF, para. 12.5 ("the athlete must establish, to the satisfaction of the Panel, that the athlete took all of the steps that could reasonably be expected of him to avoid ingesting [any] prohibited substance and it would be unreasonable to require the athlete to take any other steps").

¹⁰ *CAS 2005/C/976 & 986 FIFA & WADA*, opinion dated 21 April 2006, paras 73 and 74 ("The WADC imposes on the athlete a duty of utmost caution to avoid that a prohibited substance enters his or her body. ... It is this standard of utmost care against which the behaviour of an athlete is measured if an anti-doping violation has been identified"); *CAS 2011/A/2518 Kendrick v. ITF*, award dated 10 November 2011, para 10.14 ("the Athlete's fault is measured against the fundamental duty which he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance").

¹¹ *CAS 2011/A/2495 FINA v. Cielo*, award dated 29 July 2011, para 8.22 ("Rule DC 10.4 expressly provides for a minimum sanction of a warning and a maximum sanction of a two year Period of Ineligibility with the Athlete's degree of fault to be the sole criterion for determining the appropriate sanction within that range").

¹² See commentary to WADA Code Art 10.4 (mitigating factors will only be taken into account if they are specific and relevant to explain the Athlete's or other Person's departure from the expected standard for behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility.) See e.g. *CAS 2010/A/2229 WADA v. FIVB & Berrios*, award dated 28 April 2011, para 97 ("The Panel finds that such circumstances are indeed not relevant for assessing an athlete's degree of fault. Consequently, the Respondents'

¹³ First, in *CAS 2005/A/847, Knauss v. FIS*, award dated 20 July 2005, the athlete tested positive because a supplement he was taking was contaminated with a prohibited substance. He was able to show not only that he had checked the label and the packaging of the supplement product to ensure that no prohibited substances were listed, but also that he had made a direct inquiry of the distributor of the product and had obtained a written certification from them that it contained no prohibited substance. Nevertheless, the CAS Panel rejected his plea of No Fault or Negligence on the basis that the athlete could have done more: he could have made further enquiries about the safety of the product; he could have had the product tested for prohibited substances; or he could simply have not taken the supplement. Second, in *CAS 2005/A/990, Pobedonostsev v. IIHF*, award dated 24 August 2006, the CAS panel accepted the athlete's plea of No Fault or Negligence where the prohibited substance found in his sample came from an injection administered to him by a hospital emergency room doctor while he was experiencing heart failure after crashing into the board on the side of the ice rink. In that case, the athlete could not objectively prevent the treating doctor from administering the prohibited substance. Third, in *CAS 2009/A/1926 ITF v. Gasquet*, award dated 17 December 2009, the CAS panel accepted the athlete's plea of No Fault or Negligence where he was found to have ingested a tiny amount of cocaine by kissing (and so swallowing the saliva of) a girl who (unbeknownst to him) had just taken cocaine, largely because the Panel did not think it was reasonable to expect anyone even to know that it was possible to become contaminated with cocaine in this manner. Fourthly, in *CAS 2013/A/3370 Union Cycliste Internationale (UCI) v. Jack Burke & Canadian Cycling Association (CCA)*, award dated 17 July 2014, the CAS panel was persuaded that the athlete established, on a balance of probabilities, that the prohibited substance found in his system resulted from the ingestion of contaminated water and established that he did not know or suspect, and could not have known or suspected even with the utmost caution, that the water was contaminated with the prohibited substance. On this basis it was found that he bore No Fault or Negligence.

62. With respect to the standard of utmost caution, i.e. the duty on an athlete to do everything in his power to avoid ingesting a prohibited substance, World Rugby says “this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition.”¹⁴ Even when the circumstances are exceptional, the athlete should still deploy maximum efforts to make sure that everything he ingests does not contain a prohibited substance. World Rugby cites three authorities for this strict approach.¹⁵
63. In light of the above case law, World Rugby submits that the Player has failed to act with the utmost caution that is required for the application of Regulation 21.10.4 of the WR ADR. The Player simply ingested the medications prescribed by Dr. Glaycon and wrongly assumed that they would not contain any prohibited substances. The Player should have inquired with Dr. Glaycon as to the content of what he was being prescribed and their purpose. In particular, considering that clomiphene was being used for off-label purposes, the Player should have checked the label of the medication and conducted an internet search.
64. World Rugby cites authority that ignorance of the nature of the substances given to an athlete or acting under pressure by either club or coach to consume the products given do not constitute relevant defenses or mitigating factors concerning the presence of a

¹⁴ CAS 2005/C/976 & 986 FIFA & WADA, para. 73.

¹⁵ First, according to CAS 2006/A/1025 *Puerta v. ITF*, para. 11.4.1, there is no doubt that “CAS case law on the issue of accidental and inadvertent doping is very strict [...]”. In that case the tennis player was found to be at fault even though he ingested the banned stimulant completely accidentally and inadvertently, by using a glass that contained the (colourless, odourless, flavourless) remnants of his wife’s medicine. When he left the room for a couple of minutes, his wife used his water glass to mix and drink her medicine, leaving a drop or two in the bottom of the glass. When he returned, unaware of what happened, he poured water from a bottle into his glass and drained it, inadvertently consuming the tiny drops. The CAS panel insisted that the player could and should have done more to avoid ingesting the banned stimulant, and therefore he could not be said to be entirely innocent of wrongdoing. His plea of No Fault or Negligence was rejected. Second, in CAS 2013/A/3262 *Joel Melchor Sanchez Alegria v. FIFA*, para. 116, it was underlined by the CAS Panel that the “Player, as a professional who is aware of the anti-doping regulations and measures, could and should have been reasonably expected to find out exactly what the Product label stated, consult with the team doctor or even research the matter further on the internet himself. None of these measures require an extraordinary effort on the Player’s part and would have certainly worked in his favour when considering the degree of fault or negligence in his actions and whether any degree of fault or negligence could be attributed to him.” Third, in CAS 2017/A/5015 *FIS v. Therese Johaug & Norwegian Olympic and Paralympic Committee and Confederation of Sports (NIF)*, and CAS 2017/A/5110 *Therese Johaug v. NIF*, v. *Therese Johaug & Norwegian Olympic and Paralympic Committee and Confederation of Sports (NIF) & CAS 2017/A/5110 Therese Johaug v. NIF*, the CAS panel found that “a finding of No Fault applies only in truly exceptional cases. In order to have acted with No Fault, [the Athlete] must have exercised the ‘utmost caution’ in avoiding doping. As noted in CAS 2011/A/2518, the Athlete’s fault is ‘measured against the fundamental duty which he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance’. It also emphasised the personal duty of care, citing the basic principle that it is ‘each Competitor’s personal duty to ensure that no Prohibited Substance enters his or her body’.” (para. 185). In that case the athlete failed to simply check the label, and therefore it was clear that she did not exercise the utmost caution: “[...] Relying on the assurances of the team doctor without any further steps indicates that she did not exercise caution to the greatest possible extent – there were numerous other things, such as checking the label and conducting an internet search, that [the Athlete] could easily have done.” (para. 201)

prohibited substance in a sample.¹⁶

65. World Rugby also submits that many previous decisions hold that an athlete cannot be said to be entirely innocent of any fault or negligence by blindly relying and trusting the advice of their doctors, clubs, or coaches. Specifically, the “CAS’ consistent jurisprudence is that athlete cannot shift their duty onto their doctors. As a result, the Athlete bears a personal reasonability to ensure that no prohibited substance reaches his system, regardless of whether a doctor prescribed it.”¹⁷
66. World Rugby also relies on the Commentary to Art. 21.10.4 of the WR ADR which states that “No Fault or Negligence would not apply in the following circumstances: [...] (b) the Administration of a Prohibited Substance by the Athlete’s personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance)”.
67. This Judicial Committee agrees with World Rugby’s submissions. In this case, this Player’s reliance on the team doctor cannot be the basis for No Fault or Negligence. While it may be that the malpractice of the team doctor itself amounts to an ADRV (and the Judicial Committee presumes that if the Player’s Union has not already considered this possibility it will do so with dispatch), that does not relieve the Player of his own anti-doping responsibilities which are well-established in the rules of the sport of rugby.

No Significant Fault or Negligence?

68. Regulation 21.10.5.1.1 of the WR ADR stipulates that:

“Where the anti-doping rule violation involves a Specified Substance, and the Player or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Player’s or other Person’s degree of Fault.”

69. Both Parties say that the CAS panel in *Cilic* has provided guidance on establishing an athlete’s degree of fault.¹⁸ That decision provided for the following degrees of fault, and their respective sanction ranges:

- a. Significant degree of or considerable fault: 16-24 months, with a standard significant fault leading to a suspension of 20 months;

¹⁶ CAS 2016/O/4854 IAAF v. RUSAF & Alexandr Khiutche, award dated 21 April 2017, para. 63. See also CAS 2013/A/3050 WADA v. Andrey Krylov & FIG, award dated 10 June 2013 (“ignorance of the law is no excuse” when considering the application of a sanction lower than the standard one).

¹⁷ CAS 2017/A/5139 WADA v. CBF & Olivio Aparecido da Costa, award dated 7 December 2017, para. 115.

¹⁸ CAS 2013/A/3327 & CAS 2013/A/3335 Marin Cilic v. ITF, award dated 11 April 2014.

- b. Normal degree of fault: 8-16 months, with a standard normal degree of fault leading to a suspension of 12 months; and
 - c. Light degree of fault: 0-8 months, with a standard light degree of fault leading to a suspension of 4 months.
70. World Rugby submitted in writing that the facts and circumstances of the case warrant at least a sanction of 16-24 months, based on the Player's degree of objective and subjective fault. As noted in *Cilic*, the objective elements determine the category of fault (significant, normal, light) and the subjective elements "can then be used to move a particular athlete up or down within that category."¹⁹ With the benefit of the evidence of the oral hearing, World Rugby argued that a 20 month period of ineligibility would be appropriate. The Player's counsel responded that this would be excessive and that only up to eight months of ineligibility, including the provisional suspension, was warranted.
71. *Cilic* was a case applying the 2009 World Anti-Doping Code requirements. Strictly speaking, we question whether *Cilic* should apply given the changes that were made to the 2015 World Anti-Doping Code, especially changes to the Specified Substance requirements of the Code, and therefore of the WR ADR. In particular, it is at best counter-intuitive to apply to "No Significant Fault or Negligence" a dated schema with "significant fault" as the most egregious category. (And should one really speak of a "normal" degree of fault when it comes to prohibited substances and methods in sport?) In addition, we are not necessarily persuaded that the *Cilic* decision's three degrees of fault or negligence, and corresponding three bands of reduction of the period of ineligibility, are sufficiently flexible to meaningfully apply to the infinite number of circumstances that may arise in an individual case.
72. But, fundamentally, the *Cilic* framework does embody a common-sense approach to applying a sliding scale of sanctions such as provided in Regulation 21.10.5.1.1 – if a player's fault or negligence is less than "significant," the length of the sanction depends on the degree of less-than-significant fault or negligence. The more serious the degree, the less the possible reduction. This Panel is also comfortable that the *Cilic* consideration of subjective and objective factors in assessing a player's fault or negligence and appreciation of risk of doping is appropriate, and that the objective factors ought to be given the greater emphasis in that assessment.
73. Therefore, the Judicial Committee first considers the objective elements of the Player's level of fault. In particular, whether the Player (i) read the label of the product used (or otherwise ascertained the ingredients); (ii) cross-checked all the ingredients on the label with the list of prohibited substances; (iii) made an internet search of the product; (iv) ensured that the product is reliably sourced; and (v) consulted appropriate experts in these matters and

¹⁹ CAS 2013/A/3327 & CAS 2013/A/3335 *Marin Cilic v. ITF*, award dated 11 April 2014, para. 73

instructed them diligently before consuming the product.

74. It is apparent from the Player's submission and evidence that (i) he did not read the label of the product used (or otherwise ascertained the ingredients), (ii) did not cross-check the ingredients on the label with the list of prohibited substances, (iii) did not make an internet search of the clomiphene prescribed, and (iv) did not diligently instruct Dr. Glaycon that he was an athlete who could not consume any prohibited substances but rather just assumed Dr. Glaycon would know this.
75. The Player does not directly address the objective elements as identified by *Cilic*, although he seeks the lightest degree of fault that decision sets out.
76. On whether the product was reliably sourced, the Player has said that he purchased the clomiphene from the FFC Farmacia de Manipulacao e Homeopatia LTDA on 8 April 2019. However, the receipt provided by the Player does not specify what products were purchased. It is, therefore, unclear if the Player did in fact purchase the clomiphene from this particular pharmacy.
77. The Player has himself not provided any explanation or details on what kind of treatment was being sought through the off-label use of clomiphene. The statement of the President of the Player's club merely states that it recommended that its players consult Dr. Glaycon "in order to obtain medical and nutritional assistance based on their sports performance."²⁰ This Judicial Committee finds the lack of an explanation for the treatment of the Player with clomiphene, indeed the lack of any reason of illness or injury for seeing Dr. Glaycon, especially puzzling.
78. Similarly, the Player has not provided any witness statement from Dr. Glaycon to corroborate his version of events, or provide any medical details as to why clomiphene, a substance used to treat ovulation dysfunction in women, would be prescribed to an apparently healthy 19-year old male athlete.
79. World Rugby argues that as per the CAS in *WADA v. Ali Nilforushan & FEI*, "in consideration of the fact that athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules, the prescription of a particular medicinal product by the athlete's doctor does not excuse the athlete from investigating to their fullest extent that the medication does not contain prohibited substances'. [...] for a reduction based on no significant fault or negligence there must be more than simply reliance on a doctor. [...] an athlete must cross check assurances given by a doctor, even where such a doctor is a sports specialist".²¹

²⁰ See Witness Statement of Gabriel Gattino Réus, Player's Exhibit 2,

²¹ CAS 2012/A/2959 *WADA v. Ali Nilforushan & FEI*, award dated 30 April 2013, para. 8.19.

80. So, World Rugby argues that the Player bears a major or serious degree of fault based on the objective elements set out in *Cilic*. The Judicial Committee agrees.
81. Having established this serious degree of fault based on the objective elements, the Judicial Committee must also consider the subjective elements of the Player's level of fault in determining where the period of ineligibility should fall. These subjective elements include the Player's youth or inexperience, language or environmental problems encountered by the Player, the Player's anti-doping education, and any other personal impairments suffered by the Player.
82. The Player argues that he bore a very low degree of fault: he had no reason to doubt the instructions of a doctor indicated by his Club and with whom he had already been consulting with for some time while without ever having any problems.
83. World Rugby acknowledges this. The clomiphene was prescribed to the Player by a doctor whom he trusted would not provide him with any prohibited substances. Furthermore, the Player was 19 years old at the time of the doping control and was inexperienced at elite levels of rugby. Additionally, the Player did not have any anti-doping education prior to his use of clomiphene,²² and it was his first doping control when he provided the Sample.
84. Taking the above into account, World Rugby accepts that the Player's sanction could be less than the maximum for No Significant Fault or Negligence, that is less than 24 months.
85. During the oral hearing, the Player struck the Judicial Committee as mature, intelligent and articulate. But he failed to heed or follow-up on the limited understanding he had about doping in his sport. He took no responsibility himself for ensuring he understood all of the applicable rules of his sport, which include anti-doping rules. Accepting his evidence at face value, the Player was a victim of Dr. Glaycon. But more so he was a victim of his own lack of care in face of the personal liability anti-doping rules place on athletes in all sports. At the international tournament at which he was subject to doping control, he did learn something more about the risks of doping and about anti-doping measures. But he failed to reflect on this new information and on his then-recent past conduct and reliance on Dr. Glaycon. A chance to be withdrawn from the tournament prior to the out-of-competition doping control was missed.²³
86. So, despite or perhaps especially because his love of Rugby and dedication to the sport, as described in paragraphs 3.3 to 3.9 of his written statement, we find that the Player did not

²² World Rugby presented evidence that the Player attended an anti-doping education session on 26 June 2019 (Exhibit 8), that the Player signed the Terms of Participation for the U19 Trophy tournament on 1 July 2019 (Exhibit 9), and completed World Rugby's anti-doping e-learning program on 20 June 2019 (Exhibit 10). These post-date his use of the prohibited substance.

²³ There was no evidence that once named to the Brazilian team for the tournament, anyone reviewed with the Player his medical history including recent medication use. This ought to be the standard practice, especially in onboarding players to a national team for the first time.

act responsibly. On a subjective standard, his claim of circumstances justifying a reduction of sanction is not strong and can only support a modest decrease.

87. Therefore, this Judicial Committee finds that the Player acted with a serious although less than significant degree of fault or negligence. Giving some credit to the subjective factors in this case, a reduction of 3 months from the presumed 2-year period of ineligibility is warranted.

Decision

88. The Period of Ineligibility will be 21 months, starting from the date the Player was Provisionally Suspended (26 August 2019). Therefore, the Player will become eligible again to participate in Rugby on 26 May 2021.
89. The restrictions on the Player's status during his Period of Ineligibility are set out in Regulation 21.10.12.

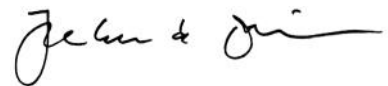
Costs

90. If World Rugby wishes the Judicial Committee to exercise its discretion in relation to costs pursuant to Regulation 21.21.10, written submissions should be provided to me by 17:00 Dublin time on 7 February 2020, with any responding written submissions from the Player to be provided by no later than 17:00 Dublin time on 14 February 2020.

Review and Appeal

91. This decision is final, subject to referral to a Post Hearing Review (Regulation 21.13.8) or an Appeal (Regulation 21.13.1 - .7).

26 January 2020



Joseph de Pencier
Chairman

Cc: Dr Margo Mountjoy and Mr Adam Casselden
World Anti-Doping Agency