IN THE MATTER OF ALLEGED BREACHES OF WORLD RUGBY REGULATION 8 AND THE WORLD RUGBY CODE OF CONDUCT AND THE RUGBY WORLD CUP 2023 QUALIFICATION PROCESS TERMS OF PARTICIPATION (RWCQ TOP)

Charges brought by:	World Rugby (WR)
Against:	Federación Española de Rugby (FER), First Respondent Gavin Van Den Berg (the Player), Second Respondent
Hearing:	28 April 2022 (via Zoom)
Judicial Committee (JC):	Nigel Hampton QC Pamela Woodman Frank Hadden
ATTENDEES:	
World Rugby:	Yvonne Nolan, Deputy General Counsel, Lead Counsel Alistair Maclean, General Counsel Brian Hammond, Legal Counsel David Carrigy, Chief, International Relations and Participation
Federación Española de Rugby:	Professor Juan De Dios Crespo Pérez, Lead Counsel Paolo Torchetti, Legal Counsel Eliseo Patrón-Costas; Secretary General Jose María Epalza, Vice President & President Eligibility Commission Eric Jara, Assistant Secretary General
The Player:	Gavin Van Den Berg Donald Boers (lay person support to the Player)
Secretariat:	Joyce Hayes

DECISION

LIABILITY

CHARGES AND PLEAS

1. The FER was charged that, in contravention of WR Regulation 8 and/or the WR Code of Conduct and/or the RWCQ TOP, FER selected the Player to represent FER's national Senior Representative Team on two occasions when he was not eligible to do so in accordance with Regulation 8.

2. The Player was charged that, in contravention of WR Regulation 8 and/or the WR Code of Conduct and/or the RWCQ TOP, he represented FER's national Senior Representative Team on two occasions when he was not eligible to do so in accordance with Regulation 8.

3. Both the FER and the Player denied the charges and the alleged breach of Regulation 8 on a two-fold basis:

   (i) that the Player did have a genuine, close, credible and established national link with Spain during the relevant thirty-six consecutive months period (18 December 2018 to 18 December 2021), such as to make him a Resident of that country; and

   (ii) that the Player's absences from Spain for a period greater than two months in the first of those "qualifying" years (18 December 2018 to 18 December 2019), should be seen as occurring in *"exceptional circumstances"* and that an exemption should be allowed to the Player in those circumstances, meaning that his status as a Resident of Spain was not disrupted;

   which meant, it was claimed, that the Player was eligible when he was selected and played – and that the JC, by applying Regulation 8 and its relevant Guidelines, retrospectively in effect, should allow the exemption now sought as in (ii) above.

4. WR agreed that the JC had the ability to grant such a retrospective indulgence, dependent on factual proof.

5. The two legs of the plea resulted in a large volume of documentary evidence and became the two live factual issues which needed to be resolved at the hearing before the JC. Oral evidence was called from the Player and on behalf of the FER.

PRELIMINARY MATTERS (and from here on in this Decision, WR Regulations will be referred to as "R"; "Guidelines" refers to the WR Explanatory Guidelines – Eligibility to Play for National Representative Teams to R 8; and "NoE" means the notes of evidence (transcript)).

6. The JC was appointed under (a) R 19.2 as to the alleged breaches of R 8 and the WR Code of Conduct; and (b) RWCQ TOP sections 13.2 and 13.3, and R 20.3.1(d), as a Disputes Committee in relation to the alleged breaches of the RWCQ TOP.

7. There was no challenge (a) to the composition of the JC; and (b) to the JC's jurisdiction. And there was ready acceptance by the FER of the consolidation of all potential charges (under the three separate provisions mentioned in the formal Charges as set out above) into effectively the one charge against each of the FER and the Player, with liability to be determined on one charge against each and, if reached, one sanctioning process against each.

8. Although the FER, in its initial Response to the Charges, indicated that it would take a point that the complaint made to WR (by the FRR – the Romanian Union) was out of time, in its written Submissions FER withdrew its limitation period objection.

9. By R 20.1.5 the standard of proof applicable in these proceedings was on the balance of probabilities.

10. The FER accepted that on matters of player eligibility the burden of proof of such issues was on the FER and the Player (R 8.1(c) and Guideline 15). In particular, those parties *"must be able to demonstrate that, during the relevant period, the country in which [the Player] claims he has been Resident was, genuinely, the country that the Player treated as his home and is clearly the country in which the Player has his primary and permanent home".* Given that the two factual issues which had to be determined in this matter directly related to whether the Player was eligible or not, the burden of proof of such was on the FER and the Player.

11. Insofar as the Charge against the FER was concerned, the R 8 offence charged is a strict liability offence and fault or intent need not be proved to establish a R 8 breach. And a necessary corollary: a lack of fault or intent is not a defence. The relevant provisions are R 8.5.1 and R 8.5.2, as well as Guideline 22.

12. As to the Player, his responsibility under R 8 will be founded on it being determined by the JC that *"he knew or ought reasonably to have known [he was] not eligible to play".* R 8.5.3 and Guideline 24 are the relevant provisions.

THE ORAL LIABILITY DECISION of 28 April 2022 (from pp 121 to 124 of transcript)

13. *"I'll briefly outline where we are with the charges in a few moments, but proper reasons will be given, or fuller reasons will be given later by the Committee. There is one charge each against the FER and the Player. They are contained at paragraphs 68 and 69 of the charging document itself. We are very aware of the provisions about the standard of proof being on the balance of probabilities and the fact that the defence to the charges raise, on behalf of Spain and the Player, two factual issues both of which touch on matters of eligibility. The two factual issues, which have been discussed at some length today, are first whether the Player had a genuine, close, credible and established link with Spain so as to be seen to be a Resident over the relevant three year period; and the second is, was there a break in Residency during the December 2018 to December 2019 period (which started off as a break of 62 days, became 101 days and now from what we're told (became) something like 127 days) and whether that break was in such exceptional circumstances as to, in effect, grant an exemption from being out of the country of Residence for that length of time.*

    As both points involve issues of eligibility, the burden of proof is clearly on, and is accepted as being on, Spain and the Player (Guideline 15 to Regulation 8). In coming to the conclusions we have, we've kept in mind both the burden and the standard of proof.

    We've formed the view that on neither of those two legs has Spain and the Player satisfied us on the balance of probabilities that (a) there was the necessary link to create Residency through the three year period and (b) in any event, we do not find that the period of time, as I say something like 127 days out of country, was done in such exceptional circumstances to allow the exemption to be granted.

    As to Residency, of importance to us is the definition of Residence to be found in Regulation 1 and then, following that, the specific references to be found in Regulation 8.1(c) and Guideline 15. There was a refreshing honesty in the Player's acceptance that in fact it was not until the end of the 2019 year and then to the start of 2020 that he came to regard and decided that Spain was to be his permanent home, which meant that, when he was selected and played for Spain for the first time in December 2021, he had not fulfilled the requisite, completed the requisite, 36 consecutive months of Residence immediately preceding the time of playing; which meant that he was ineligible to be selected and to play, which are the allegations contained in the charges.

    In addition, as I've already said, as to the out of country time, we don't find the circumstances such as to be seen as being unique and extraordinary and we will go into more detail about that in our written decision.

Turning from that then to the charge against the FER, the Committee finds the Regulation 8 offence proved. It is a strict liability offence and, as has been stated, no fault or intent need be proved and the corollary of that, that a lack of fault or intent is not a defence. So, that charge is found proved against Spain.

In relation to the charge against Mr van den Berg, responsibility there is not one of strict liability. His responsibility, if he does have it, is couched in terms of he knew or ought reasonably to have known that he was not eligible to play. The Committee finds that he did not know that he was not eligible to play but, in the circumstances, and in particular when he signed that declaration of eligibility on 15th December 2021, he ought reasonably to have known that he was not eligible to play.

So, on that basis we find the charge against the Player proved as well but we do add a rider in relation to that – we accept (a) that he may not have had put around him the best advice and information that he should have had around him and (b) that the natural excitement and anticipation that a player might feel about being selected for a national representative team; and in those circumstances … we do not believe that he should face any sanction …"

REASONS: SOME HISTORY AND FACTUAL BACKGROUND

14. On 18 December 2021 and on 5 February 2022 the Player was selected and played for the FER's national Senior Representative Team in two matches in the 2021 and 2022 Rugby Europe Championship, which was the Rugby World Cup 2023 qualifying tournament for Europe.

15. The Player, a South African national by birth, could only be eligible to be so selected if he came within the then relevant provision of R 8.1 - if he had *"a genuine, close, credible and established national link in which … (c) the Player has completed thirty-six consecutive months of Residence immediately preceding the time of playing".* Which meant that the relevant 36-month period commenced on 18 December 2018 and ended on 18 December 2021.

16. The JC noted, during the course of the hearing, that the thirty-six consecutive months provision relied on was about to expire on 31 December 2021 and was to be replaced by a sixty-month consecutive months requirement under R 8.1(c). The Player would clearly have been ineligible on that changed basis. The possible "red flag" raised by the close proximity of these two events (i.e., the 18 December 2021 match and the cut-off date of 31 December 2021) and the potential prospect of the "capture" of a foreign player by Spain before the cut-off, were the subject of discussion during both the evidence given on behalf of the FER and the oral submissions. This aspect is of some contextual relevance later when there is discussion of the procedures and processes which were followed by the FER in December 2021.

17. As something of an aside, Guidelines 10 and 14 provide that matters of application of eligibility criteria can be referred to WR's Regulations Committee for a ruling. The JC observes that a specialist committee has been established by WR to hear and decide, and build a settled jurisprudence, in relation to eligibility matters. It is there to be availed of, and the FER well knew that.

18. On 5 May 2020 the Regulations Committee delivered an Eligibility Ruling in relation to an FER matter concerning the eligibility of a player (*J W Bell* – p 639 of bundle, Tab 64) where the FER sought and received a Ruling that that player was found to be eligible, retrospectively, to represent Spain relying on the provisions of Guideline 16 to successfully claim that there were

"exceptional circumstances" which meant that the player was eligible even although he had not had *"at least 10 months actual physical presence…in the country concerned throughout any qualifying year".* (There is an instructive 'footnote' which comes from *Bell* – the list of materials in *Bell* in support of his residency claim (pp 644, 655 of bundle) - to the JC, this points up the comparative paucity of the materials in support of the Player's Spanish residency claim and the severance of his South African ties [e.g., NoE at pp 40-41, and the matters particularised there in cross-examination of the Player]).

19. As with *Bell,* the same regulatory provisions are relied on in this matter by the FER. To the JC, this is of some significance.

20. In *Bell* the Regulations Committee expressed its concerns that the FER had not sought a Ruling in advance of selecting that player, and the FER was directed to put in place more robust measures to ensure that such a situation did not arise in the future. The following passage (pp 642-643 of bundle) is of real importance in the opinion of the JC, and will resonate throughout the reasoning and findings of this Decision:

"The Committee wished to record its serious concerns about the circumstances in which this request for a ruling was made by the Union.

The Committee expressed concerns that the Player did not appear to be aware of the requirements of Regulation 8 in relation to breaks in residency. The Committee's view is that this is a serious issue which ought to be addressed immediately by the Union. It is critical to ensure compliance with Regulation 8 that Players are made fully aware of the criteria for eligibility set out in Regulation 8.

The Committee further expressed concerns that the Union did not appear to have an appropriate process in place to review the movements of players that were relying on residence for eligibility. The Committee noted that the Union had been sanctioned in the past for selection of non-eligible players (in what is referred to as the RWCQ 2019 Case) *and in those circumstances expected the Union to have stringent processes in place to ensure that the circumstances of each player had been carefully considered prior to being selected.*

The Committee further noted its dissatisfaction with the Union not seeking confirmation of the Player's eligibility in advance of selecting the Player to represent the Union. The Committee highlights to the Union the wording in Explanatory Guideline 14: 'in the event that there is any uncertainty or the need for clarification in relation to the application of the eligibility criteria in particular circumstances, then the Regulations Committee may be asked by World Rugby to make a ruling on a Player's eligibility.' The Committee noted that had it come to a difference (sic) conclusion in relation to the eligibility of the Player, the Union would be facing a judicial process with a possibility of sanctions being imposed which would have very serious consequences for the Union.

The Committee expresses its concerns in the strongest possible terms and makes the following recommendations:

The Regulations Committee to formally warn the Union of the need to ensure effective compliance with the World Rugby Regulations.

World Rugby to request the Union to provide it with details of:

- *the processes that it has put in place to ensure that the eligibility of each player selected, particularly in relation to monitoring the breaks in residency in any player relying on Regulation 8.1(c).*
- *the processes it has put in place to ensure that players are educated and informed as to the requirements of Regulation 8 prior to selection."*

[WR formally did this on 22 September 2020].

21. To the JC, here are the clearest possible warnings to the FER on player eligibility matters:

    (a) make sure the necessary rigorous processes were in place and applied;
    (b) ensure the full awareness of players as to eligibility matters under R 8; and
    (c) in matters of uncertainty, or where clarification or a Ruling is needed, or an *"exceptional circumstances"* exemption is sought, the Regulations Committee should be applied to in advance, and not (as here, and as with *Bell*) claimed retrospectively. Strict compliance by the FER was an imperative, surely.

    WR agreed that certain commendable steps were taken by the FER following *Bell*, including setting up an Eligibility Commission.

22. There will be reference in this Decision to such steps, and to what appears to this JC to be the one glaring omission from them, namely an interview of the player under scrutiny (or any other form of direct questioning of the Player), covering such vital matters as whether the criteria to meet Residency in Spain actually had been fulfilled and as to the extent of, and reasons for, breaks in his actual physical presence in Spain. [The JC refers to both the Evidence of Mr Jara, at pp 83 to 86 of the NoE, and the Player's, at pp 44 to 47, on this topic]. Jumping ahead somewhat, it is pertinent to observe that had such an interview been carried out here with this Player by the FER it is almost certain, given the recall and the honesty of the Player when giving evidence, that this situation, and the consequences which follow from it, would have been avoided. In that sense, the FER is the author of its own misfortune.

23. On 1 December 2021 the FER emailed WR (and admittedly in advance of the 18 December 2021 match) seeking advice as to the eligibility of the Player and attaching a number of documents, primarily (if not exclusively) coming from the Player's Spanish club. The FER stated that "*According to these documents"* and apparently reliant on the "*attached passport stamps"*, the Player had been out of Spain for a total of 62 days in the "qualifying" year of December 2018 to December 2019 and therefore came within the Guideline 16's 10 months physical presence within that year.

24. The evidence from the author of this email, Eric Jara, Adjunto à Secretaria of the FER and a full-time member of the FER Eligibility Commission, was of importance to this JC. There was shown by the FER, through a combination of witness evidence and submissions, (i) a determined and absolute reliance on country exit and entry stamps shown in a copy of the Player's passport; (ii) an ignoring of the effects of the Schengen Agreement which would allow travel to certain other European countries without the need of passport stamps and protocols; and (iii) a wilful blindness to any further inquiry, let alone any approach to the Player for information. And as it transpired, without any knowledge or complicity on the part of the Player or the FER, certain of the club officials had fraudulently altered the date stamps in the copy of the passport, seemingly to alter his "foreign" domestic status, beneficially from the club's point of view. (An aside really, but the passport tampering is irrelevant, except that it does point up the lack of any FER inquiry of the Player).

25. WR, acting on the bona fides and accuracy of the advice from FER, indicated that an absence of 62 days in one year would not breach the residency provisions of R 8 (email of 2 December 2021), apparently not thinking that the exactness of the 62 days absence (the exact number of days of "permitted" absence in any one qualifying year) might have raised a warning flag with it. (WR might do well to reflect on this and be more proactive in the future if such a flag appears again, from any Union).

26. As later claimed by the FER, the Player was said to have been absent from Spain for a much longer time in that 2018-2019 year - some 101 days in that relevant "qualifying" year (including a longer period in South Africa than originally disclosed, and additional travel within Europe to Schengen countries; sometimes posting on social media with a "*Saffa touring Europe/Portugal*"*/ "#saffatravelingeurope"* tag). Leading up to the hearing, both WR and the FER accepted that the "correct" number of days absent was 101 and that, consequently, the Player was clearly outside the parameters of eligibility prescribed in Guideline 16 of R 8. WR's initial position as to this was straightforward: the Player and the FER *"have therefore breached the Regulation 8 which permits a maximum of 62 days absence in a 12-month period during the relevant residency period"* (paragraph 67 of the Charging document), i.e., that there was, *prima facie*, a breach of Regulation 8.

27. It came as a considerable surprise to all (including to the FER – where was the checking by the FER as to the accuracy of the 101 days included within the FER's responses to the charges? That in itself, is a significant concern to the JC) when the Player, with a refreshing and frank openness in his evidence, spoke of his much longer time in South Africa during 2019, being in South Africa on 8 May 2019 and arriving back in Spain on 4 September 2019 - meaning that he was absent from Spain for a total of some 127 days in that year (over one third of the whole year – 34.8%) with some 119 of those days being in his native South Africa. That amount of time in that, his first claimed "qualifying" year, was seen by the JC as being significant, first as to when assessing whether the Player met the Residency criteria in that first year (scarcely indicating Spain as his primary **and** permanent home, with the *"Saffa"* comment being not insignificant) and, secondly, in assessing the matter of "*exceptional circumstances."* In particular, the Player's evidence at pp 23 to 25, 31 to 34 and 39 of NoE is relevant and informative.

28. As noted by WR in the Charging document (at paragraph 51), the *"FER's correspondence highlighted the work that had been carried out by its Eligibility Committee (sic) when considering the Player's eligibility. The correspondence included copies of the various communications between FER and the Player's club seeking information regarding his potential eligibility… (Exhibit 37)".*

29. And to the JC, here lies the crux of the problem. As already stated at paragraph 21 above, WR accepted that the FER had taken commendable steps to *"ensure that players are eligible and compliant*" with R 8 in the wake of the *Bell* case; and that the FER's Eligibility Commission had reviewed the Player's file. However, that file contained an incomplete record of his travel as only the travel documented in (the copy of) his passport was considered and it seemed *"that the Player was not requested to confirm whether this was a full record of his time out of Spain"* (WR Submissions paragraph 39(ii)a). As already noted, and it will be returned to in this Decision, none of FER's enquiries and discussions seem to have included the Player, who was the obvious source of the relevant knowledge, the primary source. Mr Jara's evidence in cross-examination (at pp 67 to 71, 74 to 75 and at 78 NoE) refers to various aspects of this failure to direct any questions to the Player. His answers to Ms Woodman, at p 82 NoE and to Mr

Hadden and the Chair at pp 83 to 86 are revelatory of the attitude within the FER's Eligibility Commission. (A template of an interrogatory to be used by Unions, to obtain answers on all potential eligibility issues from players, needs to be fully developed by WR and broadcast to Unions, perhaps).

30. On 15 December 2021 the Player (and the FER then and again on 17 December 2021) had an opportunity to correct the record (101/127 days out of country, not 62). On that day the Player signed a "Declaration of Eligibility…to Play for the Senior Fifteen-a-Side National Representative Team" (Exhibit 17(k), bundle p 491, Tab 39), declaring, *inter alia*, that he had read and understood the criteria for eligibility set out in R 8 and declaring that he was *"eligible to play for Spain Union because…I have completed thirty-six consecutive months of Residence immediately preceding the time of playing in"* Spain. The Player's state of mind and of knowledge of R 8 – or lack of knowledge – is found throughout his evidence, but particularly at such as pp 32, 44, 58 to 60 NoE – whether with his club or the FER Eligibility Commission, there was no conversation with, let alone education of, the Player as to R 8 and eligibility. Which were amongst the very matters stressed in the *Bell* matter only 18 months or so previous.

31. Footnote 2 of this Declaration emphasises that *"players ARE expected"* to provide relevant formal documentation in support of their declaration. These declarations are not just a routine "ho-hum" form – they cannot be treated lightly, by Player or by Union. They are part of a design to help protect the integrity of the eligibility system set up by WR through R 8. Yet in this case the evidence revealed a disturbing lack of information, education and support to the Player by the FER.

32. Here in this Decision, enter matters in relation to the Player's responsibility in terms of R 8.5.3 and that Regulation's formulation of the test of a player knowing or ought reasonably to have known about their ineligibility. The relevant box checked by the Player in his 15 December 2021 declaration brings the "36 **consecutive** months **immediately preceding** his playing" clearly to the forefront.

33. On 17 December 2021 Eliseo Patrón-Costas, as Secretary General of the FER, signed a "Declaration of Union" for the match the next day (at p 492 of bundle) stating, *inter alia, "that the Spanish Rugby Union [had] made all such necessary enquiries"* in relation to the Player's eligibility, that the FER was satisfied the information in the Player's declaration was correct and that the Player was eligible. He acknowledged that if the Player was ineligible or that the FER had *"provided inaccurate information in this declaration then the Union will be subject to the fixed penalty sanctions"* in R 8. As with the Player's declaration, the importance of the Union declaration as a protective guard of the integrity of the eligibility system, cannot be under-estimated. After all, Guideline 21 requires that *"before selecting a Player, Unions must ensure that they obtain valid/authentic documentation and such other evidence that may be necessary to prove, definitively, a Player's eligibility to play for that Union".*

34. On 18 December 2021 and again on 5 February 2022 the Player was selected and played for Spain (in each case against The Netherlands) in the Rugby Europe Championship.

35. On 9 February 2022 a media article raised the possibility that the Player may not have been eligible to play for Spain, alleging that the Player was in Spain for only 8 months of the first "qualifying" year (running from December 2018).

36. On 4 March 2022 the FRR complained to WR alleging against FER, that the Player had been ineligible to represent the FER. The complaint referenced the earlier media article, the FRR's own investigations and included materials apparently sourced from the Player's own social media posts showing some of the Player's apparent travels, previously undisclosed to WR, and which would indicate the Player's absence from Spain for a longer period than that permitted under R 8. This material contained matters certainly within the Player's knowledge, in the JC's view, and therefore readily available to the FER on its proper enquiry.

37. On 7 March 2022 WR forwarded the complaint to the FER for comment and explanation, resulting in a to-and-fro of correspondence (and information) between the FER and WR over the ensuing two or so weeks. The machinations then revealed over the apparent tampering with, and (ab)use of, the copy of the Player's passport (not, the JC stresses, by either of the Player or by the FER, or with the complicity of either) are quite despicable and reflect very badly on those that may have played a part in such events. However, these events are not directly relevant here. A proper explanation, in evidence, from the responsible club officials might have been helpful, but was not essential. All three allegedly complicit club officials declined to give evidence.

38. The Player states that he was spoken to by the FER on 9 March 2022 in relation to the matter. In his declaration of 21 April 2022 made for the purposes of this hearing the Player stated: *"On March 9th 2022 the FER called me me (sic) in to a meeting to answer some questions sent by World Rugby and, at that moment, when they showed me the copy of my passport that Alcobendas Rugby Club had provided to FER, I saw that the dates of the exit stamps from Spain and the entry stamps in South Africa in 2019 did not match with the actual dates of my trip. On March 16th 2022…I made a written declaration where I stated that I was completely unaware of the fact that my passport had been tampered"*. The Player's reaction to seeing the copy of the passport and the altered stamps was repeated in evidence. To the JC, his reaction was a genuine one – in effect a mixture of surprise and shock.

39. And to the JC, here lies the answer to this matter. The Player knew the correct position about the December 2018 to December 2019 year, he knew the details of his travels, both inside and outside the Schengen area, and, in particular, of the length of his stay in South Africa in 2019, yet he was not approached or consulted by the FER leading up to his selection for Spain and his playing on 18 December 2021. He does not seem to have been consulted by the FER leading up to its email to WR of 1 December 2021; and he does not appear to have (properly and necessarily) turned his mind or been asked/instructed to turn his mind to his eligibility under R 8 before he made his solemn declaration of eligibility on 15 December 2021. The lack of attention by the FER to properly inform and educate him, to even make R 8 available to him, and for the FER then to make the declaration it did on 17 December 2021 is concerning, coming as it did so soon after the formal warning and requests of 22 September 2020 (paragraph 20 above) and the emphasis placed on educating and informing players.

REASONS: FACTUAL FINDINGS ON THE TWO ISSUES

40. As set out earlier, the FER (and the Player) asked the JC to "retrospectively" consider whether the Player (a) had *"a genuine, close, credible and established"* national link with Spain (R 8.1); and (b) that the 101/127-day break in residency during 2018-19 was *"in exceptional circumstances"* (Guideline 16). And says the FER, if this JC finds those two things to be so, then the JC should effectively rule that the Player was eligible as of 18 December 2021 when he was selected and played for Spain, and that no breach of R 8 has taken place.

ISSUE 1: RESIDENCY

41. The JC has already mentioned at least three relevant factors in this Decision: (i) the Player's absences from Spain (totalling 127 days, including 119 in South Africa) in that first "qualifying" year (at paragraphs 26 and 27) rather underlining his non-resident status in Spain at that time; (ii) the *"Saffa"* social media references (paragraph 26); and (iii) the 'paucity' of evidence in support of the submissions made on behalf of the FER, as to severance of ties with South Africa and growth of ties with Spain, as compared with the *Bell* case (paragraph 18 and its reference to the Player's evidence at pp 40-41 NoE). The WR submissions at paragraph 18 (p 90 of bundle) are pertinent and were explored in the cross-examination of the Player. The JC does not feel the need to detail those matters in view of the material in paragraph 43 following. Although the fact he was living in a "club house" with other players, and without any permanency of a physical place of residence, is a compelling factor against "Residency" as defined.

42. Guideline 17 states that *"Save in exceptional circumstances, the [36 months'] Residence will be expected to have been completed consecutively and be achieved immediately before the Player represents a Union. This is designed to create a contemporary national link with the country of the Union concerned. This factor will be particularly significant if a Player has moved to make a "new" country their Residence having been Resident in another country previously. In essence, in such circumstances, the Player, as well as demonstrating their commitment to a new country, must also be (and be seen to be) relinquishing their ties with the country in which they lived previously".*

43. The comment made by the JC in paragraph 41 above, about it not detailing certain evidence, was made because "clinching" this aspect of the matter was the Player's complete openness and honesty in answering a question from Ms Woodman. He earlier had stated that he regarded Spain as his permanent home and that he had commenced the processes to obtain a three-year Spanish residency visa. To Ms Woodman he said that it was possibly at the end of 2019 or the start of the next year, that he started to make Spain his home. The Chair followed this up with the Player to make sure that there was no mistake about what he was acknowledging.

    NoE p 54 – Ms Woodman:
    "*Q. …can you just clarify when you decided to make Spain your primary and permanent home?*
    A. So, I actually started doing that in 2020, end of 2019 because for me it was the opportunity I had living in Spain, living abroad … and for me just being in a country that I can call home which I enjoy so much … after all my future is one I want to build in Spain.

    NoE p 57-58 – Chair:
    "*Q. Okay, so you told Ms Woodman, Gavin, that you decided in 2020, the end of 2019, that that was when you decided Spain was your permanent primary home, is that right?*
    A. Yes.
    .
    .
    Q. But that means that when it comes to your being selected for Spain in December 2021 that you at that stage had only been considering Spain as your primary, your principal and primary home for the previous two years before you played, doesn't it?
    A. Yes. … After my first season I felt comfortable coming back and making it my home.

Q. So that means … doesn't it that you had only been regarding Spain as your permanent and primary home for two years?
A. Yes."

44. R 1 contains this definition: "*Residence means the place or location in which a Player has his primary and permanent home and Resident shall be construed accordingly".* R 8.1(c) stresses the "*genuine, close, credible and established national link in which … he has completed thirty-six consecutive months of Residence".* Guideline 15, over and above the various extracts from it already quoted in this Decision, states that *"For the avoidance of any doubt, a Player cannot nominate a country as his home without demonstrating that he has satisfied the geographical commitment/presence test enshrined in Regulation 8.1(c) …(which) will be vigorously upheld and applied to avoid abuse of the Residency criteria".*

45. Applying these Residency tests to the evidence, would indicate that, at best, when the Player was first selected and played for Spain, he had completed only some twenty-four consecutive months or so of Residency in Spain. On the balance of probabilities, the JR determined that it could reach no other conclusion.

ISSUE 2: EXCEPTIONAL CIRCUMSTANCES

46. Given the conclusion reached on Issue 1, strictly no conclusion had to be reached as to Issue 2 as the decision on Issue 1 is determinative

47. However, the JC did reach a clear view on that as well, in effect being asked by WR to second guess what the specialist WR Regulations Committee would have done when faced with this factual situation – the 127 days out of Spain in the first claimed "qualifying" year and not the expected *"minimum requirement"* of *"at least 10 months actual physical* presence" in Spain (Guideline 16), but only approximately some 8 months (as FRR had been able to find out by looking at publicly available sources – rather pointing up the 'slackness' of the FER's efforts).

48. There are some 8 previous cases in which the "*exceptional circumstances"* exemption has been discussed and decided (one of which being the *Bell* case) in the Regulations Committee (at tabs 64 and 77 to 83 of the bundle). WR in Submissions (at paragraph 29, p 92 bundle) said that the *"key question is this: Had the application been brought in advance of FER selecting the Player, is it likely that the 'exceptional circumstances' provision would have been applied by the Regulations Committee?".* Given that Committee's now reservoir of knowledge and expertise, it is a pity indeed that the FER did not get all the facts straight at the appropriate time and apply for a ruling from that Committee prior to the Player's selection. The pattern of consistency of findings from that Committee could have continued. Much angst would have been avoided, not only to the parties but also to this JC. The JC cannot but offer this common-sense observation: that a retrospective application for the grant of an exceptional circumstances' exemption should in itself only be done (let alone allowed) where exceptional circumstances, a compelling good reason, exist for not applying in advance of a player's selection.

49. The various matters traversed at paragraphs 41 and 43 above (on Issue 1) also have considerable effect here and do indicate to the JC that the Player, in being absent some four months in that first claimed "qualifying" year, especially in his continuous 119 days in South Africa, was not demonstrating that Spain was *"the place where the Player has his primary and permanent home"* (Guideline 16).

50. The following matters were pertinent to the JC's consideration as to whether or not the Player and the FER had proven, on the balance of probabilities, that there were "*exceptional circumstances"* for the Player not being actually physically present in Spain for at least 10 months in the first "qualifying" year:

    (a) Neither the Player nor the FER raised the matter of exceptional circumstances until after the potential eligibility issue was raised by WR with the FER in March 2022;

    (b) The Player's immediate departure from Spain, back to South Africa, following his club's quarter-final loss – an indication of an absence of commitment to club and to Spain;

    (c) As already noted, the earlier date of the Player's presence in South Africa (8 May 2019, rather than 2/3 June 2019) only came to light in the hearing, adding almost 4 weeks to the period spent outside of Spain – the lack of disclosure prior to the hearing was of significant concern to the JC and the significant length of the absence from Spain, in his native country, did not easily reconcile with a finding of "Residence" in Spain;

    (d) The Player, apparently, had no consideration of the amount of time he was spending out of Spain in 2019 - it seems to the JC that is likely because he was not aware of the requirements of R 8.1(c). As he told the JC in his evidence, playing for Spain was not in his reasonable contemplation at that time (it only being raised with him as a possibility in 2021) (NoE pp 56-57); and, by the Player's own evidence, he did not consider Spain to be his primary and permanent home at that time (the passages in paragraph 43 above);

    (e) The Player apparently made no attempt to minimise his time out of Spain – that was a choice, but it then may not be relied on for "exceptional circumstances". (The JC wishes to be clear: there is no criticism by it of the Player for wanting to support his family);

    (f) The evidence provided by the Player as to when he became aware of his father being ill was not consistent as between the written statements provided in advance of the hearing (for example "*When I was already in South Africa, my mother told me that my father was worried because he had pain…"*) and in response to questions at the hearing (for example *"So therefore on my arrival in South Africa I already knew about my Dad's illness and my Mum did inform me that he has been feeling, he's not been feeling well and therefore it was about a few weeks into my stay in South Africa and my Dad actually went in for emergency medicine and on that emergency medicine he actually spoke to the Doctor and said that he has this issue and therefore the Doctor was also worried about it and therefore he got an operation date which was for the 12th of July"* – NoE p 17)*;*

    (g) As at 8 May 2019 (when the Player accepts he was in South Africa), the Player now says that he had been told that his father had not been feeling well (but at that stage there was no diagnosis, no known need for an operation and, accordingly, no scheduled operation), which the JC was not satisfied constituted "exceptional circumstances";

    (h) Much of the time which the Player spent out of Spain in 2019 was not as a result of "exceptional circumstances" - had he flown in immediately before his friend's wedding in mid-June and out in late August when his father returned to work, there might have been scope to argue for this – but even so there was almost a month's gap between the wedding and the operation;

    (i) No evidence was put before the JC to support the oral submissions that the process for obtaining the Player's visa to return to Spain was commenced in May 2019 (as claimed) and pursued expeditiously thereafter, but the visa was not issued until early September 2019.

51. The sort of factors considered by the JC in the discussion above, were the very type of matters which the *Bell* case in 2020 had fully and emphatically made apparent to the FER should be contemplated in eligibility cases. And the Regulations Committee in *Bell* could not have been

clearer than it was in stipulating that such eligibility issues should be placed in front of it and resolved *"prior"* to selection. Full information should have been gathered by the FER from all sources, including the Player. That was not done, regrettably. Hence the problem that the FER now faces is one of its own making.

52. For the avoidance of any doubt, the JC rejected the FER submissions that "*the Player being present in any part of the Schengen area, should be deemed to be presence, actual physical presence in Spain"* on the basis that the Schengen area is not a "nation" with which the Player could have a "national link" and, besides actual physical presence of the Player in, say, France (an independent Republic, with its own national rugby federation, and a part of the Schengen area) would not, and could not, reasonably be considered to be "actual physical presence of the Player" in Spain, i.e., "the country concerned" in which the Player was seeking to establish his "Residence".

FINDINGS AS TO LIABILITY

53. The FER has not established, on the balance of probabilities that the Player was eligible for selection and, given that the offence charged is one of strict liability, the JC finds that the FER did breach R 8 as charged**.**

54. The Player has not established, on the balance of probabilities that he was eligible to play, and the JC finds that the Player did breach R 8 as charged **–** he knew, or ought reasonably to have known, that he was not eligible to play, given the factual matters above. But, for the reasons threaded through the narrative above, and most notably the FER's failures in its responsibilities, by not informing, educating and interrogating the Player, the JC's clear view was that no sanction should be imposed on the Player.

SANCTIONS

THE ORAL SANCTIONING DECISION of 28 April 2022 (from pp 135 to 137 of transcript)

55. *"Again, in due course reasons in writing will be provided. As to sanction, first in relation to the Player: as indicated earlier and as accepted in effect by World Rugby, there will be no sanction imposed on the Player in all the circumstances and as indicated earlier, there is a considerable degree of sympathy for the situation he found himself in.*

    As to the Union, we note that this is in effect the third time that there have been breaches of Regulation 8 in the last four or so years and that is a considerably aggravating factor in terms of sanction.

    First, in relation to Regulation 8.5.2, FER has not been able to provide clear and undisputable evidence that truly exceptional circumstances exist and nor has it been able to provide clear and undisputable evidence that it has taken all necessary steps to comply with Regulation 8. Many of the matters aired in evidence today were in relation to the steps that had been taken by Spain and although they have been described as commendable, the steps that were taken did not fulfill all the necessary steps required to comply with Regulation 8 and in particular, and as discussed during the course of the hearing, the Committee's concern was in the failure to approach the Player himself. So, there is no basis on which the applicable minimum fixed fine can be, or should be, reduced.

Secondly, and pursuant to 8.5.1(b), there will be a minimum fixed fine of £25,000 (pounds) imposed and there is no question of suspension of payment on this occasion and that's especially in the light of previous fines totalling £50,000 (pounds) which, we have been told, had been suspended for previous breaches by Spain.

Thirdly, the Committee imposes a further sanction of a deduction of five points for each of the two games in which the ineligible player played. The Committee took guidance from, in particular, the decision in what is described as the RWCQ 2019 case and has placed some store on the passages from that case set out at paragraph 47 (p 98 of bundle) of World Rugby's submissions. In addition, on appeal from that decision, the extract which is set out at paragraph 48 (p 98 of bundle) of World Rugby's submissions – that passage comes from the Appeal Committee which upheld the decision and the two extracts come from respectively paragraph 55 (p 920 of bundle) and paragraph 58 (p 921 of bundle).

The two matches played here were RWCQ qualifying matches and we see no reason why we should not, and consistency would dictate that we should, apply the same sort of sanction in terms of penalty as was applied in the RWCQ 2019 case. We have considered the submissions made on behalf of Spain that there might be some suspension, a Damocles' sword, in relation to the points deduction but we are not persuaded in the circumstances that that would be appropriate, and in particular having regard to that aggravating feature already mentioned of the prior offending by Spain and in relation to Regulation 8."

56. As explained in paragraph 54 above, in its discretion the JC determined that no sanction need be imposed on the Player.

57. As to the FER, the very reasons that led to no sanctioning of the Player were the very reasons that led to the JC rejecting the FER's argument that no minimum fixed fine (£25,000.00 pounds sterling) should be imposed. Given all the matters traversed in such as paragraphs 16 to 33, 38-39, 50 and 51 above, the JC was of the very clear view that the FER had not been *"able to provide clear and indisputable evidence that truly exceptional circumstances exist and that the Union concerned had taken all necessary steps to comply with Regulation 8".* (R 8.5.2).

58. Given that this was effectively the third transgression by the FER of the R 8 provisions within a four year or so period (RWCQ 2019, *Bell*, the present case) the JR found that this third 'difficulty' in such a short time was an aggravating factor. However, trying to take the least punitive approach possible in these unfortunate circumstances, the JC resolved to impose just the minimum fixed fine and not a greater fine which might well have been justified. In addition, the JC, cognisant of the precedent cases placed in front of it, pursuant to R 8.5.3 and R 19.4.1(b) imposed the "standard" (maximum) deduction of competition points for each of the two matches where the ineligible Player had been selected and played, a total of 10 points (5 for each match). Given the history of the FER with regards player ineligibility, this further sanction seemed wholly proportionate.

59. Fair and clear warning had been given to the FER in the *Bell* case, which had followed on from the RWCQ 2019 case. There are two quotes from that RWCQ 2019 case (one at first instance, the other on appeal) which are germane, and which influenced the JR here.

60. The first: *"We accept that in general terms it is undesirable to impose sanctions of: expelling a Union; overturning the result of a match; or imposing deductions. This is because the result of a qualifying competition or tournament should be determined on the pitch and not by judicial committees after the tournament. However, fielding an ineligible player undermines the*

integrity of a competition, which it is vital to protect. It is not possible, and invidious, to attempt to make any meaningful assessment of a player on the game. This is because while some players score points other players prevent points being scored, and yet others provide inspiration to a team by their presence. Therefore, the Panel considers, having regard to the previous decisions set out above, that there should be a points deduction for each occasion that an ineligible player played in the RWCQ competition and that the points deduction should be the maximum points (5 points) which were available to be won by the team. If more than one ineligible player was played the points deduction should remain at 5 points, because 5 points remained the maximum points which could have been won by the team. Restricting the points deduction to 5 points per match also avoids imposing a disproportionate sanction. Therefore, the deductions referred to above in relation to the RWCQ tournament should be imposed on Belgium, Spain and Romania".

61. And on appeal upholding that first instance decision, this: *"imposing a points deduction is – we have concluded – a fair basis upon which to approach a sanctioning within a tournament or league environment. That is not to be taken as saying or approving that in such a situation, a points deduction is the fixed or 'default' sanction. It remains a matter of discretion or judgment, informed as Disciplinary Committees will be by the principles we have set out, which fall to be applied to the particular facts of a given case." … "In our judgment, the appropriate starting point is not an end point but, for the reasons we have set out above, it is to be regarded as the most appropriate sanction. That is always subject to consideration of the individual facts of the case. It may be that there will be rare cases where the particular facts justify a suspension of any points deduction (in whole or in part) or no deduction at all".*

62. Regrettably, this was not such a case. But it is a case that brings with it this cautionary note to the FER – the FER need to be conscious of the potential sanctions contained in R 19.4.1, including such as suspension from tournaments or competitions and the making of a recommendation to the WR Council that a Union be suspended from WR membership. A fourth R 8 transgression by the FER might well result, rightly, in dire consequences. Adapting the language used in the RWCQ 2019 case at first instance, a time may arise where it is desirable (and necessary, as a general deterrent of future cavalier treatment of R 8 eligibility requirements by any Union) to impose such stinging penalties.

Nigel Hampton QC, Chair
Pamela Woodman
Frank Hadden

5 May 2022