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The story of Paolo Guerrero: a need for amendments to the WADA Code?

The Peruvian national football team last qualified for the FIFA World Cup finals held in Spain 36 years ago. The South American nation was elated and looking forward to finally seeing its beloved squad compete in the finals on the back of its captain and all-time leading goal scorer Paolo Guerrero. In the months leading up to World Cup finals however, Guerrero was prohibited from competing in the tournament by virtue of a decision of the Court of Arbitration for Sport ('CAS'). The CAS upheld an appeal by the World Anti-Doping Agency ('WADA') of a FIFA decision and imposed a sanction of a prohibition from competing for 14 months, which meant Guerrero would miss the 2018 FIFA World Cup finals in Russia. At that moment it was almost clear that at 34 years old el Pistolero had missed his only opportunity to play in a World Cup final.

Ultimately Guerrero competed in the 2018 FIFA World Cup finals. The decision of the CAS was appealed to the Swiss Federal Tribunal ('SFT') on the basis that imposing such a sanction, resulting in the player being unable to compete, without the full grounds of the decision, was a violation of his rights. The result is that the SFT suspended the effect of the CAS award. The CAS panel did not release the full grounds of the award prior to the commencement of the tournament and as a result Guerrero ended up playing in the three group stage matches scoring a goal and assisting on another against Australia.

Guerrero tested positive for the cocaine metabolite benzoylecgonine ('BZE'). In the end it was established, as accepted by the CAS, that the substance entered the athlete's body via the drinking of a Peruvian tea, known as a mate. The consumption of this type of beverage in Peru is not only very popular but quite common. These types of teas are consumed to combat nausea caused by high altitude, and has been used as such for centuries, as Peru is in the Andes. Despite establishing that this tea was not only common in Peru, and that it was taken in the hotel where, presumably, the nutritionist and doctors of the national team controlled the players' diets, the CAS found that the player was ultimately responsible and that an anti-doping rule violation had occurred.

In the end this was a 'food' case where the athlete was not intentionally cheating nor was he attempting to procure a sporting advantage. The effect of this decision is that the WADA Code places the onus on the player to ensure that all meals are to be clean, subject to the rules of negligence, and that an athlete cannot delegate this function to a nutritionist or a team doctor. Here, Juan de Dios Crespo Pérez and Paolo Torchetti, of Ruiz-Huerta & Crespo Sport Lawyers, who represented Guerrero in this case, review it from a substantive and procedural perspective and explain the legal issues. Juan and Paolo posit that the WADA Code is ill-equipped to deal with the realities of sport, medicine and human nature, and that this case is a perfect example of how and why the WADA Code ought to be reformed. Additionally, Juan and Paolo propose that WADA ought to amend the WADA Code so that (1) an exception be written in that athletes can delegate the exercise of the standard of care to accredited nutritionists and/or doctors; and (2) performance enhancing substances, supplements, contaminated food products and recreational drugs be treated differently.

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Procedural history and the decision of the SFT

Guerrero was tested on 5 October 2017, after Peru played against Argentina during the qualification round for the 2018 FIFA World Cup Russia. The analysis of the A sample revealed the presence of BZE and the analysis of the B sample confirmed the result. Cocaine is a non-specified stimulant prohibited under category S6 of the 2017 WADA Prohibited List. Guerrero was provisionally suspended pending the result of the dispute resolution process. Guerrero sought interim measures seeking a stay of procedure of the provisional suspension before the FIFA Disciplinary Committee and on appeal before the FIFA Appeals Committee, but this request was rejected on both counts.

A hearing was held before the FIFA Disciplinary Committee which ultimately ruled that Guerrero was prohibited from competing for one year. The FIFA Disciplinary Committee reasoned that the adverse analytical finding was not the result of Guerrero ingesting cocaine and that on the balance of probabilities he ingested the substance through the consumption of a tea containing coca leaves which is consistent with the evidence provided by the expert witnesses. Moreover, the athlete reasoned that there were three possible times when he drank such a tea while with the national team, and that of these three times it was the second meeting in a particular hotel in Lima. It was reasoned that given the circumstances this was the most likely time the tea containing BZE was ingested. The FIFA Disciplinary Decision does not contain extensive justification, but Guerrero was sanctioned to a one-year prohibition from playing and such a sanction would have

meant missing the 2018 FIFA World Cup. Imposing a ban of one year necessarily means that the adverse analytical finding was committed without significant fault and/or negligence, which under the WADA and FIFA anti-doping codes requires a minimum sanction of one year.

This decision was appealed to the FIFA Appeals Committee on the basis that he bears no fault or negligence and that the sanction ought to be completely vacated. The athlete argued that he drank the tea containing the prohibited substance under controlled circumstances where the nutritionist of the national team working with the hotel was responsible for determining what the players were eating and drinking. The evidence was put forward that the tea was taken under the supervision of the nutritionist and that the nutritionist was derelict in her duties. The argument follows that Guerrero bears no fault or negligence because it is perfectly legitimate to expect that there will be no risk in consuming prohibited substances under such circumstances. The FIFA Appeals Committee partially agreed and reduced the sanction to six months, which meant that Guerrero would be able to compete in the 2018 FIFA World Cup. The FIFA Appeals Committee agreed with the FIFA Disciplinary Committee as to the origins of the substance and that he bears no significant fault or negligence, and therefore the general principles of proportionality dictate that only a six month ban be imposed.

WADA appealed this decision to the CAS as it has the ability to do so in all anti-doping cases around the world, whether or not it is a party to the original proceeding. WADA argued that the six month sanction imposed by the FIFA

Appeals Committee was inconsistent with the WADA Code and that as the player bore fault and/or negligence the sanction ought to be in the 22-month range. With specific respect to the proportionality aspect of the FIFA Appeals Committee decision, WADA argued that where the athlete bears no significant fault or negligence the WADA Code provides no room in such cases for the panel to impose less than a one year prohibition because the general laws of proportionality do not apply. Ultimately the CAS panel agreed and imposed a sanction of 14 months applying the rationale in *Cilic*, where there is room to vary the sanction depending on the mitigating factors of the case. The CAS released the decision without grounds on 14 May 2018 effectively eliminating any chance of Guerrero playing the World Cup finals. What is note-worthy, however, is that the effect of the decision to prohibit Guerrero from playing emanated from a decision without any reasons attached.

This is the precise basis on which the athlete appealed the effect of the decision to the SFT. Guerrero argued that the decision without grounds is nonetheless a final decision and that it affects his personal, actual, economic and legal rights, and the decision without grounds must be set aside as it violates the principles enshrined in article 190(2) Switzerland's Federal Code on Private International Law ('PILA'). More specifically, the timing of the decision without grounds presented a particular and unique problem. All teams needed to have submitted their final 23-man roster to FIFA by 4 June 2018, and Peru would play its first match on 16 June 2018. A party to a CAS proceeding generally has 30 days to appeal the

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decision of the CAS, which runs from the date that the award with grounds is communicated. Without this final decision with grounds, nor the ability to appeal to the SFT, it was argued that fundamental rights are transgressed as it is possible that the timing of the release of the grounds may impede any appeal route otherwise available to Guerrero without recourse to attempt to be reinstated before the commencement of the World Cup. Without these full reasons, the decision was final and it was argued that the effect of the decision must be set aside pending the release of the grounds enabling the number 9 to compete in Russia for his country. Within this framework it was argued that the suspensive relief is necessary in order to protect the applicant from irreparable harm in the form of missing the World Cup finals.

The SFT agreed with this reasoning and granted Guerrero the provisional measures that were requested, that the effect of the decision was suspended and that the order to prohibit el Pistolero from competing would only come into effect once the CAS released the full grounds of the decision. As the full grounds of the award were only communicated on 30 July 2018, after the conclusion of the World Cup finals, Guerrero did indeed compete.

Although the decision can easily be justified in Swiss law it is interesting from the point of view as it applies in the sporting world. Guerrero was at risk to miss out on his only chance to take part in arguably the most important competition of his life. With his age clearly a factor, at 34, the irreparable harm associated with such an opportunity cannot be overlooked. Such circumstances usually do not arise outside of the sporting world as such a competition is unique. It is true to say that any consequence that cannot be undone for the last time could arise in the corporate or business world. However, given the importance of football in Peru and Guerrero's importance to his team and country, this is a unique set of circumstances that justifiably captured the sporting world in the lead up to the 2018 FIFA World Cup finals.

Legal issues

In addition to the procedural history

as it affected the footballer's ability to compete, this case raises three interesting legal issues: (1) the ability to demonstrate how the substance entered the athlete's system; (2) the concept of negligence and/or fault, standard of care and how it applies to a situation where an athlete is in the care of a nutritionist or a doctor; and (3) the issue of proportionality as it applies to the WADA Code.

In order for an athlete to avail themselves of the defence that they bear no significant fault or negligence and that the anti-doping violation is unintentional, the athlete must demonstrate how the prohibited substance entered their system. In this case Guerrero alleged that it was through the drinking of a tea which contains the coca leaf. Guerrero had very low levels of BZE in his system and according to the expert testimony this level was consistent with the ingestion of a tea during a specific time frame, when the player was with his national team.

During this time period the player drank tea on three different occasions. Guerrero argued, however that it was the second occasion that contained the prohibited substance. The first and second teas were consumed on the same day where the entire Peruvian national team was staying in a hotel preparing for its qualification matches. During one of those days leading up to the match against Argentina the players had a prepared lunch in the dining room of the hotel. The evidence that was put forward was that the team nutritionist worked with the hotel to plan the meal and to ensure that the players were not served anything that would create an anti-doping violation. This meal was held in a controlled dining room held exclusively for the players. After lunch Guerrero approached the team nutritionist and said that he had a stomach ache. The nutritionist selected the tea for the player ensuring that it was one that did not contain coca leaves and brewed the tea. The CAS Panel accepted this evidence and determined that this consumption did not lead to the adverse analytical finding. Equally the third tea was ruled out as the culprit as it was consumed in Buenos Aires, where the coca leaf is not used in teas. This was accepted fact by the CAS Panel.

The result is that Guerrero discharged his burden of proof in demonstrating how

the prohibited substance entered into his system. What is of paramount importance to note is that the two expert witnesses, one for the player and the other on behalf of FIFA, agreed that the low level of BZE contained in Guerrero's system meant that it was likely that ingestion took place during the time as alleged by the player, and most likely under the circumstances as alleged due to the prevalence of the coca tea in Peru. That the player was effectively able to demonstrate that it was this second consumption that led to the adverse finding enabled him to argue that he, at least, bore no significant fault and/or negligence.

The second interesting substantive legal issue raised in this case is the standard of care and duty of care that athletes must exercise in attempting to argue that they bear no fault or negligence. Relevant to this discussion, naturally, are the circumstances surrounding the consumption of this second tea. The evidence put forward by the player was that the second consumption while in the hotel in Lima with his teammates was the tea that inadvertently contained coca leaves. Guerrero testified that he was sitting in a lounge area that was reserved for players and their visitors. Guerrero was with his mother, some family friends, his agent and a teammate. Guerrero testified that he ordered a tea which, in his mind, was the same tea that he earlier drank, as controlled by the team nutritionist. As mentioned above the CAS accepted that this was the ingestion that caused the anti-doping rule violation.

However, despite Guerrero testifying that it was his belief that the team nutritionist exerted control as to what was served the players in this area, the CAS panel decided that the player did not exercise the standard of care required to successfully argue that he bore no fault or negligence. It is trite law to say that an athlete cannot delegate this duty to another person and that athletes are responsible for what they ingest. The WADA Code is clear on this point and the CAS jurisprudence interpreting this section is equally straightforward. What is curious is that from an abstract perspective, it is difficult to accept the incidence that an athlete that believes that he is in a safe zone controlled by team personnel has no effect on the element and concept of risk. This

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perceived element of risk, in the author's estimation, from a policy perspective, ought to affect the standard and duty of care required to be exercised in order to demonstrate that there is no fault or negligence. Situations of lower risk clearly require a lower standard of care applied to the player personally because the standard of care is already being exercised. Although the CAS did decide that Guerrero bore no significant fault and/or negligence, and the possibility of a four-year prohibition from football was avoided, the WADA Code dictated that the sanction ought to be between one to two years.

Proportionality is the third compelling legal issue raised in this case. The FIFA Appeals Committee applied a six month sanction on the basis of mitigating factors in the application of the proportionality principle. WADA took the position that there is no room in the WADA Code to apply the proportionality principle. Indeed, there is CAS jurisprudence that states that the proportionality principle is already built into the WADA Code and this is reflected in the introduction of the WADA Code where it specifically states that '[t]he Code has been drafted giving consideration to the principles of proportionality and human rights' where presumably the ability of a sanction to be anywhere from no prohibition to a four year prohibition is reflective of this occurrence. The CAS award discussed this jurisprudence and principle and equally confirmed that there is a one year prescribed minimum

for cases where there is a finding of no significant fault or negligence.

This interesting aspect to the application of the proportionality argument is that is that the finding of a six month prohibition by the FIFA Appeals Committee effectively would have allowed Guerrero to have competed in the 2018 World Cup. It appears that WADA, as the gatekeeper of the WADA Code, has a legitimate and real interest to ensure that the WADA Code is applied not only in a manner that is consistent with the intent of the legislation but in a manner that is consistent before all federations around the world. This is a laudable goal and it should not be overlooked. The issue, however, that the authors have with the rejection of the application of the proportionality principle is that it leaves arbitration panels world wide with no discretion to have a finding of less than one year prohibition where the athlete bears no significant fault or negligence. This leads to a rigid application of the WADA Code with no quasi-judicial discretion for the difficult cases where a sanction of more than one year could be viewed to be excessive.

Conclusion: the need for reform

Ultimately some may say that all is well that ends well as Guerrero ended up representing Peru in the 2018 World Cup. The authors do not share this view. The difficulties presented in this case highlight the need for certain amendments to the WADA Code. The authors understand that as in all areas of law legislation and regulations develop

over time in a way that responds to the changing landscape of the world. This particular case presents an opportunity for WADA to review its Code and make certain changes that could better serve all stakeholders in the international sporting community, especially athletes. In this sense the authors propose that two particular amendments ought to be introduced in response to this case:

1. that an exception be written in that athletes can delegate the exercise of the standard of care to accredited nutritionists and/or doctors; and
2. that performance enhancing substances, supplements, contaminated food products and recreational drugs be treated differently.

With respect to the first suggestion, the authors believe that the athlete's ability to delegate the exercise of care to an accredited professional can be justified in both policy and law. From a legal perspective, as was mentioned above, the exercise of the duty of care is, generally speaking, a function of the level of risk that is assumed. Presumably an athlete who is treated by and follows the advice of a professional who is responsible for what the athlete ingests surely exposes themselves to lower level of risk. It would follow that the application of the principle of the level and standard of care required would be malleable in such a case as the athlete is exercising such care when following the instructions of these professionals. The need for this type of amendment is exacerbated

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by the fact that many professional athlete contracts, particularly those of professional football players, mandate that the footballer follow such advice. The authors recognise that such a rule could be abused and also propose that certain limitation would be necessary:

1. the anti-doping rule violation would have to have been the result of the particular substance recommended to the athlete;
2. there would have to be some type of accreditation process for these medical professionals; and
3. the burden of proof ought to rely on the athlete to demonstrate that this is the case. From a policy perspective this approach makes sense as athletes are not always in the best position to make such informed decisions, particularly in comparison to doctors and nutritionists. Athletes are focused on their competition, their sport, and it is completely understandable that such a function could be exercised by a professional. This would be the correct approach as the current WADA Code prohibits substances that are not even listed, making their discovery even more difficult.

The second proposal, that performance enhancing substances, supplements, contaminated food products and recreational drugs be treated differently, would be an approach akin to how the professional sport leagues in North America deal with these issues. Interestingly enough, those regulations in the NFL, NBA, NHL and MLB are

contained in the respective collective bargaining agreements where the players and the owners of the clubs have agreed to the regime. This is not the case in the international sporting pyramid as the WADA Code has been unilaterally imposed despite the indirect representation of athletes at the WADA level.

The current WADA regime applies a four year sanction for any intentional adverse analytical finding and only adjusts a sanction based on the level of fault. To divide the regime in these four categories would further recognise that there is a different level of fault with different policy interests. Obvious performance enhancing substances ought to be treated in the harshest way possible where their use is intentional as there is a clear interest in punishing cheaters. The same could be argued when it comes to supplements that may contain prohibited substances.

Where treating all substances the same does not make sense is where we consider food and recreational drug cases. To impose the standard as applied in the CAS case of *Mecca-Medina*, that the source of the prohibited substance must be demonstrated to a fault all the way back to the precise animal and/or farm (in the case of meat), is not a reasonable standard. WADA does have an interest in ensuring that legitimate cases of prohibited substances through the ingestion of food are not confused with using a food supply argument to mask an

athlete's true intentions. The issue is that the standard as it is applied at the moment places the onus on the athlete to exercise care in 100% of their meals during the entire course of their career. This is simply not reasonable if anyone intends on eating in a restaurant, a foreign country or even a pre-prepared meal from the grocer. This incidence should be reflected in an amended to the WADA Code, where such transgressions should not attract a possible prohibition of four years.

With respect to recreational drug use, a prohibition of four years does not meet any legitimate policy objective WADA may have. To prohibit a young athlete from working in his desired field for such a long time effectively ends a career. Moreover, if, for example, the athlete has substance abuse problems, the WADA regime does nothing to assist an athlete in getting the help he or she requires. In fact, it does quite the opposite where now the athlete is out of a job yet may still have a substance abuse problem. The application of the WADA Code as it currently stands does nothing to serve such athletes with such problems and is completely ignorant of this issue. The authors urge WADA, if nothing else, to seriously consider this amendment where help provided and lower sanctions are imposed where drug abuse is an issue. Athletes are, without a doubt, the most important stakeholders in the sporting community and the neglect of the WADA Code to reflect such circumstances is difficult to comprehend.