

WORLD RUGBY NATIONS CUP 2016 (the “Tournament”)

DECISION OF JUDICIAL OFFICER

Disciplinary hearing (“**the Hearing**”) held by telephone conference call at 7pm (UK) and 3pm (Buenos Aires) on Monday 20 June 2016¹

in respect of

Santiago Portillo (“**the Player**”) of Argentina XV

in relation to an alleged act of foul play committed by the Player in the match between Romania and Argentina XV played on Saturday 18 June 2016 at the Stadionul National Arcul de Triumf, Bucharest (“**the Match**”), which resulted in a citing complaint being issued by the citing commissioner, Stefano Marrama, (“**the Citing Commissioner**”) regarding an alleged infringement of Law 10.4(m) (*acts contrary to good sportsmanship*).

The independent judicial officer appointed by World Rugby to hear the case was Pamela Woodman (“**the JO**”) from Scotland.

In addition to the JO, the following persons were present at the Hearing:

- a. the Player
- b. Sol Iglesias – UAR
- c. Juan Cruz Gomez Oromi – UAR
- d. Felipe Contepomi – Argentina XV coach
- e. Chris Smith, Lewis Silkin (“**the Player’s Representative**”)
- f. Daniela [] – translator for the Player
- g. Yvonne Nolan, World Rugby designated disciplinary officer (“**the DDO**”)
- h. Agnes Congoste, World Rugby

Decision of the JO

1. The JO determined that an act of foul play contrary to Law 10.4(m) (*acts contrary to good sportsmanship*) had been committed by the Player.
2. Accordingly, the Player was not eligible to play the game of rugby union (or any form thereof) or be involved in any on-field activities on match days until 23:59 on Sunday 7 August 2016. This represented a 7 week suspension. However, the JO clarified that this suspension would not prevent the Player from coaching junior players at his home club (*Los Tarcos Tucuman*) and at his local high performance centre in order that junior rugby players were not prejudiced as a result of the sanction. The Player was free to resume playing on Monday 8 August 2016.

¹ At the request of the Player, the Hearing had been postponed from the original time set for the Hearing, namely 11am on Sunday 19 June 2016, in order to allow the Player to have legal representation present.

Preliminary matters

1. All persons present were identified. It was confirmed that the Player was the player referred to in the citing complaint and had been playing number 8 for Argentina XV in the Match.
2. The JO outlined the procedure to be adopted for the Hearing.
3. The JO established that the Player had received copies of the same papers and video clips as the JO had received, namely:
 - Notice of disciplinary hearing
 - Citing commissioners report
 - Referee's report – by e-mail
 - Team sheet
 - Statement from Romania 10 (Jody Rose) – by e-mail from Romania team manager
 - 10 July 2009 International Rugby Board (“**IRB**”) memorandum
 - 24 October 2014 IRB memorandum
 - Decision of independent JO in the case of Mariano Galarza (Arg) – 23 September 2015
 - Decision of independent appeal committee in the case of Mariano Galarza (Arg) – 27 October 2015
 - Terms of Participation for World Rugby Nations Cup 2016 – section 12 of which contained the Tournament Disciplinary Programme (said section 12 being hereinafter referred to as “**the TDP**”)
 - Video clips – in a single mp4 file

Citing complaint

4. The citing complaint made by the Citing Commissioner in respect of an incident (which occurred in the second half of the Match when 39 minutes had elapsed and the score was Romania 20 – Argentina XV 8) was in the following terms:

“10R Jody Rose (with 12R) tackles 16A Axel Zapata, who looses the ball forward in the contact. The referee blows the whistle for knock on. 10R gets up and it appears he says something to 16A. 21A appears to react to this and complaining to the referee pointing to 10R. 8A then reacts and walks towards 10R and 8A puts a hand onto his face and eye area. After the game I asked 10R in the presence of his team manager, if he was injured in the face or in the eye area. He confirmed he was not injured.”

Plea

5. The Player's Representative confirmed that the Player accepted that the Player had committed the act of foul play that was subject to the citing complaint.
6. In light of the acceptance that an act of foul play had been committed in terms of Law 10.4(m) and in accordance with rule 12.8(d) of the TDP, the JO upheld the citing complaint and asked the Player's Representative to make submissions with regard to sanction.

Submissions in relation to sanction – seriousness of the offending

7. The Player did not speak English and so the submissions were all made by the Player's Representative or through the translator.
8. With regard to the seriousness of the offending, the main submissions made by the Player's Representative on behalf of the Player were that:
 - a. The Player had carefully considered whether or not he accepted that he had committed an act of foul play;
 - b. Every game was full of incidents of pushing and shoving;
 - c. The Player saw Romania 10 (“**R10**”) celebrate the knock on by Argentina 16 (“**A16**”) and the Player was upset that R10 was saying something in A16's face;
 - d. The Player wanted to stand up for his teammate and reacted to the incident by pushing R10;

- e. R10 was looking down and Romania 13 (“**R13**”) had his hand on the upper shoulder and chest area of R10;
- f. The Player would have pushed R10 in the chest but, because of the position of R13’s arm, the “normal” zone to push R10 was gone and this was why his hand went over R13’s arm and ended up in the face of R10 in a pushing motion;
- g. The Player accepted that the push went slightly wrong but that he had no intention to make contact with the eye or eye area of R10 - this was an accident but contact with the eye area (but not the eye) did occur;
- h. The Player was prevented from carrying out a push in the “normal” way by R13;
- i. As soon as the Player realised that his hand was on R10’s face, he quickly moved his hand to R10’s rugby jersey instead;
- j. The statement of R10 provided by e-mail through the Romania team manager was consistent with the Player’s position that the contact was with the eye area and that the Player had made no direct contact with the eye of R10;

For the record, the statement of R10 noted that “it was just a off the ball incident but nothing bad, it is part of the game. I didn’t feel any contact with my eyes” and, following clarification, “there was a contact made with the eye area , not directly to the eye”;

- k. In the Galarza case, a number of key points were discussed – in the current case, the Player did not seek out the eye of R10, his left hand did not enter the eye socket of R10 and there was no digital pressure applied on the eyeball;
 - l. When asked by the JO about the Player moving approximately 2 metres to make contact with R10, it was submitted that the Player was standing up for his teammate but had got it slightly wrong;
 - m. When asked by the JO about the movement of the Player’s left arm (starting with the elbow directed generally towards the ground with both upper and lower left arm below the shoulder line and then the lifting of the left elbow to (or just above) the shoulder line), it was submitted that it was not more than an act to push, it was something that the Player had got wrong and had happened very quickly, the arm of R13 was blocking the “normal” area where the Player would push and, in a split second, the Player went over R13’s arm/hand and made contact with the face of R10 – this was a misplaced push and the Player quickly adjusted his hand to the jersey of R10 when he realised that he had put his hand in the wrong place;
 - n. The Player’s fingers never deliberately attacked the eye or eye socket;
 - o. The Player’s Representative had read section 4.4(b) of the judicial officer’s decision in the Galarza case to the Player prior to the Hearing, with regard to the meaning of “reckless” in a rugby context – “knew or ought to have known that...there was a risk of committing an act of foul play”; and
 - p. In light of this, the Player accepted that, in pushing R10, he should have known that there was a risk of making contact with the eye or eye area but that this was reckless, rather than intentional.
9. The Player’s own description of the incident, made through the translator was as follows:
- a. The situation arose after Argentina 16 (“**A16**”) received a tackle and had knocked on the ball;
 - b. R10 then approached A16 and celebrated what had just happened;
 - c. The Player saw this happen and reacted out of anger – there having been another earlier situation where a Romanian player had been celebrating in the face of an Argentinian player; and
 - d. The Player never had the intention to touch or make contact with the face of R10 but he did know that pushing R10 was an act of foul play.

10. The DDO did not make any submissions as to the seriousness of the act of foul play.
11. The Player's Representative then helpfully made submissions with respect to each of the specific features set out in rule 12.10.1 of the TDP regarding the assessment of the seriousness of the foul play:

- a. *Whether the offending was intentional or deliberate*

It was not intentional.

- b. *Whether the offending was reckless, that is the Player knew (or should have known) there was a risk of committing an act of Foul Play*

It was accepted that the conduct was reckless in that the Player should have known that there was a risk of contact and the Player took responsibility for what he had done. However, it had not gone to plan. The Player never wanted to make contact with the eye or eye area of R10.

- c. *The gravity of the Player's actions in relation to the offending*

In all games, there was an element of pushing and shoving – it just happens. The Player accepted that he did not quite get it right and that the face/eye/eye area should be sacrosanct. In this case, the contact was with the eye area but the Player did switch his grip to the jersey.

- d. *The nature of the actions, the manner in which the offence was committed including part of body used (for example, fist, elbow, knee or boot)*

The Player's Representative referred to the quotation from the Hartley case which was repeated in both the 2009 and 2014 IRB memoranda and submitted that the offending would be lower end conduct, the contact being with an open palm. The contact with the eye area was for less than half a second. R10 did not feel pressure with his eye socket. The Player did not deliberately seek out the face/eye area.

- e. *The existence of provocation*

The Player was upset by R10's action towards A16 and wanted to help stand up for his team mate. He reacted to this.

- f. *Whether the Player acted in retaliation and the timing of such*

The Player was not retaliating.

- g. *Whether the Player acted in self-defence (that is whether he used a reasonable degree of force in defending himself)*

The Player was not acting in self-defence.

- h. *The effect of the Player's actions on the victim (for example, extent of injury, removal of victim player from the game)*

None.

- i. *The effect of the Player's actions on the match*

This was not applicable as there was only 1 minute left in the Match at that point. It was submitted that it was notable that the referee penalised R10 and reversed the penalty.

- j. *The vulnerability of the victim Player including part of victim's body involved/affected, position of the victim player, ability to defend himself*

The eye/eye area were sacrosanct and Law 10.4(m) was applied in order to make sure that continued. The eyes and eye area were vulnerable but there was no contact with the eyes. On the scale of vulnerability, this was at the low end.

k. *The level of participation in the offending and level of premeditation*

There was no premeditation.

l. *Whether the conduct of the offending Player was completed or amounted to an attempt*

The Player did not attempt to make contact with the eye or eye area. The Player attempted a legitimate push which went wrong. The Player was present to take responsibility for the push.

m. *Any other feature of the Player's conduct in relation to or connected with the offending*

None.

12. The Player's Representative noted that the quotation from the Hartley case in the 2009 IRB memorandum refers to contact with the eye or eye area being a serious offence, often the result of an insidious act and one of the most abhorrent offences. The current situation was not that and it was submitted that the seriousness of the offending was at the low end of the scale. The Player's Representative noted that it was agreed that the Player got it slightly wrong but it was not a malicious act, albeit it was accepted that contact was made.
13. With regard to mitigating factors (as referred to in rule 12.10.3 of the TDP), it was submitted on behalf of the Player that the Player:
- a. Had a clean record;
 - b. Had accepted that he had got this slightly wrong – it was not an intentional act, it was accidental, but the Player had accepted responsibility for it;
 - c. Had been playing rugby since he was 4 years old and was now 20 years old;
 - d. Had played in two junior world championships and around 15 matches for the Argentina Jaguars;
 - e. Had fronted up to his actions during conversations with the Player's Representative (who had been instructed on the day prior to the Hearing) and wanted to be responsible for his actions;
 - f. Had conducted himself in a positive way in all interactions with the Player's Representative; and
 - g. Apologised to R10 after the Match, which was accepted by R10, and they shook hands.
14. Mr Contepomi then provided submissions in support of the Player as follows:
- a. Whilst Mr Contepomi had been coaching the Player only for this year, the Player had always been well behaved. There had been no problems, not even in training. The Player was a young player who wanted to improve, who had a great future ahead of him and who was always trying.
 - b. Mr Contepomi was surprised by the citing because the same action had been evaluated by the TMO and only a penalty had been awarded.
15. The Player's Representative submitted that the number of mitigating factors warranted the full 50% reduction as referred to in rule 12.10.3(b) of the TDP.
16. The Player's Representative invited the JO to consider the wholly disproportionate test and submitted that the Galarza case was the leading authority in this respect. He submitted that the factors which should be considered in this case were that:
- a. it was possible to apply all of the mitigating factors in this case;
 - b. there was only fleeting contact;
 - c. there was no contact with the eyeball; and

- d. the Player had changed his position to move his hand to R10's jersey.

Similar to the consideration of the judicial officer in the Galarza case, it was submitted that what wholly disproportionate means required to be considered on the facts of this particular case.

17. In response to a question from the JO, the Player (through the translator) confirmed that he trained junior teams at his club and also taught young children how to play rugby through a charity programme at a local high performance centre.

Submissions by World Rugby in relation to sanction

18. The DDO made the following submissions:
 - a. To the Player's credit, he had accepted that he committed the act of foul play;
 - b. No specific submission was made with regard to the entry point;
 - c. In terms of aggravating factors, the IRB memoranda were still in force and had not been revoked. A deterrent was still required and so the memoranda should be applied. The risk to the eye area was grave;
 - d. In terms of mitigating factors, there was nothing in World Rugby's records to suggest that the Player had any disciplinary record;
 - e. She could not agree that any sanction would be wholly disproportionate, in that it would be completely, totally or entirely disproportionate to the type of offending involved, bearing in mind the risk to the eye area.

Closing submissions by the Player's Representative

19. The Player's Representative submitted that:
 - a. The existence of the IRB memoranda was not disputed but the offending in this case did not merit any aggravation as a result. However, whether or not the memoranda were to apply was a matter for the decision of the JO;
 - b. Whilst the "wholly disproportionate" provisions were hardly ever invoked, if they were invoked this did not have to mean that there was no sanction at all, just that the sanction was reduced from the 50% threshold. This was a matter for determination of the JO on the specific facts of the case.
 - c. This was a tricky case but was made more straightforward by the Player's honesty and by him taking responsibility for his actions. The Player should be applauded for that, particularly when the low end entry point was so high and many others would "give it a crack";
 - d. The Player didn't know he'd done it until after he saw the Citing Commissioner's report and the video clips;
 - e. The sanction should be for low end offending with full mitigation and it was then up to the JO to determine if that would be wholly disproportionate; and
 - f. He was not arguing for no sanction, just a sanction which was proportionate to the offending in question.

Written evidence of referee, Lloyd Linton

20. Prior to the Hearing, the referee had provided a statement by e-mail in the following terms:

"I saw a tackle situation between Romania 10 and an Argentinian player, the Romanian player got up and said something into the face of the Argentinian player then all I saw after that was pushing and shoving by a number of players. I asked for a TMO review, but I was too far from the screen to see any detail. I was reliant on the TMO. The TMO said that there was a "neck roll" by Argentina number 8. I thought at the time that this was the player who had been involved in the tackle situation with the Romanian number 10. This is why I penalised 8 for the neck roll, then reversed the penalty against the Romanian 10 as I thought this was retaliation. I did not see any hands in the face by any players live, and I couldn't see anything on the screen during the TMO review."

21. This statement was not discussed during the Hearing but was accepted as having been received by the Player and the JO prior to the Hearing.

Deliberations

22. The conference call was then adjourned in order to allow the JO to consider, in private, the evidence and submissions provided.

23. The JO had reviewed the video clips a number of times both at full speed and at a slower speed prior to the Hearing but again reviewed those video clips as part of her deliberations in order properly to consider the submissions made by or on behalf of the Player in respect of the incident in question with the benefit of the video footage.

24. The conference call was resumed.

Decision – sanction

25. As set out in rule 12.8(a) of the TDP, the standard of proof for all matters under the TDP was on the balance of probabilities.

26. With that standard of proof in mind, the JO found as follows:

- a. Based on the Citing Commissioner's report, the statement from R10 and the admission of the Player, the JO was satisfied that there had not been contact with the eye itself of R10, but that there had been contact by the Player with the eye area of R10;
- b. Based on the video evidence, the referee's report and the evidence on behalf of the Player, the JO was satisfied that R10 had said something, which appeared to be objectionable (based on the immediate reaction of A21 towards the referee), to A16 but it was not known what was said;
- c. Based on the Citing Commissioner's report and the video evidence, the JO was not satisfied that the contact with the eye area was an accident nor that this was a case of a "normal" push which had gone slightly wrong. The incident occurred after the referee had blown his whistle and play had stopped. The Player was seen to make a slight change in direction and then move a distance of approximately 2 metres directly in the direction of, and looking at, R10 in order to make contact with R10, initially accelerating and then slowing down as he reached R10. The Player, while still looking directly at R10, made contact with the face of R10 with his left hand with an open palm, his thumb in the area of R10's left cheek/jaw, his forefinger over the right eye of R10 and his other three fingers on R10's right cheek/jaw area. At the initial point of contact, the hand of the Player was moving in a slight upwards direction, the elbow of the Player was directed generally towards the ground with both upper and lower left arm below the shoulder line of the Player and then the left elbow was lifted to (or just above) the shoulder line, the left hand/wrist of the Player appearing to exert force in a slight twisting/grinding motion. The Player's left arm remained bent throughout and there was no "normal" pushing motion, the "normal" pulling back action (which preceded a forward pushing action) in a "normal" push being missing. R13 was seen to have his right hand around the side and back of the neck of R10. The JO was not satisfied with the evidence on behalf of the Player that this had resulted in the "normal" zone to push R10 (namely, based on the submission of the Player's Representative, the chest) not being available and that this was why the Player had made contact with the face of R10. Instead, the JO noted that the left shoulder and left rib area of R10 appeared to be more accessible and, if anything,

the more natural place to effect a “normal” push, if that is what had really been intended. The exact point at which the Player moved his hand from the face of R10 to the jersey of R10 was not entirely clear from the video evidence but the JO was satisfied that the contact with the face of R10 appeared to last less than 1 second based on the time markers on the video clips.

27. In determining the seriousness of the foul play, the JO considered the features set out in rule 12.10.1 of the TDP, as follows:

a. *Whether the offending was intentional or deliberate*

Based on the findings set out in paragraph 26.c. above, the JO considered that the offending was deliberate.

b. *Whether the offending was reckless, that is the Player knew (or should have known) there was a risk of committing an act of Foul Play*

The JO considered that the incident was not merely reckless.

c. *The gravity of the Player’s actions in relation to the offending*

Any contact with the eye area was grave because of the inherent risk of contact being made with the eye.

d. *The nature of the actions, the manner in which the offence was committed including part of body used (for example, fist, elbow, knee or boot)*

The detail of this was set out above in paragraph 26.c. but, in general terms, the Player moved a distance of approximately 2 metres to make contact with R10 and then made contact with his left hand to the face of R10.

e. *The existence of provocation*

Any comments which were made by R10 appeared to be made to A16 but were not made directly to the Player. The JO did not consider that this amounted to provocation in this case, even if earlier comments had been made directly to the Player by R10.

f. *Whether the Player acted in retaliation and the timing of such*

The Player accepted that he was not acting in retaliation.

g. *Whether the Player acted in self-defence (that is whether he used a reasonable degree of force in defending himself)*

The Player accepted that he was not acting in self-defence.

h. *The effect of the Player’s actions on the victim (for example, extent of injury, removal of victim player from the game)*

There was no injury to R10.

i. *The effect of the Player’s actions on the match*

Other than an ensuing scuffle, there was no effect on the Match which only had one minute remaining at the time of the offending.

j. *The vulnerability of the victim Player including part of victim’s body involved/affected, position of the victim player, ability to defend himself*

Whilst R10 was not in a vulnerable position, per se, as he was standing up and his movement was not constrained in any way, any contact with the eye area would then make that player vulnerable.

k. *The level of participation in the offending and level of premeditation*

The Player fully participated in the offending but there did not appear to be any premeditation.

l. *Whether the conduct of the offending Player was completed or amounted to an attempt*

The conduct of the offending was completed.

m. *Any other feature of the Player's conduct in relation to or connected with the offending*

None.

28. Therefore, the JO determined that the offending be categorised as being at the lower end of the scale of seriousness of offending.
29. The low end entry point for such offending was 12 weeks.
30. In terms of off-field aggravating factors (as referred to in rule 12.10.2 of the TDP), the JO was satisfied that the 2009 and 2014 IRB memoranda remained in force and so, as was noted by the judicial officer in the Galarza case, the "only sensible inferences are that offending of this kind continues and such offending remains a matter of concern for World Rugby". In addition, the appeal committee decision in that same case highlighted that "Judicial Officers and Appeal Committees are constrained. IRB memoranda in respect of contact with the eye or eye area of 1 July 2009 and 24 October 2014 suggest that we deal with such incidents "severely", with the principal underpinning purpose of protecting players and deterring others from such activity". Accordingly, given that this case involves contact with the eye area, the JO was satisfied that the need for a deterrent remained and so would increase the sanction by a period of 1 week.
31. In terms of off-field mitigating factors (as referred to in rule 12.10.3 of the TDP), the JO gave the Player significant credit for accepting, at the outset of the Hearing, that he had committed an act of foul play. She also took into account that the Player had previously had a very good disciplinary record, was of good character (helping to coach junior players, including as part of a charity programme), was relatively young and there was no suggestion that his conduct had been other than good at the Hearing. Given that the Hearing was done by conference call, the JO could not see the Player but, at the pre-hearing conference held on Sunday 19 June 2016, his conduct had been excellent. The JO determined that the relevant mitigating factors would decrease the sanction by the maximum 50%, namely by 6 weeks.
32. In terms of the submission that the JO should consider whether to apply a sanction less than 50% of the lower end entry point based on that being wholly disproportionate (as referred to in rule 12.10.3(c) of the TDP), including in appropriate cases no sanction, the JO noted that the Player's Representative had not submitted that there should be no sanction at all. Whilst there were significant mitigating factors in this case (which were taken into account in determining that the sanction would be decreased by 50% (as referred to in paragraph 31 above), the JO noted that she would also have to be satisfied that "the sanction would be wholly disproportionate to the level and type of offending involved". The JO also noted that the analysis of the judicial officer in the Galarza case (which was confirmed by the appeal committee in that case) was that "the adverb "wholly" means completely, totally or entirely and modifies by addition "disproportionate". It connotes a sanction which is really exceptional for that level and type of offending." The JO noted the sanctions set down by World Rugby for contact with the eye or eye area categorised as lower end offending were deliberately set at a higher level than those for other lower end offences because of the need to protect other players from such action and the seriousness of this type of offending. The JO also noted that it was relevant in this context that the 2009 and 2014 IRB memoranda remained in force.
33. Based on (a) the facts of this case (as referred to in paragraph 26.c. above), (b) the manner in which the offending occurred with the Player moving a distance of approximately 2 metres to make contact with R10's eye area (albeit that it was accepted that the contact with the eye area was fleeting), and (c) the JO's determination that the offending was deliberate, the JO determined that a sanction of 7 weeks was not wholly disproportionate to the level and type of offending involved.
34. Any sanction requires to be meaningful for the player concerned and so the Player's playing schedule has been taken account in determining the end date of the suspension. The Player's

playing schedule was not available at the time of the Hearing but was provided to the JO thereafter.

35. Accordingly, the Player was not eligible to play the game of rugby union (or any form thereof) or be involved in any on-field activities on match days until 23:59 on Sunday 7 August 2016. This represented a 7 week suspension. However, the JO clarified that this suspension would not prevent the Player from coaching junior players at his home club (Los Tarcos Tucuman) and at his local high performance centre in order that junior rugby players were not prejudiced as a result of the sanction. The Player is free to resume playing on Monday 8 August 2016.

Costs

36. No application for costs was made and, accordingly, no order was made.

Right of appeal

37. The Player was advised of his right of appeal.

Pamela Woodman
Judicial Officer
20 June 2016