

WORLD RUGBY

IN THE MATTER OF AN APPEAL BROUGHT BY FEDERATIA ROMANA DE RUGBY & FEDERACIÓN ESPAÑOLA DE RUGBY FROM A DECISION OF THE JUDICIAL AND DISPUTES COMMITTEE CONCERNING COMPLAINTS RELATING TO A MATCH ON 18 MARCH 2018 AND THE ELIGIBILITY OF PLAYERS FOR THE RUGBY WORLD CUP QUALIFYING COMPETITION

Venue: The Royal Garden Hotel, Kensington

Date: Friday 1 June 2018

Panel: Christopher Quinlan QC (World Rugby Independent Judicial Panel Chairman)
Mike Hamlin (former player, referee and Chairman of the Independent Judicial Disciplinary Panel for EPCR)
Phaidra Knight (former USA International, World Rugby Hall of Fame Inductee and lawyer)

Secretary: Joyce Hayes

Appellants: Federatia Romana de Rugby ('Romania'): Alin Petrache, President
Mr. Rhodri Thomas, Counsel, Freshfields Bruckhaus Deringer; Dan Cristea, Counsel, Țuca Zbârcea & Asociații; Mr. Bogdan Muntean, High Performance Manager for Romania

Federación Española de Rugby ('Spain'): Donal Spring, Daniel Spring & Company, Solicitors; Barra O'Sullivan, Daniel Spring & Company, Solicitors; Alfonso Feijoo, President of FER; José Marie Epalza, Vice President FER; Eliseo Patrón-Costas, General Secretary of FER.

Respondents: World Rugby: Alistair MacLean (General Counsel); Yvonne Nolan (Senior Legal Counsel); and David Carrigy (Head of Development and International Relations).

Interested Parties: Rugby Union of Russia ('Russia'): Kirill Yashenkov, Deputy Chairman, Highest Council of RUR & Kirill Kulemin, RUR High Performance Manager
Fédération Belge de Rugby ('Belgium'): Salvatore Zandona (President) & Dany Roelands.
Rugby Europe: Jean-Jacques Zander (Head of the Legal Committee).

DECISION OF THE APPEAL COMMITTEE

A. INTRODUCTION

1. These proceedings arise out of a Rugby World Cup Qualifier ("RWCQ") tournament for the Rugby World Cup 2019 ('RWC 2019'). This was played alongside and as part of the Rugby Europe Championship organised by Rugby Europe.
2. In one of the final matches Spain played Belgium in Belgium ('the match'). If Spain won, they would qualify. If Spain lost, Romania, who were then in second place in the table (behind Georgia who had qualified by virtue of its pool position in RWC 2015) would qualify. A Romanian match official team was appointed to officiate at the match. When the mathematics of the qualification process became clear Spain asked Rugby Europe to change the refereeing team. The referee was not stood down nor did he stand down. In fact, no change was made to the proposed match officials.
3. The match was played on 18 March 2018. Belgium won by a score of 18-10. Controversy arose about the performance of the referee. Spain raised two further issues: concerning (1) the dimensions of the pitch and (2) the absence of a "captain's run" (pre-match training session on the match pitch).
4. Spain complained to World Rugby about the performance of the referee, the failure to replace the referee and the other matters pursuant to section 13.1 of the RWCQ Terms

of Participation (“TOP”). The Rugby World Cup Competitions Manager referred the dispute to a Disputes Committee pursuant to section 13.3 of the TOP. A Panel was appointed to be that Disputes Committee (“DC”).

5. Additionally, World Rugby received complaints that Spain, Romania, Russia, Germany and Belgium had fielded in the RWCQ tournament, players who were not eligible to play either because there was no qualifying connection with the particular country, or because the player had already been “captured” by playing for another country. These issues required to be determined under Regulation 8 of the World Rugby Regulations¹ by a Judicial Committee. The appointed DC therefore became a joint Disputes and Judicial Committee (“DJC”).
6. The DJC promulgated its written Decision on 15 May 2018. Thereby, and in summary, it:
 - a. Did not order the match to be replayed.
 - b. Ordered in respect of Spain, Romania and Belgium that
 - i. There should be a 5 points deduction for each occasion that an ineligible player or players² played in the RWCQ competition and in the Rugby Europe tournament; and
 - ii. the points deduction should be the maximum points (5 points) which were available to be won by the team.
 - c. Imposed upon each of Spain, Romania and Belgium financial penalties which it suspended for a period of 5 years.
 - d. Did not address (because – for good reasons - it was not asked to) the question of sanctions on individual players.
7. Spain and Romania appealed against that Decision. We together comprise the Appeal Committee (“AC”) convened to determine the said appeals. We granted Spain and Romania an oral hearing and made directions in relation thereto. We declined Spain’s

¹ All references to Regulations are to the World Rugby Regulations unless stated otherwise.

² The deduction was 5 points whether it was one or more ineligible player *per* match

application to have the hearing conducted in two parts: (1) the replaying of the match and (2) the Regulation 8 issues.

8. The substantive hearing of the appeal took place on 1 June 2018. At the conclusion, we reserved our decision. This document constitutes our final reasoned Decision, reached after due consideration of the evidence, the written submissions and decisions placed before us. It represents our conclusions. It is necessarily a summary. The fact that specific reference is not made herein to any part or aspect thereof does not mean it was not considered and given the appropriate weight.
9. As with the DJC, we too are very grateful to Romania, Spain, Russia, Belgium and World Rugby, for all of their assistance before and during the appeal hearing and for the admirable written and oral submissions.

B. REGULATIONS

(1) Procedural Regulations

10. There was no issue before the DJC or us in this respect. The parties agreed that any appeal against a decision of the DJC shall be brought in accordance with the procedures contained in Regulation 18 and that any AC appointed thereunder shall have sole and unfettered authority to determine any appeal. Upon receipt of an indication from Spain and Romania that they intended to appeal, the AC was appointed and subsequently made directions, which the parties had the opportunity to comment on.
11. Paragraph 4.5, Appendix 1, Regulation 18 provides:

Except where an appeal proceeds in whole as a de novo hearing it is for the Appellant to establish that the decision being challenged on appeal:

 - (a) was in error (either as to central factual findings or in law);*
 - (b) in the interests of justice should be overturned;*
 - (c) the sanction imposed was manifestly excessive or wrong in principle;*

and/or

(d) the sanction imposed was unduly lenient.

12. This was not a *de novo* appeal.

13. Further, Paragraph 4.6 of Appendix 1 to Regulation 18 provides that appeals shall be conducted on the basis that:

- a. *“the evidential assessment or decision involving an exercise of discretion or judgment of or by a Judicial Committee or Judicial Officer shall not be overturned save in circumstances where the relevant findings made by the Judicial Committee or Judicial Officer are manifestly wrong;*
- b. *The evidential assessment or decision involving an exercise of discretion or judgment of or by a Judicial Committee or Judicial Officer shall not be overturned save in circumstances where the Judicial Committee or Judicial Officer applied wrong principles in the exercise of its/his discretion which has resulted in an erroneous decision being made...”*

(2) Regulation 8

14. Regulation 8 is entitled "ELIGIBILITY TO PLAY FOR NATIONAL REPRESENTATIVE TEAMS". Regulation 8 governs the eligibility of players to play for the senior fifteen-a-side National Representative Team, the next senior fifteen-a-side National Representative Team and the senior National Representative Sevens Team of a Union.

15. The present incarnation of Regulation 8.1 provides:

“Subject to Regulation 8.2, a Player may only play for the senior fifteen-a-side National Representative Team, the next senior fifteen-a-side National Representative Team and the senior National Representative Sevens Team of the Union of the country in which:

- (a) he was born; or*
- (b) one parent or grandparent was born; or*
- (c) he has completed thirty-six consecutive months of Residence immediately preceding the time of playing.”*

16. Regulation 8.2 provides:

“A Player who has played for the senior fifteen-a-side National Representative Team or the next senior fifteen-a-side National Representative Team or the senior National Representative Sevens Team of a Union is not eligible to play for the senior fifteen-a-side National Representative Team or the next senior fifteen-a-side National Representative Team or the senior National Representative Sevens Team of another Union.”

17. As to the meaning of Regulation 8.2, Regulation 8.3 provides:

“For the purposes of this Regulation, a Player is deemed to have played for the senior fifteen-a-side National Representative Team or the next senior fifteen-a-side National Representative Team of a Union if:

(a) He is selected for such team to play in an International Match against the senior fifteen-a-side National Representative Team or the next senior fifteen-a-side National Representative Team of another Union (or in a fifteen-a-side international Match against another Union's senior or next senior Touring Squad during a World Rugby approved International Tour) and is present at the Match played by that team either as a replacement, substitute or a playing member of that team and has, at the time of the Match, reached the age of majority; or

(b) He is selected to represent a Union's senior Touring Squad on an International Tour which includes an International Match or Matches approved by World Rugby and is present at any fifteen-a-side Match played on that International Tour either as a replacement, substitute or a playing member of a team selected from the Union's senior Touring Squad and has, at the time of the Match, reached the age of majority; or

(c) He is selected to represent a Union's next senior Touring Squad on a World Rugby approved International Tour and during that International Tour he is present at a Match against the senior fifteen-a-side National Representative Team or the next senior fifteen-a-side National Representative Team of another Union either as a replacement, substitute or playing member of a team selected from the Union's next senior Touring Squad and has, at the time of the Match reached the age of majority.

(d) Before January 1, 2018³, he is selected to represent the Under 20s National Representative Team of a Union which has been pre-designated as that Union's next senior fifteen-a-side National Representative Team and the Player is part of the team which participates in an International Match as part of the World Rugby Junior World Championships, World Rugby Junior World Rugby Trophy or the Six Nations U20 Championship and is present at the Match played by that Team either as a replacement, substitute or playing member of that Team and has, at the time of the Match, reached the age of majority.

18. Regulation 8.5 provides:

“8.5.1. Unions

Regulation 8 is a strict liability offence and shall be construed in accordance with the principles of strict liability under English law. It is not, therefore, necessary that fault or intent on the part of a Union be shown in order for a breach of Regulation 8 to be established. Nor is lack of fault or intent on the part of a Union a defence to a breach of Regulation 8. For the avoidance of any doubt (and without limiting a Union's other obligations and responsibilities for the conduct, acts or omissions of its members and Persons under its jurisdiction pursuant to any other Regulation) Unions are responsible and accountable for the conduct of their Players and all Persons under its jurisdiction in relation to compliance with the provisions of Regulation 8 and any breach of Regulation 8 by such Player(s) or Person(s) shall be deemed to be a breach of Regulation 8 by the Union concerned. Each breach of Regulation 8 by a Union, howsoever arising, will result in a minimum fixed fine being imposed on the Union concerned. The minimum fixed fines for each breach of Regulation 8 are as follows:

(a) For a Union that is represented on the Council £100,000 sterling;

(b) For all other World Rugby Member Unions £25,000 sterling.

Based on the facts and circumstances of any breach of Regulation 8 the applicable minimum fixed fine as set out above may be increased. In addition, other penalties as set out in Regulation 18.6 may also be imposed on the Union concerned.”

³ With effect from January 1, 2018, Unions will no longer be permitted to name its Under 20s National Representative Team as that Union's next senior fifteen-a-side National Representative Team.

19. As World Rugby submitted, and the AC agrees, but two key principles of Regulation 8 applied throughout the relevant period:

- a. The basis for a player's eligibility: a player may only represent the Union of the country in which he, or his parent/grandparent was born, or where he has completed a specified residency period; and
- b. The "one Union only" rule: subject to limited exceptions, a player may represent only one Union. Once "captured" by one Union, he may not represent another Union.

20. World Rugby Regulation 18.6 provides:

"18.6 Penalties

18.6.1 Upon finding a breach of the Bye-Laws and/or Regulations, or that an offence pursuant to Regulation 18.1.1(a) to (e) inclusive has been committed, Judicial Officers and Judicial Committees shall be entitled to impose such penalties as they think fit. Such penalties may include, but shall not be limited to:

- (a) a caution, warning as to future conduct, reprimand and/or a fine;*
- (b) a suspension for a specified number of Matches and/or a specified period; a requirement that a Match or Matches be played with the exclusion of the public; the cancellation of a Match result and, where appropriate, the replaying of a Match; the forfeiture of a Match or matches and/or tie(s); the deduction or cancellation of points; the immediate or future expulsion or suspension from a tournament(s) or competition(s); or any such similar sanctions;*
- (c) cancellation or refusal of the registration of any Person registered in contravention of the Regulations;*
- (d) a recommendation to the Council that a Union or Association be expelled or suspended from Membership of World Rugby. Subject to the provisions of Bye-Law 6(d), only the Council shall be competent to expel or suspend a Union or Association and any such expulsion or suspension shall only have effect if approved by a two-thirds majority of the votes cast at a properly convened and quorate Council meeting;*
- (e) an order that any Union, Association, Rugby Body, Club or Person pay compensation and/or restitution;*

(f) the withdrawal of other benefits or membership of World Rugby, including, but not limited to, the right to apply to host International Tournaments; and

(g) any combination of the penalties set out in 18.6.1(a) to (f) above.

18.6.2 Judicial Officers and Judicial Committees shall be entitled to make such order in relation to cost as is deemed appropriate;

18.6.3 In determining the appropriate penalty under these Regulations, a Judicial Officer or Judicial Committee shall be entitled to take account of mitigating and/or aggravating circumstances. Aggravating circumstances shall include, but shall not be limited to, the repetition of a breach of a particular Bye-Law or Regulation.”

C. GROUNDS OF APPEAL - ROMANIA

21. Romania argued that the sanction imposed by the DJC was

- a. “manifestly excessive or wrong in principle”;
- b. “in error as to central factual findings or in law”; and that
- c. “in the interests of justice should be overturned”⁴.

22. More particularly Romania submitted (in summary) that:

- a. No legal grounds were provided for the imposition of additional sanctions (i.e. the points deductions), in addition to the financial penalty;
- b. Multiple mitigating factors which should have been, but were not, considered when the DJC assessed Romania’s culpability and sanction. Those included:
 - i. Romania conducted substantial due diligence in order to verify the Player’s (Sione Faka’osilea) eligibility under Regulation 8(ii);
 - ii. The Player’s selection by Romania was not an attempt to create an opportunistic and unfair advantage to Romania. He had substantial personal and professional connections with Romania;
 - iii. Romania had no intention to gain a competitive advantage or to cheat. Romania had every reason to assume that the Player and the Tongan Rugby Union were acting in good faith as well; and

⁴ §6 Romania Statement of Appeal, 28 May 2018

- iv. Romania admitted the breach as soon as credible information surfaced that the Player had been captured by Tonga.
- c. The sanctions imposed on Romania are wholly disproportionate and are also not commensurate with:
 - i. the mitigating factors surrounding Romania's breach;
 - ii. the lack of aggravating circumstances surrounding the breach; and
 - iii. the sanctions applied to Belgium and Spain, both of which breached the same rule but in more egregious circumstances (it was argued);
 - iv. the sanctions applied in similar previous cases.
- d. Its bold submission was to ask, "*what else could Romania have done*" to check whether the player was captured?

23. The AC heard and considered with care oral argument expanding upon those Grounds. It also permitted Romania to adduce 'new evidence' (which application was opposed by World Rugby⁵) in the form of a letter from Lord Tupou, President of Tonga Sports Association dated 28 May 2018.

D. GROUNDS OF APPEAL - SPAIN

24. Spain appealed on three Grounds:

- a. The decision not to set aside the Match result and order a replay;
- b. The finding of ineligibility in relation to Mathieu Belie and Bastien Fuster;
- c. The sanctions imposed on Spain.

25. The AC heard and considered with care oral argument expanding upon those Grounds. On the match replay issue, Spain maintained that the evidence established bad faith on the part of the match referee. They contended further that the DJC fell into error, *inter alia* by

- a. placing excessive emphasis on

⁵ There was no objection from any other party

- i. World Rugby's submission that there was no actual bias on the match referee's part; and
 - ii. Belgium's view regarding the dynamics of the match and their subjective assertion that they played well, but Spain did not.
- b. Making a false comparison with officiating in the Six Nations.
- c. Failing to give sufficient weight to World Rugby's contention to it that, *"there is no doubt that the integrity of the RWC Qualification Process will be damaged in the event that a replay is not ordered"*⁶.

26. Spain maintained the argument they advanced before the DJC that Mathieu Belie and Bastien Fuster were not captured by Regulation 8 having played for France's Next Senior National Representative Team ('NSNRT') and so were and remained eligible to be selected for Spain in 2017/2018. Accordingly, it submitted that the DJC erred in finding to the contrary. On this issue, Spain relied upon and took the AC through (in detail and with care) correspondence over a number of years, between or involving, *inter alia*, the International Rugby Board (as it then was), Wales Rugby Union ('WRU') and Fédération Française de Rugby ('FFR'). This was new evidence in the sense that it was not available to and so put before the DJC. In fact, World Rugby disclosed it when it was located following further researches, conducted after the hearing before the DJC ('the recently disclosed correspondence'). It did so without objection by World Rugby or any other party.

27. If their submission that neither Player was captured failed, then Spain submitted that the DJC erred in imposing a points deduction. In short, they contended that the DJC failed to have sufficient regard to the mitigating factors they identified including:

- a. Fuster played for Spain for 6 minutes in one France U20 match and was an unused substitute in the other.
- b. Neither player was told that he was captured.
- c. In relation to Belie,

⁶ §127 World Rugby Submissions, 18 April 2018

- i. the “*marked failure on the part of World Rugby to maintain proper records as to which teams were NSNRTs for the purposes of Regulation 8*”⁷ when he represented France U20s (14 March 2008).
 - ii. The ‘recently disclosed correspondence’ suggested that World Rugby was not in possession of the material it told the DJC was readily available to Unions and players at the material time.
- d. The age of both players at the material time.

E. WORLD RUGBY

28. In written and oral submissions, World Rugby opposed both appeals and invited the AC not to disturb the DJC’s Decision.

(1) Romania

29. In summary, World Rugby took issue with the factual and legal foundations for the appeal. It argued that the DJC had power pursuant to Regulation 18.6 to make a points deduction. Romania did not argue to the contrary before the DJC.

30. In summary, in relation to mitigating and aggravating factors, World Rugby says:

- a. The DJC is not obliged to take into account aggravating and mitigating factors and has a discretion as to how it determines whether to apply additional sanctions.
- b. In any event it is clear that the DJC took them into account in coming to its decision.
- c. The DJC is not obliged to set out each and every factor taken into account in its written Decision.

31. Further, the DJC’s conclusions should not be disturbed: it had not been demonstrated that there was a manifest error or incorrect application of principles.

⁷ §4.7 Spain Appeal Submissions, 28 May 2018

32. In any event, World Rugby disputed some of the factual assertions made by Romania.

By way of example,

- a. it disputed that
 - i. the due diligence carried out by Romania was not “*strict, thorough and rigorous*”.
 - ii. Romania had “*continuously informed World Rugby about the steps taken regarding selection of the player*”.
- b. Contended that a simple Google search would have shown - and still did - on 1 June that Sione Faka’osilea had played for Tonga Sevens and Tonga A. World Rugby and Romania provided us with screenshots of internet searches each carried out on 1 June to support their competing contentions that such particular searches did or did not reveal his having played for Tonga Sevens and Tonga A.

(2) Spain

33. On the question of replaying the match, World Rugby did not appeal, notwithstanding its position before the DJC. Its explanation for not appealing was that it recognised the decision not to order the replay was one the DJC was reasonably entitled to reach.

34. On eligibility, World Rugby submitted that Mathieu Belie and Bastien Fuster were captured by Regulation 8 having played for France’s NSNRT upon the basis:

- a. France’s nomination of the NSNRTs for which Belie and Fuster played was not defective or invalid; or
- b. Even if the nomination of France’s NSNRT was defective this is irrelevant to the eligibility of Belie and Fuster since Spain did not rely on the issues now raised regarding France’s nominations when it selected Belie and Fuster in 2017 and 2018.

35. As to the submission that in fixing the appropriate sanction the DJC failed to have sufficient regard to the mitigating factors, World Rugby contended that (1) in truth they were not mitigation and (2) in any event, the DJC was perfectly entitled to reach the conclusions it did.

F. BELGIUM RESPONSE

36. Belgium did not appeal. They had an obvious interest in the outcome of any appeal and accordingly filed submissions. They amplified those briefly during the hearing before us.

37. Belgium opposed any replaying of the match. On the Regulation 8 and points deduction issues, they submitted that *“the same treatment should be applied to all parties involved, whatever the decision of the Appeal Committee on points deduction will be”*.

G. RUSSIA RESPONSE

38. As a consequence of the DJC’s Decision, Russia qualified for the RWC 2019, joining Ireland, Scotland and Japan in Pool A. Obviously they had an interest in the outcome of the appeal and so filed written submissions. In addition, Russia made brief oral submissions, inviting the AC to *“leave the decision of the Dispute Committee (and Judicial Committee) of May 10, 2018 without change, and the Appeals of the Romanian Rugby Union and the Federación Española De Rugby without satisfaction”*.

H. DETERMINATION

(1) Regulation 8

39. The starting point is Guideline 1 to Regulation 8. It explains the rationale or philosophy of the Regulation in these terms:

“The rationale/philosophy of Regulation 8 is to ensure that Players selected to represent either the senior and next senior fifteen-a-side National Representative Teams of a Union or a Union’s senior National Representative Sevens Team have a genuine, close, credible and established national link with the country of the Union for which they have been selected. Such a national link is essential to maintain the unique characteristics and culture of elite international sporting competition between Unions. The integrity of International Matches between Unions depends upon strict adherence to the eligibility criteria set out in the Regulations.”

40. It is a cornerstone Regulation. As it makes clear, the integrity of International Matches between Unions depends upon strict adherence to that criteria.

41. Next by Regulation 8.5, it creates a 'strict liability offence'. Therefore, it is not necessary for World Rugby to establish fault on the Union's or Player's part. Inadvertence and/or misunderstanding and/or ignorance of the regulatory and/or material facts does not afford Union or player a defence.

(2) Appeal Threshold

42. This appeal was not held *de novo*. Rather, it was an appeal essentially by way of review, subject to consideration of new material which was not available for the DJC. In those circumstances, the test on appeal is emphatically not whether the AC would have reached a different decision than the first instance decision-making tribunal, rather, in order to succeed the Appellant must establish that

- a. the Decision was in error (either as to central factual findings or in law);
- b. in the interests of justice, the Decision should be overturned; and/or
- c. the sanction imposed was manifestly excessive or wrong in principle;

43. When considering evidential assessments, factual findings and the exercise of a judicial discretion in the context of an appeal by way of review, an Appeal Committee must be accorded what has long been described accurately as a "*significant margin of appreciation*". Accordingly, such evidential assessments and factual findings should only be disturbed if they are clearly wrong or wrong principles have been applied. That threshold is high and deliberately so.

44. When assessing whether a sanction is manifestly excessive or wrong in principle the same margin of appreciation applies. Further, manifestly excessive means what it says: it is not simply too much or too long but manifestly so.

45. Those are the principles we applied in considering the appeals except where new evidence was relied upon. In the case of new evidence, we necessarily considered the merits afresh and as if at first instance.

(3) Romania Appeal

46. It is necessary to consider whether (1) the points deduction was wrong in principle and/or (2) the sanctions imposed in consequence were manifestly excessive.

(a) Points Deduction

47. Regulation 8.5.1 mandates minimum fixed fines for each breach. Regulation 18.6.1(b), empowers the DJC to impose an additional penalty, including a points deduction, as and when appropriate.

48. It is to be noted that neither Regulation 8 nor Regulation 18.6.1 mandate the factors to be considered when imposing a sanction. Indeed, Regulation 186.1 provides that “*Judicial Officers and Judicial Committees shall be entitled to impose such penalties as they think fit*” (emphasis added). It appears to be an absolute discretion. It is not entirely absolute: any sanction must be proportionate. It must be proportionate by reference to the culpability. When assessing culpability and considering sanction for a breach of Regulation 8, it would be appropriate to have regard to:

- a. The factual circumstances of the individual breaches;
- b. The aggravating and mitigating factors arising out of the facts of those breaches; but also, in the context of a league or tournament, to consider
- c. Parity and consistency of approach and sanction as between the ‘offending’ Unions.

49. When evaluating the DJC’s decision to impose a points deduction (in respect of Romania, Spain and Belgium), it is imperative to appreciate the context in which it was exercising its sanctioning power. The DJC was dealing with three Unions, each of which had fielded ineligible players (as it found or was admitted) in a tournament situation,

namely the RWCQ. It was not, for example, dealing with one country having fielded an ineligible player in a single match or friendly or in a competition long since concluded.

50. In World Rugby's submissions to the DJC, it proposed that a deduction of points was a fair approach to sanctioning the breaches by the three 'offending' Unions. Further, the importance of compliance with Regulation 8, particularly in the context of an RWC - World Rugby's pinnacle event - justified the application of this discretionary sanction. The DJC agreed.

51. Both we and the DJC were referred to a number of previous Regulation 8 cases, including one decided by the Chair of this AC Chair. Strictly speaking there is no doctrine of *stare decisis* in rugby. Such cases are illustrative, not least for testing by reference thereto whether the DJC approach was either wrong in principle or the sanction imposed in consequence manifestly excessive.

52. In our judgment, analysis of them reveals that the approach adopted by the DJC was entirely consistent with sanctioning of breaches of Regulation 8 or fielding ineligible players in the context of a league or qualifying tournament:

- a. *In the matter of a Complaint by the Spanish Rugby Union as to the Eligibility of Three Players, Johan Hendriks, Renier Volschenk and Werner Pieterse to Play for the Russian National Team against Spain in RWC Qualifying Matches Spain v Russia (2003)*: Russia were expelled from the qualification process having used 3 ineligible players over a two-legged qualifying match.
- b. *In the matter of World Rugby and Tahiti Rugby Union and Players (2018) (RWCQ)*: result of the match overturned when Tahiti used 2 ineligible players in the RWC qualifying match.
- c. *In the Matter of International Rugby Board and the South African Rugby Football Union (Chavhanga) (2004)*: points earned by the South Africa Sevens team in the two IRB Sevens Series tournaments in which the ineligible player participated were deducted from the Series points table. This was a total of 20 points from winning the Dubai tournament and 12 points from being a semi-finalist in the George tournament.

- d. *In the Matter of International Rugby Board and the Japan Rugby Football Union (Glenn Marsh) (2007)*: Japan were deducted 15 points which was calculated on the basis of the maximum 5 points available in each of the 3 matches in the Pacific Nations Cup in which the ineligible player represented the JRFU.
- e. *Decision of the ERC Disciplinary Committee in the Amlin Challenge Cup 2012, in respect of FC Grenoble Rugby*: Grenoble fielded an ineligible player and the result of the cup match was void, the points won by Grenoble were taken away from it and the match was awarded to their opponents (London Welsh) with a notional margin of victory of 28-0 (representing four converted tries and therefore a bonus point win which equates to 5 points).
- f. *Decision of the EPCR Disciplinary Committee in the European Rugby Champions Cup 2015/2016, in respect of Scarlets*: Scarlets had an ineligible player in their match day (European Rugby Champions Cup) squad who was subsequently withdrawn from the bench at half time when Scarlets became aware of the error. Scarlets lost the match to Racing 92 by a score of 64 points to 14 and the match result therefore stood (being a bonus point win to Racing 92). The Committee stated that they would have not hesitated in declaring the result of the match void and imposing a 28-0 loss on Scarlets had the match result been different (regardless of the fact that the player had not even played).

53. It is to be noted that other cases where there has been no points deduction do not set a precedent for that to be the appropriate sanction in every case. Where there has been no points deduction it is invariably because the breach was discovered a long time after the relevant match and not within the context of a qualifying process. Accordingly, a points deduction would be meaningless or impracticable.

54. In light thereof, we can find no error in principle in the DJC's conclusion that a points deduction was the appropriate sanction for Romania's breaches of Regulation 8. We say that for the following reasons:

- a. Regulation 8 is a cornerstone Regulation. The integrity of international matches between Unions depends upon strict adherence to that criteria.

- b. The breaches occurred in the context of qualifying for the Game's premier tournament, namely the RWC 2019. It is vital to protect the integrity of that competition.
- c. Adopting this approach does not result in unfairness as between Unions. On the contrary, in our opinion it is both a consistent and fair approach to sanctioning. It is fair because the impact an ineligible player has on a match cannot be measured in any objective manner. It is, as the DJC observed, invidious to attempt any meaningful assessment of a player's impact⁸. It is fair because it is consistent as between offending Unions. That is especially so where the competition or tournament is live and the points relevant.

55. In those circumstances, imposing a points deduction is - we have concluded - a fair basis upon which to approach 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 judgement, informed as Disciplinary Committees will be by the principles we have set out, which will fall to be applied to the particular facts of a given case.

56. The crucial fact in this case is that the RWCQ points table was live, relevant and impacted on competing Unions. In our judgment, where the ineligible players are selected and have the potential to or actually did influence the points earned by their teams, they affect that Union's prospects of qualifying for the RWC 2019, a consistently applied points deduction is entirely reasonable and fair. Put another way, we certainly cannot say that the DJC's approach in this respect was wrong in principle.

(b) Manifestly Excessive

57. We have considered the individual circumstances of Romania's breaches. Complaint was made to us that the DJC failed properly or at all to consider the circumstances of the breaches and instead simply imposed a blanket 5-point deduction in respect of each time they fielded the ineligible player. What it was said the DJC did not do, but should have

⁸ §49 DJC Decision, 15 May 2018

done, was (1) to consider and then (2) reflect in sanction the individual culpability of Romania (and so also of Spain and Belgium).

58. As we have observed in paragraph 48 hereof, when sanctioning for breaches of Regulation 8, it is appropriate to have regard to the factual circumstances of the individual breach/es, which includes any aggravating and mitigating factors. However, in our judgement, the appropriate starting point in the context of a league or tournament, is the imposition of a points deduction. It underlines the utmost importance of complying with Regulation 8. A 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 particular case. It may be that there will be rare cases where the particular facts justify a suspension of any points deduction (in whole or part) or no deduction at all.

59. Turning back to this case, it is right to observe that the DJC Decision does not contain an analysis of the particular circumstances of the facts of Romania's breaches at the point where it addressed the points deduction. It did analyse them – carefully – but in context of considering “*exceptional circumstances*”. The DJC found that Romania “*made inquiries*” and took “*some steps*” to ensure they were able to select Sione Faka’osilea⁹

60. In light of that, we considered afresh the circumstances surrounding the selection of Sione Faka’osilea and the enquires made by Romania in that regard. We have considered the arguments advanced by Romania in that respect and the further material put before us during and after the appeal hearing. In particular we noted the following - which applied only to Romania – namely that the Union:

- a. Obtained a statement from the player (albeit it was incorrect).
- b. Obtained information – albeit inaccurate – from Tonga.
- c. Carried out some database checks.
- d. Admitted culpability.

⁹ §47 DJC decision, 15 May 2018

61. With respect, the letter from Lord Tupou did not advance the matter. In light of a dispute which arose at the hearing as to what could (or could not) be discovered on the Internet, we invited Romania and World Rugby to put before us the product of their Internet researches on 1 June 2018. Romania submitted a signed Declaration from Horatiu Bargaunas (the Manager of the Romanian national team between 2012 and 2017) which stated that he "*checked all databases available at that moment*" and listed 3 websites.
62. Further, after the hearing Romania sent us two screenshots each of which showed a single Google search results page for "Sione Fakaosilea [sic] Tonga", In addition Romania sent a screenshot from the World Rugby HBSC World 7s Series, also for the player which showed he had played no matches in that competition.
63. World Rugby responded thus. It was not disputed that Sione Faka'osilea was captured by Tonga whilst playing at the Gold Coast Sevens between 12-13th October 2013. That event was run by World Rugby and information on the event, the teams, matches was made available at (and since) that time on the IRB (or World Rugby) website. As World Rugby observed, the information would have also been available to Romania if they had made an inquiry to World Rugby to specifically check and/or ask for an eligibility ruling on the player, which it did not do.
64. Further, there is further information available on the internet (open source) regarding the player's participation in other non-capturing matches (for Tonga U19). The links set out below were all available on the World Rugby website at the beginning of January 2017:
- a. <https://www.worldrugby.org/tournament/919/teams/2496>
 - b. <https://www.worldrugby.org/match/9615>
 - c. <https://www.worldrugby.org/match/9623>
 - d. <https://www.worldrugby.org/match/9415>
 - e. <https://www.worldrugby.org/match/9405>
 - f. <https://www.worldrugby.org/match/9396>

65. Notwithstanding the skill and passion with which the arguments were advanced, the majority concluded that the circumstances did not merit a derogation from the appropriate starting point for sanction (in the context of a tournament or league), namely a 5 points deduction for each breach. One of our number would, in light of the factors identified in paragraph 60 above, have suspended the immediate deduction of 50% of the total points. That would have put Romania above Germany in the adjusted RWCQ table, but not result in automatic qualification for RWC 2019.

66. In light of our conclusion in respect of the DJC's finding on "*exceptional circumstances*" we can see no error of reasoning so far as the imposition of a financial penalty is concerned. We agree that the DJC was reasonably entitled - on the evidence - to conclude Romania had failed to take "all necessary steps" including its failure to make a direct request to World Rugby for approval by Council relating to the Player. Once it did so there was no permissible basis to reduce the mandatory financial sanction. That the DJC suspended that financial penalty was to the Union's obvious benefit.

67. It follows that Romania's appeal must fail.

(4) Spain Appeal

(a) Ineligibility

68. The first question is whether the DJC erred in its finding that Mathieu Belie and Bastien Fuster were 'captured' or ineligible.

69. World Rugby submitted that the players were not eligible to play for Spain because they had been captured by France by playing for France U20 against Wales U20 in March 2008 (Mathieu Belie) and for France U20 against Wales U20 in March 2012 (Bastien Fuster). World Rugby submitted - and the DJC accepted - that France U20 was France's NSNRT for the purposes of Regulation 8 at the material times in 2008 and 2012.

70. In summary, Spain submitted that the players were eligible to play for Spain. They argued that they qualified by virtue of family relationships and had not been ‘captured’ by France. Spain submitted that they had not been ‘captured’ because France had failed to follow the correct procedure for nominating their NSNRT and had altered the nominations when they had no power to do so. Spain submitted that a nomination of a NSNRT was fixed and lasted for 4 years pursuant to Guideline 6 of Regulation 8. Therefore, France had no power to change the identity of its NSNRT as in fact it did.

71. The foundation of Spain’s argument was what it called a “literal interpretation” of Guideline 6, which at the relevant times (2008 and 2012) provided:

“There should be no uncertainty over which team constitutes a Union’s next fifteen-a-side senior National Representative Team since, as from January 1 2000, Unions are required to notify the IRB of the name of its nominated next senior fifteen-a-side National Representative Team. The team nominated remains the Union’s next fifteen-a-side senior National Representative team for a period of 4 years. The identity of a Union’s next senior fifteen-a-side National Representative Team can be verified with the Union concerned and/or the IRB” (emphasis added).

72. Spain adduced evidence which appeared to show that France nominated its U20 team in 2008 and its U20 team in 2012. However, Spain also noted that France nominated its U21 team in 2007 and therefore was not entitled to nominate its U20 team a year later (in 2008). The 2007 U21 team nomination should have lasted to 2011 (under the 4-year period). Similarly, France had nominated France A in 2010 and that nomination should have lasted for 4 years. Therefore, in the years 2008 (Belie) and 2012 (Fuster) the nominations of France U20 were invalid and neither thereby ‘captured’.

73. The DJC conclude that the literal interpretation contended for by Spain was wrong.

We agree:

- a. Explanatory Guideline 6 does not state or expressly forbid or remove the right to make an alternative nomination in the 4-year period.
- b. What it does state is that the nomination will “*remain... for a period of 4 years*”. We agree with the DJC that it is implicit in Explanatory Guideline 6 that the

nomination would last or “*remain*” for 4 years, unless another nomination was made by the Union during that period. It does so to address the risk identified in the fourth word of the first sentence of the Guidelines: “*uncertainty*”.

- c. The alternative – literal interpretation – would lead to absurd consequences. It would make it impossible to change a nomination within the 4-year period. That would include, for example, where the NSNRT was disbanded, as occurred with the U21 sides.

74. Once that is understood, one then needs to consider the position of Belie and Fuster. Both played for France U20, Belie in 2008 and Fuster in 2012. In both 2008 and 2012 France U20 was nominated as France’s NSNRT. They were therefore and thereby ‘captured’. We reach that conclusion having had regard to all of the material placed before us, including the recently disclosed correspondence. None of the recently disclosed correspondence undermines the DJC interpretation of Explanatory Guideline 6, with which we agree. Further, the alleged error in the DJC’s reasoning¹⁰ does nothing to undermine the validity of the interpretation and the conclusion which flows from it. The subsequent clarification of Explanatory Guideline 6 brought clarity, but that clarity does not undermine our interpretation of its meaning and effect in its original form.

75. Accordingly, this Ground of Appeal fails.

(b) Sanction

76. The next issue is consideration of the sanctions imposed on Spain. We need not repeat here the approach to sanctioning we considered appropriate in cases involving a breach of Regulation 8. The reasoning set out above in relation to Romania’s appeal, applies equally to our consideration of the arguments advanced in this context on behalf of Spain.

¹⁰ §38 DJC Decision, 15 May 2018

77. We considered afresh the factors Spain argued mitigated the breaches of Regulation 8. We did so in the context of what we considered to be the correct approach in a qualifying tournament or league. We repeat: that it is not to be taken as us saying that in such a situation, a 'simple default' to a points deduction is appropriate. There should be an assessment of the Union's (and player's) culpability. But looking again at that issue, we can see no valid reasons based on the material before us, to conclude that the DJC erred in deducting points as it did. Dealing briefly with the points made by Spain –

- a. Fuster
 - i. His actual match participation was very limited - that is not the point, with respect, for reasons set out above (paragraphs 53-54).
 - ii. Was not warned he was captured – the obligation to warn came after he played for France and in any event, it is the sole responsibility of each player to ensure that he is aware of the status of every match in which he plays and the implications thereof.
- b. Failure to maintain records – we know not what enquiries they actually made rather than what they may or may not have discovered had they done so.
- c. Inaccurate charts – the claimed inaccuracy relates to Wales not France.

78. Accordingly, this Ground of Appeal fails.

(c) Replay

79. Necessarily in our judgment this is the last issue to address. The effect of our findings in relation to ineligibility and sanctions is that replaying the match would have no material effect on qualification for the RWC 2019. The points deduction is such that Spain could not, even with a 5-point win, bridge the difference to Russia. It is hereof largely of academic consequence. However, it is a Ground of Appeal which requires consideration and in any event the principles involved are important.

80. We agree with the DJC's conclusion that it had power, pursuant to Section 13.3 of the TOP to order the match to be replayed.

81. The context for consideration for this issue is Regulation 17.17.2 which provides:

“The integrity of Law 6.5(a) of the Laws of the Game and the referee’s position as sole judge of fact and law during the Match is unassailable. With the sole exception of Regulation 17.19.7 the referee’s decisions on the field of play and their sporting consequences shall not be altered or overturned by a ruling of a Disciplinary Committee or Judicial Officer. The purpose of a subsequent review of an incident that occurred during a Match, by a Citing Commissioner and/or Disciplinary Committee or Judicial Officer, is to determine whether there should be any disciplinary sanctions applied for an act of Foul Play as provided for in Law 9.”

82. It is in that context that we express these core principles, as we understand them:

- a. The referee’s position as sole judge of fact and law during the match is unassailable and is a core principle of rugby
- b. A Disciplinary Committee has very limited jurisdiction to overturn the decisions of referees made on the pitch.
- c. A Disciplinary Committee may exercise that jurisdiction if corruption or bad faith on the part of a referee or match official is established.
- d. The appointment of neutral match officials in international matches is essential, as is appearance of neutrality.
- e. Accordingly, this AC is not prepared to say there may never be circumstances where the ‘appearance of bias’ is sufficient basis for a Disciplinary Committee to intervene and to order a match to be replayed. To the extent the DJC expressed a contrary view we, with respect, disagree.
- f. However, we do recognise that ‘appearance of bias’ is a difficult concept to import on the sporting field of play. The circumstances where it is sufficient to merit interference such as to order a replay will necessarily be rare indeed, not least because of the degree of respect to which decisions of referees are entitled (absent corruption or bad faith).

83. It is important to emphasise that we are not saying that a referee’s objectively assessed poor performance *per se*, will ever be a sufficient basis for ordering a replay. It will not. To permit match results to be varied or annulled based on the poor performance of a

referee or match official would be impossible sensibly to administer and a recipe for sporting uncertainty, with potentially disastrous consequences for the Game.

84. Turning from the general to the specific, we considered the submissions made by Spain in support of its contention that the match should be replayed. In doing so, we agreed with the findings of the DJC that the way in which Rugby Europe dealt with Spain's request for a change of match officials was inadequate. For transparently obvious reasons once the mathematics of the final matches of the competition became clear, Rugby Europe should have changed the match officials. To do so would have removed all risk of controversy of the kind which developed. It would also not have exposed the referee to the scrutiny which followed. Further, and with respect, insofar as the referee was asked to express a view on the issue, he should not have been. Rugby Europe should have made that decision and removed him from the fixture.

85. Rugby Europe's approach is to be contrasted with World Rugby's decision in the 2018 Six Nations Tournament to replace the assistant referee where he had spent time with a side in respect of whom he was soon to officiate. World Rugby took a view to stand down the official in question "*to avoid any additional unfair and unnecessary conjecture*".

86. We are bound to observe that we were initially exercised by the submission made by World Rugby before the DJC, namely that it should order a replay to preserve the integrity of the RWCQ tournament. It did so not because of or based upon his performance (objectively assessed) or his "*ability to officiate in a neutral way*" but rather because "*It is the perception which creates difficulty. In the same way that it is likely any professional or elite referee could no doubt officiate in a match involving a team from his/her own Union, the importance of the perception of neutrality means that this would not occur*"¹¹. A submission of that kind from an international sporting federation merits considerable respect.

¹¹ §124, World Rugby's Submissions, 18 April 2018

87. However, like the DJC, we are not bound by that (or any) submission made by World Rugby. We, like the DJC, are wholly independent of World Rugby. We are free to and must reach – and have done – our own judgement, based on our own assessment of the evidence.

88. Standing back and looking afresh at all the evidence, and contrary to Spain’s submissions, the evidence did not establish “*actual bias or bad faith*” on the referee’s part. We agree that absent an admission or other direct evidence, such a conclusion could, where the evidence justified it, be inferred. However, in that respect we were not persuaded that the DJC erred in its conclusion that the available evidence did not support such a finding

89. Further, we concluded that the other criticisms of the DJC’s reasoning or approach on this topic were not flawed. Accordingly, we were driven to conclude that the DJC’s decision namely that “*there is a presumption of neutrality on the part of referees, and none of the individual circumstances of this case causes the Panel to rebut that presumption*” in this case was not unreasonable or not one it was entitled to come to or manifestly wrong. However, one member of our number would, on the basis of the perception of neutrality of officiating and the integrity of the Game and RWCQ, have ordered a replay but for the fact both Romania and Spain failed in that appeal relating to eligibility.

90. Accordingly, this Ground of Appeal must, and does fail.

I. CONCLUSION

91. It follows for all the reasons set out, we dismiss the appeals of both Romania and Spain.

92. Whilst it is not for an independent AC to advise World Rugby, we agree with and endorse this paragraph of the DJC’s Decision:

“These disputes have shown that Unions acting in good faith can make errors about which players have a sufficient connection to the Union and which players have been captured by another Union. Consideration should be given to the way in which the importance of Regulation 8 might be

emphasised to Unions, particularly to those Unions not represented on Council which might not have the administrative resources of other Unions. World Rugby might want to consider whether to maintain a database showing players who have been captured by Unions. Any steps which avoid the risk of qualification being determined off the pitch and not on it are desirable.”

93. We repeat our gratitude to the parties for their assistance and pay testament to the skill with which their arguments were deployed.

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

Christopher Quinlan QC

Mike Hamlin

Phaidra Knight

6 June 2018

Signed on behalf of the Appeal Committee