

Cricket pair "not out" in doping row

CHARLISH, P. <<http://orcid.org/0000-0002-3733-7374>>

Available from Sheffield Hallam University Research Archive (SHURA) at:

<https://shura.shu.ac.uk/708/>

This document is the

Citation:

CHARLISH, P. (2007). Cricket pair "not out" in doping row. *International sports law review*, 7 (4), 57-66. [Article]

Copyright and re-use policy

See <http://shura.shu.ac.uk/information.html>

Cricket pair “not out” in doping row

Deleted: ¶
© Peter Charlish

Formatted: Font: Not Bold, No underline

Introduction

Although cricket is a high profile sport with substantial rewards for success, it has been corruption via match-fixing¹ and apparent attempts to gain an unfair advantage from ball tampering,² rather than the spectre of performance enhancing drugs that have impacted the sport in recent years. There certainly has not been the same sense of crisis in cricket that has been seen for example in cycling and track and field athletics over the issue of drugs in sport. Of the few participants who have tested positive for banned substances, they have been for recreational drugs,³ rather than for performance enhancing substances. This insulation from the realities faced by many modern sports was however stripped away on the 12th October 2006 when it was revealed that urine samples taken from two Pakistani international cricketers, had both tested positive for the banned performance-enhancing substance 19-Norandrosterone, (a metabolite of the anabolic steroid Nandrolone). Five days later, on the 17th October 2006, it was confirmed that the identities of the cricketers were those of the 31 year old veteran Shoaib Akhtar and 23 year old Muhammad Asif, both fast bowlers.

¹ Hansie Cronje, (the late former captain of South Africa), Mohammad Azharuddin, (the former captain of India) and Shane Warne, (the world record holder for test match wickets taken), are just some of the cricketers who at one stage or other in their careers have been implicated in match-fixing allegations

² Such as the recent scandal in the test series between England and Pakistan involving Australian umpire Darrell Hair. Former England players Allan Lamb and Ian Botham and Pakistan captain Imran Khan went to court over the issue and former England captain Mike Atherton was disciplined for alleged ball tampering

³ Shane Warne received a year ban for testing positive for a weight loss drug, Ed Giddins a county cricket player received a 2 yr ban whilst Graham Wagg, another county cricketer received a ban of 15 months, both for testing positive for cocaine.

The samples of the two players, along with those of seventeen of their teammates preparing to play in an International Cricket Council,⁴ (ICC) sponsored event were collected between the 25th September 2006 and the 2nd October 2006. Once collected, the samples were then taken to the Doping Control Centre, Universiti Sains, in the city of Penang in Malaysia, as there is no World Anti-Doping Agency, (WADA) accredited laboratory in Pakistan.⁵ Both Akhtar and Asif produced samples which contained 19-Norandrosterone readings greater than the permitted threshold of 2ng/ml. Akhtar's sample reached the level of 14.06 ng/ml, whilst Asif's was slightly lower at 13.07 ng/ml.⁶

The impact of nandrolone on performance is quite significant and perhaps just as importantly, it has few of the side effects associated with other anabolic steroids. May comments:

“The drug known as nandrolone ...is an anabolic steroid (a muscle-building chemical) which occurs naturally in the human body, but only in tiny quantities. It is very similar in structure to the male hormone testosterone, and has many of the same effects in terms of increasing muscle mass, without some of the more unwanted side-effects such as increased body hair or aggressive behaviour ... However, what is detected in the drug tests is the metabolism product of this molecule, called 19-norandrosterone, which is excreted from the body in urine, making it easy to obtain samples.”⁷

In terms of the specific performance effects of anabolic steroids such as nandrolone, the British Broadcasting Corporation, (BBC) comment:

⁴ The governing body of world cricket

⁵ <http://www.pcboard.com.pk/Pakistan/Articles/5/5298.html> at para 3

⁶ <http://www.pcboard.com.pk/Pakistan/Articles/5/5298.html> at para 4

⁷ <http://www.chm.bris.ac.uk/motm/nandrolone/nandh.htm> accessed 5th March 2007

“Anabolic steroids can improve the body's capacity to train and compete at the highest level. They reduce the fatigue associated with training, and the time required to recover after physical exertion. They also promote the development of muscle tissue in the body, with an associated increase in strength and power. This is achieved by stimulating the production of protein in the body”.⁸

On receipt of notification of the positive tests on October 15th, the PCB suspended Akhtar and Asif with immediate effect pending findings by the Anti Doping Commission, (ADC) set up to rule on the case.

The ADC are empowered by clause 5.7 of the PCB anti-doping regulations to determine the following:

- “a) whether the person has committed a doping offence, and, if so;
- b) what sanction will apply, and
- c) for how long the sanction will apply”.⁹

They convened very early in November of 2006. Both Akhtar and Asif were subsequently found guilty of committing a doping violation under clause 4.1 of the PCB Anti-Doping Regulations by the ADC and received bans of two years and one year respectively as a result of their positive tests.

⁸<http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/health/3381221.stm>
accessed 5th March 2007

⁹ Pakistan Cricket Board Anti-Doping Regulations, clause 5.7

The Anti-Doping Commission Hearing

With both players testing positive for nandrolone and neither claiming a therapeutic exemption, their only defence lay in the area of *exceptional circumstances*, and it is here that difficulties arise. There are very clear and pertinent differences between the defence as defined under the PCB regulations and as dealt with under the ICC anti-doping code. Under clause 4.1 of the PCB regulations, a player who tests positive for a prohibited substance in his body tissue or fluids will be exonerated if there are *exceptional circumstances*. The key question therefore remains exactly how are such *circumstances* defined? The pertinent part of clause 4.5 of the code states:

“4.5 Exceptional circumstances exist if:
b) the player held an honest and reasonable belief in a state of facts which, if they existed, would mean that the player did not commit a doping offence....
4.6 The onus of proof is on the player who claims that:
b) there are exceptional circumstances”.¹⁰

In contrast, the ICC Anti-Doping Code describes an anti-doping violation under a different set of criteria. Under clause 3.1.1, where a cricketer has tested positive for a prohibited substance, it states:

“It is each Cricket Player’s personal duty to ensure that no Prohibited Substance enters his body. Cricket Player’s are responsible for any prohibited substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Cricket Player’s part be demonstrated in order to establish an anti-doping violation under Clause 3.1”.¹¹

¹⁰ Pakistan Cricket Board, *Anti Doping Regulations*, Clause 4.5-4.6

¹¹ International Cricket Council *Anti-Doping Code*, Background, paras C and D

Once again, if the participant can establish *exceptional circumstances* then they shall be found to have committed no doping violation.¹² The relevant clause states:

“If the cricketer establishes ... that he bears No Fault or Negligence for the violation, he shall be found to have committed no violation”.¹³

If not completely exonerated, then the code also allows for a reduction in the tariff served by a player. Clause 9.5.2 continues:

“If a Cricketer establishes ... he bears No Significant Fault or Negligence, then the period of ineligibility may be reduced”.

In both events, the onus is further on the cricketer to establish how the prohibited substance entered his body in order to have the period of ineligibility reduced or the violation eliminated.

The defence run by Shoaib Akhtar began with the assertion that he had not knowingly taken any banned or prohibited substances¹⁴ and further that his high protein intake over the years and evidenced by his consumption of the substances detailed later had caused endogenous production of 19-Norandrosterone,¹⁵ which led to his positive test. Crucially in addressing this question, the ADC drew on the test for *exceptional circumstances* from the ICC anti-doping code rather than the PCB regulations.¹⁶ Quite clearly the ICC definition of *exceptional circumstances* is a more exacting hurdle to overcome

¹² This provision is a significant departure from the WADA code where such *exceptional circumstances* may reduce the period of ineligibility but they will not eliminate the violation itself

¹³ International Cricket Council *Anti-Doping Code*, clause 9.5.1

¹⁴ PCB Anti-Doping Commission report at para 16

¹⁵ PCB Anti-Doping Commission report at para 27. The ADC gave this particular argument short shrift leaving *exceptional circumstances* as the only viable defence, (see PCB Anti Doping Commission Report at paras 27-28)

¹⁶ PCB Anti-Doping Commission report at para 26

than that of the PCB. Further, the ICC regulations deal specifically with the responsibilities which are placed upon cricketers. Article 2 explains that it is the personal responsibility of every cricketer to be knowledgeable with the code and to comply with its provisions. At all times they are responsible for what they ingest and also for insuring that they at no time violate the code due to medical reasons or any other issue. The code states:

"2.1 Cricketers' Obligations

2.1.1 It is the personal responsibility of Cricketers to be knowledgeable of and comply with the terms of this Anti-Doping Code.

2.1.2 In the context of anti-doping, Cricket Players take responsibility for:

- (a) what they ingest and use;
- (b) informing their medical personnel of the Cricket Players' obligations not to use Prohibited Substances and Prohibited Methods; and
- (c) making sure that any medical treatment received by them does not violate this Anti-Doping Code".¹⁷

Shoaib Akhtar in his defence appeared to pay no heed to his obligations as a professional cricketer as defined in Article 2 of the ICC anti-doping code. He suggested that he did not know that nandrolone was a banned steroid¹⁸ and nor had he been given any information pertaining to WADA's updated 2006 list of banned substances.¹⁹

Akhtar's arguments cited as to why he may have tested positive and therefore why the defence of *exceptional circumstances* should be applied to him revolved around his poor educational background, coupled with his regular and quite substantial consumption of various different kinds of nutrients and

¹⁷ International Cricket Council *Anti-Doping Code* article 2

¹⁸ PCB Anti-Doping Commission report at para 29

¹⁹ PCB Anti-Doping Commission report at para 29

food supplements.²⁰ These apparently legal supplements were designed to aid his performance and were taken as part of his normal dietary regime.

It was therefore submitted on behalf of Shoaib Akhtar that he had demonstrated no fault or negligence and therefore should be exonerated from the charge relating to the commission of a doping violation:

“When asked finally whether he was himself not responsible for whatever supplements, etc he had taken, he said that they were not banned substances and I could not know their effects. During the final arguments Dr. Nouman Niaz admitted that Shoaib Akhtar had been taking the supplements injudiciously and ill-advisedly because he had absolutely no educational background about their possible adverse effects and also because no PCB doctor was available to advise about these substances”.²¹

He stated further that at no stage had he received any warning about the anti-doping code or the possible dangers associated with the ingestion of food supplements.²² Perhaps his most startling admission over this issue came when he was pressed about his practice of taking such a substantial number

²⁰ In evidence given, Akhtar admitted to taking high protein diet and protein supplements since 1999, also isotonic solutions and herbal medicines since 2002. In addition, he normally takes heavy protein diets (two major portions-steaks or steamed meat-mutton/beef) twice daily. Has been taking BLAZE XTREME (a fat burning supplement containing the All-Star MVPs: Delta 5-E, Tyramine, Forskolin, EGCG (a special constituent of green Tea), Bacosides A & B, TTA and Caffeine). He has also been taking NITRON5 containing ornithine and arginine. He has a history of taking ERGOLEAN AMP. Pre-Workout Neuro-stimulant/ Thermogenic Monster. He has also once prescribed SIZE ON by a local trainer which contains Creatine Gluconate. Additionally he has periodically taken Promax 50, which is a liquid protein diet, Viper-an isotonic drink to boost the immunity, T-Bomb II which is like Testosterone in that it raises the testosterone levels to the maximum. It is technically a male hormone optimizing formula. It is supposedly a pro-hormone free testosterone formula available to optimize testosterone levels in the blood, also increasing the free testosterone, improving the testosterone to estrongen ratio and maximizing the anabolic effects of pure testosterone. He also admits taking Herbal medicines (masculinity/strength boosters). He has also been taking mixed pill vitamins. - PCB Anti-Doping Commission at para 17

²¹ PCB Anti Doping Commission at paras 30-31

²² PCB Anti-Doping Commission report at para 29

of supplements and the guidance he received about them. The ADC commented:

"When asked whether he had taken the advice of any medical practitioner with regard to the supplements, vitamins and herbal medicines he replied in the negative and said that he had been taking them on the basis of "general wisdom" based on his contacts with friends and others and that he had never consulted even Dr. Nouman Niaz who had accompanied him to the hearing. He said that he had taken all the above because they were good for him".²³

This displays an alarming lack of care in the type of substances which he may be ingesting. Under such circumstances it was impossible for him to demonstrate that his positive test was due to *exceptional circumstances* as defined by the ICC code. It may be suggested that Akhtar had been at best grossly negligent in his attitude towards vitamins, supplements and other substances which might theoretically lead to or contribute to a positive test. The suggestion was also hinted that he was being rather disingenuous in suggesting he had no knowledge of the status of nandrolone, nor of the important details from the appropriate anti-doping code. He had signed a central contract with the Pakistan Cricket Board in 2004 which dealt with precisely these issues, and therefore the suspicion may be justified that this was not an entirely honest response. The ADC commented:

"When confronted with the Central Contract signed by all the players (which contains specific clauses with regard to doping, etc) he said that he had not signed current year's contract but admitted that he had signed the contract for the year 2004-05. He claimed however that he had not read the said contract. When asked finally whether he was himself not responsible for whatever supplements, etc he had taken, he said that they were not

²³ PCB Anti-Doping Commission report at para 29

banned substances and I could not know their effects".²⁴

Based on the available information, it was incomprehensible that Akhtar could support a defence of *exceptional circumstances*,²⁵ and it was therefore without surprise that he was found guilty of committing an anti-doping violation and received the appropriate two year ban. What was significant however, were the deliberations behind the guilty verdict delivered. The ADC concluded:

"In the totality of the circumstances we are not convinced that there was no fault or negligence on the part of Shoaib Akhtar or even no significant fault or negligence. We hold that he has committed a doping offence as defined in clause 4.1 of the PCB Anti Doping Regulations There are no mitigating circumstances which would justify the imposition of a sanction less than the minimum prescribed namely a ban of two years. Consequently in accordance with clause 7.1 read with clause 8.1 of the PCB Anti Doping Regulations we impose the following bans on Shoaib Akhtar for a period of two years commencing 15th October 2006".²⁶

What is evident is that it is here that the ADC generates significant difficulties for itself. On the one hand they very clearly pay heed to the ICC anti doping regulations as their guide on the question of the guilt of Akhtar. However, in finding against him, it is via reference to the PCB regulations and further it is under authority from those same regulations that they impose his appropriate punishment.

The analysis of the position of Muhammad Asif again betrays inconsistencies on the part of the Anti-Doping Commission. Whilst generally adopting a more

²⁴ PCB Anti-Doping Commission report at para 30

²⁵ As defined by the ICC in clause 9.5

²⁶ PCB Anti-Doping Commission report at para 36

sympathetic attitude towards the player, the Commission once again demonstrate some confusion over which anti-doping guidelines are applicable to the situation. They comment:

“Notwithstanding the above, quite apart from the specific provisions of the WADA Anti Doping Code and the ICC Anti Doping Regulations, it is a matter of common sense that it is each player's own duty to ensure that no prohibited substance enters his body. The WADA Code states that it is not necessary to demonstrate intent, fault or negligence or knowing use in order to establish a doping offence”.²⁷

Quite apart from the irrelevant reference to *common sense*, the Commission refers to both the WADA code and the ICC code without attempting to differentiate between the two. Asif's defence once again centres on the fact that he had not knowingly taken the prohibited substance.²⁸ His history within the international arena was very much more limited than Akhtar's. It was only in the spring of 2006 that he actually broke into the Pakistan test team,²⁹ and unlike Akhtar, he had neither been tested before nor had he been shown to have attended any lectures or briefing sessions on anti doping regulations. It was also unclear as to whether he had been given the up to date WADA list of prohibited substances.³⁰ Whilst perhaps deserving of some sympathy, especially when considering the direct ADC criticism of the PCB for its handling of doping control issues and specifically information players are exposed to,³¹ this is however all irrelevant in considering Asif's guilt according to the ICC code. His defence that he just could not explain how the banned substance got into his system is simply inadequate and in no way could be

²⁷ PCB Anti Doping Commission at para 38

²⁸ PCB Anti-Doping Commission report at para 15

²⁹ PCB Anti-Doping Commission report at para 37

³⁰ PCB Anti-Doping Commission report at para 37

³¹ PCB Anti-Doping Commission report at para 35

looked upon as *exceptional circumstances* as defined by the ICC code. However, despite this, the ADC were prepared to reduce his tariff from two years to just one, on the basis that his lack of explanation, and the circumstances surrounding it meant that he bore no *significant* fault or *negligence* for the finding and therefore by virtue of clause 9.5.2 of the ICC Anti Doping Code they were empowered to reduce his ban from two years to one.³² The reduction by the ADC of Asif's ban was explained thus:

“In the absence of any reasonable explanation for the adverse test result we are not convinced that Asif's case is one of no fault or negligence. However, keeping in view the totality of the circumstances we are of the view that it is one of no significant fault or negligence and that there are exceptional circumstances noted by us hereinabove that justify a more lenient view than that taken by us in Shoab Akhtar's case. Accordingly we have decided to impose a one year ban on Mohammad Asif”.³³

Whilst it seemed that Asif had been treated unduly leniently, at least compared to participants from other sports who have tested positive for the same or similar substances,³⁴ most interested parties assumed that the matter would end with these punishments. Akhtar had always been a rather controversial, albeit a charismatic player and as he was by this stage thirty one years old and had been plagued by injuries for much of his career,³⁵ it seemed reasonable to assume that he would slip quietly into retirement. Asif on the other hand was a youngster who had only recently broken into the International side and was thought to have a very bright future and whilst

³² PCB Anti-Doping Commission report at para 38

³³ <http://www.pcboard.com.pk/Pakistan/Articles/5/5298.html> at para 38

³⁴ For example, the following sports participants all tested positive for 19-norandrosterone in 2005/2006 and all received a two year ban from their sports: Michael Williams, powerlifter; Gareth Brain, rugby league player; Colin Goldhawk, amateur boxer; Nathan Thompson, amateur boxer.

³⁵ PCB Anti-Doping Commission at para 16

some may have thought his ban for just one year rather lenient, it meant that he would be expected to return to the International team without significant adverse effects on his career.

However, this was not the end of the matter and pursuant to their rights under clause 11 of the PCB Anti-Doping Regulations both Akhtar and Asif exercised their right to appeal to be heard by a separate Appeals Committee, constituted by the PCB.

The Appeal

To the surprise of many,³⁶ the Appeal hearing exonerated both Asif and Akhtar and in order to understand why this decision was taken, it is necessary to spend some time investigating the nature of both the ICC Anti-Doping Regulations and also those of the PCB, which surprisingly had some significant differences which were exploited by both players in their appeals.

The ICC are the governing body of world cricket and as such, the PCB are affiliated to the ICC and it might be assumed that where there is an issue as fundamental as anti-doping control, then their rules and regulations would be based upon the same document. This though crucially proved not to be the case. The Anti-Doping Commission however stressed very clearly that the affiliation of the PCB to the ICC necessarily created particular assumptions on their part.

“The ICC Anti Doping Regulations, which apply only to in-competition periods i.e. periods of the relevant ICC events may also pertinently be noticed here because PCB is a member of the ICC and the Central Contracts signed by all Pakistan cricketers state inter-alia that they shall be bound by the Anti-Doping Policies of both the ICC and the PCB. ... In the matter of no fault or negligence, no significant fault or negligence, the burden of proof and the standard of proof, the provisions of the WADA Anti Doping Code are very similar to those of the ICC Anti Doping Regulations. Pakistan is a signatory to the Copenhagen Declaration establishing WADA and bound by the provisions of the WADA Anti-Doping Code”.³⁷

³⁶ For example Malcolm Speed, head of the ICC, (<http://www.sportal.com.au/cricket.asp?i=news&id=95207> - last accessed 9th March 2007; and the WADA Chairman Dick Pound both expressed concern about the sentences, (http://news.bbc.co.uk/sport1/hi/cricket/other_international/pakistan/6183997.stm - last accessed 9th March 2007)

³⁷ PCB Anti-Doping Commission at para 11-12

The ICC Anti-Doping Code makes it clear that whenever cricket matches are played at ICC events, then the regulation of illegal substances is governed by their own Code.³⁸ It is this fundamental point however which spawned the inconsistency which led to the exoneration of the two cricketers. The drugs tests were administered crucially prior to the Pakistan team leaving for India to play in the ICC Champions Tournament. The testing itself was thus done outside the control of the ICC and therefore it was accepted in the appeal that the pertinent applicable Anti-Doping Code was the PCB version rather than that of the ICC, the World Governing Body of cricket. This small detail was to have a profound impact on the eventual decision to find for the two cricketers in their appeal. Ebrahim, as head of the panel hearing the appeal made clear:

“It is worthwhile to note that the ADC which was a creature of the PCB Anti-Doping Regulations, while repeatedly referring to various PCB Anti Doping Regulations under which the players were charged, proceeded against and even punished, without any ostensible rationale sought to rely on distinct benchmarks of ‘*No fault or Negligence*’ and ‘*No Significant Fault or Negligence*’ from the International Cricket Council (“ICC”) Anti Doping Code in its decision. It may be mentioned that the ICC Anti-Doping Code is to operate as the Doping Regulations for ICC Events and it is no one’s case before the ADC that the ICC Anti Doping Code would apply to the case of Shoaib Akhtar and Muhammad Asif”.³⁹

The ADC however, as stated above, although paying lip service to the PCB regulations, nevertheless drew on the ICC document to define their approach.

To reiterate, the ADC, in pronouncing the guilt of the players commented:

"In the totality of the circumstances we are not convinced that there was no fault or negligence on the part of Shoaib Akhtar or even no significant

³⁸ International Cricket Council *Anti-Doping Code*, Background, paras C and D

³⁹ Anti Doping Appeals Committee, para 12

fault or negligence. We hold that he has committed a doping offence as defined in clause 4.1 of the PCB Anti Doping Regulations".⁴⁰

On the one hand, the ADC are applying the standard of no fault or no significant fault from the ICC Code, however, they then go on to hold the players responsible under clause 4.1 of the PCB code. Similarly, whilst generally adopting a more sympathetic attitude towards Asif, the Commission nevertheless demonstrated an ambiguous attitude over which anti-doping guidelines should be applicable to the situation.⁴¹ The Commission appeared to refer to the codes interchangeably and despite differences, no clue appears apparent as to which code, (if any), has standing under these circumstances. At no point in its deliberations concerning Muhammad Asif does the Commission make reference to the PCB anti-doping regulations. This crucial factor is rendered all the more important due to the significant divergence between the ICC and PCB over the issue of what may or may not constitute *exceptional circumstances*, and indeed some difference between the ICC and WADA over sanctions likely to be imposed in the event of *exceptional circumstances* being found which may mitigate the severity of the PCB code for a sports participant testing positive for an illegal substance.

When it is clear that the approach of the two codes on this issue is markedly different, it seems difficult to justify the application of neither one nor the other. Based solely on the defences submitted by both Akhtar and Asif, and the application by the ADC of the ICC standard of *exceptional circumstances*, it is difficult to understand how the ADC were nevertheless able to find

⁴⁰ PCB Anti-Doping Commission report at para 36

⁴¹ PCB Anti Doping Commission report at para 38

partially in favour of Asif in that in their assessment he demonstrated "no significant fault or negligence", and therefore warranted a reduction in his tariff from two years to one year by authority from Clause 9.5.2 of the ICC anti doping code. To suggest that his actions fell within this clause must therefore mean that his actions did not violate this definition as explained in the interpretation section of the code. Briefly, this standard is defined as:

"No Significant Fault or Negligence" means the Cricketer establishing that his fault or negligence, when viewed in totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relation to the Anti Doping Code violation".⁴²

In assessing the behaviour of Asif, it is difficult to understand how the ADC were able to conclude that he bore no *significant* fault or *negligence* for the violation. He had received injections to treat an injury, (albeit whilst the Pakistan team physiotherapist was present), he had also been taking a vitamin supplement. His defence lay in the fact that he lived in a village,⁴³ had a relatively poor command of English and therefore could not possibly understand the WADA publications.⁴⁴ It is a fact however that Asif had signed a central contract with the PCB,⁴⁵ and further that two key WADA publications dealing with the issue of drugs and the athlete's responsibility with reference to such substances had been distributed to the team medical personnel prior to their 2006 tour to England.⁴⁶ When set in the context of the athlete's responsibility for all substances which enter his or her body and other

⁴² ICC Anti Doping Code at clause 1.1.29

⁴³ PCB Anti-Doping Commission report at para 15

⁴⁴ PCB Anti-Doping Commission report at para 37

⁴⁵ PCB Anti-Doping Commission report at para 20

⁴⁶ PCB Anti-Doping Commission report at para 20

obligations detailed under clause 2 of the ICC code, most particularly that “It is the personal responsibility of cricketers to be knowledgeable of and comply with the terms of this Anti-Doping Code”,⁴⁷ it appears perverse to simply find no *significant* fault or *negligence* on the part of Asif merely because his command of English may be limited. Effectively such action has the potential to open this defence up to any sports participant whose native tongue is not covered by a translation of the WADA code or any other governing body anti-doping code. Under these criteria,⁴⁸ which were apparently applied in halving Asif’s tariff, it is simply incomprehensible that his admission of ignorance could have enabled him to fall within *exceptional circumstances* as defined under the ICC standard, (which had been applied by the ADC), and therefore qualify for a reduction in his tariff.

The question that remains the key to providing the appropriate solution to this case is what code is applicable – the ICC code or the PCB code? It is suggested that guidance should have been drawn from the case *Wilander and Another v Tobin and Another*,⁴⁹ which commented that in the event of ambiguity concerning the application of appropriate provisions, then any ambiguity should be construed in favour of the athlete. In this particular case, the Court of Appeal held that where conflict existed between two codes of practice, the meaning of one would not be incorporated into the other. Neill LJ commented:

“Having had the opportunity of looking at the medical code of the IOC on the other hand and the French Protocol and the ITF Rules on the other

⁴⁷ ICC Anti-Doping Code clause 2.1.1

⁴⁸ As defined by the ICC Anti-Doping Code

⁴⁹ *Wilander and Another v Tobin and Another* The Times 8 April 1996

hand, I am satisfied that they form two quite distinct and separate codes. They are broadly similar and are designed to achieve similar results. But I see no justification for importing into the French Protocol or into the contract between the ITF and individual players one part of the IOC medical code, namely App D".⁵⁰

If we consider the position faced by Akhtar and Asif in the light of the comments by Neill LJ, it is clear that the PCB and ICC anti doping codes, whilst seeking broadly similar aims are nevertheless very distinct codes, with clear and very significant differences and it would therefore appear, despite the nature of the relationship between the PCB and ICC that there is simply no justification for incorporating the ICC code to deal with a question where the PCB code has very clear and unambiguous rules.⁵¹ Where there is a lack of consistency between anti-doping regulations stemming from an international governing body such as the ICC and national governing bodies, then it is suggested that it is not for appeal tribunals or the courts to attempt to circumvent these inconsistencies by imposing the rules which they prefer, especially in an area as fundamentally important to sport as anti-doping regulation. The solution as suggested by Neill LJ in *Wilander and Another v Tobin and Another*,⁵² more than ten years ago is for the appropriate international governing body to compel consistency amongst all countries. In his concluding remarks, Neill LJ in stressing the importance of such consistency commented:

"The second thing I would mention is that it is important that, in the case of international bodies of the standing of the ITF who are responsible for

⁵⁰ *Wilander and Another v Tobin and Another* The Times 8 April 1996 lexis transcript at p5

⁵¹ The PCB code makes it clear that International Olympic Committee/Wada law should only be applied where there is a dispute in the provision of the PCB code, (See "Matters not provided for", clause 2, PCB Anti Doping Regulations).

⁵² *Wilander and Another v Tobin and Another* The Times 8 April 1996

major international sports, the rules which govern their affairs should be most carefully drafted so that the possibility of confusion and doubt is removed. These sports now assume multi-million pound, or multi-million dollars, dimensions and it is therefore incumbent on those responsible to make sure the rules are absolutely clear, and drafted so that the possibility of confusion is avoided. I know that re-drafting is already in hand, but I would recommend that different sports should, as far as possible, adopt common practices so that there is not the possibility that one sport should have one system of testing when another sport has a different one. Testing for drugs is now a matter of concern in all professional sports and it should be subject to most careful rules".⁵³

If it is correct, as the Appeal Committee suggested that it is the PCB regulations that should have been applied⁵⁴ then a further examination of the appropriate clause is necessary. The key question therefore is whether Akhtar and Asif are able to pass the rather low hurdle presented by the defence of *exceptional circumstances* under clause 4.5.⁵⁵ All that is necessary for both players to establish is that they held an honest and reasonable belief that the products they had taken would not cause them to test positive for a banned substance. Whilst there may have been question marks about the complete honesty of Akhtar, the same could not be said of Asif. The ADC had demonstrated real sympathy for him and certainly there were no doubts about the honesty of his actions or submissions. Whilst an accusation of naivety could perhaps have been sustained against Akhtar, dishonesty was likely going a step too far. However, whether or not their beliefs were *reasonable* is perhaps more questionable. When set against

⁵³ *Wilander and Another v Tobin and Another* The Times 8 April 1996, lexis transcript at p10

⁵⁴ PCB Anti-Doping Appeals Commission report at para 12

⁵⁵ The PCB anti-doping regulations clause 4.5 states that *exceptional circumstances* exist if "the player held an honest and reasonable belief in a state of facts which, if they existed, would mean that the player did not commit a doping offence".

such a *standard*, especially given the climate surrounding illegal substances in the world of sport, one assessment of *reasonable* might lead one to believe that under no circumstances should professional sports participants ever take food or vitamin supplements, particularly not in the quantity demonstrated by Akhtar. The danger presented by contaminated vitamin or food supplements is well known, particularly in sporting circles and one may therefore argue that the ingestion of such substances may never be viewed as *reasonable*. However, this was not the opinion of the Appeal panel. They held that the belief of both players was clearly sufficient not to breach the honest and reasonable *standard* presented in clause 4.5(b).⁵⁶

A strong influencing factor in the decision of the Appeal committee may have been the strong paternal statement of responsibility towards players contained within the PCB code.⁵⁷ In the code, the PCB are very clearly imposing a duty of responsibility upon themselves which has at its heart the aim of establishing a partnership between players and the Board to deal with the spectre of illegal substances. Specifically the code comments:

"2.2 The PCB aims to prevent the use of performance enhancing drugs and doping practices in Cricket by :

- a) imposing effective sanctions on persons who commit doping offences;
- b) educating and informing persons about drugs in sport issues;** and
- c) supporting the drug testing programs and education initiatives of POA other drug testing authorities.

2.3 The PCB will also :-

⁵⁶ PCB Anti-Doping Code clause 4.5(b)

⁵⁷ PCB anti-doping code clauses 2.2-2.3

- a) **make these Regulations available to members, players**, coaches, officials and medical and health practitioner;
- b) **develop and implement, drug education and information programs for players**, coaches, officials and medical and health practitioner".⁵⁸
(emphasis added)

It may be argued that where there has been such an explicit assumption of responsibility on the part of the PCB that it was reasonable for the players to rely on these statements contained in the code outlined above. As further evidence subsequently given at the hearings demonstrated, the PCB failed in this assumed duty, particularly where Muhammad Asif was concerned. Under such circumstances where there is a very clear statement assuming responsibility, and where the PCB has failed to fulfil its obligations as described in their own code then it may be suggested that they may be estopped from enforcing any sanction outlined in the appropriate code.

If we look back to the cases involving tennis players Greg Rusedski and Bohdan Ulihrach, both men tested positive for 19-norandrosterone.⁵⁹ They were subsequently exonerated by the Association of Tennis Professionals, (ATP). The decision to clear both players was based on the principle of estoppel. The ATP trainers had allegedly supplied the players with contaminated supplements and this factor it was found prevented the ATP from relying on the rule of *strict liability* in relation to the positive tests. Whilst the PCB may not have been as complicit as the ATP in the test failure, it is certainly arguable in relation to Asif that their failure to fulfil their obligations as

⁵⁸ PCB anti-doping code clauses 2.2-2.3

⁵⁹ For discussion see Charlish P., "Wada report on positive drug tests", *ISLR* 2005 1, (Feb), 19-22

laid out in the PCB code⁶⁰ was extremely influential in his positive test and therefore arguably the estoppel analysis may be an appropriate one to make. However, as the Appeal committee completely exonerated both Asif and Akhtar, due solely to the application of the *exceptional circumstances* defence contained within the applicable PCB code, then the issue of estoppel need not be raised any further.

An issue which was raised in the initial PCB hearing was that as Pakistan is a signatory of the Copenhagen Declaration on Anti Doping in Sport, the PCB are therefore bound by the documentation of the WADA code, which is explicitly referred to in the Copenhagen Declaration, and therefore by the related ICC code. This suggestion was given short shrift by the Anti-Doping Appeals Commission, who commented,⁶¹

“The ADC Decision records that *“Pakistan is a signatory to the Copenhagen Declaration establishing WADA and bound by the provisions of the WADA Anti Doping Code.”* In this regard, this Appeals Committee has noted that although the Pakistan Olympic Association is a signatory to the Copenhagen Declaration, the same cannot be equated with the Federation of Pakistan nor will the same automatically bind the PCB. It may be added that in the section titled *“Matters Not Provided For”* the PCB Anti Doping Regulations clarify that only in the event of a dispute in connection to the PCB Anti Doping Regulations should the IOC/WADA law be followed”.⁶²

Whilst clauses 2 and 4 of the Copenhagen Declaration recognise the importance of the WADA code and discuss the aim particularly of the harmonisation of strategies to deal with doping in sport, at no point is there

⁶⁰ PCB anti-doping code clauses 2.2-2.3

⁶¹ PCB Anti-Doping Commission report at para 12

⁶² PCB Anti-Doping Appeals Commission report at para 14

any sense of compulsion or diktat and therefore this calls into question the effect of Pakistan's status as a signatory in any event. Further as was pointed out in the Appeal, it is the Pakistan Olympic Association which is the signatory, not the Pakistan federation, nor the PCB and this may lead one to question the status of the declaration in relation to this particular problem. It should also be noted that the Appeals Committee stressed once again, as suggested in *Wilander v Tobin*⁶³ that only where there is a dispute or lack of clarity in the PCB regulations should the ADC look to the WADA Code and the ICC Code

⁶³ *Wilander and Another v Tobin and Another* The Times 8 April 1996

The Hearing before the Court of Arbitration for Sport

On the 21st December 2006, the WADA filed an appeal with the Court of Arbitration for Sport, (CAS), against the decision taken by the PCB Anti-Doping Appeals Committee to set aside the previous decision of the ADC concerning Akhtar and Asif. However, on the 28th December the PCB wrote to the CAS disputing their jurisdiction to actually hear an appeal and requested a panel be convened with the sole aim of determining whether or not the CAS had jurisdiction in this matter.⁶⁴

The first issue that had to be resolved was whether the CAS had competence to rule on the matter of its own jurisdiction. This was answered in the affirmative, citing Article 186 of Swiss private International Law Act,⁶⁵ and further it was stressed that both parties had, "expressly accepted the competence of CAS to rule on its own jurisdiction".⁶⁶

The second and more complex issue was for a decision to be made on whether or not the CAS had jurisdiction to actually entertain the appeal. WADA placed reliance on Article R47 of the CAS Code which they suggested meant that CAS had jurisdiction as this article may be implied by reference into the PCB regulations and further that Article 13.2 of the WADA Code granted WADA the right of appeal to CAS.⁶⁷ However, this argument was dismissed categorically by the CAS. In systematically dismissing all of the arguments presented by WADA they found conclusively for the PCB. On the

⁶⁴ CAS 2006/A/1190 WADA v/Pakistan Cricket Board & Akhtar & Asif

⁶⁵ CAS 2006/A/1190 WADA v/Pakistan Cricket Board & Akhtar & Asif at para 6.2

⁶⁶ CAS 2006/A/1190 WADA v/Pakistan Cricket Board & Akhtar & Asif at para 6.4

⁶⁷ CAS 2006/A/1190 WADA v/Pakistan Cricket Board & Akhtar & Asif at paras 4.1-4.4

issue of Article R47, CAS quoted their conclusion from the case *Ashley Cole v FA Premier League*⁶⁸;

"For CAS to have jurisdiction to rule on an appeal, Article R47 of the Code requires that a direct reference to CAS be contained in the statutes or regulations of the body whose decision is being appealed against".⁶⁹

They found that in order to have jurisdiction then the regulations from the appropriate governing body had to recognise expressly the CAS as an arbitral appeal body.⁷⁰ It was quite clear in the PCB regulations that the PCB Appeals Committee which had exonerated both Asif and Akhtar would make the final and binding decision.⁷¹ This, of course meant for the exclusion of CAS from jurisdiction in this case and further that even assuming that Article 13.2 of the WADA Code gave WADA the authority to appeal to CA, that authority was still limited by the CAS Code which prevented it from hearing any such appeal.⁷²

WADA further suggested that the PCB anti-doping regulations, (which did not comply with the WADA Code), should be interpreted consistently with the ICC Code and in particular the ICC Anti-Doping regulations, (which did comply with the WADA Code). Once again however, WADA failed to convince CAS. The ICC Code is explicit in stating that when players are participating in an ICC event then they are subject to the ICC Code.⁷³ However, Asif and Akhtar were both tested outside of such an ICC event and therefore were subject to regulation via the PCB Code. The ICC Code does allow the right of appeal to

⁶⁸ CAS 2005/A/952 *Ashley Cole v FA Premier League*

⁶⁹ CAS 2006/A/1190 *WADA v/Pakistan Cricket Board & Akhtar & Asif* at para 7.2

⁷⁰ CAS 2002/0/422 *Besiktas v. FIFA & SC Freiburg*

⁷¹ PCB Regulations clause 11.5

⁷² CAS 2006/A/1190 *WADA v/Pakistan Cricket Board & Akhtar & Asif* at paras 7.4-7.7

⁷³ International Cricket Council *Anti-Doping Code*, Background, paras C and D

CAS relating to any offence covered by the ICC which crucially meant that this event did not comply with that requirement.⁷⁴

The CAS stressed that this decision was reached with "considerable regret",⁷⁵ citing concerns over the implications for the fight against doping if International Governing Bodies failed to ensure that National Federations consistently incorporated the provisions of the WADA Code into their own regulations. They stressed that the decision of the PCB Appeals Committee was an unsatisfactory one,⁷⁶ but lay the blame for this squarely at the feet of the ICC for failing to ensure compliance or at least providing the opportunity for appeal by WADA, (or any other party involved), citing *IRB v Keyter*,⁷⁷ as an example of good practice where such an appeal was successfully followed and a ban increased from one year to two years for a rugby union player who tested positive for cocaine use.⁷⁸

The end result of this of course has been that two players have been able to resurrect their careers whilst others, (such as Jason Keyter), have been required to serve a two year ban. That this is down to the incompetence of the ICC is particularly regrettable.

Deleted: ¶

¶
¶
¶
¶
¶
¶
¶

⁷⁴ CAS 2006/A/1190 WADA v/Pakistan Cricket Board & Akhtar & Asif at para 7.12

⁷⁵ CAS 2006/A/1190 WADA v/Pakistan Cricket Board & Akhtar & Asif at para 8.8

⁷⁶ CAS 2006/A/1190 WADA v/Pakistan Cricket Board & Akhtar & Asif at para 8.8

⁷⁷ CAS 2006/A/1067 *IRB v Keyter*. For analysis of this case see Charlish P., and Heywood R., "Anti-Doping inconsistencies snare American star", 8 *Texas Review of Entertainment and Sports Law* 79 [2007]

⁷⁸ CAS 2006/A/1190 WADA v/Pakistan Cricket Board & Akhtar & Asif at para 8.8