

FOOTBALL ASSOCIATION REGULATORY COMMISSION

In the matter of disciplinary proceedings brought pursuant to the Football Association Doping Control Programme for the season 2008-09

THE FOOTBALL ASSOCIATION

- and -

PATRICK KENNY

Commission: Christopher Quinlan (Chairman)

Lt. Cdr. S Vasey

Roy Carter

Alan Jones

Date: 7 September 2009

Venue: Wembley Stadium, London

Present: Matthew Johnson, Regulatory Legal Advisor, Football Association
Mark Ives, Disciplinary Manager, Football Association
Mike Earl, Doping Control Programme Manager, Football Association
Jenni Fitzgerald, Football Regulation Manager, Football Association
Patrick Kenny, the Player
Jim Sturman QC, counsel for Mr Kenny
Mark Knowles
Terry Robinson, International Chairman/Football Executive SUFC
Kevin Blackwell, Manager SUFC
Observer – John Bramhall, Professional Footballers Association

DECISION

Introduction

1. We were appointed to hear and determine a misconduct charge brought against Patrick Kenny ('PK') in that he committed a 'doping offence' contrary to Rule E25 of the Football Association's ('FA') Rules of Association when on 11 May 2009 he provided a sample of urine which contained Ephedrine, which is a Prohibited Substance¹ (Category S6: Stimulants).
2. The sample was provided towards the end of the 2008-2009 season. Both the FA and the player through his representative Jim Sturman QC accepted that the relevant Doping Control Programme is that which came into effect on 1 October 2008. The relevant disciplinary regulations are the Disciplinary Procedures – Regulations set out and provided for in the FA Handbook Season 2008-2009 ('the Handbook'). The current FA Doping Control Programme took effect on 7 August 2009, and has no retrospective effect save for the principle of *lex mitior* (Article 1, Preamble).
3. On the 2 September 2009 I issued a single pre-hearing direction relating to the attendance of expert witnesses. This document records the reasons for our decision, which we announced on the day of the hearing.

The Regulatory Scheme

4. Patrick Kenny ('PK') is a professional footballer. He is and was at the material time contracted to play for Sheffield United Football Club ('SUFC'). He is bound by the Rules of the Football Association ('the Rules'). Part E of the Rules is headed "Conduct".

¹ When its concentration in urine is greater than 10 microgrammes per millilitre

Pursuant to Rule 1(b) defines “misconduct” as including “the Rules and Regulations of The Association and in particular Rules E3 to 28 below”.

5. Rule E25, entitled “Doping Control” states: “A Participant shall comply with the provisions of any doping control regulations of The Association from time to time in force”.
6. Pursuant to Regulation 2 of the FA Doping Control Programme Regulations (‘Doping Regulations’) a ‘doping offence’ is committed if there a Prohibited Substance or its Metabolites or Markers present or detected in a sample provided by a Player. Regulation² 2(a) provides that it is the Player’s duty to ensure no Prohibited Substance enters his body, tissues or fluids or is present or detected there.
7. Prohibited Substances are defined in Schedule 3 to the Doping Regulations. “Category S6: Stimulants” includes ephedrine when its concentration in urine is greater than 10 micrograms per millilitre. Ephedrine is also listed as a “Specified Substance”.
8. Parts 5-8 of the Doping Regulations provide penalties. Regulation 22 (Part 5) requires the imposition of minimum penalties set out in Doping Regulations 34-41 unless *the Player establishes* that there are grounds to eliminate or reduce such penalties in accordance with Regulations 42-50.
9. The minimum penalty for a first offence committed by a Player under Regulation 2 *in the circumstances of this case* is a minimum suspension of 2 years (Regulation 34 (Part 6)).
10. By Regulation 42 (Part 8) the Commission “*may disregard*” [emphasis added] the minimum penalties if the Player establishes any of the applicable conditions set out in

² Reference to “Regulations” is to the Doping Regulations unless otherwise stated

Regulations 43-49. In this instance, PK initially sought to rely upon two specific Regulations, 46, “No Significant Fault” and 48 “Specified Substances”.

11. Regulation 46 provides for a reduction to not less than one half of the minimum penalty (in the circumstances of this case) if the Player establishes that “he bears no significant fault and proves how the Prohibited Substance entered his body”.
12. Regulation 48 makes provision for Specified Substances. If the Player establishes that
 - a. The doping offence involves a Specified Substance; and
 - b. “there was no intention to enhance sporting performance”“for a first offence - a minimum penalty of a warning and reprimand without any period of suspension and a maximum of 1 year’s suspension”.
13. We interpolate that there are material differences between Regulation 48 and its successor provision under the 2009 Doping Regulations (Regulation 67). By way of example, the successor provision requires the Player to show how the substance entered his body, produce corroborating evidence, and provides for a maximum suspension of 2 years (as oppose to a year) for a first offence.
14. As is clear from the above, in relation to the ‘reduction’ provisions, the burden of proof rests on the player. The standard of proof is the balance of probabilities (Regulation 20).
15. Regulation 15 provides for the commencement of disciplinary proceedings. These proceedings were conducted in accordance with Part G of the Rules, Part 3 of the Doping Regulations and the appropriate Disciplinary Regulations (Handbook, p298 *et seq*).

'The Doping Offence'

16. Patrick Kenny admitted (in advance of the hearing and before us) that he committed a 'doping offence' contrary to Rule E25 of the Football Association's ('FA') Rules of Association when on 11 May 2009 he provided a sample of urine which contained Ephedrine, which is a Prohibited Substance³ (Category S6: Stimulants). The facts were not in dispute and accordingly can be summarised.

17. The Player was selected to play in goal for SUFC in its Championship play-off games against Preston North End FC on 11 May 2009. He played in that match. Under the FA Doping Control Programme he was one of the players selected to provide a urine sample after the game. He did so, at approximately 23.00 that evening. The sample was sealed and marked and the necessary and appropriate forms completed according to procedure. On the sample collection form, PK disclosed only that he had taken voltarol, which he told us he took as an analgesic. He did not disclose any other medication he was taking.

18. There was no issue before us in respect of any aspect of the sampling and testing procedure, chain of custody, the laboratory analysis or results thereof.

19. The specimen was sent and the A sample tested. By letter dated 1 June 2009 the principal analyst (PD Levy) reported that the average concentration of ephedrine present in the A sample was measured as 46.9 micrograms per millilitre. The Club was informed and by letter from Terry Robinson dated 4 June 2009 the player was so informed and suspended by the club. The same letter advised him to ask for the B sample to be analysed. He did so.

³ When its concentration in urine is greater than 10 micrograms per millilitre

20. By letter dated 17 June 2009 the Professor D Cowan reported that the average concentration of ephedrine present in the B sample was measured as 47.2 micrograms per millilitre. The Player was informed by a letter from Mike Earl dated 19 June 2009.
21. The burden of proving the doping offence rests upon the FA (Regulation 19). It has discharged that burden (and so established the offence) to the requisite standard (the Commission's "comfortable satisfaction").

Expert Evidence

22. In advance of the start of the hearing the experts relied upon by each of the parties, Dr Professor Vivian James and Dr Neil Chester. In advance of the hearing we had helpfully been provided with copies of their reports and considered the same. The parties and their experts were able to reach agreement, which agreement was recorded in writing and placed before us. In short it recorded
- a. "The concentration of ephedrine found in the urine sample could have been due to the ingestion of the medication that he described, i.e. two tablets of Do Do Cesteze the night before the test;
 - b. It is not possible to conclude how likely or unlikely that is, due to the paucity of relevant evidence in this field and the significant inter and intra individual variation shown in relevant studies;
 - c. Ephedrine is abused by athletes;
 - d. However, studies of the performance enhancing effect of ephedrine alone are inconclusive;
 - e. Studies do show that ephedrine has a performance enhancing effect when combined with caffeine;
 - f. Ephedrine is a specified substance..."

23. In addition, each gave evidence and answered questions from the Commission and the parties.

The Player's Case

24. The Player's case was outlined in an interview conducted with him by Jenni Fitzgerald and Paul Jackson (Doping Control Programme Officer) on 29 June. That interview was audio recorded and we had a transcript of the same, which took place in presence of Mr Blackwell and Mr Bramhall. He expanded upon that before us.

25. In summary, his case was that Wednesday 6 May 2009 he saw Dr Muggleton, SUFC's club doctor, and also his general practitioner. He described a three-day history of a chesty cough, productive of green sputum. The doctor examined him and prescribed amoxicillin for five days, together with paracetamol and steam inhalation. He took the medication but did not undertake any steam inhalation.

26. He told us his condition was worse the following evening. His chest tightened and he found breathing more difficult than usual. He consulted his partner, Louise Deakin who advised him to take medication she told us she purchased, namely Do-Do Chesteze. We were provided with a photocopy of the box and the advisory leaflet within. It describes itself as a medication which relieves bronchial coughs and catarrh and eases breathing.

27. Mr Kenny told us that he did not read the box nor leaflet. The reverse of the box advises the dose to be one tablet and not more than four within twenty-four hours. The leaflet lists the ingredients as ephedrine hydrochloride, theophylline and caffeine. He told us he took two tablets that night. The medication brought noticeable relief within thirty minutes. When pressed as to why he had not read the box, the leaflet or checked with the doctor or club physiotherapist he replied that he did not know. In the context of his

receiving a course of treatment from the doctor and being a professional sportsman with experience of drug testing, we find that staggering.

28. The next day he travelled to Preston and played in the first leg of the Play-Off semi-final. Thereafter and before he went to bed, he took a further two tablets. He took a further two during the evening of Saturday 9 May and Sunday 10 May. In all, he took eight tablets over the course of four days. He did so each evening, because the condition (i.e. the breathing difficulties) manifested itself only when he lay down.
29. In due course we heard from Dr Muggleton. He supported the Player's account and produced extracts of his notes which confirmed the diagnosis and advice given. He also told us that he would have expected the Player to return to him for advice should the condition worsen in the way he, PK, described. Dr Muggleton also told us that he had on occasions given PK advice about what he was permitted and was not permitted to take.
30. Mr Kenny is thirty-one years of age. He told us about his anti-doping education. He has been tested before, both at club level and when representing his country. He is a seasoned player, eleven years professional experience and a capped international. At the start of the 2008-2009 season the SUFC players received a visit from Ms Fitzgerald. She addressed them in the gym at the end of a training session. He agreed he and the other players were provided with doping control advisory cards/leaflets which set out in detail examples of prohibited substances, permitted medication and outline therapeutic use exemptions and supplements. He told us that the said cards/leaflets were simply left; as he put it, "people don't read them". He opined that the players seemed more interested because (as he put it) a "woman turned up".
31. There were significant failures on PK's part which we record later in this decision. It might suffice at this stage to summarise it in this way: the effect of his evidence was

such that ultimately (at the close of the evidence) Mr Sturman QC abandoned the “no significant fault” limb of his submissions.

32. His partner Louise Deakin gave evidence. She confirmed she purchased the Do-Do Chesteze, had used it before and it was in the medicine cabinet. She said he was suffering as he described and she advised him to take the said substance.

33. We heard from Mr Blackwell. He told us he was not aware that PK had seen the doctor on the 6 May and was never told about the Player’s condition. During the interview on 29 June Mr Blackwell expressed himself in colourful terms when speaking about the Player’s level of understanding, which he repeated before us. Had the Player been in any doubt about the regime or the regulations or the medication he need only have ask one of the experts available within his club to help. As Dr Muggleton observed, he had given PK such advice before.

34. Mr Blackwell was interesting on drug education. He told us that in the “last two years” the club had “given out everything the FA has given us”. That includes the doping control advice cards and various posters, examples of which we were shown. He stated that Ms Fitzgerald’s visit at the start of the 2008-2009 season was held in the gym at the end of a “very hard training session” as it very often was. He said the “attention span” of the players “left something to be desired”. The importance of the doping programme should not be underestimated. The doping programme, education and the learning demands proper attention. Quite why a few clear hours could not be found for the doping training, in circumstances conducive to listening, is beyond us.

35. In his closing submissions, Mr Sturman QC urged us to the view that the Player had discharged the burden upon him and accordingly we could be satisfied that he did not take the substance with the intention of enhancing sporting performance.

36. At the start of the hearing the Commission Chairman circulated a number of decisions of disciplinary tribunals in other sports, concerning doping offence involving ephedrine. They were the decisions of *Greaves* 8 March 2005, *Mercer* January 2006, *Boyle* September 2006 and *Berti* October 2006, There are others including *Stewart* November 2006⁴ to which Mr Sturman QC made some reference. He also referred obliquely to other cases which he had, but did not seek to rely upon any specific decision nor place before us any of the cases. He submitted that the appropriate penalty was a suspension of between six weeks and three months for what he described as a “stupid mistake”.

The FA’s Case

37. In his opening submissions, Mr Johnson outlined the circumstances of the doping offence, speaking to his helpful written submissions. The FA’s case was

- a. On his own account Mr Kenny could not rely upon the “no significant fault” provision
- b. As to the issue of intent to enhance sporting performance he put it in this way: “the FA is entitled to test the veracity of Mr Kenny’s account”

38. In light of the way the hearing developed, he limited his closing submissions to the question of Regulation 48. In summary and having heard (as we did) his evidence, the FA’s position crystallised to this: he submitted that the player’s own evidence undermined that aspect of his case such that he had failed to discharge the burden upon him. If we were against him in relation to that, he submitted that in light of the Player’s evidence the appropriate penalty was a suspension in excess of six months.

⁴ Date of the first instance decision

Determination

Ephedrine

39. Ephedrine is abused by athletes. Ephedrines are members of a group of drugs known as sympathomimetic amines. They are compounds that stimulate the sympathetic nervous system and initiate to a lesser or greater extent the 'fight or flight' response. They are effective decongestants for use in the treatment of cough, cold and allergies. Studies are inconclusive in terms of their performance enhancement. Mr Sturman QC invited us to a document entitled "Q & As Regarding the World Anti-Doping Code" in which the following observation appears

"The Code also addresses violations involving certain specified substances included in the Prohibited List (for example ephedrine, cannabinoids etc). These are substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused or doping agents."

Regulation 48

40. The doping offence involved a Specified Substance.

41. The Player satisfied us that there was no intention to improve sporting performance. We approached that question in the following way.

42. The first question was the source of the ephedrine. Although Regulation 48 does not require him to establish the source, the reality of this case (as conceded by Mr Sturman QC) was that he must. The only evidence before us as to the source of the ephedrine was the Do-Do Chesteze. Our analysis of the evidence left us satisfied (to the requisite standard) that the ephedrine came from PK ingestion of the Do-Do Chesteze. We were so satisfied for the following reasons

- a. The taking of it was supported by the circumstances, namely his seeing Dr Muggleton on 6 May. Further, the doctor's evidence (oral and written, including contemporaneous notes) was supportive of PK having the chest complaint and symptoms which might be relieved by the taking of Do-Do Chesteze. We accepted Dr Muggleton's evidence.
 - b. His girlfriend supported the initial taking of it.
 - c. There was no other source. In this context we noted Dr Muggleton's reference to Mr Kenny's previous weight issues; ephedrine is a well known "fat-burner" (as confirmed by Professor James). Dr Muggleton stated that PK had had no such problems over the last two years and there was nothing before us to suggest the contrary.
43. The next question seemed to us to be the circumstances of its taking. Only PK spoke directly to the extent of this. Ms Deakin told us that she first suggested he take it on the evening of 7 May. She did not give any evidence about subsequent takings. Mr Johnson explored with PK whether he might have taken it during, for example, the course of the afternoon before the game on 8 May.
44. We were satisfied he took it in the circumstances he said. The agreed expert evidence is that the concentration of ephedrine found in the urine sample "could" have been due to the ingestion of the medication as he described. Of course, on that basis it also "could not" have been but we accepted (on the balance of probabilities) PK's evidence on this point.
45. With those factual findings we turned to the question of his intention. The FA Doping Regulations provide no definition of "enhance sporting performance". The commentary to Article 10.4 World Anti-Doping Code 2009 (which is similar but by no means identical to Regulation 48 of *last season's* Doping Regulations) provides some assistance:

“Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include: the fact that the nature of the Specified Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete’s open Use or disclosure of his or her Use of the Specified Substance; and a contemporaneous medical records file substantiating the non sport-related prescription for the Specified Substance. Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance.”

46. The expert evidence was that ephedrine has a performance enhancing effect when combined with caffeine. The Do-Do Chestez tablets contain both substances. However, the agreed expert evidence before us was that the effects of ephedrine are apparent for a period of four to eight hours after ingestion. We accepted the circumstances in which PK told us he took the Do-Do Chestez – in short during the late evening and not during the day and many hours before the respective matches. Accordingly, taking the drugs in that way would not be of use to improve performance *in the matches*.
47. We emphasise the last three words in the preceding paragraph for this reason. We were exercised by answers Mr Kenny gave to Mr Sturman QC at the end of his evidence. We were anxious to ensure PK understood and we understood properly what he was saying. We qualified it with him and his counsel and gave him every opportunity to correct it or us if we were wrong. Mr Sturman QC asked him whether he took the Do-Do Chestez so as to be “able to play in the game”. His answer: “yes”. He added “Obviously it help me out in the night and I would be available then”. He continued: “not sure if I would have been able to play if I hadn’t taken the tablets. They were to help me out in the night so I’d be okay for the next day – so I was feeling well and so I could train, so I could play”. In other words, he gave conscious thought to his fitness when he took the medication and took it so as to enable him to train and play.

48. The Shorter Oxford English Dictionary defines “enhance” as to “lift, raise, raise the level of”. “Performance” is defined as “the execution or accomplishment of an action, operation or process undertaken”. It means, in our view, for example improving the performance of an athlete to a level which he cannot obtain through legitimate means or by seeking to do so more quickly than he could through such legitimate means. Patrick Kenny satisfied us (on the balance of probabilities) that he did not intend to do that. His intention was to get better so he could play and train. We were satisfied that his intention was not to enhance sporting performance.

49. As for the failure to declare the drug on the form, he did not declare any of the drugs the doctor prescribed him either. That omission was not in our view of significance.

Penalty

50. In assessing the appropriate penalty we consider the Player’s degree of fault. It was significant. Indeed Mr Sturman QC conceded that he could not suggest he was not. In our view it is worth recording his evidence on this point; it reveals what he did not do. He accepted that

- a. He did not read the box so as to establish the correct dosage to take: it is on the reverse side.
- b. He did not read the accompanying leaflet (inside the box) which contains instructions and ingredients and warns of potential side effects. Ephedrine is listed as an ingredient, as is caffeine.
- c. He did not speak to Dr Muggleton or either club physiotherapist before taking the medication. The doctor told us he or one of the physiotherapists was effectively available to the Player any time of the day or night.
- d. He did not at any stage over the course of the four days he was taking the medication speak again to Dr Muggleton or either club physiotherapist. Dr Muggleton travelled with the side to Preston on 8 May.

- e. He did not reveal the fact he was taking the medication to any person at the club.
- f. He took no steps to establish whether it contained any Prohibited Substance. As told us that he “gave it no thought whatsoever” even though Dr Muggleton had advised him on such matters before.

51. In addition, in assessing the degree of fault we have also in mind that this was repeated taking of a Prohibited Substance – four times over four days.

52. We cannot emphasise sufficiently the importance of the principle that a professional athlete, who might derive great advantage from his privileged position, has strict responsibility for ensuring that no Prohibited Substance enters his system. It simply will not do to pray in aid stupidity or naivety as some mitigation or excuse. Whilst we found that the Player satisfied us on the balance of probabilities that the substance was not taken with the intention of enhancing sporting performance, his admitted conduct displayed significant fault. Mr Kenny knowingly and repeatedly ingested an over-the-counter medicine above the prescribed dosage without reading the accompanying package or leaflet and without reference to his club’s doctor or other medical staff. He has been tested before and advised by his doctor on doping matters. It is incumbent upon all professional footballers to understand the perils and dangers of so doing and to act in the way he did, contrary to the Doping Control Programme delivered by the FA and in any event what should be a matter of common sense for a professional sportsman, showed in our judgment a complete disregard for those responsibilities. He repeatedly exercised a culpable lack of care and of judgment.

53. We had regard to the fact that he admitted the doping offence and that it was his first. We also took into account all that was said about his character and on his behalf. He offered to assist the FA Doping Programme in its education of players, an offer he extended regardless of the outcome of the hearing.

54. In light of the significant fault, we were unanimously of the view that a warning and reprimand would be wholly inadequate. In fixing the appropriate period of suspension we had regard to all the matters set out above. The period of suspension suggested by Mr Sturman QC would not reflect adequately those factors. In our judgment, the appropriate period of suspension was nine months.

55. The FA suspended Mr Kenny from 22 July in a letter which also charged him with the offence he subsequently admitted. His club suspended him with effect from the 10 June (when he returned from holiday). That was the 'close season'. Suspensions must have meaning and effect; they do not if they run at a time when a player is not playing. The league season started on or about 8 August 2009. The club had, we were told a number of "warm-up" games. In our judgment, the appropriate starting point for commencement of the suspension is the date of the FA's suspension.

56. His status during his suspension is as provided by Regulation 32: he cannot participate in any football match or any other football related activity other than anti-doping education or rehabilitation programmes.

57. With effect from the date of the hearing (7 September 2009) and for a period of two years thereafter, he will be subject to designated or target testing as provided for by Schedule 1 paragraph 7 of the Doping Regulations and the Disciplinary Procedures Regulation 8.4 (p303 Handbook).

58. The hearing fee is to be retained by the FA and Mr Kenny is ordered to pay costs of the hearing.

Summary

59. For the reasons adumbrated above we found

- a. Mr Kenny committed a doping offence, namely the presence in his urine sample of ephedrine at a concentration of greater than 10ug/ml. Thereby he is guilty of misconduct.
- b. That Mr Kenny's use of ephedrine was not intended to enhance sporting performance.
- c. The appropriate penalty imposed for this doping offence is a period of suspension from all football and football activities for a period of nine months.
- d. The suspension is to be effective (i.e. commence) from the date the FA suspended the player, namely 22nd July 2009.
- e. Mr Kenny will be subject to 'target testing' for a period of two years with immediate effect.
- f. The hearing fee is to be retained by the FA and Mr Kenny is ordered to pay costs of the hearing.

60. The Player has a right of appeal as provided by Regulation 51 and the Disciplinary Regulations.

61. Although the Chairman typed the decision, each member of the Commission contributed to it and it is the decision of us all.



9 September 2009

Christopher Quinlan

Chairman

Regulatory Commission