

Football Association Appeal Board

Appeal by Patrick Kenny

Reasons for Appeal Board Decision 20 October 2009

1. These are the written reasons for an FA Appeal Board decision made at a hearing on Tuesday 20 October 2009, requested under 3.7 of the Regulations for Football Association Appeals (see The FA Handbook Season 2009-2010, page 367).
2. The Appeal Board members are Mr Nicholas Stewart QC (Chairman), Mr M.M. Armstrong and Mr G. Mabbutt. The Appellant is Mr Patrick Kenny, who has been at all material times a player with Sheffield United FC (“the Club”). He is a top-class goalkeeper who has been capped by the Republic of Ireland on a number of occasions.
3. Mr Kenny has appealed by notice dated 18 September 2009 against a decision of an FA Regulatory Commission on 7 September 2009 (chairman Mr Christopher Quinlan) that for a breach of FA Rule E25 (Doping Control) Mr Kenny should be suspended from all football and football activities for a period of 9 months from 22 July 2009¹. He appeals only against the length of that suspension and not against the

¹ It was also ordered that the Appellant would be subject to target testing for a period of 2 years with immediate effect, that the hearing fee be retained by the FA and that Mr Kenny should pay the costs of the hearing. However, this appeal is only against the 9 months suspension.

finding of a breach of Rule E25, which he had admitted before the hearing by the Regulatory Commission.

4. Mr Kenny was present at the appeal hearing where his appeal was presented by Mr Jim Sturman QC and resisted on behalf of The FA by Mr Matthew Johnson. We are appreciative of their helpful written and oral submissions.
5. The full reasons and decision of the Regulatory Commission are very clearly set out in a 17 page written document dated 9 September 2009 signed by Mr Quinlan as Chairman (“the Regulatory Commission Reasons”). It contains full references to the applicable Doping Regulations and we do not set all that material out here all over again.
6. As explained in the Regulatory Commission Reasons, in this case the minimum penalty for the offence committed by Mr Kenny was 2 years suspension *unless* he could establish either (a) that he bore no significant fault and proved how the Prohibited Substance entered his body; or (b) there was no intention to enhance sporting performance. In either of those cases the Regulatory Commission could disregard that 2 year minimum and for a first offence (as this was) the minimum penalty was a warning and reprimand without any period of suspension and the maximum was 1 year’s suspension.
7. Although initially at the Regulatory Commission hearing it had been argued on Mr Kenny’s behalf that he bore no significant fault, that contention was dropped in the course of the hearing, at the close of the evidence. That means that it was to be taken by the Regulatory Commission as established that there had been significant fault on his part, as explained more fully at paragraphs 50-52 of the Regulatory Commission Reasons.

8. However, the Regulatory Commission did accept that there had been no intention to enhance sporting performance. The consequence was that the Regulatory Commission was then considering whether to impose a suspension up to a maximum of 1 year, rather than the mandatory 2 year minimum which would have applied if Mr Kenny had failed to satisfy the Regulatory Commission on that issue of no intention to enhance sporting performance.
9. The Appellant's submission, as forcefully argued by Mr Sturman on his behalf, was that the length of the 9 month suspension was excessive and the impact upon the Appellant's personal situation meant that the punishment was disproportionate to the offence admitted. Under the *Regulations for Football Association Appeals* (The FA Handbook Season 2009-2010, page 364) the express test for the purposes of this appeal is whether or not that 9 months suspension is "excessive". That is the test we apply, while noting that Mr Sturman put Mr Kenny's case on the footing (which we regard as correct) that "excessive" and "disproportionate" amount to the same thing here.
10. This Appeal Board sees nothing excessive or disproportionate in the 9 months suspension and sees no flaw in the reasons and approach of the Regulatory Commission, which we endorse. The Regulatory Commission Reasons make clear the ways in which Mr Kenny's actions fell significantly short of what is expected of a professional sportsman in his position: see particularly paragraphs 27 and 50-52.
11. We recognise, as the Regulatory Commission plainly would have done, that a 9 months suspension was inevitably going to be very hard on Mr Kenny, both in direct financial and other broader career and

personal terms. That is not just the unavoidable result but is after all part of the purpose of suspensions for doping offences. It is clear that the FA Doping Control Programme, including the Doping Regulations as a vital ingredient, is intended to involve tough sanctions for breaches. It should also be noted that in Mr Kenny's situation (where he eventually had to accept that he had been significantly at fault) it was only by establishing lack of intention to enhance sporting performance that he could bring himself into a discretionary range of penalties with a *maximum* of 12 months as opposed to a *minimum* of 2 years. That means there was already a very significant reduction in the penalty as a result of his having established no intention to enhance sporting performance. In other words, a major adjustment is made in the player's favour to reflect his innocence of that intention, i.e. the adjustment from a 2 year mandatory minimum suspension to a maximum 12 months.

12. Once the Regulatory Commission had decided to disregard the 2 year minimum penalty, because Mr Kenny had established no intention to enhance sporting performance, it was then considering the range of 0-12 months suspension as the range specifically applicable to those cases where there has been no such intention to enhance sporting performance. It is important to appreciate that the applicable doping regulations do clearly and expressly contemplate the possibility of a suspension up to 1 year for a first offence even where there is that key mitigating factor. Whether there should be a suspension at or near the top or bottom end of that 0-12 months range (or somewhere in the middle) must of course be judged in all the circumstances of the particular case.

13. Broadly, and bearing in mind always that every case must be judged on its own particular facts, this Appeal Board considers that cases

where, in addition to showing no intention to enhance sporting performance, the player also establishes no significant fault are more likely to lead to a penalty at the lower end of that 0-12 months range than cases where the player establishes no intention to enhance sporting performance but (as here) has nevertheless been significantly at fault,² Putting it the other way round, significant fault by the player is more likely, and quite fairly, to be marked by a Regulatory Commission imposing a suspension towards the top end . That is what happened here.

14. Sanctions imposed by Regulatory Commissions must achieve broad consistency in the sense that cases involving reasonably similar factual situations should give rise to sanctions in a range which avoids significant disparities. But as long as the sanctions imposed by a Regulatory Commission are not outside any range of judgments as to be excessive or disproportionate, they will and must be upheld on appeal.
15. We see nothing in the other cases cited by Mr Sturman which shows that this 9 months suspension was excessive or disproportionate on the facts of this case.
16. We do note that this suspension is one month more than Rio Ferdinand received for missing a drugs test. However, while we see great force in Mr Sturman's submission that a failure to cooperate with a drugs test should normally attract a sterner penalty than Mr Kenny's offence, we do not know what might have been the particular reasons why Mr Ferdinand was suspended for only 8 months. We do not see that case as having set some benchmark for missed test offences

² This is common sense and is also supported by the last paragraph of Regulation 48 of the Doping Regulations in force at the time of Mr Kenny's offence: see The FA Handbook Season 2008-2009, page 189

generally and even less so for an offence such as Mr Kenny's. Though it will be for future Regulatory Commissions and Appeal Boards to deal with such cases on their own facts as and when they arise, we should expect the basic starting point as a penalty for a missed drugs test offence to be the equivalent of the maximum penalty for the most serious offence which might have been revealed by the test. As always, the actual penalty would be judged on the specific facts of the individual case so that any starting point may very well not be the finishing point or even close to it.

17. There are no other matters in the grounds and supporting submissions for Mr Kenny's appeal which persuade us that there is anything wrong with the Regulatory Commission's decision.
18. It appears to us that the Regulatory Commission took full and suitable account of all the relevant considerations.
19. The contention that the Regulatory Commission gave inadequate credit for the prompt acceptance of guilt seems to us unrealistic. Mr Kenny did accept that the ephedrine was in his blood at a prohibited level but he had little practical choice as he was hardly likely to refute the clear result of testing of two samples. We recognise that he was cooperative when interviewed on behalf of the FA. We cannot see any basis for concluding that the Regulatory Commission did not take into account the degree of cooperation.
20. In any case, what Mr Kenny did not promptly accept was his own significant fault, which was also clearly (if unsurprisingly) underplayed in the submissions made on his behalf on appeal. That was correctly treated by the Regulatory Commission as taking this case into the upper end of the 0-12 months range open to them once they

had accepted that there had been no intention to enhance sporting performance.

21. Another submission which we regard as unrealistic is the contention that Mr Kenny will require several months of training at the end of the ban before he can be match fit. That is an obvious exaggeration, assuming as we do that a footballer in his position will do everything feasible to keep as fit as possible throughout the whole of the suspension.
22. In all the circumstances a 9 months suspension was neither excessive nor disproportionate.
23. We have accordingly dismissed this appeal and upheld the sanctions imposed by the Regulatory Commission. We have also ordered the appellant Mr Kenny to pay the costs incurred in relation to this Appeal Board, under 3.4 of the *Regulations for Football Association Appeals*, as well as forfeit the £100 deposit paid under 1.3(4) of the Regulations.

Nicholas Stewart QC
(Chairman)

M.M. Armstrong

G. Mabbutt

2 November 2009