

RUGBY FOOTBALL UNION

RE: Olivier Azam

APPEAL PANEL HEARING

Panel: Ian Mill QC (Chairman), Philip Evans and David Hurst

At: The Offices of the Judge Advocate General, 81 Chancery Lane, London WC2

On: Tuesday 13 October 2009

Representation: For Olivier Azam (“the Player”), Rob Burgess, Head of Rugby Operations, Gloucester Rugby (“Mr Burgess”)
For the Rugby Football Union (“the RFU”), Nick de Marco of Counsel (“Mr de Marco”)

Decision under appeal: Decision of an RFU Disciplinary Panel (Christopher Quinlan (chairman), Mike Curling and David Martin) (“the Panel”) dated Tuesday 6 October 2009 (“the Decision”)

JUDGMENT

The Decision

1. On 6 October 2009, the Panel met to consider a charge against the Player brought in the light of a citing report following the Player’s participation as a member of the Gloucester Rugby team in its Guinness Premiership match against Saracens RFC at Vicarage Road on 27 September 2009.
2. The charge alleged an offence of kicking an opponent (the Saracens No. 4, Steve Borthwick (“Mr Borthwick”)) contrary to Law 10(4)(c) of the Laws of the Game. The

event in question occurred in the 13th minute of the game. The Player's boot connected with Mr Borthwick's face in the area of his right eye as he lay at the bottom of a ruck.

3. Before the Panel, a preliminary issue was raised at the outset on behalf of the Player by Mr Burgess, namely whether the available evidence supporting the charge disclosed a case for an offence of kicking an opponent contrary to Law 10(4)(c), as opposed to one of stamping on an opponent contrary to Law 10(4)(b) of the Laws of the Game¹.
4. The Panel decided this issue against the Player on the basis (in particular) of its study of the DVD footage of the incident, which showed the Player striking out with his foot while he was lying on the ground.
5. In consequence of this decision, the Player at this point pleaded guilty to the charge of kicking an opponent contrary to Law 10(4)(c). It therefore fell to the Panel to decide the seriousness of the offence admitted and, consequently, the appropriate level of sanction to be imposed upon the Player. In this context, the principal issue for the Panel was whether the offence was one which merited a Top End Entry Point or whether the Mid Range Entry Point was appropriate. This required the Panel's assessment of the seriousness of the offence in the light of the features of offending set out in RFU Regulation 8.2.5.
6. The principal matters that the Panel considered for this purpose were as follows:
 - 6.1 Whether the Player's kick to the face of Mr Borthwick was or was not deliberate.
 - 6.2 The existence and extent of any relevant act of provocation by Mr Borthwick.
 - 6.3 The seriousness of the injuries suffered by Mr Borthwick.

¹ This was a relevant issue because the various Entry Points in Annexe 2 to the RFU's Disciplinary Regulations for stamping offences are lower in each case than the equivalent Entry Points for kicking offences.

6.4 The effect of the Player's actions on the game.

7. The Player's case was that he had not deliberately kicked Mr Borthwick in the face. In essence, what had occurred was that his left foot had been held and twisted by Mr Borthwick, causing the Player pain, and that he had kicked out to "*stop that pain, to get free*". He had not been looking in the direction of Mr Borthwick when he did this. The contact with Mr Borthwick's face had been "*accidental*" and the result of "*severe provocation*" on the part of Mr Borthwick.
8. Mr Borthwick, who gave evidence by telephone, could not recall having held or twisted the Player's foot. He informed the Panel of his injuries. He had required three stitches in his right eyelid. The eye had remained closed for several days. There had been no fracture but he had experienced numbness in the area and there remained a degree of bruising. At the time of the hearing, he described the eye as "*healthy*".
9. The Panel concluded unanimously that they were not persuaded to the requisite standard that the Player had intended to kick Mr Borthwick in the face. He had intentionally kicked out, but had not done so aiming at Mr Borthwick's face. Further, the Panel accepted that the Player had acted as he did having had his left foot grabbed and twisted by Mr Borthwick and that the Player "*kicked out in the direction of that foot and did so, as he said, in an effort to free himself*".
10. Having reached that factual conclusion, the Panel then turned to assess the seriousness of the offence in the light of the Regulation 8.2.5 features. The result of that assessment was that unanimity was achieved as to the salient relevant factual features of the offence, but not as to their effect. A majority of the Panel concluded that the offence, in the light of those factual findings, merited a Top End Entry Point, while the remaining member of the Panel considered (it is to be inferred) that the Mid Range Entry Point was appropriate.
11. The agreed factual features of the offence found by the Panel were as follows:
 - 11.1 That the Player's action involved a deliberate kick with the foot, but one which was not aimed intentionally at the head.

- 11.2 That, as to the gravity of the Player's actions, "*it was boot to head*".
 - 11.3 That "*it was a retaliatory act to his being held in the way we found*".
 - 11.4 That the act of foul play caused a not insignificant injury, in consequence of which the injured player left the field, received treatment, spent time in hospital and was unfit to play the following week.
 - 11.5 That it had an effect on the game in that a number of Saracens players reacted immediately to the Player's conduct.
 - 11.6 That the opposing player was to some extent vulnerable and was struck to the face.
 - 11.7 That it was a completed act of foul play.
12. In the light of the conclusion of the majority, it was necessary for the Panel to determine what, within the Top End Range for this offence (12 to 52 weeks), was the appropriate Entry Point. Having considered the guidance in this respect set out in Appendix 9 to the RFU's Disciplinary Regulations, the Panel fixed the Entry Point at 16 weeks.
 13. The final part of the Panel's analysis was its assessment of the existence and extent of any features (provided for in RFU Regulations 8.2.7 and 8.2.8, respectively) which operated by way of aggravation or in mitigation of the offence and which might therefore increase or reduce the period of suspension for the Player above or below the Entry Point period of 16 weeks. The result of that analysis was the Panel found that there existed no aggravating factors, but found the existence of mitigating factors which had the effect of reducing the period of suspension by four weeks, to 12 weeks. These factors were:
 - 13.1 The Player's admission of the charge at the hearing.

13.2 The Player's regret and remorse in the face of the Panel, which the Panel accepted as genuine.

Rather curiously, in the passage in the Decision dealing with mitigation (rather than aggravation), the Panel recorded that the Player's "*record is not clean, indeed he had just returned from a 9 week suspension for another act of foul play, which occurred towards the end of last season*". We return to this matter later in this Judgment.

The Grounds of Appeal

14. The Player appeals against the Decision on three bases², namely:

14.1 That the Panel had been wrong to reject the Player's preliminary point that the evidence available to the Panel disclosed a case for an offence of stamping, but not one of kicking.

14.2 That the Panel had been wrong to describe the Player's action as one of "*retaliation*" (see the passage from the Decision quoted at paragraph 11.3 above), having correctly concluded that the Player had kicked out in order to free himself (see the passage from the Decision quoted in paragraph 9 above).

14.3 That (having regard to the second Ground of Appeal and generally), the Panel had been wrong to conclude that the offence merited a Top End Entry Point.

15. As is stated in RFU Regulation 11.1.1, an RFU Appeal Panel has the power (among other things) to reduce *or increase* the original sanction. In his submissions on behalf of the RFU, Mr de Marco adverted to the finding made by the Panel in the Decision that there were no aggravating factors relevant to the offence and expressed the RFU's disquiet in this respect in the light of the Player's recent act of indiscipline from which he had just returned (see the passage from the Decision quoted at the end of paragraph 13 above). Although the RFU did not specifically advance a case that the

² A fourth Ground of Appeal, which focussed upon the manner in which the RFU's case was advanced by Counsel on its behalf, Mr Gerard McEvelly, was abandoned during the hearing by Mr Burgess in the light of the fact that it was clear that, whatever the merits of the Player's concerns in this respect, the presentation by Mr McEvelly had not had a material impact upon the Decision.

sanction against the Player should in consequence be increased from 12 weeks by any specific further period of suspension, nonetheless this feature of the matter was one which the Appeal Panel considered should be borne very much in mind.

The Appeal Hearing

16. We are grateful both to Mr Burgess and to Mr de Marco for their very helpful submissions. In particular, we would commend Mr Burgess, who has not received the benefit of any formal legal training, for the cogent and well-structured nature of his arguments before us. We set out below, in setting out our conclusions on each of the Grounds of Appeal, the principal arguments that were addressed to us during the hearing on both sides.

The Appeal Panel's Findings

(1) The Preliminary Issue: A Kick or a Stamp

17. In order to succeed on an appeal, the Appellant must prove on the balance of probabilities that *“the decision appealed against was wrong or was one the Panel could not reasonably have reached”*.³ In seeking to discharge this burden, Mr Burgess on behalf of the Player referred to the Panel's definition of a stamp, namely *“to bring down one's foot or a downward blow with the foot”*, and argued that this better described what had occurred than a kick, which the Panel defined as *“to strike out or to strike another with the foot”*.
18. We are content to accept these definitions, but not the Player's argument. Mr Burgess pointed to the fact that it was possible to stamp downwards despite not being in a vertical position. We agree that such a possibility exists, but in circumstances where the offender is lying down (as was the Player in this case) a *“downwards”* movement of the foot, in order to be in the nature of a stamp, would be in a horizontal plane (i.e. down the line of his body). Here, as Mr Burgess's written submissions asserted and as was evident from the DVD footage, the Player's foot followed a downwards arc

³ RFU Regulation 11.5.1. The second part of this phrase has been added since the Regulations were last published.

towards the ground from its highest point. We consider, in those circumstances, that the Panel was perfectly entitled to reach the conclusion that it did that the evidence available to it disclosed a case to answer that the offence of kicking an opponent had been committed.

(2) The finding of a retaliatory act

19. One of the factors that the Panel was required to take into account in determining the seriousness of the offence⁴ was “*the existence of provocation and whether the player acted in retaliation*”. Doubtless, it was in this context that the Panel concluded (see paragraph 11.3 above) that the Player’s action was “*a retaliatory act to his being held in the way we found*”. The Player’s point on appeal was that this finding was inconsistent with the earlier finding that the Player had acted in an effort to free himself (see paragraph 9 above). Mr Burgess argued that this inconsistency was clear when those findings were viewed from the perspective of the Player’s motivation. The latter finding was consistent only with his motivation being to extricate himself, while the former finding suggested (through the use of the word “*retaliatory*”) that his motivation was to “*meet violence with violence*” (to adopt Mr Burgess’s phrase). There was, stated Mr Burgess, no necessary identity between acts which were a response to provocation and acts which were in the nature of retaliation. The two parts of RFU Regulation 8.2.5 quoted above were separate and should be treated as such. The Panel’s error was in treating an act as being retaliatory if it was in response to an act of provocation.
20. In response, Mr de Marco urged us not to be overly sensitive to the use of language. The Panel was following the phraseology in the Regulation, but it clearly had in mind what the Player’s primary motivation was, given its factual finding (in the immediately preceding paragraph of the Decision) that he was acting in an effort to free himself. Therefore, argued Mr de Marco, there was no reason to suppose that the Panel had misdirected itself as to the seriousness of the offence.

⁴ RFU Regulation 8.2.5(c)(ii)

21. We agree with Mr de Marco that the Player’s appeal in this respect would only have substance if we could infer from the use of the phrase “*retaliatory act*” that the Panel might have regarded the offence as having been more serious than it should have done in the light of its previous factual findings. However, we consider ourselves unable to exclude the possibility that this is in fact what occurred. The use of that phrase in the paragraph of the Decision which described the features which determined the seriousness of the offence was inapposite. Further, the use of that phrase, when combined with the absence of any reference in this paragraph to the fact and the extent of the act of provocation by Mr Borthwick (described in paragraph 9 above), raises at least the possibility that the Panel regarded the Player’s conduct as having been more serious (for the purposes of the Regulation 8.2.5 assessment) than it in fact was.
22. Accordingly, we reach the conclusion that it would not be safe to assume that the Panel directed itself correctly when it came to consider whether the offence merited a Top End Entry. We therefore conclude that we should consider this matter afresh. We do so in the context of the Player’s third ground of appeal.

(3) Top End Entry or Mid Range

23. As stated above, the majority of the Panel concluded that the Player’s offence merited a Top End Entry Point. Although the Decision does not say so expressly, it is to be inferred that the remaining member of the Panel considered that the Mid Range Entry Point was appropriate. Before us, Mr Burgess argued that the majority view was incorrect.⁵ Mr de Marco argued that the conclusion of the majority of the Panel was the correct one.
24. Much of the argument in relation to this ground of appeal centred around the decision of the ERC Appeal Committee in the case of *Jerry Flannery* in February 2008. In that case, Mr Flannery was cited following the match between ASM Clement Auvergne (“ASM”) and Munster Rugby on 13 January 2008 for stamping with his left foot on

⁵ In his written submissions, Mr Burgess merely argued that the offence should be “*downgraded*” from the Top End Range – i.e. he did not exclude the possibility of it being a Lower End offence. Sensibly, however, he did not urge such an outcome on us during the hearing.

the head of Julien Bonnaire while he lay on the ground. At the time, Mr Flannery's left leg was being held by another ASM player. This impeded Mr Flannery's ability to move and led him to act as he did. The ERC Discipline Committee had held the offence to merit a Top End Entry Point. On appeal, the Appeal Committee disagreed and reduced the offence to Mid Range. In so doing, the Appeal Committee considered that the Discipline Committee had misdirected itself in describing the act of foul play as having been deliberate. While the "*primary act*" had been deliberate, according to the Appeal Committee "*the subsidiary and consequential act of foul play (namely the stamp to the head of M. Bonnaire) was reckless rather than deliberate, and should have been so characterised*". The Appeal Committee then went on to find that, had the Discipline Committee categorised the act of foul play as reckless rather than deliberate, they would have concluded that a Mid-Range Entry Point would have been more appropriate.

25. On behalf of the Player, Mr Burgess argued that the case of *Flannery* dictated that the Player's offence was not one that merited a Top End Entry Point. Indeed, he maintained that the Player's conduct was less serious than that of Mr Flannery because the Appeal Committee in that case had found the player's actions to have been reckless whereas there had been no such finding by the Panel in the present case (which had merely accepted that the Player had not acted deliberately or intentionally in kicking Mr Borthwick in the face). Mr Burgess sought to portray the striking of Mr Borthwick's face as merely accidental.
26. For the RFU, Mr de Marco argued that the Panel had clearly had in mind that the Player's conduct had been reckless in relation to the risk of kicking Mr Borthwick in the face, since in the Decision they referred to the *Flannery* case as being similar. He went on to argue that the Panel had been correct to conclude that the Player's offence merited a Top End Entry Point because in material respects his was a more serious offence than that committed by Mr Flannery. In particular, Mr de Marco pointed to the relative severity of Mr Borthwick's injuries and to its greater impact upon the game.
27. We consider these points specifically below, but at this point we would wish to make the following observations:

- 27.1 Mr de Marco is clearly right that the Panel had in mind that the Player acted recklessly in that there was a clear risk that his deliberate kick would cause serious injury to the person who was holding his foot. If they did not have this in mind, then we have no doubt that this is the correct factual conclusion. The Player was not going to free himself without causing sufficient discomfort to the person who was holding him. That person was clearly at the bottom of the ruck. The Panel found, and we accept having studied the DVD footage, that the Player could not and did not see the precise position of Mr Borthwick's face when he kicked out, but there was an obvious risk that it was this part of his anatomy that the Player's foot would strike. This was no mere accident, as Mr Burgess invited us to find.
- 27.2 While there were certainly features of the incident involving the Player that renders it more serious than that involving Mr Flannery, it does not follow (as Mr de Marco submitted was the case) that the Player had necessarily committed an offence that merited a Top End Entry Point. There must be a wide range of offences of kicking an opponent that would merit no more (or less) than the Mid Range Entry Point, despite the fact that there is only one such Entry Point and not the wide range of Entry Points that exists in relation to Top End offences.⁶
- 27.3 We had some difficulty with the rationale behind the decision of the Appeal Committee in *Flannery* (albeit not with the outcome of the appeal itself). While we understood why it was that they found that the act of stamping on the head of M. Bonnaire was reckless rather than deliberate, it does not follow, as it seems to us, that the *offence* was therefore committed recklessly. The offence (under Law 10.4(b) of the Laws of the Game) is one of stamping on an opponent. That (as the Discipline Committee found) was committed deliberately. Where Mr Flannery was reckless was as to the consequences of

⁶ We would observe in passing that we found it rather unsatisfactory that there is only one Entry Point in relation to Mid Range offences since that Entry Point has to be used in a variety of situations, some of which would be considerably more serious than others.

his deliberate act. That, it seems to us, is relevant to seriousness of the offence but not as to the true character of the offence itself.

28. With these points in mind, we turn to consider the seriousness of the Player's conduct in the light of the factors which are set out in RFU Regulation 8.2.5. As it seems to us, the salient points are as follows:

28.1 The offence of kicking an opponent was intentional, rather than reckless, but the Player was reckless (not acting intentionally) in inflicting the nature and severity of the injuries that his kick in fact caused.

28.2 It adds to the seriousness of the offence that it was committed using a boot, which is clearly capable of inflicting serious injury.

28.3 The offence was preceded by serious provocation by Mr Borthwick. The Player, in his evidence to the Panel, asserted that he was in pain as a result of Mr Borthwick's actions. There was no finding by the Panel accepting (or indeed not accepting) this evidence. However, the important point is that Mr Borthwick's actions had clearly (based upon the DVD footage) caused the Player some discomfort and constrained his movements.

28.4 The offence was committed in an attempt (which was in the circumstances unsurprisingly successful) to bring Mr Borthwick's provocative actions to an end. We do not find, however, that the act was retaliatory (in the sense described by Mr Burgess, whose definition of "*retaliation*" we accept).

28.5 The actions of the Player had a serious impact on Mr Borthwick (as described above). It is correct, as Mr de Marco submitted, that this impact was greater than that suffered by M. Bonnaire who was, following treatment on the pitch for a wound near his left eye, able to play on and who was available to play in ASM's subsequent match.

28.6 The actions of the Player had a moderate impact only on the game. It is correct that a couple of Saracens players remonstrated with the Player immediately

following the incident, but there was no outbreak of indiscipline and the game continued after Mr Borthwick had left the pitch. We do not consider this to be a point of substance.

28.7 Although Mr Borthwick was, as the Panel stated, vulnerable given his position on the ground at the bottom of a ruck, we do not regard that as a point of importance given that it was his act of provocation from that position which had given rise to the incident in the first place.

28.8 It was, as the Panel correctly observed, not a mere attempt but a successfully completed act of foul play.

29. Of these features, we regard the two most important in determining whether the offence merits the Mid Range or a Top End Entry Point as being: (i) that there was no intention on the part of the Player to inflict serious injury on Mr Borthwick, and (ii) that the Player's actions were a response to serious provocative action by the player injured. While the Panel might have had the former point in mind, we are not satisfied that the majority of the Panel had the latter point sufficiently in mind when concluding that a Top End Entry Point was appropriate. Had they done so, we believe that they would have concluded that this was a Mid Range offence, albeit one right at the top end of that range. In any event, that is the conclusion that we have reached unanimously as being the correct one in all the circumstances and we are satisfied that the Panel was wrong in concluding otherwise.

30. It therefore follows that we have to consider afresh the sanction that should be imposed upon the Player. We do so below.

Sanction

31. As noted above, there is a fixed Entry Point for Mid Range offences of kicking an opponent. That is eight weeks. Subject therefore to questions of aggravation and mitigation, that is the period of suspension which would apply to the Player.

32. The RFU Regulations require us in the first instance to consider whether there exist any relevant aggravating factors and (if so) what additional period of suspension should apply in consequence. RFU Regulation 8.2.7 identifies the following as being specific examples of such factors:
- 32.1 An absence or lack of remorse or contrition on the part of the offending player.
- 32.2 The player's status as an offender of the law of the game. The notes to this Regulation specify that in any case in which it is established that the player has previously been found to have committed an act of foul play then account may be taken of this as an aggravating factor in fixing the appropriate sanction.
- 32.3 The need for a deterrent to combat a pattern of offending.
33. The Panel, as noted above, found that there were no aggravating factors in this case. We strongly disagree. The Player had only just returned from serving a period of suspension of nine weeks, having been cited following the EDF Cup semi-final between Gloucester Rugby and the Cardiff Blues on 18 April 2009. He was found guilty of conduct prejudicial to the interests of the Union and/or the Game, contrary to Rule 5.12 of the RFU Rules 2008/2009, the Player having made contact with the eye or eye area of the Cardiff No. 12, Jamie Roberts, as he and Mr Roberts contested a loose ball. It seems to us that this is a matter which requires to be taken strongly into account in assessing what the appropriate sanction should be, having regard to the factors identified in paragraphs 32.2 and/or 32.3 above. It is necessary in our view to emphasise to players, including the Player, that it is totally unacceptable to commit back-to-back offences involving foul play – especially in circumstances where the foul play in each case involves a reckless disregard for the risk of injury to the eyes of an opponent.
34. In those circumstances, and given the lack of any obvious remorse or contrition at the time of the offence (see further below), we have decided that the period of suspension

should be increased by an amount of six weeks, bringing the total suspension period up to 14 weeks.

35. As to mitigating factors, we have noted and accepted the finding of the Panel that the Player showed genuine remorse and regret during the hearing and that he pleaded guilty to the charge of kicking an opponent once the preliminary issue had been lost by him. These factors do justify some reduction in the suspension period, but not in our view the period of four weeks which the Panel decided was appropriate. We were informed by Mr Burgess, when we questioned him about the attitude of the Player immediately following the incident and subsequently that he was and remained very annoyed by the actions of Mr Borthwick which preceded the offence. We raised this with Mr Burgess because it appeared to us from the DVD footage that the Player showed no remorse whatsoever despite seeing what the effect of his actions had been. While we can to some extent understand the Player's annoyance, this lack of remorse or contrition on his part at the time must in our view be reflected in the amount by which we reduce his suspension period by way of mitigation. We have concluded that the appropriate period of reduction is two weeks.
36. In summary, therefore, the period of suspension which the Player is to serve remains at the 12 weeks fixed by the Panel, albeit that we have reached the same ultimate conclusion via a rather different process of reasoning.

Conclusion

37. For the reasons set out above, the Player's appeal against his 12 week period of suspension is dismissed and his £500 deposit is forfeited.

Ian MILL QC
Chairman

22 October 2009