

INTERNATIONAL TENNIS FEDERATION
INDEPENDENT ANTI-DOPING TRIBUNAL
DECISION IN THE CASE OF JOHN PAUL FRUTTERO

Ian Mill QC, Chairman (sitting alone)

Introduction

1. This is the decision of the independent Anti-Doping Tribunal (“the Tribunal”) appointed by the Anti-Doping Administrator of the International Tennis Federation (“the ITF”) under Article K.1.1 of the ITF Tennis Anti-Doping Programme 2007 (“the Programme”) to determine a charge brought against Mr John Paul Fruttero (“the player”)¹. An oral hearing was scheduled to take place today in London. However, in circumstances described below, this hearing did not in the event take place.
2. The player was represented by Mr Howard L. Jacobs, attorney in Westlake Village, California. The ITF was represented by Mr Jonathan Taylor and Mr Iain Higgins, both of Bird & Bird, solicitors in London. The Tribunal is grateful to the parties’ representatives for their considerable assistance.
3. The player was charged² with a Doping Offence under Article C.1 (“the Charge”) following an adverse analytical finding in respect of a urine sample which was provided by him on 16 July 2007 during the Comerica Challenger tournament in Aptos, California (“the Tournament”). Both the “A” and “B” samples taken on that occasion were said by the ITF to have returned adverse analytical findings for

¹ References in this Decision to undefined capitalised terms and to Articles are to terms defined in and to Articles of the Programme.

² In a letter from the ITF dated 7 November 2007.

“modafinil and metabolites”. Modafinil is a Prohibited Substance (category “S6. Stimulants”) under the Programme.

4. In response to the Charge, the player admitted that he had committed the Doping Offence alleged. Specifically, he admitted that modafinil, a Prohibited Substance, was present in the urine sample which he provided on the occasion in question.
5. The player nonetheless requested a hearing of the Charge, in particular so as to make submissions (a) pursuant to Articles M.5.2 and M.8.3 about the period of Ineligibility which should apply, and (b) pursuant to Article M.7 as to the extent to which his results should be Disqualified.

The player’s case

6. In summary, the player’s case as set out in his written submissions and in signed statements from the player and from his doctor (among others) was as follows:

Period of Ineligibility

- 6.1 The modafinil which he had ingested had been prescribed for him, under its brand name “Provigil”, by his doctor, John McShane (a sports specialist who had treated many professional athletes subject to drugs testing), as a response to his complaints of jet lag and problems resuming normal sleep patterns when travelling extensively.
- 6.2 Dr McShane had believed that Provigil was not a stimulant and would not be performance enhancing; he had had no reason to

believe that Provigil would be included on the ITF's list of Prohibited Substances.

- 6.3 The player had checked and confirmed that "Provigil"³ was not on that list; he had not known, and had not been told by Dr McShane, to check that list for "modafinil". He had been unaware that "modafinil" was the generic name for his prescribed medication before he was notified of the results of his analysed "A" sample.
- 6.4 In the light of these matters set out above, the player bore no Significant Fault or Negligence (for the purposes of Article M.5.2) in connection with the admitted Doping Offence.
- 6.5 Therefore, the period of two years' Ineligibility which otherwise would be a Consequence of the admitted Doping Offence should be reduced to one year⁴.
- 6.6 As to the start date of that one year period, this should be the date of the sample collection (i.e 16 July 2007) rather than the date of this Decision, which ordinarily would be the case pursuant to Article M.8. Having regard to Article M.8.3, fairness required that this earlier date be adopted, given the facts that (a) the player had voluntarily suspended himself from competition when he had received notification that the "B" sample had confirmed the positive "A" sample, and (b) he had not received

³ He also checked the list for "Cephalon", which (in addition to "Provigil") appeared on the labels of the bottles which he received against his prescription.

⁴ The player also sought to support a one year period of Ineligibility on the basis that this was consistent with a proportionality analysis. He also made submissions to the same effect on the basis of possible changes in the future to sanctions applicable under the World Anti-Doping Code ("WADC").

notice of the positive “A” sample until three months after the sample had been taken.

Disqualification

6.7 He accepted that he could not contest the automatic Disqualification (under Article L) of his results in the competition that produced the positive sample. However, his results in the subsequent competitions prior to his voluntary suspension should not be Disqualified. Pursuant to Article M.7, fairness dictated that this should be the result having regard to the facts that:

6.7.1 the nature of the Prohibited Substance which he had admitted ingesting was such that its ingestion prior to the positive test would not have had any impact upon future competitions;

6.7.2 if his results in the competitions following the Tournament were Disqualified, he would have to re-start his career without any ranking points. Having regard to his age (27), this would be likely to bring an end to his professional tennis career.

The ITF's response

7. The ITF's written response to this case was in summary as follows:

Period of Ineligibility

- 7.1 The player would be required to establish at a hearing the facts upon which he based his case of No Significant Fault or Negligence.
- 7.2 The player would also be required to persuade the Tribunal at that hearing that his admitted fault in ingesting a Prohibited Substance was not “*Significant*” for the purposes of Article M.5.2. The ITF pointed to a number of factual matters which it suggested in its written submissions constituted “*gross*” or “*high*” negligence. It also identified a number of further steps which it suggested the player could and in some cases should have taken, but which he omitted to take.
- 7.3 It in any event did not follow from a finding by the Tribunal of “*No Significant Fault or Negligence*” that a period of Ineligibility of only one year should result. Such a finding merely triggered a discretion in the Tribunal to reduce the otherwise applicable two year period of Ineligibility by a maximum of one year. Therefore, a period of Ineligibility of one year was the minimum ban that the Tribunal could impose. In the exercise of that discretion, the Tribunal would have regard to “*the athlete’s relative fault (or lack thereof), and in particular to what extent there was more that he could and should have done to avoid the Doping Offence in question*”⁵.
- 7.4 On the player’s own account, there was more that he could and should have done. If he had taken any of the steps identified in the ITF’s submissions, then it was highly likely that the Doping Offence would have been avoided.

⁵ The ITF strongly opposed the player’s arguments in favour of a one year ban based upon his proportionality arguments and the possible future changes to the WADC (see footnote 2 above).

7.5 The ITF accepted that, in accordance with Article M.8.3, the Tribunal should apply a degree of back-dating of the commencement of the Period of Ineligibility (from the date of the Decision to 18 October 2007, when the Player voluntarily stopped competing). However, fairness did not require any earlier date, as there had been no unusual delay in the results management process.

Disqualification

7.6 The factors identified by the player did not establish for the purposes of Article M.7 that fairness required that his results in competitions after the Tournament should not be Disqualified. If, however, the Tribunal found that there were good reasons for departing from the usual rule, then the Tribunal should consider the question as to which results should not be Disqualified “*in the round*” – i.e so that the overall sanctioning for the Doping Offence committed met the justice of the case⁶.

The vacation of the oral hearing

8. As set above, the Tribunal directed that an oral hearing should take place in London today, 21 January 2008. In the event, that hearing did not take place. The circumstances which led to this turn of events were as follows:

8.1 During the evening of 16 January 2008 (shortly after the conclusion of the written submission process), the Tribunal was contacted by Mr Higgins on behalf of the parties asking that a

⁶ *ITF v Dupuis*: Decision of the Anti-Doping Tribunal dated 29 September 2006, para 31.

telephone conference take place with the parties' representatives during the following day.

8.2 This occurred during the morning of 17 January 2008. It was attended by Mr Taylor, Mr Higgins and Dr Stuart Miller on behalf of the ITF and by Mr Jacobs on behalf of the player. The Tribunal was informed that the parties, having considered and discussed the written submissions and the issues between them:

8.2.1 had reached a conclusion that they should explore the possibility of reaching a compromise on those issues with a view to avoiding the expense, burden and uncertainty of an oral hearing⁷;

8.2.2 had subsequently arrived at terms of compromise which they wished to recommend to the Tribunal for its consideration;

8.2.3 in particular, wished the Tribunal to consider vacating the hearing and to issuing a Decision which adopted those terms.

9. It was made very clear to the Tribunal on behalf of the ITF (both during this conference call and subsequently in an email which set out proposed terms of compromise) that the ITF very much had in mind both its wider duties to the sport arising out of its regulatory role and the important regulatory imperatives underlying the Programme. Therefore, the Tribunal was invited to give independent consideration as to whether the outcome and the terms proposed were, in its view,

⁷ For the player, an oral hearing in London involved travel from California for himself, for Dr McShane and for Mr Jacobs (albeit that Mr Jacobs had other business in Europe during the relevant period).

appropriate in all the circumstances. The Tribunal was assured on behalf of the ITF that this approach was one which it was open to the Tribunal to adopt as a matter of jurisdiction (despite the absence of express provision therefor in the Programme). The Tribunal accepted that assurance, and agreed to consider any proposed terms of compromise which might be submitted.

10. The Tribunal reflected carefully upon the terms that were subsequently submitted on behalf of the parties by email. It recognised that they involved a substantial degree of compromise by both parties on each of the issues identified above. In particular:

- 10.1 The ITF had accepted that the player had evidential material which justified findings by the Tribunal (a) of No Significant Fault or Negligence, and (b) that fairness required that not all the player's results after the Tournament should be Disqualified.

- 10.2 The player had abandoned his arguments based upon proportionality and possible subsequent changes to the WADC, and had made concessions as to the period of Ineligibility which should apply to him.

11. The Tribunal was unable to conclude whether, following an oral hearing, it would have reached a Decision which was the same as that which the parties proposed or whether (if not) the Decision would have involved an outcome which would have been more favourable to one party or the other than that which the parties proposed. However, it seemed to the Tribunal after careful reflection that:

- 11.1 the concessions made by each party as set out above appeared, on the basis of the evidence and submissions before it, reasonable in all the circumstances⁸;
 - 11.2 the terms proposed were clearly within the range of reasonably foreseeable outcomes following a hearing;
 - 11.3 when viewed in the round, the terms proposed appeared to satisfy the requirement (see paragraph 7.6 above) that they meet the justice of the case.
12. The Tribunal further understood and supported the principle of avoiding (if reasonably possible) the cost and burden of a hearing, in the particular circumstances of this case.
13. Therefore, the Tribunal decided to accept the outcome proposed by the parties, to vacate the hearing fixed for 21 January 2008 and to adopt as the terms of its Decision those which were recommended to it by the parties.

The Tribunal's Ruling

14. Accordingly the Tribunal's Ruling is as follows:
- 14.1 It confirms the commission of the Doping Offence under Article C.1 specified in the notice of charge set out in the ITF's letter to the player dated 7 November 2007.

⁸ In particular, it seemed to the Tribunal that it was appropriate that a period of Ineligibility which exceeded 12 months was being proposed. Having regard to the ITF's well-founded submission summarised in paragraph 7.3 above and the apparent facts of the case, a period in excess of 12 months was reasonable to reflect the degree of fault which on any view was to be attributed to the player.

- 14.2 It orders in accordance with Articles L.1 and M.1 that the results obtained by the player in both the doubles and singles competitions at the Tournament be Disqualified, including forfeiture of the associated ranking points and prize money (without deduction for tax).
- 14.3 It accepts the player's plea of No Significant Fault or Negligence under Article M.5.2. In consequence, it imposes a period of Ineligibility of 14 months instead of the period of two years otherwise applicable.
- 14.4 Pursuant to Article M.8.3, the commencement of this period of Ineligibility is to be back-dated to 1 October 2007. Accordingly, the player shall be ineligible until (and including) 30 November from participating in any event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised by the ITF or any national or regional entity which is a member of or is recognised by the ITF as the entity governing the sport of tennis in that nation or region.
- 14.5 Pursuant to Article M.7, the player's results in tournaments after the Tournament but prior to 1 October 2007 shall not be Disqualified, but his results from 1 October 2007 onwards shall be Disqualified, including forfeiture of the associated ranking points and prize money (without deduction for tax).

Ian Mill QC

21 January 2008