

INTERNATIONAL TENNIS FEDERATION
INDEPENDENT ANTI-DOPING TRIBUNAL
DECISION IN THE CASE OF MAXIMILIAN ABEL

Ian Mill QC, Chairman
Dr Anik Sax
Dr Mario Zorzoli

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 Maximilian Abel (“the player”)¹.
2. The ITF was represented by Mr Iain Higgins of Bird & Bird, solicitors in London. The player elected to represent himself. In circumstances described below, there was no oral hearing in respect of the charge. The Tribunal is grateful to Mr Higgins and to the player for their 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 30 September 2007 during the Open de Moselle in Metz, France (“the Tournament”). Both the “A” and “B” samples taken on that occasion were said by the ITF to have

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 22 January 2008.

returned adverse analytical findings for "*Cocaine and metabolites*". Cocaine and its metabolites are Prohibited Substances (category "*S6. Stimulants*") under the Programme.

4. In his written submissions to the ITF dated 17 December 2007 (following notification of the adverse "A" sample analysis) and 27 January 2008 (in response to the Charge), the player did not dispute the analytical findings in respect of either the "A" sample or the "B" sample. However, he did not formally admit the commission of the Doping Offence with which he was charged. He denied knowing ingestion of the Prohibited Substance, and suggested that "*outside influences*" [sic] must have been responsible – albeit that he accepted that he could not prove this. He also made it clear that he did not wish to exercise his right to an oral hearing of the Charge, and that he did not intend to take any legal advice "*because I am convinced of my innocence*".

5. The ITF's written submissions in reply to the Tribunal dated 4 March 2008 contained the following material contentions:
 - 5.1 That the player's acceptance of the analytical findings in effect amounted to an admission of the commission by him of the Doping Offence with which he was charged.

 - 5.2 That, if anything, the player's protestations of innocence were relevant only to the period of Ineligibility – i.e to the issue whether, under Article M.5, the player could establish either that he bore No Fault or Negligence for his offence or that he bore No Significant Fault or Negligence therefor.

- 5.3 That, given his failure to advance any evidence to establish his assertion that the Doping Offence was the responsibility of outside agencies, the Tribunal was bound to impose a period of Ineligibility of two years under Article M.2³ - i.e. it was bound to reject the player's case that he bore No (or No Significant) Fault or Negligence.
- 5.4 That the period of Ineligibility should commence on 22 January 2008 pursuant to Article M.8.3(a) as a result of the player's voluntary withdrawal from competition with effect from that date.
- 5.5 That the commission of the Doping Offence meant that the Tribunal was bound (pursuant to Article L.1) to Disqualify the player from the Tournament with all resulting consequences (including forfeiture of any prize money and ranking points).
- 5.6 That, pursuant to Article M.7, all subsequent competitive results obtained from the date the positive Sample was collected should similarly be Disqualified. The ITF pointed out that the player had not made the submission in response to the Charge (available to him under Article M.7) that "*fairness dictated otherwise*".
6. The Tribunal took the view at this point (in the light of the failure of the player to take the benefit of legal advice) that it needed to be satisfied, before making its Decision, that the player: (a) had properly appreciated the consequences under the Programme of a finding that he had committed the Doping Offence with which he was charged; (b) had fully taken into account the burden upon him if he was to contest

³ It was confirmed by the ITF that this was the player's first Doping Offence.

the specific consequences for which the IT was contending, and (c) had given sufficient consideration to relevant matters in advance of his decisions not to call for an oral hearing and not to take the benefit of legal advice. Accordingly, a telephone conference took place on 13 March 2008 which was attended by the Chairman of the Tribunal, the player and Mr Higgins and Dr Stuart Miller on behalf of the ITF at which each of the matters referred to above was discussed. The player confirmed his previously stated intentions as regards a hearing and the taking of legal advice.

7. Following that conference, and at the Tribunal's invitation, the player made a further written submission on 17 March 2008, which was expressed as being designed to support a finding by the Tribunal of No Significant Fault or Negligence. (The Tribunal had not imposed any limit upon the matters which the player might wish to address in that submission). The ITF declined the opportunity to put in any further submission in response.

The Doping Offence

8. The Tribunal considers that this aspect can be dealt with briefly. As stated above, the player does not challenge the analytical findings in respect of either his "A" or "B" Sample. The Tribunal has nonetheless considered the evidence adduced by the ITF in this respect. Having done so, it is entirely satisfied that the evidence presented establishes the presence as alleged in the player's urine of the stipulated Prohibited Substance.
9. Despite the player's protestation of his innocence as to the circumstances in which that Prohibited Substance might have come to

be present in his system, we conclude (as the ITF has submitted) that the ITF has therefore proved the commission of the Doping Offence with which the player has been charged. The reasons for that conclusion are as follows:

9.1 By Article C.1, a Doping Offence is committed where the ITF establishes the presence of a Prohibited Substance in a Player's Specimen⁴.

9.2 Under Article C.1.1, a Player is responsible for any Prohibited Substance found to be present in his Specimen. Article C.1.1 specifically provides that:

"..it is not necessary that intent, fault, negligence or knowing Use on the Player's part be demonstrated in order to establish a Doping Offence under Article C.1; nor is the Player's lack of intent, fault, negligence or knowledge a defence to a charge that a Doping Offence has been committed under Article C.1."

9.3 These provisions are consistent with the strict liability approach to Doping Offence that is to be found within the WADA Code. By Article S.1, the Programme is to be interpreted in a manner consistent with the applicable provisions of the Code.

9.4 In short, therefore, a Doping Offence under Article C.1 is one of strict liability, and none of the points raised by the player in response thereto operate by way of defence to the Doping Offence with which he has been charged.

⁴ Save in circumstances where the Player can establish that the presence was due to a therapeutic use exemption granted under Article E.

Consequences

(1) Period of Ineligibility

10. The Programme (so far as material for these purposes) provides:

10.1 Article M.2:

*“Imposition of Ineligibility for Prohibited Substances....
.....the period of Ineligibility imposed for a violation of Article
C.1...shall be:
First Offence: Two (2) years’ Ineligibility”.*

10.2 Article M.5.2:

“...If a Player establishes in an individual case involving such offences⁵ that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. When the Doping Offence involves Article C.1, the Player must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced”.⁶

10.3 Appendix One (Definitions):

“No Fault or Negligence. The Player establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance...

⁵ Including a Doping Offence involving Article C.1.

⁶ As set out in paragraph 7 above, the player’s most recent submissions addressed themselves to the issue of No Significant Fault or Negligence only, and not to No Fault or Negligence. In those circumstances, and given our conclusion on the issue which he did address, we do not consider it necessary to set out or express our views separately on Article M.5.1, which deals with the consequences of a Player establishing No Fault or Negligence.

No Significant Fault or Negligence. The Player establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relation to the Doping Offence”.

10.4 Article K.3.2:

“Where this programme places the burden of proof upon the Participant alleged to have committed a Doping Offence to...establish specified facts or circumstances, the standard of proof shall be by a balance of probability”.

11. The text of the Articles quoted above makes it clear that, in relation to the issue of No Significant Fault or Negligence:

11.1 It is the player who bears the burden of establishing this (including how the Prohibited Substance entered his system).

11.2 The obligation upon him is to do so on the balance of probabilities.

12. The player’s case in this respect amounts to the following assertions made by him in his various written submissions:

12.1 he has always taken special care in relation to his health and off court social activities involving consumption of food and beverages;

12.2 he had carefully analysed his daily activities in the lead up to the Tournament;

- 12.3 having done this, he had concluded that the Prohibited Substance must have entered his system through the involvement of some outside agency (such as “so-called friends or others known to me” tampering with or manipulating his food or drink).
13. The player provided no detail or witness evidence to support these highly generalised and speculative assertions. Moreover, he was realistic enough expressly to accept in his submissions that he could not prove his assertions in this respect. Even without any relevant authority, we would have found it quite impossible in those circumstances to conclude that the player had discharged the burden upon him of establishing No Significant Fault or Negligence for the purposes of Article M.5.2. However, it is quite clear from a number of cases decided by the CAS (as well as by the ITF’s Anti-Doping Tribunal) that speculation of this nature, unsupported by credible evidence, cannot support a plea of No Significant Fault or Negligence⁷.
14. The ITF’s written submissions to the Tribunal gave this summary of the relevant case law:

“..there is a stringent requirement to adduce specific and competent evidence that is sufficient to persuade the tribunal that the explanation advanced is more likely than not to be correct. Theoretical possibilities are simply not enough; corroborating evidence is required that proves that the postulated cause did in fact take place”.

⁷ E.g. *WADA v Stanic & Swiss Olympic Association* CAS 2006/A/1130; *IRB v Keyter* CAS 2006/A/1067; *Karatancheva v ITF* CAS 2006/A/1032

15. We accept this as an accurate summary of that case law. It supports our firm conclusion that the player's plea of No Significant Fault or Negligence must fail.
16. It follows that we must impose upon the player a period of Ineligibility of two years.
17. The general rule is that a Consequence set out in the decision of an ITF Anti- Doping Tribunal takes effect from the date that the decision is issued⁸. Accordingly, in the normal way the date of issue of this Decision would be the date when the player's two year period of Ineligibility should commence. However, by Article M.8.3(a):

"any period during which the Player demonstrates that he or she has voluntarily foregone any form of involvement in Competitions...shall be credited against the total period of Ineligibility to be served.."

18. As stated in paragraph 5.4 above, the ITF accepts that the player's period of Ineligibility should be treated as having commenced upon 22 January 2008 as a result of his voluntary withdrawal from competition with effect from that date. We do not understand the player to contend for any different or earlier commencement date. Nonetheless, we have considered whether any other date would be more appropriate. We have been informed that, following the Tournament, the player only participated in two events (in Germany in October 2007 and in Finland in November 2007). However, the player has not suggested (in particular, when the point was raised with him during the telephone conference on 13 March 2008) that his non-participation in any further tournament (prior to 22 January 2008) was due to notification of the adverse "A" Sample finding (or otherwise connected with his

⁸ Article M.8

appreciation that he might be charged with the commission of a Doping Offence).

18. We therefore conclude that the player's two year period of Ineligibility should be treated as having commenced on 22 January 2008.

(2) Disqualification

19. Disqualification of the player's individual results obtained in the Tournament (including ranking points and prize money) is automatic (see Article L.1). By way of contrast, in relation to subsequent competitions prior to the commencement of the period of Ineligibility Article M.7 provides:

" all other competitive results...shall, unless the Anti-Doping Tribunal determines that fairness requires otherwise, be Disqualified with all of the resulting consequences..." (emphasis added)

20. In its recent decision in the case of Ms Martina Hingis (a case in which the Prohibited Substance was a metabolite of cocaine), the ITF Anti-Doping tribunal considered Article M.7 in the context of a plea by Ms Hingis that it would be unfair to disqualify her results in competitions after Wimbledon (when the Doping Offence was committed) because:

20.1 No competitive advantage was gained or could have been gained in those competitions from the Prohibited Substance having regard to its nature and the low concentration reported.

20.2 Her subsequent doping tests had been negative.

20.3 She voluntarily decided to forego competition from late September onwards.

21. In rejecting that plea, the Anti-Doping Tribunal reminded itself of the acceptance by the Anti-Doping Tribunal in an earlier decision (*ITF v Dupuis*) that the lack of evidence of illegitimate enhancement of performance during subsequent competitions was not of itself sufficient to trigger the Tribunal's discretion under Article M.7, and that subsequent negative tests should be disregarded for the same reason. There was nothing exceptional in the circumstances of Ms Hingis' case; it was noted that she had not voluntarily abstained from competitive tennis until notified of the "B" Sample result (which made it virtually inevitable she would be charged with a Doping Offence). We see no reason not to follow the approach of the Anti-Doping Tribunals in these earlier cases.
22. As noted earlier in this Decision, the player does not specifically invite the Tribunal to exercise the discretion in his favour which exists under Article M.7. However, we consider that we should nonetheless consider whether we have been made aware of any factors which might warrant the "exceptional" course of not Disqualifying the player's results in the tournaments in which he participated in October and November 2007.
23. The only matter to which the player has drawn our attention which we consider should be assessed by us in this regard is his greatest concern (as stated by him), namely "*the grave consequences that this situation could mean to my professional tennis future, depending on the severity of the sanctions that may follow (I am 26 years old)*". In our view, this expression of concern does not amount to any exceptional circumstance such as would justify the exercise of a discretion under Article M.7 in the

player's favour. If anything, his concern would appear to be addressed to the length of the period of Ineligibility, not to the Disqualification of results. We have not been made aware by the ITF of any other relevant matter in this context.

24. The ITF invites us to conclude, under Article M.7, that the player's results in competitions following the Tournament should be Disqualified. We accept that invitation, and so conclude.

The Tribunal's Ruling

25. Accordingly, for the reasons given above, the Tribunal:
- 25.1 confirms the commission of the Doping Offence specified in the Charge;
 - 25.2 orders that the player's individual results in the Tournament must be Disqualified, and in consequence rules that the prize money and ranking points obtained by the player through his participation in the Tournament must be forfeited;
 - 25.3 orders, further, that the player's results in all singles and doubles competitions subsequent to the Tournament shall be Disqualified and all prize money (half the prize money awarded to the pair in the case of doubles competitions) and ranking points in those competitions forfeited;
 - 25.4 declares that the player shall be Ineligible for a period of two years commencing on 22 January 2008 from participating in any capacity in any event or activity (other than anti-doping education or rehabilitation programmes) authorised by the ITF

or any national or regional entity which is a member of or is recognised the ITF as the entity governing the sport of tennis in that nation or region.

Dated 29 April 2008