INTERNATIONAL TENNIS FEDERATION

INDEPENDENT ANTI-DOPING TRIBUNAL

DECISION IN THE CASE OF MR FRANCISO CLIMENT AND MR PHILIPP ALEKSANYAN

Tim Kerr QC, Chairman (sitting alone)

Introduction

1. This is the decision of the independent Anti-Doping Tribunal ("the Tribunal") appointed by the Anti-Doping Manager of the International Tennis Federation ("the ITF"), Dr Stuart Miller, under Article 8.1.1 of the ITF Tennis Anti-Doping Programme 2013 ("the Programme") to determine a charge brought against Mr Francisco Climent and Mr Philipp Aleksanyan.

2. The players were initially legally represented but subsequently communications to and from them were channelled through their translator and intermediary, Mr [redacted]. The ITF was represented by Mr Jamie Herbert of Bird & Bird LLP, the ITF's solicitors in London. I am grateful to both for their helpful written contributions. The case has proceeded by way of written submissions, without an oral hearing.

3. In view of the protracted correspondence and the absence of any oral hearing, and in the interests of proportionality, this decision is given (without objection from either party) in summary form. Both players were charged with a doping offence under Article 2.1 of the Programme by letter of 26 October 2013, after testing positive for stanozolol as a result of urine samples taken at the Madrid F30 Futures Event on 8 September 2013.

4. The players were provisionally suspended from 5 November 2013, after their B samples had tested positive for stanozolol. They did not apply to lift their suspension and have not competed since. They both admit the commission of the doping offence but ask for the normally mandatory two year period of ineligibility to be reduced. The ITF contends that there is no basis for it to be reduced. It is agreed that their period of ineligibility will commence from 5 November 2013, giving credit for the time during which they have been provisionally suspended.

5. By Article 1.7 the Tribunal must interpret the Programme in a manner that is consistent with the World Anti-Doping Code ("the Code") which:

> "shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of any Signatory or government. The comments annotating various provisions of the Code may be used to assist in the understanding and interpretation of this Programme."

Subject to that provision, by Article 1.8 the Programme is governed by and construed in accordance with English law.

The Facts

6. The players are both young. As at 28 February 2014 Mr Climent was aged 17 and Mr Aleksanyan aged 18. Mr Climent is a Spanish citizen and Mr Aleksanyan is a Russian citizen. They both train at the Gandia Tennis Club, near the Mediterranean coast, south of Valencia. They share the same coach. As stated above, they both tested positive for stanozolol after submitting to doping control at the Madrid Futures Event on 8 September 2013. Stanozolol is a banned performance enhancing anabolic steroid.

7. Both players have denied any intent to cheat and attributed the positive test results to vitamin and protein supplements given to them by their coach. Later, they indicated through their then legal representative that the positive test result could be due to a pill given to them in the dressing room of the Gandia Tennis Club during August 2013, or to a contaminated vitamin supplement. They were unable to identify the pill and the person who allegedly gave it to them was identified only as a pharmacist.

The Proceedings

8. The players were charged by letters dated 16 October 2013. Agreed directions were given which were intended to lead to an oral hearing of the charges in London on 31 March 2014. The ITF then served its opening brief on 28 February 2014, setting out its case in detail, including the possibility that it might be appropriate to impose a period of ineligibility longer than two years, up to four years, by reason of aggravating circumstances; and reserving the right to claim costs against the players.

9. Hard copies of the bundles were sent to the players' legal representatives in Spain. On 12 March 2014 the players' then representatives sent a document saying they could not afford to hire lawyers for the hearing, nor to face the risk of a ban longer than two years and possible liability to pay legal costs; and requested an "immediate stop" to the proceedings with the ITF imposing such sanction as it considered appropriate. The players also contended in that document that two years would be disproportionate.

10. In the covering email, the players' then representative said she and her partner would no longer be representing the players. After enquiries, it was established that communications to and from them should be channelled through their translator and intermediary, Mr [redacted]. The hearing date on 31 March 2014 was vacated, to enable discussions to take place, ensure that linguistic difficulties were overcome and ensure that the players were fully aware of the case against them and were content for communications on their behalf to go through Mr [redacted]; and to enable the agreed sanctions procedure to be operated if agreement were reached.

11. Further email correspondence then ensued, at least some of which was copied to me, and to which I responded, using Spanish where necessary to ensure the players and their coach understood everything clearly. The ITF assisted in this process by helpfully providing translations into Spanish where necessary. I am satisfied that the players were able to make their case fully and properly in written form, having decided to exercise their right

under Article 8.5.3 of the Programme to make written submissions instead of appearing at an oral hearing.

12. The stance of the players was unchanged: they each admitted the doping offence; they did not add to or materially alter their account of the facts leading to the presence of stanozolol in their bodies; they invited the Tribunal to impose the minimum permissible sanctions; they did not agree with the ITF's proposed ban of at least two years; and therefore, in my judgment, did not "accede[..] to the Consequences specified by the ITF" within Article 8.1.3 of the Programme; and they asked for lenient treatment in view of their age and absence of intent to cheat. A plea in mitigation along the same lines was added by Mr Climent's father.

The Tribunal's Conclusions, With Summary Reasons

13. The players did not argue against the mandatory disqualification of their results in the Madrid F30 Futures Event, in accordance with Article 9.1 of the Programme, including forfeiture of any medals, ranking points and prize money. By Article 9.2.1 and 9.2.2 the results of their respective doubles partners must also be disqualified, on the same basis, neither doubles partner having taken any part in the proceedings.

14. By Article 10.8 of the Programme, the players' other competitive results obtained from 8 September 2013, the date they gave their urine samples, down to 5 November 2013, the agreed start date for any period of ineligibility, must be disqualified (together with forfeiture of any medals, ranking points and prize money), unless the Tribunal determines that fairness requires otherwise. The players did not suggest that fairness requires me to leave their subsequent results undisturbed, and I do not do so.

15. The players suggested that they did not intend to dope themselves and must have been contaminated by a supplement or by pills supplied by a person at the Gandia Tennis Club. This raises the question whether they can achieve elimination or reduction of the otherwise mandatory two year ban for these offences (see Article 10.2 of the Programme), by bringing their case within

Article 10.5.1 (no fault or negligence) or Article 10.5.2 (no significant fault or negligence). To do this they must first show, by a balance of probability, how the prohibited substance entered their system.

16. Mr Herbert, in the ITF's opening brief, referred me to well known CAS and other authority for the proposition that it is not enough for an athlete to advance an innocent explanation coupled with a denial of deliberate doping; the athlete must go on to show that the innocent explanation is more likely than not to be the correct one and must show, on the balance of probabilities, not only the route of administration of the prohibited substance but also the circumstances of its ingestion.

17. In the present case, I consider that the players cannot satisfy me as to how stanozolol entered their bodies. There is no direct evidence that any pill or supplement they took contained stanozolol. The players only speculate that it must have done. This speculation is no more than a denial of deliberate doping coupled with a suggested innocent explanation. It follows that the players cannot bring their case within Article 10.5.1 or 10.5.2, and that questions about fault or negligence do not arise.

18. In any case, it seems to me very unlikely that the players would have been able to establish the absence of significant fault or negligence, if they had persuaded the Tribunal that stanozolol entered their bodies by oral ingestion of pills or supplements contaminated with stanozolol. They did not provide clear evidence of the circumstances of the ingestion. They were not able to identify the man at their tennis club who, they say, provided the pills. On their own explanation, they made no proper enquiries about the contents of the pills and supplements they ingested.

19. The players stated in their written submissions that they were unable to afford to hire legal representation; that they feared a ban of more than two years, up to four years; and that they were concerned about the risk of a costs award against them if they should attend an oral hearing. I do not, in the circumstances, draw any further adverse inference from their decision not to attend an oral hearing; but their written evidence does not persuade

me on the balance of probabilities that stanozolol entered their bodies in the way they say it did.

20. The players have also sought to rely on Article 10.5.4 of the Programme, which provides:

> Where a Participant voluntarily admits the commission of an Anti-Doping Rule Violation before having received either (a) notification of a Sample collection that could establish the Anti-Doping Rule Violation (in the case of an Anti-Doping Rule Violation under Article 2.1), or (b) a Notice of Charge (in the case of any other Anti-Doping Rule Violation), and that admission is the only reliable evidence of the offence at the time of the admission, then the otherwise applicable period of Ineligibility may be reduced, but not by more than 50%.

21. However, that provision cannot apply here. The players' admissions of the doping offence occurred after they were charged. The charge was based on the reliable evidence of the A sample analyses. When they made their admissions, those admissions were not the only reliable evidence of the doping offences.

22. The players argued in their written submissions that a two year ban would be disproportionate, taking into account the serious consequences for their nascent careers, their young age and the fact that had not received any anti-doping education. The ITF pointed out that, while it did not suggest they had received anti-doping education in a classroom setting, there were ample warnings and information about anti-doping on the ITF's website.

23. I do not accept that a two year ban is disproportionate. The penalty is that provided for under the Programme, which mirrors the equivalent provisions of the World Anti-Doping Code and as such represents a broad consensus in the world of sport that a two year ban is appropriate for athletes who take banned substances which are performance enhancing, are not specified substances and are taken in circumstances where absence of intent to enhance performance in competition cannot be shown.

24. As for the players' assertion of ignorance about anti-doping, it was their clear responsibility under the Programme to familiarise themselves with the

contents of the Programme and their responsibilities under it to avoid taking prohibited substances. In view of their very young age, their situation gives rise to ordinary human sympathy because of the adverse consequences to their lives and careers; but this sympathy does not enable the Tribunal to find that a two year ban would be disproportionate and unlawful and to disapply the mandatory sanctions provisions in the Programme.

25. The ITF, in its opening brief, mentioned the possibility of arguing that there were aggravating circumstances here, justifying an increase in the length of the players' ban beyond two years, up to a maximum of four years. This suggestion has not been pursued further by the ITF, and no specific aggravating circumstances are relied upon in support of such an increase. I therefore decide that the ban for each player should not exceed two years.

26. The ITF also mentioned the possibility of applying for costs against the players. However, it does not now expressly invite me to make any order in respect of the costs of these proceedings, and I therefore do not do so. It is likely that the players' economic circumstances would not enable them to meet any substantial order for costs, in any case. The result is that each side must bear its own costs.

The Tribunal's Ruling

27. Accordingly, for the reasons given above, the Tribunal:

(1) confirms the commission of the doping offence charged in the ITF's letters to the players dated 26 October 2013, namely that a prohibited substance, stanozolol, was present in the urine samples provided by the players at the Madrid F30 Futures Event on 8 September 2013;

(2) orders that the players' individual results must be disqualified in respect of that event, and in consequence rules that any prize money and ranking points obtained by the players and their respective doubles partners through their participation in the singles and doubles competition in that event must be forfeited;

(3) orders, further, that the players' individual results (including any ranking points and prize money) in subsequent events in which they competed up to 4 November 2013 shall be disqualified and all prize money in respect of those competitions shall be forfeited;

(4) finds that the players have not succeeded in establishing by a balance of probability how the prohibited substance entered their bodies and are therefore unable to rely on Article 10.5 of the Programme;

(5) declares the players ineligible for a period of two years commencing on 5 November 2013 and expiring at midnight (London time) on 4 November 2015 from participating in any capacity in any event or activity (other than authorised anti-doping education or rehabilitation programmes) or competition authorised, organised or sanctioned by the ITF or any of the other bodies referred to in Article 10.10.1(a) of the Programme.

28. This decision may be appealed to the Court of Arbitration for Sport by any of the parties referred to in Article 12 of the Programme, in accordance with the provisions of Article 12. Subject only to any such appeal, this decision is final and binding on the parties.

Tim Kerr QC, Chairman

Dated: 30 April 2014